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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1236, 1237, 1238 -- August Term, 1993

(Argued April 18, 1994 Decided fl~\$tic.l- 14, /94U

Docket Nos. 93-6207, 93-6253, 93-6333

Jessie Comer; Jewel Culverhouse; Hazel Grimes:
Yvonne Primm; Felicia Stokes; Rosemary Comer:
Annette McCutcheon, individually and on behalf
of all persons similarly situated,
Plaintiffs-Appellants,

Dorothy Solomon; Saren Lewis; Betty Smith:
Karen Edmond; Odessa Edwards; Penny Ferguson:
Claude Fletcher; Ronda Mapp; Jane Pennick:
Tyrone Pennick; Darlene Perry, Proposed
Intervener-Plaintiffs, individually and on
behalf of all persons similarly situated,
Appellants,

V.

jack Kemp, in his official capacity as
Secretary of the United States Department
of Housing and Urban Development: US
Department of Housing and Urban Development:
Belmont Shelter Corporation; Town of Amherst,
New York; Rental Assistance corporation of
Buffalo: City of Buffalo: Lawrence A. GriSanti,
individually and in his official capacity as
former Executive Director of Buffalo Municipal
Housing Authority; James D. Griffin: Richard L.
Higgins, individually and in his official Capacity
as Commissioner of the New York State Division of
Housing and Community Renewal; Buffalo Municipal
Housing Authority,
Defendants-Appellees.

Before OAKES, I(EARSE, and MAHONEY, ~~Circuit~~ Judges.

Appeal from a judgment of the United States District Court
for the Western District Of New York, John T. Curtin, Judge,
Csxer v. Kemp, 824 F. Supp. 1113 (W.D.N.Y. 1993), holding that
the plaintiffs lack standing to seek declaratory or injunctive

1 relief against allegedly racially discriminatory housing policies
2 and practices, and dismissing all eleven proposed interveners'
3 claims as moot.

4 Judgment vacated in part and affirmed in part.

5 Charles S. Ralston, New York, NY (Elaine
6 R. Jones, Alice.L. Brown, Theodore M.
7 Shaw, NAACP Legal Defense and Education
8 Fund, Inc., New York, NY; Barbara A.
9 Kavanaugh, Dennis McGrath, Neighborhood
10 Legal Services, Inc., Buffalo, NY;
11 Michael L. Hanley, Ellen M. Yacknin,
12 Greater Upstate Law Project, Rochester,
13 NY; Ronald L. Ellis, Pue-?o I' .ican Legal
14 Defense & Education Fund, New York, NY,
15 of counsel), for Plaintiffs-AuDellants
16 and ADDellants.

17 Michael T. Robinson, Washington, D.C.
18 (Howard M. Schmeltzer, Assistant General
19 Counsel for Litigation, James C.
20 Brylinski, Patricia Sharin Flagg, Office
21 of General Counsel, United States
22 Department of Housing and Urban
23 Development; Frank W. Hunger, Assistant
24 Attorney General, Washington, DC;
25 Patrick H. Nemoyer, United States
26 Attorney, Shirley Troutman, Assistant
27 United States Attorney, Buffalo, NY;
28 Michael Jay Singer, Michael E. Robinson,
29 Stuart A. Licht, Felix V. Baxter, Lisa
30 A. Olson, United States Department of
31 Justice, Civil Division, Washington, DC,
32 of counsel), for Defendant-Aunellees
33 Secretary of Housinu and Urban
34 Development and U.S. Department of
35 Housing and Urban Development.

36 Daniel Smirlock, Assistant Attorney
37 General, Albany, NY (Robert Abrams,
38 Attorney Generai, Peter H. Schiff,
39 Deputy Solicitor General, Mark R.
40 Walling, Albany, NY, of counsel), for
41 Defendant-Aooellee Richard L. Hiacins.

42 (Sally S. Mennen, Buffalo Municipal
43 Housing Authority; James N. Schmit, Ian
44 A. Bradford, Damon & Morey, Buffalo, NY,

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of counsel), for Defendant-ADDellee
B u f f a A U t h r i t e .

(Charles C. swanekamp, Saperston C Day,
Buffalo, NY), o f
Belmont Shelter COrDOration.

(**John P. Lane**, Deputy Town Attorney,
Williamsville, NY), for Defendant-
ADDellee Town of Amherst. New York.

(Sharon Porcellio, Lippes, Silverstein,
Muthias t Wexler, Buffalo, NY), for
Defendant-ADDellee Rental Assistance
c o r a t i o n o f r B u f f a o .

(R. Peter **Morrow**, III, Cc--2orzticn
Counsel's Office, Buffalo, NY), for
Defendants-ADDellees CitV of Buffalo.
Lawrence A. Grisanti and James D.
Griffin.

(Michael E. Deutsch, Center for
Constitutional Rights, and National
Lawyers' Guild, New York, NY), for
Amicus Curiae.

1 OAKES , Senior Circuit Judge:

2 The plaintiffs, low-income minority individuals, brought
3 this class action on behalf of all former, current, and future
4 minority residents of Buffalo, New York public housing projects
5 and applicants for federal housing assistance in Erie County, New
6 York. The original complaint alleged racial discrimination and
7 segregation in public housing and assistance programs. The
8 district court dismissed the complaint for lack of standing. The
9 court also dismissed as moot the claims brought by all eleven
10 proposed plaintiffs-intervenors.

11 In light of the procedural posture of this case, we must
12 resolve several questions of law:

13 (1) Whether the plaintiffs and proposed intervenors, as low-
14 income, minority residents of the City of Buffalo who have
15 applied for or received rental housing subsidies from the Rental
16 Assistance Corporation of Buffalo ("¹¹RAC"),¹ have standing to
17 challenge, as racially discriminatory: (a) RAC's policy and
18 practice of prohibiting 3 the majority of its rental housing
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21 This case presents many abbreviations. For the reader's
22 convenience, we list these acronyms below:

23 PHAs -- Public Housing Agencies
24 gg -- Rental Assistance Corporation of Buffalo
Belmont -- Belmont Shelter Corporation
25 BMHA - Buffalo Municipal Housing Authority
26 m -- Department of Housing and Urban Development
CDBG -- Community Development Block Grant Program
FHA -- The Fair Housing Act of 1968
HCDA - Housing and Community Development Act of 1974
DHCR - New York Division of Housing and Community Renewal
MSA -- Metropolitan statistical Area

1 subsidies from being used in the suburbs of Buffalo; and
2 (b) RAC's minority participation outreach efforts.

3 (2) Whether the plaintiffs and proposed intervenors, as low-
4 income, minority residents of the City of Buffalo who have
5 applied for rental housing subsidies from the Belmont Shelter
6 Corporation (^vBelmont^a), have standing to challenge, as racially
7 discriminatory: (a) Belmont's "suburban residency preference"
8 policy which gives some suburban residents and workers subsidies
9 ahead of Buffalo residents: and (b) Belmont's mix,ity
10 participation outreach efforts.

11 (3) Whether any of these claims are moot.

12 (4) Whether we have jurisdiction to review the claims
13 against the Buffalo Municipal Housing Authority ("BMHA^f").

14 (5) Whether the plaintiffs are entitled to class
15 certification on behalf of the various sub-classes.

16 We must also decide:

17 (6) Whether, in the event of reversal, we should transfer
18 this case to another district court judge on remand.

19 (7) Whether the district court properly dismissed the claims
20 against state-defendant Richard L. Higgins.

21 We now affirm the judgment as to Higgins, dismiss the appeal
22 as to BMHA for lack of appellate jurisdiction, and vacate the
23 district court's judgment in all other respects.
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I. Jurisdiction

The district court had jurisdiction over this civil rights action under 28 U.S.C. §§ 1331, 1343(a)(3), (4) (1988), and, over the state law claims, under 28 U.S.C. § 1367 (S.U.P. IV 1992). Pursuant to a June 2, 1993, published opinion, the district court granted summary judgment to the Belmont and RAC defendants thereby dismissing the Belmont and RAC complaints in their entirety on grounds that the plaintiffs lacked standing. Comer v. Kemo, 824 F. Supp. 1113, 1134 (W.D.N.Y. 1993). With respect to the BMHA complaint, the district court dismissed the claims against state-defendant Richard L. Higgins concerning the federal projects, severed the claims against Higgins pertaining to the state projects, and held that although the BMHA plaintiffs lacked standing to pursue declaratory and prospective injunctive relief, they did have standing to pursue claims for compensatory damage for past discrimination. Id. Finally, the court denied the plaintiffs' motion for class certification in the BMHA complaint, and implicitly in the I&C and Belmont complaints. On August 19, 1993, the district court dismissed the claims against Higgins and certified, as final under Fed. R. Civ. P. 54(b), the judgments against all defendants except the BMHA and the City of Buffalo in the BMHA matter. Comer v. Kemp, No. 89-1556 (W.D.N.Y. Aug. 19, 1993) (order granting entry of final judgment on to certain defendants). On September 9, 1993, the plaintiffs and the interveners filed a new notice of appeal from this order. On

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November 5, 1993, the court issued an order of clarification, which stated that its June 2, 1993, judgment had denied the motions of the interveners as moot. On November 9, 1993, the intervenors filed a notice of appeal from the November 5 order. Thus, pursuant to 28 U.S.C. 5 1291 (1988), this COURT has jurisdiction over all of the plaintiffs' and intervenors' claims except those against BMHA and the City of Buffalo in the BMHA complaint.

II. Background

This case presents the substantive issue of racial discrimination and segregation in housing. Specifically for us, this case presents an instance **where** the court house doors have remained closed to individuals and similarly situated individuals who have presented 'a significant and serious claim of racial discrimination in the local administration of a public housing program,' Comer v. Kemp, 10. 92-6247 (2d Cir. Jan. 13, 1993) (order affirming judgment of district court denying plaintiffs' motion for a preliminary injunction). To understand how the court house doors have remained closed to these individuals, it is helpful to understand the statutory and regulatory foundations as well as the institutional structures that have given rise to this rancorous law suit. Although many of these background facts have been set forth in the lower court's opinion, Comer v. Kern, 824 F. Supp. at 1116-19, we find it necessary to expand upon, although in part to duplicate, them. We do not review the facts

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1 underlying the plaintiffs' dispute with BMHA, except as they
2 touch upon the remaining disputes, because, as we have noted
3 above, we do not have appellate jurisdiction over the dispute
1 with BMHA.

5 A. Statutory and Regulatory Background

6 This case involves two federally subsidized rental housing
7 programs for low-income families. The first provides federal
8 financial assistance to Public Housing Agencies ("PHAs") to help
9 finance and maintain PHA owned and operated, lower-income public
10 housing projects. 42 U.S.C. 03 1437b-1437d (1988 & Supp. IV
11 1992). A PHA is "any State, county, municipality, or other
12 governmental entity or /public body (or agency or instrumentality
13 thereof) which is authdrized to engage in or assist in the
14 development or operation of low-income housing." 42 U.S.C.
15 § 1437a(b)(6) (supp. Iv 1992). The PHA is responsible for
16 selecting and assigning tenants as well as for physically
17 maintaining the projects. Typically, the PHA is a not-for-
18 profit, municipal corporation which arranges for a separate
19 agency to administer t e local, lower-income housing program.

20 The second, known as the Section 8 Existing Housing Program
21 ("Section 8"), provides subsidies to private landlords. See
22 Housing and Community Development Act of 1974 ("HCDA"), 42 U.S.C.
23 5 1437f (1988 & Supp., IV 1992). Under the Section 8 program,
24 qualifying tenants pa\$ a portion of their income to the landlord.
25 42 U.S.C. 0 1437a(a) (1988 & Supp. IV 1992). To raise these
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payments to market level rents, Section 8 authorizes the PHA to make "assistance payments" to the landlords by using federal funds made available by contract with the United States Department of Housing and Urban Development ("HUD"). 42 U.S.C. 5 1437f (b), (c) and (0).

TO participate in the Section 8 program, an eligible family applies to a local PHA. The PHA then puts the eligible family on a waiting list according to three statutorily mandated selection priorities or preferences: (1) families who occu;; substandard housing: (2) families who are involuntarily displaced: and (3) families who are paying more than 50 percent of family income for rent. 42 U.S.C. 9 1437f(o)(3); 24 C.F.R. 05 882.219, 887.157 (1993) .* In general, the PHA must place applicants who qualify for a federal preference on the waiting list ahead of applicants who do not. The PHA, however, "must apply the Federal preferences in a manner that is consistent with," (1) Title VI of the Civil Rights Act of 1964; 42 U.S.C. 55 2000d to 2000d-7 (1988) (non-discrimination in federally-assisyed programs); Title 'XII of the Civil Rights Act of 1968 (the "Fair Housing Act" or "FHA"), 42 U.S.C. gj 3601-3631 (1988 & Supp. IV 1992); and other equal opportunity legislation, rules, and reguiatlons: (2) "the selection and participation provisions of 5 882.209 (including limitations on the use of local residency requirements and

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'All citations to C.F.R. are to the year 1993 unless otherwise indicated.

1 preferences contained in § 882.209(a)(4)(i)):" and (3) other
2 applicable regulations. 24 C.F.R. 4 882.219(b)(1), (3). And, of
3 course, the PHA must administer these preferences in a manner
4 that is constitutional.

5 HUD argues that the HCDA 1992 amendment gives PHAs
6 discretion to adopt a local preference in addition to the
7 mandatory federal preferences. 42 U.S.C. 5 1437f(o)(3). See
8 also 24 C.F.R. 55 882.209(a)(4), 882.219(b)(2) (iii). According
9 to HUD, although Section 8 assistance is "portable," "The Act
10 restricts 'portability' 'during the first 12 months after a non-
11 resident's receipt of assistance" in order "to help PHAs meet the
12 housing needs of their local residents, and to discourage
13 'waiting list shopping.'" Brief of Appellee-HUD at 9 (citing
14 H.R. Conf. Rep. No. 760, 102d Cong., 2d Sess- 90 (1992),
15 reprinted in, 1992 U.S.C.C.A.N. 3281, 3370). To support this
16 argument, HUD quotes this section of the Act, as amended in 1992:

17 any family not living within the jurisdiction of a public
18 housing agency at the time that such family applies for
19 assistance from such agency shall, during the 12-month
20 period beginning upon the receipt of any tenant-based rental
21 assistance made available on behalf of the family, use such
22 assistance to rent an eligible dwelling unit located within
23 the jurisdiction served by such public housing agency.

24 42 U.S.C. § 1437f(r)(i) (1988 f supp. IV 1992). HUD also reminds
25 us that, under the Act a PHA

26 may provide for circumstances in which families who do not
qualify for [a Federal preference] are provided assistance
under this subsection before families who do qualify for
such preference, except that not more than 10 percent . . .
of the families who initially receive assistance in any 1-

1 year period . . . may be families who do not qualify for
2 such preference.

3 42 U.S.C. g 1437f(o)(3)(B) (1988 & Supp. IV 1992) (emphasis
4 added). Furthermore, HUD authorizes PHAs to apply non-federal
5 preferences in such a way as to give applicants, who qualify for
6 both a federal preference and a local preference, priority over
7 federal preference holders who do not qualify for a local
8 preference. 24 C.F.R. 05 882.219(b)(2) (iii) (A),
9 887.157(b)(2)(iii)(A). HUD argues that, under the appropriate
10 circumstances, HUD may assist a family which does not qualify for
11 a federal preference, before it assists a family which does
12 qualify for a federal preference, but which does *not* live in the
13 applicable housing jurisdiction at the time of application. At
14 the same time, however, a family that lives within the
15 jurisdiction of the PI-IA at the time of the application can
16 continue to rent a unit anywhere in the State or metrOpOlitan
17 statistical area.

18 As each family moves off the waiting list to participate in
19 the Section 8 program, the local PHAs issue the family a
20 "certif irate" or llvoucher" which entitles them to "assistance
21 payments" in the manner described above. "Certificate" and
22 "voucher" systems are substantially similar: the primary
23 difference between the two is the method of calculating how much
24 rent a participating family must pay, and significantly, prior to
25 July 2, 1990, certificates were not permitted to be used outside
26 the local PHA market area. Roth certificates and vouchers are

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1 "portable," that is, section 8 subsidies are not linked to the
2 rental unit. Thus, once the local PHA issues the certificate or
3 voucher, the recipient family may carry the certificate or
4 voucher from its chosen apartment to the next apartment so long
5 as the landlord participates in the program and the apartment "is
6 within the same State, or the same or a *Contiguous* metropolitan
7 statistical area as the metropolitan *statistical* area within
8 which is located the area of jurisdiction of the public housing
9 agency approving such assistance." 42 U.S.C. § 1437f(r)(1)(j). The
10 family conveys the certificate or voucher, together with the
11 family's previously determined rent contribution, to the landlord
12 who then presents the certificate or voucher to the PHA, which
13 pays the balance of the rent. HUD then reimburses the local PHA.
14 42 U.S.C. §§ 1437f(b), (0). The PHA enters *into* an Annual
15 Contributions Contract with HUD which provides for the payment of
16 administrative fees by HUD to the PHA. In connection with this
17 contract, the HA *must* submit an Administrative Plan and an Equal
18 Housing Opportunity Plan describing the administrative details of
19 the Section 8 program and its compliance with federal and state
20 equal housing requirements. 24 C.F.R. 5 882.204(b)(1), (3). As
21 part of its Administrative Plan, the PHA must describe the
22 geographic area that its program serves. 24 C.F.R.
23 § 882.203(b)(3); see also 24 C.F.R. 5 887.61. As part of its
24 Equal Housing Opportunity Plan, the PHA must describe its
25 policies and procedures for (I) "[O]utreach to eligible
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1 families," (2) achieving the participation of qualified landlords j
2 both "outside areas of low income or minority concentrations,¹¹
3 and lVoutside the local jurisdiction in any area where the PHA is
4 not legally barred from entering into contracts,"

5 (3) "[s]electing families for participation without
6 discrimination because of . . . race," and (4) "[alssisting
7 housing Voucher holders who allege that illegal discrimination is
8 preventing them from leasing suitable units." 24 C.F.R.

9 § 887.59.

10 HUD uses metropolitan statistical areas ("MSAs") to
11 delineate PBA market areas. 53 Fed. Reg. 36,701 (1988); see also
12 24 C.F.R. § 888.113. Using this system, BUD identified all of
13 Erie County, including the City of Buffalo, as a single housing
14 market. Notwithstanding this fact, BUD has established two
15 Section 8 programs within Erie County.

16 HUD authorized the City of Buffalo, as a PHA, to operate a
17 Section 8 program. Buffalo then contracted with RAC to
18 administer the program. HUD also authorized the Town of Amherst,
19 as a PHA, to operate a Section 8 program on behalf of the 41-
20 community suburban consortium. Amherst contracted with Belmont
21 to administer its Section 8 program.

22 8. The Defendants/Appellees PBAs and Administering
23 Entities -- An In-Depth EXZUUination

24 1. Buffalo and RAC

25 RAC is the not-for-profit corporation which has contracted
26 with the City of Buffalo, as the PHA, to administer Buffalo's

1 Section 8 program. Over ninety percent of the households which
2 RAC services are minority households.

3 RAC maintains a waiting list of eligible households who have
4 applied for RAC-administered housing assistance. As of August
5 1990, RAC combined its waiting list with that of BMHA.
6 Accordingly, RAC automatically places a person applying for RAC
7 housing on BMHA's waiting list and visa versa. The
8 administrative agent chooses the applicant by the date of
9 application with priority given to those applicant, who claim a
10 federal preference. As of late October 1990, the waiting list
11 contained over 7,000 applicants, seventy-percent of whom claimed
12 a federal preference. According to RAC, "[b]ased on our current
13 rate of turnover in the program, it would take at least nine
14 years for all of the applicants claiming federal preferences to
15 be offered assistance by RAC. An applicant who did not claim a
16 federal preference, but who was otherwise eligible for the
17 program, would have virtually no likelihood of receiving housing
18 assistance because the number of applicants who meet the federal
19 preference is always larger than the number of available units.
20 Accordingly, an applicant who does not qualify for the federal
21 preference as a practical matter would never be offered
22 assistance." Affidavit of George Fanelli in Support of RAC's
23 Motion to Dismiss, for Summary Judgment, and in Opposition to
24 Motion for Class Certification, Comer v. Kemm, No. 89-1556
25 (W.D.N.Y. filed Nov. 9, 1990) ("Fanelli Aff."), at 5, P 17. Once
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1 the agent chooses an applicant from the waiting list, RAC
2 provides the applicant with either a voucher or a certificate.
3 The plaintiffs challenge only the certificate program as racially
4 discriminatory.

5 Since 1975, under the Community Development Block Grant
6 ("CDBG") program, HUD has paid *in excess* of \$269 million to the
7 City of Buffalo, which has used the funds to pay all or part of
8 its housing code enforcement program. As conditions to receive
9 CDBG funds, the grantee must (1) "affirmatively further fair
10 housing," 42 U.S.C. 5 5304(b)(2) (1988 L SUpp. IV 1992);
11 (2) administer the grant in conformance with Title II of the
12 Civil Rights Act of 1964, The Public Accommodations Act, 42
13 U.S.C. §§ 2000a to 2000a-6 (1988); 42 U.S.C. §f 2000d to 2000d-7
14 (non-discrimination in federally-assisted programs); and the FHA,
15 42 U.S.C. 05 3601 - 3631; and (3) submit an annual performance
16 report for HUD's review, 42 U.S.C. § 5304(e) (1988). This report
17 must address the CDBG recipient's compliance with Title VI and
18 Title VIII, and the recipient's efforts at meeting the statutory
19 obligations to promote fair housing under 42 U.S.C. 5 5304(b)(2).

20 2. Amherst and Belmont

21 HUD has authorized the Town of Amherst, as a PKA, to Operate
22 the Section 8 program on behalf of the Erie County PHA
23 consortium. The Erie County PHA Consortium Comprises 41
24 municipalities which surround the City of Buffalo, but does not
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2 include the City of Buffalo itself or the communities of Kenmore
3 or Wales.

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5 In 1977, Amherst contracted with the not-for-profit agency,
6 Belmont, to administer the suburban Section 8 program on behalf
7 of the consortium. The Belmont Section 8 program is in some ways
8 similar to the RAC Section 8 program. Belmont is directly
9 responsible for the daily administration of the Erie County
10 consortium's Section 8 programs and for the selection of program
11 participants pursuant to federal and state law. Belmont also has
12 established a waiting list because there are more applicants to
13 it for Section 8 subsidies than there are funds available for
14 assistance. 24 C.F.R.^P 882.209(a)(7), 887.153. Regarding the
15 selection process, Belmont must adhere to the same regulations
16 governing federal preferences as RAC. See also 24. C.F.R.
17 882.219, 887.157. Belmont also promotes housing development,
18 construction of affordable homes and apartments, and supervises
19 the management of subsidized apartments.

20 Unlike RAC, however, in addition to the federally mandated
21 preference structure, Belmont awards a local preference to
22 applicants who live or work in one of the consortium communities
23 on the grounds that such a preference is ~~permitted~~ by statute and
24 the HUD regulations. 42 u.s.c. 1437f(o)(3) (B); 24 C.F.R.
25 882.219(b) (Z)(iii)(4). consequently, Belmont ranks applicants
26 on its waiting list for Section 8 assistance as follows:

(1) applicants who claim both a federal and a local preference,

(2) applicants who claim only a federal Preference,
(3) applicants who claim only a local preference, and
(4) applicants who do not claim a preference. See Affidavit of Elizabeth Huckabone in Support of Belmont's Motion to Dismiss, for Summary Judgment, and In opposition to Motion For Class Certification, Comer v. Kemo, No. 89-1556 (W.D.N.Y. filed Nov. 9, 1990) ("Huckabone Aff. 1") Attachment 1 at 4-5, 1 11. Belmont then selects applicants from within each category based on the date and time of application. Id at 5, q 12.

The plaintiffs contend that Belmont's local preference structure has prevented minorities from moving to the suburbs. Brief for Appellants at 21. Belmont and HUD argue that the consortium is merely establishing a preference for individuals who live or work in a member community. Brief for Appellee-HUD at 12 n.7. Moreover, Belmont contends that, as of March 1991, the use of a local preference has had no effect because, due to "the large number of applicants presently on the waiting list" and the lack of funding, Belmont has been **SeniCinq Only** the neediest low income families in the consortium, that is, only those families who are eligible for a federal preference. See Huckabone Aff. I at 5, 7 13; Affidavit of Elizabeth Huckabone in Support of Belmont's Motion to Dismiss for Summary Judgment, and In Opposition to Motion For Class certification, Comer v. Kemp, No. 89-1556 (W.D.N.Y. filed Mar. 14, 1991 ("Huckabone Aff. II") at 2, 7 4.

3. BHEA

We save a consideration of the BMHA facts for the end of this opinion where we treat the district Court's decision as to Richard L. Higgins.

III. Procedural History

On December 4, 1989, (1) the Buffalo League of Public Housing Tenants, and (2) several low-income minority individuals, Jessie Comer, Jewel Culverhouse, Hazel Grimes, Yvonne Primm, Rosemary Comer, Matilda Santiago, Rosetta Weeden, & Annette McCutcheon (the "named plaintiffs"), individually, and on behalf of all persons similarly situated, filed a complaint alleging racially discriminatory housing policies and practices. See Complaint, Comer v. Kemp, No. 89-1556 (W.D.N.Y. filed Dec. 4, 1989) ("Original Complaint"). On February 20, 1990, they filed a motion for class certification. The defendants named in the original complaint were: Jack Kemp, in his official capacity as Secretary of HUD; HUD; the Buffalo Municipal Housing Authority ("BMHA"); the City of Buffalo, New York; James D. Griffin, in his official capacity as Mayor of the City of Buffalo; Richard L. Higgins, individually and in his Official Capacity as Commissioner of the New York State Division of Housing and Community Renewal ("DECRY"); the RAC; the Town of Amherst, New York; and Belmont. The complaint asked the court to enjoin the racially discriminatory policies and practices in the defendants'

operation of three interrelated subsidized housing programs in the Buffalo metropolitan area. See original Complaint.

On July 10, 1990, the United States District Court for the Western District of New York, John T. Curtin, ~JUdQe, ordered the plaintiffs to divide their claims into three separate actions and to file three amended complaints, "for the purpose of clarity and to provide a guide for the conduct of depositions to follow on the class certification issues," * ~~Comer v. Kemb~~, 824 F. Supp. at 1115 (referring to First Amended Complaint, ~~Comer v. Kemn~~, No. 89-1556 [EIAC] (W.D.N.Y. filed Jul. 23, 1990) ("MC Complaint"; First Amended Complaint, Comer v. KemD, No. 89-1556 [BELMONT] (W.D.N.Y. filed Jul. 23, 1990) ("Belmont Complaint"); First Amended Complaint, Comer v. Kemn, No. 89-1556 [BMHA] (W.D.N.Y. filed Jul. 23, 1990) ("BMHA Complaint")).

A. RAC Complaint

Jessie Comer, Hazel Grimes, Yvonne Primm, and Felice Stokes, individually and on behalf of themselves and all those similarly situated, (the "RAC plaintiffs"), filed a first Amended Complaint against HUD and then-HUD Secretary Jack Kemp (the "federal defendants"); R&2; and the City of Buffalo (**COLLECTIVELY**, the "RAC defendants"). As HUD points out, current HUD Secretary Henry G. Cisneros should be substituted for Jack Kemp. Erief for Appellee-Hud at 17 n.8 (citing Fed. R. App. P. 43(c)).

The RAC plaintiffs brought t-do sets of claims against the RAC defendants bearing cn (1) RAC's alleged unlawful segregation

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1 and racial discrimination and (2) the City's alleged violation of
2 the CDBG Program. In particular, the RAC plaintiffs allege the
3 following constitutional claims: In the pursuit and/or
4 administration of the policies, practices, and procedures
5 discussed above, (1) the City of Buffalo and RAC, acting under
6 color of state law, intentionally (a) deprived the RAC plaintiffs
7 of their constitutionally-protected property interests without
8 due process of law, and (b) denied them equal protection of the
9 law in violation of the Fourteenth Amendment; (2) the federal
10 defendants, the City of Buffalo, and RAC have intentionally
11 deprived the RAC plaintiffs of their right to be free from racial
12 discrimination (a) in the making of contracts, 42 U.S.C. § 1981
13 (1988 & Supp. IV 1992), and (b) in the leasing of real property,
14 42 U.S.C. § 1982 (1988); (3) the federal defendants, by funding,
15 approving, and failing to remedy racial discrimination in RAC's
16 Section 8 Program, have intentionally deprived the RAC plaintiffs
17 of their constitutionally-protected property rights without due
18 process of law and have intentionally denied them equal
19 protection of the law in violation of U.S. Const. amend. V; and
20 (4) by virtue of RAC's use of federal CDBG funds for housing code
21 enforcement, the City of Buffalo, acting under color of state
22 law, has intentionally (a) deprived the plaintiffs of their
23 constitutionally protected property interests without due process
24 of law, and (b) denied them equal protection of the law
25 guaranteed by the Fourteenth Amendment, as well as (c) denied
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them rights granted under the HCDA. m RAC Complaint, 11 126,
124, 125, 127, and 142 respectively.

The RAC plaintiffs **raise** the following statutory claims as well: (1) the federal defendants, the City of Buffalo, and RAC have made rental housing unavailable on the basis of race in violation of the FHA, 42 U.S.C. 0 3604; (2) the federal defendants, (a) by funding RAC's racially discriminatory housing program, have **violated** their **statutory** obligation to administer the RAC Section 8 program in a manner **consistent** \-'th the. FHA, 42 U.S.C. 5 3608(d) and (e).(5); **and** (b) by failing to ensure that RAC housing is administered in a non-discriminatory manner, have violated 42 U.s.c. 5 2000d, the FHA, 42 U.S.C. 0 3601, and the United States Housing Act of 1937, 42 U,S.CI-.§§_1437, 1441, 1441a (1988 & Supp. IV 1992); (3) the City of Buffalo and RX, (a) by failing to administer the RAC Section 8 program in a manner which prevents or eliminates racially discriminatory housing practices, have violated the X-IA, 42. U.S.C. 0 3608, (b) by excluding the RAC plaintiffs in the. participation of, **and** by denying them-the benefits of this federally-funded program, have violated 42 U.S.C. §§ 2000d to 2000d-7, and, acting under color of state law, (c) deprived them of their rights granted under federal law, including, Title VI, the FHA, and the United States Housing Act of 1937. See RAC Complaint, Ty 128, 129, 132, 133, 130, 131, and 135 respectively.

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1 By virtue of its use of federal CDBG funds for housing code
2 enforcement in the City of Buffalo, the RAC plaintiffs raise
3 several other statutory claims including: (1) the City of
4 Buffalo has failed to remedy racial discriminatory practices of
5 its Section 8 Program in violation of its duties
6 to (a) affirmatively further fair housing, HCDA, 42 U.S.C.
7 5304(b) (2), (b) administer the grant consistent with Title VI
8 and the FHA, 42 U.S.C. 5304(b)(2); (2) the federal defendants
9 have violated their duty to administer the program in a manner
10 which eliminates discriminatory housing practices, 42 U.S.C.
11 §§ 3608(d) and (e)(S). See RAC complaint, 139, 140, and 143
12 respectively. 1

13 Finally, the RAC plaintiffs have alleged that the City of
14 Buffalo and RAC have violated New York state law through the same
15 actions described above. RAC Complaint, 136 (citing N.Y.
16 Const. art. I, § 11; N.Y. Exec. Law § 296(5) (McKinney 1993 &
17 Supp. 1994); N.Y. Civ. Rights Law, §§ 18-a to 19-b (McKinney
18 1992)).

19 B. Belmont Complaint

20 Jessie Comer and Jewel Culverhouse, individually and on
21 behalf of themselves and all those similarly situated, (the
22 "Belmont plaintiffs") filed a First Amended Complaint against
23 Belmont, Town of Amherst, and the federal defendants
24 (collectively, the "Belmont defendants").

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The Belmont plaintiffs raise both Constitutional and statutory claims with respect to two sets of claims against the Belmont defendants: (1) Belmont's alleged unlawful segregation and racial discrimination and (2) the alleged violation of the CDBG Program. The Belmont Complaint is identical to the RAC Complaint comore RAC Complaint, 91 123-138 with Belmont Complaint, qq 96-111, except in a few instances regarding the federal CDBG grant program, cornDare RAC Complaint, Ii 139-146 with Belmont Complaint, 91 112-116, which we now mate: (1) the Town of Amherst and the federal defendants have failed to administer the cDBG program in a manner that affirmatively furthers fair housing, in violation of the HCDA, 42 U.S.C. f 5304, and the FHA, 42 U.S.C. §f 3608(d)- and (e): (2) the federal defendants have violated the HCDA, 42. U.S.C. 0 5304, and the FHA, 42 u.s.c. gg 3608(d) and (e), by failing to remove the Consortium's non-federal, local preference See Belmont Complaint, 4q 112-113.

C. Procedural Summary

On November 9, 1990, the federal defendants filed motions to dismiss the MC, Belmont and BMHA complaints for lack of scanding and in opposition to the motion for class Certification. The other defendants filed similar motions. On June 3, 1991, =?,e district court heard oral argument on these motions. On Tune 2, 1993, almost two years after oral argument was heard, and aver two and one-half years after the defendants filed notions ta

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2 dismiss, the district court dismissed the various complaints for
3 lack of standing and mootness.

4 IV. Standard of Review

5 This case, insofar as it involves the RAC and Belmont
6 complaints, comes before us on the district Court's grant of the
7 defendants' motion to dismiss the complaint for lack of standing
8 and for summary judgment. Fed. R. Civ. P. 12(c), 56(b), and
9 56(c); RAC's Motion to Dismiss, for Summary Judgment, and in
10 Opposition to Motion for Class Certification, Corn & v. Kemp, No.
11 89-1556 (W.D.N.Y. filed Nov. 9, 1990); **Belmont's** Motion to
12 Dismiss for **Summary Judgment**, and In Opposition to Motion For
13 Class **Certification**, Comer v. Kemp, No. 89-1556 (W.D.N.Y. filed
14 Nov. 9, 1990); see also Comer v. Kemp, 824 P. Supp. at 1119, 1134
15 (granting, inter alia, summary judgment to the Belmont and RAC
16 defendants). We review the grant of a motion to dismiss or
17 summary judgment de novo, accepting as true the factual
18 allegations of the RAC and Belmont **Complaints**, see, e.g.,
19 Leatherman v. Tarrant County Narcotics Intelligence and
20 Coordination Unit, I U.S. -, -, 113 S. Ct. 1160, 1161
21 (1993) (motion to dismiss); Scmare D Co. v. Niagara Frontier
22 Tariff Bureau, Inc., 476 U.S. 409, 411 (1986), and drawing
23 inferences based **upon these** allegations in the light most
24 favorable to the RAC and Belmont plaintiffs. Scheuer v. Rhodes,
25 416 U.S. 232, 235 (1974); Oranae Lake ASSOCS., Inc. V.
26 Kirkpatrick, 21 F.3d 1214, 1217 (2d Cir. 1994); THE AFL-CIO

1 Pension Fund v. Herrmann, 9 F.3d 1049, 1052 (2d Cir. 1993). We
 2 affirm an award of summary judgment if the moving party can
 3 demonstrate that "there is no genuine iSSUe as to any material
 4 fact and that [it] is entitled to a judgment as a matter of law."¹¹
 5 Fed. R. Civ. P. 56(c). "Thus, summary judgment is warranted
 6 where the non-moving party has no evidentiary support for an
 7 essential element on which it bears the burden of proof."¹¹ Oranae
 8 Lake, 21 F.3d at 1217 (citing Celotex Cork. v. Catrett, 477 U.S.
 9 317, 322-23 (1986)). Additionally, we review de the
 10 questions of standing and mootness because they are questions of
 11 law.

12 v. Standing

13 Article- III of the Constitution. provides that "[t]he
 14 judicial Power- shall extend to & Cases . . . arising under this
 15 Constitution [or] the Laws of the United States." U.S. Const.
 16 art. III 0 2 (emphasis added). Accordingly, the Supreme Court
 17 has interpreted this affirmative grant of jurisdiction to all
 18 cases arising under the constitution or federal'statutes as a
 19 limitation of federal court jurisdiction to cases. Allen v.
 20 Wriuht, 468 U.S. 737, 750 (1984) ("Article III of the
 21 Constitution confines the federal courts to adjudicating actual
 22 'cases' and 'controversies'").

23 TO determine just what constitutes a l^vCase⁸@ arising under
 24 the Constitution or laws of the united States, the Supreme Court
 25 has developed a number of doctrines. Foremost among these is the
 26

1
2 doctrine of standing. This doctrine delineates the plaintiff's
3 ability to invoke the power of a federal court.⁹¹ &

4 Courts have divided the question of standing into a two-
5 tiered inquiry which includes (1) three constitutional minima and
6 (2) prudential considerations which may limit judicial review in
7 some circumstances. H. a. a kson v. Okaloosa County, 21 F.3d
8 1531, 1536 (11th Cir. 1994) (explicating the body of caselaw on
9 the question of standing). The three constitutional minima are
10 that: (1) the **litigant** suffered a personal injury or threat of
11 injury; (2) the **injury** fairly can be traced to the action
12 challenged; and (3) **the** injury is likely to be redressed by the
13 requested relief. E.u., Northeastern Florida Chapter of the
14 Associated Gen. Contractors of Am. v. City of Jacksonville, ___
15 U.S. -I -I 113 S. Ct. 2297; 2301-02, (1993); -i ValTev Forue
16 Christian College v. Americans United for Separation of Church
17 and State, Inc., 454 U.S. 464, 472 (1982); Amsat Cable v.
18 Cablevision of Connecticut, 6 F.3d 867, 873 (2d Cir. 1993);
19 Heldman v. Sobol, 962 F.2d 148, 154 (2d Cir. 1992); LamOnt v.
20 Woods, 948 F.2d 825, 829 (2d Cir. 1991). These constitutional
21 minima are assessed as of the time the lawsuit is brought. Luian
22 v. Defenders of Wildlife, - U.S. -I - n.4, 112 S. Ct. 2130,
23 2141 n.4 (1992) (citing Newman-Green, Inc. v. Alfonso-Larrain,
24 490 U.S. 826, 830 (1989)); Robidoux v. Celani, 987 F.2d 931, 938
25 (2d Cir. 1993)

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In Jacksonville, the Supreme court laid out what it means by each of these three constitutional minima. The injury minimum signifies "an invasion of a legally protected interest that is '(a) concrete and particularized, and (b) actual and imminent, not conjectural or hypothetical.'" Jacksonville, - U.S. at -, 113 S. Ct. at 2302 (quoting Luian, - U.S. at -, 112 S. Ct. at 2136 (citations, footnote, and internal quotation marks omitted)). The causation minimum signifies a "Causal relationship between the injury and the challenged conduct," that is, "the injury 'fairly can be traced to the challenged action of the defendant,' and has not resulted 'from the independent action of some third party not before the court.'" Id. (quoting Simon v. Eastern Kentucky Welfare Rights Org., # 426 U.S. 26, 41-42 (1976)). The redressability minimum ensures that the "'prospect of obtaining relief from the injury as a result of a favorable ruling' is not 'too speculative.'" Id. (quoting Allen v. Wright, 468 U.S. at 752).

"If these constitutional minima are satisfied, a court may nevertheless deny standing for prudential reasons." Lamont, 948 F.2d at 829. However, congressional legislation may expand standing to the full extent permitted by Article III, thereby proscribing judicial exercise of prudential considerations. Gladstone, Realtors v. Village of Sellwood, 441 U.S. 91, 100 (1979) .

1 As already apparent, this case presents a myriad of claims
2 against federal, state, and local government officials as well as
3 against various federal and state housing authorities. These
4 claims include both constitutional claims and statutory claims
5 under Title VI, Title VIII, and the United States Housing Act.
6 For federal courts to have jurisdiction over any of these claims,
7 only one named plaintiff need have standing with respect to each
8 claim. Village of Arlington Heights v. Metropolitan Hous. Dev.
9 corr., 429 U.S. 252, 23-64 (1977). J

10 Nonetheless, the district court held that none of the named
11 plaintiffs had alleged facts sufficient to establish the injury
12 in fact minima of the Article III test. Comer v. Kemn, 824
13 F. Supp. at 1120. The court also held that even if the
14 plaintiffs did allege facts sufficient to establish injury and
15 causation, they have not met the standard to be heard on a claim
16 for injunctive or declaratory relief. Id. We now hold that the
17 RAC and Belmont plaintiffs do have standing to bring Suit against
18 their respective defendants and vacate the judgment of the
19 district court ~~dismissing the~~ RAC and Belmont Complaints. we
20 take each complaint in turn.

21 A. RAC Complaint :

22 We examine the question of the RAC plaintiffs' Article III
23 standing first with respect to the statutory claims and then with
24 respect to the constitutional claims.
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1. Statutory Standing **Under the** PBA

The RAC plaintiffs allege that RX'S *policies, practices,* and procedures have created and continue to perpetuate racial discrimination within the federal Section 8 certificate program. Specifically, the RAC plaintiffs allege that the Section 8 program as administered in Buffalo *is* racially discriminatory because the *we* unlawfully restricts the use of Section 8 certificates to the City of Buffalo (the "Section 8 Claim") and fails to conduct adequate affirmative outreach to economically disadvantaged minorities as required by 24 C.F.R. § 882.207 (the "Outreach Claim"). RX Complaint, 19 70-80. Accordingly, the RAC plaintiffs argue that RAC's policies, practices, and procedures impede economically disadvantaged minorities from moving to and residing in suburban neighborhoods surrounding the *city* of Buffalo. RAC Complaint, 17 1-3.

RAC argues that its Section 8 program does not restrict *participants* to the City of Buffalo. Rather, RAC contends that its policy is to give any certificate holder, who wishes to live outside the city limits, a voucher, subject to availability, which could be used in any PHA operating a voucher program, Belmont, for instance. Fanelli Aff. at 6, 99 20-23; RAC's Answer to First Amended Complaint, comer v. Kemp, No. 89-1556 (W.D.N.Y. Sept. 5, 1990) at 6, 9 29. If no vouchers were available, then RAC would place the certificate holder on a waiting *list* and would issue a voucher as soon as one with the correct number of

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1 bedrooms became available. Fanelli Aff. at 6-7; 1 22. Finally,
3 RAC contends that this entire claim has been mooted by a July 2,
1 1990, HUD notice to all Section 8 PHAs directing them to advise
.11 certificate holders that they may move not only within the same
3 MSA of the PHA but into a contiguous MSA- On RAC's motion to
ij dismiss, the district court found (1) that RAC was in compliance
t with Section 8 rules and regulations because "by August 1990,
certificates issued by RAC could be used **anywhere.**" Comer v.
Kemu, 824 F. Supp. at 1123, and (2) TIAC's Outreach Programs [are]
in compliance with HUD's outreach regulations, and that the RAC
plaintiffs were well acquainted with RAC's programs before
3 initiating this suit and suffer no palpable injury as a result of
RAC's outreach efforts." Id. at 1128.

To the extent that the plaintiffs' claims invoke the FHA, we
2 need only examine the constitutional minima of injury, causation,
and redressability because

"Congress intended standing . . . to extend to the full
limits of Art. III and . . . the courts accordingly lack
the authority to create prudential barriers to standing in
suits brought under that section. Thus the sole requirement
for standing to sue under [the FHA] is the Art. III minima
of injury in fact; that the plaintiff allege that as a
result of the defendant's actions he [or she] has suffered
a distinct and palpable injury."

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discriminatory housing practice,' ha(ve] standing to litigate
violations of the [FHA]. . . . Congress hats] given residents of
housing facilities covered by the statute an actionable right to
be free from the adverse consequences to them of racially
discriminatory practices directed at and immediately harmful to
others." Warth, 422 U.S. at 512-13;³ see also Rasin v. Harry
Macklow Real Estate Co., 6 F.3d 898, 904 (2d Cir. 1993) ("Given
the private attorney general provision in section 813(a) of the
[FHA] and the Supreme Court's holding in Havens R-Alt;:iVV
newspaper readers had standing to challenge newspaper ad that
excluded African-American models); Michigan Protection and
Advocacy Serv., Inc. v. Babin, 18 F.3d 337, 344 (6th Cir. 1994)
("Congress intended [FRA] 0 3604 to reach a broad range of
activities that have the effect of denying-housing opportunities
to a member of a protected class. . . . When Congress amended
[FHA] § 3604(f) in 1988, it intended the section to reach not
only actors who were directly involved in the real estate
business, but also actors who directly affect the availability of
housing, such as state or local governments") (citing H.R. Rep.
NO. 711, 100th Cong., 2d Sess. 22 (1988), ~~reprinted in~~ 1988
U.S.C.C.A.N. 2173, 2183) (other citations omitted); Growth
Horizons, Inc. v. Delaware County, Pa., 983 F.2d 1277, 1282 n.6
(3rd Cir. 1993) (citing Trafficante v. Metrooolitan Life Ins.

³Section 812, previously codified at 42 U.S.C. 9 3612 and referred to in Warth, has been repealed and replaced by 42 U.S.C. 0 3613 (a).

CO., 409 U.S. 205, 208-lb (1972) and Gladstone, 441 U.S. at 102-09); South-Suburban Hous. ctr. v. Greater South Suburban Bd. of Realtors, 935 F.2d.868, 878 (7th Cir. 1991) ("the sole requirement for standing to sue under [the FHA] is the Art. III minima"), cert. denied, ___ U.S. -, 112 S. Ct. 971 (1992).

In summary, with respect to the FHA claims, we accord the RAC plaintiffs, as well as the Belmont plaintiffs, the broadest possible grounds for standing.

Now, turning to the merits of the arguments, kither RAC's contentions nor the district court's reasoning meet the plaintiffs' challenge. Each named plaintiff, Jessie Comer, Hazel Grimes, Yvonne Primm, and Felicia Stokes, points to several legally protected interests that have been invaded, and each alleges that the RAC defendants have invaded these legally protected interests. For example, each plaintiff alleges that RAC violates the FHA by failing to administer RAC housing in a non-discriminatory manner. Under the Civil Rights Act of 1964, "[n]o person in the United States shall, on the ground of race . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. 2000d. Each named plaintiff alleges that she is a low-income black resident of a public housing project in Buffalo. Each alleges that she was eligible for and applied for RAC housing. Primm and Stokes allege that they were specifically told that

1 they could not use their Section 8 voucher or certificate outside
2 the City of Buffalo. Deposition of Yvonne Primm at 49, Comer v.
3 Kern, No. 89-1556 (RAC) (Sept. 6, 1990) ("Primm DepositionI@);
4 Deposition of Felicia Stokes at 9, 35, Comer v. KemD, No. 89-1556
5 (RAC) (Sept. 6, 1990) (^{1g}Stokes Deposition"). Comer testified
6 that RAC gave her little information about RAC housing, and
7 "[wlhat little I heard of, I picked it up from friends."
8 Deposition of Jessie Comer at 42, Comer v. KemD, No. 89-1556
9 (RAC) (Sept. 5, 1990) ("J. Comer Deposition of 9/>/90ⁱ*)". Primm
10 and Comer allege that they were given a *Section 8* fact sheet
11 which gives no information that the voucher or certificate could
12 be used outside the City of Buffalo. In fact, the second
13 paragraph of the fact sheet plainly states: *'TAB-Purpose of
14 these (Section 81 programs is to ensure decent, safe, and-
15 sanitary housing in privately owned buildings in the City of
16 Buffalo.¹⁸ Undated RAC Section 8 Fact Sheet, Brief in Opposition
17 of Motion to Dismiss, Exhibit P, Comer V. KemD, No. 89-1556
18 (W.D.N.Y. Jan. 9, 1991) (emphasis added). Comer and Grimes
19 allege that they were given no information at all in violation of
20 HUD regulation, 24 C.F.R. 0 **882.207** (RAC failed to "make known to
21 the public, through publication in a newspaper of general
22 circulation as vdell aS through minority media and other suitable
23 means, the availability and nature of housing assistance for
24 lower-income families"). In fact, Grimes was denied housing
25 because she was purportedly ineligible. Finally each named
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1 plaintiff demands injunctive relief; assuming that the RAC
2 plaintiffs can prove their case, the court can provide such
3 relief. Therefore these claims are redressable.

4 In short, each named plaintiff has standing to bring suit
5 against the RX defendants pursuant to the FHA because, according
6 to each named plaintiff, the RAC, a "program . . . receiving
7 Federal financial assistance," administers its certificate system
8 and waiting list in a way that allegedly (1) has denied Comer,
9 Grimes, Primm, and Stokes the benefits of the Section 6 program,
10 (2) has excluded Comer, Grimes, Primm and Stokes from
11 participation in the programs, and (3) has subjected Comer,
12 Grimes, Primm, and Stokes to racial discrimination in violation
13 of the FHA and applicable civil rights laws. Thus, each named
14 plaintiff has alleged facts that demonstrate that the RAC
15 defendants have invaded a legally protected interest and that
16 such injury is redressable by injunctive relief. For similar
17 reasons, we find that the named plaintiffs have standing to bring
18 suit on their CDBG claim.

19 Furthermore, the claims are not mooted by the introduction
20 of a July 2, 1990, notice to all Section 8 PHAs directing
21 them to advise certificate holders that they may move within the
22 same MSA of the PHA or a contiguous MSA. If RAC fails to
23 communicate this information to the economically disadvantaged
24 minority certificate holders, then RAC still is in violation of
25 civil rights laws. Havens, 455 U.S. at 372-74 (holding that a
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black "tester," posing as a renter to collect evidence of racial steering practices in housing, had standing to seek damages because the FHA conferred the legal right to be given truthful information about housing availability); See also tuian, - U.S. at ___ n.4, 112 s. ct. at 2141 n.4; Robidoux, 987 F.2d at 938); infra section VII of this opinion (dealing with mootness).

In summary, we hold that Jessie Comer, Hazel Grimes, Yvonne Primm and Felicia Stokes have standing to bring their statutory Claims against the RAC defendants.

2. Constitutional. **Standing**

The case for standing on the constitutional claims is more difficult only because we must consider not only the three constitutional minima but also any prudent reasons for denying standing. We now hold that each RAC-plaintiff has standing to sue on the constitutional claims as well.

Take Felicia Stokes, for example. Stokes is an African-American woman resident of federally subsidized rental housing administered by RAC. She alleges that she was deprived of the opportunity to obtain RAC housing in the suburbs. According to her deposition, she first heard about RAC housing assistance sometime in 1988. Stokes Deposition at 7. On April 28, 1989,

[^] With respect to the substantive standards, the plaintiffs' constitutional claims also require proof of intentional discrimination, but their statutory claims can succeed by showing disparate impact, which is assessed in accordance with "Title VII'S burden-shifting analysis." Orange Lake, 21 F.3d at 1227 (explicating the difference between the CONSTITUTIONAL and statutory standards).

1 she applied for a Section 8 subsidy. She received the subsidy
2 after only two months because a fire in her apartment
3 involuntarily displaced her, qualifying her for a federal
4 subsidy. At a housing orientation session, RAC agents instructed
5 her that she could use her certificate only within the city
6 limits, and not in the suburbs. RAC agents did not advise her of
7 the voucher program which could be used outside the City. Stokes
8 Deposition at 34-35. Although she attended several other
9 Section 8 briefing sessions, no administrator ever gave her any
10 information of any programs for which she might be eligible
11 outside the City. Stokes Deposition at 35-36.

12 Thus, Stokes' claim is two-fold: First, the government, by
13 deliberately failing to provide a free flow of housing
14 information, has erected a barrier that makes it more difficult
15 for economically disadvantaged blacks to obtain a housing benefit
16 than it is for non-minorities. See Jacksonville, - U.S. at
17 -, 113 S. Ct. at 23103. Second, regardless of whether RAC was
18 in compliance with Section 8 rules and regulations* when HUD
19 issued its July 2, 1990, notice that RAC certificate holders were
20 no longer restricted to the City of Buffalo, see Comer v. Kemu,
21 824 F. Supp. at 1123, a fact irrelevant to the question of
22 standing, see Luian, 1 U.S. at - 3.4, 112 S. Ct. at 2141 n.4,
23 the lack of information given to economically disadvantaged
24 minority voucher and certificate holders was intentional and
25 harmed those individuals who subsequently failed to find housing

1 in the suburbs. Thus, Stokes not only has two **separate** and
 2 distinct claims, i.e., a Section 8 Claim and an Outreach Claim,
 3 but also two claims which are inextricably interwoven.

Jj The district court found that there **was** no injury in fact to
 5 Felicia Stokes because although Stokes "'would have liked to"
 6 live outside the City, she no longer wished to move to the
 7 suburbs. Comer v. KemD, 824 F. Supp. at 1125-26; Stokes
 8 Deposition at 17. Based on this portion of Stokes' deposition
 9 testimony, the district court summarily dismissed Ar claim for
 10 lack of standing because; according to the court, Stokes
 11 "testified that she is content with the treatment which she
 12 received from-MC through the years of her dealings and has no
 13 current desire to move outside the City of Buffalo"! Comer v.
 14 IZemD, 824 F. Supp. at 1129. The district court's point is this:
 15 Felicia Stokes does not have standing to pursue this litigation
 16 because Suburban RX housing was and is available to Felicia
 17 Stokes. Therefore, Stokes has not suffered an injury-

18 TO make this point, the district court has cleaved the
 19 Section 8 claim from the Outreach Claim. In the cleavage, the
 20 theory of the case seeps through the cracks, thereby facilitating
 21 the dismissal of the case.

22 We are not persuaded by this reasoning. First, as we have
 23 stated repeatedly, the question whether Stokes has a Current
 24 desire to live outside the City of Buffalo is irrelevant because
 25 standing is measured as of the time the suit is brought. Luian,
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1 ___ U.S. at ___ n.4, 112 S. Ct. at 2141 n-4; ~~Robidoux~~, 987 F.2d
2 at 938.

3 Putting aside the question of timing, we now hold that the
4 RAC plaintiffs had standing to bring their constitutional claims.
5 Assuming, for purposes of this appeal, the truth of the
6 allegations against MC, this is the **story** of Felicia Stokes.
7 She applied for public housing, but received only the information
8 that the administrators chose to share with **her**. She alleges
9 that she did not know that she could use her vouch,? to move
10 outside the city limits: Furthermore, Stokes contends that RAC
11 rules and regulations ~~in their administration~~, violate the
12 Constitution because they erect a barrier **that makes** it more
13 difficult for economically disadvantaged blacks to obtain a
14 housing benefit than 't is for non-minorities. See Jacksonville,
15 ___ U.S. at -, 113 t. ct. at 2303. "The 'injury in fact' in an
16 equal protection case of this variety is the denial of equal
17 treatment resultirig from the imposition of the barrier, not the
18 ultimate inability to obtain the benefit." Id. (~~Citing Turner v.~~
19 Fouche, 396 U.S. 346,; 362 (1970)). And, this injury is directly
20 traceable to the act'onsl of the EIAC defendants.

21 Our examination of the other plaintiffs, Comer, Grimes and
22 Primm, shows **similar problems** with the administration of their
23 housing applications. At every turn, HUD and RAC agents have
24 either failed to give any information at all, as In the case of
25 Comer and Grimes, orsqave incomplete information about houslr,q
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availability as in the cases of Primm **and** Stokes. Furthermore, each of the named plaintiffs demands injunctive relief. As we stated earlier, if the plaintiffs prevail on their claims, the court can shape such relief. Therefore, the RAC plaintiffs also meet the redressability minima.

Finally, the defendants do not provide and we **cannot** find any prudential reasons for denying standing to these plaintiffs. Therefore, we hold that the FUG plaintiffs do have standing to bring this case on their equal protection claims. For similar reasons, we find that the RAC plaintiffs have standing to bring **Suit** on their other constitutional **Claims** as well. We therefore vacate the judgment of the district court with respect to the RAC Complaint.

B. Belmont Complaint .I 7

The Belmont plaintiffs allege that (1) Belmont's local preference impedes persons who live in the City of Buffalo, which has a higher percentage minority population than the suburbs, from obtaining rental assistance available under Belmont's program, thereby giving subsidies to a disproportionate number of white suburban residents and workers ahead of minority city dwellers, and (2) the suburban consortium fails to conduct adequate affirmative action outreach to minority households *within* the City of Buffalo. Belmont Complaint, 9'8 1-3, qy 47-64 (preference claim), lq 65-74 (outreach claim) .

1 The district court never held that Belmont's local
2 preference policy conforms either to applicable civil rights laws
3 or to the Constitution. Instead, the district court held that
4 neither Jessie Comer nor Jewel Culverhouse, the two minority
5 individuals who brought suit against Belmont, have standing
6 because neither Comer nor Culverhouse can show injury in fact.
7 The argument is as follows: Given the limited resources
8 available for Section 8 assistance, "a successful Belmont
9 applicant must qualify for a federal preference . . . to have a
10 realistic prospect for obtaining Section 8 assistance." Comer v.
11 KemRl 824 F. Supp. at 1122. Neither Comer nor Culverhouse can
12 "demonstrate that they qualify, or that there is any prospect of
13 future qualification to be on the two lists which offer a
14 reasonable probability of reaching the top." -Id. Therefore,
15 neither Comer nor Culverhouse has standing to bring suit against
16 Belmont. Belmont's argument on appeal is a variation of the
17 court's holding below. Brief for HUD-Federal Appellees at 33-34.

18 We are not persuaded by these arguments. Assuming that
19 neither Comer nor Culverhouse qualifies for a federal preference,
20 then, under current administration by Belmont, neither plaintiff
21 has much of a chance of reaching the top of the waiting list.
22 Nevertheless, the Belmont defendants cannot defeat the legal
23 challenge presented by the Belmont plaintiffs with an appeal to
24 the Belmont program as currently administered.

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1 The FHA provides that under the appropriate circumstances,
2 HUD may assist a family which does not qualify for a federal
3 preference, before it assists a family which does qualify for a
4 federal-preference, but which does not live in the jurisdiction
5 at the time of application. 42 U.S.C. § 1437f(o). The local
6 preference is subject to various limitations including that its
7 administration must be consistent with the United States
8 Constitution and with civil rights laws. 42 U.S.C. 5 3604, 42
9 U.S.C. 5 2000d. Furthermore, according to the plin Lxquage of
10 the HCDA itself, as conditions for receiving federal CDBG funds,
11 the grantee must (1) "affirmatively further fair housing," 42
12 U.S.C. § 5304(b)(2); (2) administer the grant in conformance with
13 42 U.S.C. g§ 2000.a to 2000a-6 (public accommodations); 42 U.S.C.
14 §§ 2000d to 2000d-7 (federally-assisted prOgr==);- and the **FHA**,
15 42 U.S.C. 55 3601 - 3631; and (3) submit an annual performance
16 report for HUD's review, 42 U.S.C. 5 5304(e). This report must
17 address the CDBG recipient's compliance with Title VI and
18 Title VIII, and the recipient's efforts at meeting the statutory
19 obligations to promote fair housing under 42 U.S.C. § 5304(b)(2).
20 Once again, the administration of the funds must be consistent
21 with the Constitution as well as applicable civil rights laws.
22 In short, Belmont officials must administer the local preference
23 and handle CDBG funds in conformance with the Constitution and
24 applicable civil rights laws.
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1 Having established the contours of the arguments surrounding
2 the question of the Belmont plaintiffs' standing to sue the
3 Belmont defendants, we now examine this question first with
4 respect to the constitutional claims, **and** then with respect to
5 the statutory claims of the Belmont plaintiffs. We limit our
6 comments to standing on the local preference because our analysis
7 of the Belmont plaintiffs' standing to sue the Belmont defendants
8 on the outreach claim would be substantially similar to our
9 analysis on the RAC plaintiffs' standing to sue o..'these claims.

10 1. Constitutional Standing

11 A government harms minority individuals, and violates the
12 Equal Protection Clause, accordingly:

13 When the government erects a barrier that makes it more
14 difficult for members of one group to obtain a benefit than
15 it is for members of another group, a member of the former
16 group seeking to challenge the barrier need not allege that
17 he [or she] would have obtained the benefit but for the
18 barrier in order to establish standing. The "injury in
19 fact" in an equal protection case of this variety is the
20 denial of equal treatment resulting from the imposition of
21 the barrier, not the ultimate inability to obtain the
22 benefit.

23 Jacksonville, ___ U.S. at -, 113 S. Ct. at 2303. Thus, under
24 Jacksonville, to show Article III standing for constitutionally-
25 protected equal protection claims, a plaintiff must allege that
26 (1) there exists a reasonable likelihood that the plaintiff is i
the disadvantaged group, (2) there exists a government-erected
barrier, and (3) the barrier causes members of one group to be
treated differently from members of the other group. See, e-a.
Turner v. Fouche, 396 U.s. at 362 ("We nay assume that the

1 [plaintiffs] have no right to be appointed to the . . . board of
2 education. But [they] do have a federal constitutional right to
3 be considered for public service without the burden of
4 invidiously discriminatory disqualifications"); City of Richmond
5 v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("The [minority set-
6 aside program] denies certain citizens the opportunity to compete
7 for a fixed percentage of public contracts based solely upon
8 their race").

9 In this case, the government-erected barrier is the local
10 preference, which, the Belmont plaintiffs allege, **effectively**
11 blocks African-American residents of the City from moving to the
12 suburbs. The Belmont plaintiffs support this argument with
13 statistics that demonstrate that while there are many blacks who
14 live within the city limits, many less live in suburban Buffalo.
15 The Belmont plaintiffs also alleged that, as of January 1990,
16 minority families held only three per cent of the over 2000
17 certificates and vouchers issued by the suburban Belmont
18 Section 8 Program, although 21 per cent of the families on
19 Belmont's waiting list of over 3,800 households were minority
20 families. Thus, the erection and application of the local
21 preference acts as a proxy for race which serves as an
22 instrument to deny minority individuals the opportunity to be
23 considered for suburban housing. While a local preference may be
24 neither per se unconstitutional, nor per se unfair, where a
25 government erects a local preference that has the effect of
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1 filtering only a small percentage of minorities to the locally
2 preferred area, such government action is suspect to being a
3 proxy for race and therefore a barrier to racial minorities who
4 wish to -integrate into suburban life. This allegation is
5 sufficient to show injury and causation for purposes of Article
6 III standing on the constitutional claims.

7 The Belmont defendants argue that The local preference used
8 by Belmont operates in a race-neutral fashion: because] it gives
9 both white and minority residents and workers in Llle consortium
10 communities subsidie ahead of both white and minority Buffalo
11 residents." Brief f₁r HUD-Appellees at 31 n.13 (HUD's emphasis).
12 This argument cannot overcome the constitutional challenge.

13 Taking the well-pleaded allegations Of the Belmont
14 plaintiffs as true, while the local preference may be neutral on
15 its face, the preference impermissibly classifies according to
16 race, thereby transgressing the constitutionally protected rights
17 of blacks. The Belmont plaintiffs may constitutionally challenge
18 a state action on the grounds that it constitutes a device
19 designed to classify individuals as a means to serve an
20 impermissible end. see, e.g., Orange Lake, 21 F.3d at 1225
21 (citing Ronald D. R tunda & John E. Nowak, Treatise on
22 Constitutional Law, 2d ed., 0 18.4 (1982)). As we explain above,
23 the Belmont plaintijffs allege that the local preference is such s
24 device.

1 The Belmont defendants also contend that neither named
2 plaintiff has a federal preference. Therefore, as a practical
3 matter, neither would receive housing assistance and therefore
4 neither has standing to sue. This situation is analogous to the
5 one presented to the Supreme Court in Fea University of
6 California v. Bakke, 438 U.S. 265 (1978), "where a twice-rejected
7 white male applicant (to medical school claimed that the
8 University's] admissions program, which reserved 16 of the 100
9 places in [each] entering class for minority [carhidaces), was
10 inconsistent with the Equal Protection Clause." Jacksonville,
11 - U.S. at -, 113 S. Ct. at 2302. Several amici curiae argued
12 that Bakke lacked standing to challenge the program because he
13 would not have been admitted anyway. Justice Powell, writing for
14 a majority on this point, explained that "even if Bakke had been
15 unable to prove that he would have been admitted in the absence
16 of the special program, it would not follow that he lacked
17 standing," because Bakke's injury was the "University's decision
18 not to permit Bakke to compete for all 100 places in the class,
19 simply because of his race." Bakke, 438 U.S. at 280-81 n.14.
20 (opinion of Powell, J.). AS stated above, "[t]he 'injury in
21 fact' . . . is the denial of equal treatment resulting from the
22 imposition of the barrier, not the ultimate inability to obtain
23 the benefit." Jacksonville, ___ U.S. at -, 113 S. Ct. at 2303

24 Similarly, the injury to the Belmont plaintiffs cannot be
25 defeated by showing that, as a practical matter, the plaintiffs
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1 would never receive housing assistance anyway. The injury is not
2 the failure to obtain housing assistance in the suburbs, but is
3 the missed opportunity to compete for suburban housing on an
4 equal footing with the local residents. See Trafficante, 409
5 U.S. at 208-12 (holding that a white and a black tenant had
6 standing to challenge their landlord's acts of discriminating
7 against non-white rental applicants); McMichael, 455 U.S. at 372-74.

8 As with RAC, it is not enough to demonstrate standing on the
9 strength of a hypothetical plaintiff. The Belmont plaintiffs
10 must show that there is some link between the challenged
11 government action, and their particular injury. They must also
12 show that such injury is redressable. We find that both named
13 plaintiffs allege facts sufficient to demonstrate the
14 constitutional minimum. We also find that there are no prudential
15 reasons for denying standing and therefore conclude that both
16 named plaintiffs have standing to sue the Belmont defendants on
17 the equal protection claims.

18 Take Jessie Comer, for instance. Jessie Comer is an
19 African-American single mother of two children who works
20 approximately three days per week as a substitute teacher in the
21 Buffalo public schools. Deposition of Jessie Comer at 7, Comer
22 v. Kernto, No. 89-1556 (Belmont) (Sept. 20, 1990) ("J- Comer
23 Deposition of 9/20/90^{8t}"). Until recently, she had been a resident
24 of BMHA housing. She has applied to both RAC and Belmont for a
25 housing subsidy, but has not yet received one. Comer contends
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a.

that she is entitled to a federal preference= Although the appellees contend that they have provided evidence sufficient to demonstrate that Comer is not entitled to a federal preference and therefore that there is no genuine issue of fact on this point, we disagree. We need not elaborate on this point, however, because as we stated above, the plaintiffs' lack of a federal preference does not defeat their standing to challenge the constitutionality of the local preference. See Bakke, 438 U.S. at 280-81 n.14. Comer alleges that, although she knew about Belmont's suburban housing program since the late 1980s, she believed that an applicant had to live outside the city limits to obtain a Belmont subsidy. When she learned otherwise, she applied for a Belmont subsidy in July 1990. Huckabone Affidavit, Exhibit B; J. Comer Deposition of 6/20/90, at 20. **Comer** also alleges that white suburban applicants who applied for a Belmont subsidy after July 1990, such as Ann Palmer, have already received their subsidy. See Brief for Appellants, Addendum F; Plaintiffs Response to Belmont's Opposition To Preliminary Injunction Motion, Exhibit 3, Comer v. Kemu, No. 89-1556 (Belmont) (letter of 7/9/1991 from Belmont to Palmer stating that she had applied for a subsidy and was placed on Belmont's waiting list as of June 27, 1991, and letter of 7/13/1992 from Belmont to Palmer informing her that she had received a subsidy). At this time, Comer is homeless, although living with a relative, and waiting for affordable housing to become available. Culverhouse

1 j alleges similar facts. She too is an African-American single
 2 / mother of three children. Culverhouse and her children lived in
 ? : BMHA housing for about two years, then, for a short time, they
 4 lived at a battered women's shelter, before moving to a privately
 5 ; owned, unsubsidized house. When her landlord sold this house in
 i 0 1989, Culverhouse and her children moved to a Salvation Army
 - 1 Shelter. At this time, she applied for both BMHA and Belmont
 3 suburban housing. However,

when I filled out my application at that time, the lady told
 me because I was not already living in the suburban area,
 they could not help me. . . . If the Salvation Army was
 located in Amherst or Tonawanda, it was a different story.

. . . .

The receptionist took a look at the application and handed
 it back because she said that they were doing the suburban
 areas and I did not live in a suburban area and that I could
 not be helped, anyway. So, it was like a waste of time to
 submit the application because I was living right around the
 corner from [the Belmont office] in the Salvation Army
 Shelter.

Deposition of Jewel Culverhouse at 19-20, 25, ~~Comer v. Kemu~~, No.
 89-1556 (Belmont) (Oicr. 11, 1990) ("Culverhouse Deposition").

Culverhouse and her children now live in the overwhelmingly
 minority-occupied Belmont Kenfield Apartments.

In summary, we hold that the named plaintiffs have standing
 to sue the Belmont defendants on the equal protection Claims.
 For substantially similar reasons, we hold that the named
 plaintiffs also have standing to sue the Belmont plaintiffs on
 the other constitutional claims as well. We now turn to
 examination of the statutory claims.

2. Statutory Standing

Although the FHA, by its terms, does Permit a local preference, such preference is subject to various limitations including that its administration must be consistent with the Constitution and civil rights laws. See, e.g., 42 U.S.C. § 5304(b)(2); 42 U.S.C. §§ 2000a to **2000a-6** (public accommodations); 42 U.S.C. §§ 2000d to 2000d-7; 42 U.S.C. §§ 3601-3631. Therefore, the application of the local preference is null and void to the extent that the local preference is inconsistent with the Constitution, as we demonstrated suora, or any of these acts. See Oranae Lake, 21 F.3d at 1227 (explicating the difference between the constitutional and statutory standards in this respect). The Belmont plaintiffs allege that Belmont's application of the local preference promotes segregation. If true, then the administration of Belmont's housing program is in violation of its own terms. Therefore, all that any specific plaintiff must show is that (1) the application of the FHA has a disparate impact on minority residents of the City of Buffalo, (2) he or she is a member of the class harmed by the application of the FHA that is being denied the benefits accorded under the FHA because of Belmont's application of the local preference and (3) he or she applied for and was denied housing. Comer and Culverhouse have alleged these facts and therefore have Article III standing to bring this lawsuit on the Statutory **CLAIMS**. We need not address the question of prudential concerns as they do

1 not apply to standing under the FHA. For substantially similar
2 reasons, Comer and Culverhouse have standing to pursue their
3 claims under the CDBG as well.

4 In -short, we hold that the Belmont plaintiffs do have
5 standing to bring this case and reverse the judgment of the
6 district court with respect to the RAC and Belmont Complaints.

7 VI. Class Certification

8 Normally, we would analyze the question of mootness before
9 reviewing the question of class certification. But, for reasons
10 that become clear, the issues of mootness and class certification
11 are inextricably interwoven in this case. Before we can
12 determine whether this case is moot, we *must* determine whether or
13 not we are dealing with a class action **Suit**.

14 The various plaintiffs commenced this action on behalf of a
15 class of all named plaintiffs, and on behalf of all other persons
16 similarly situated. Fed. R. Civ. P. 23(a) and (b)(2). The RAC
17 plaintiffs seek injunctive relief on behalf of a sub-class of all
18 minority Buffalo residents who are financially eligible for
19 Section 8 Existing housing subsidies and who: (a) have applied
20 for an RAC subsidy; (b) would apply if they were notified of the
21 availability of the program; or (c) will apply for an FIAC subsidy
22 in the future. The Belmont plaintiffs seek injunctive relief on
23 behalf of a sub-class of all minority Buffalo residents who are
24 financially eligible for Section 8 Existing Housing subsidies and
25 (a) who have applied for a Belmont subsidy; (b) who would apply
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1 if they were notified of the availability of the program: or
2 (c) who will apply for a Belmont subsidy in the future. The BMHA
3 plaintiffs seek injunctive relief on behalf of a sub-class of all
4 former, current and future residents of and applicants for
5 housing in BMHA administered public housing projects.

6 The district court dismissed the plaintiffs' claims on
7 standing and mootness grounds. As a result, the court denied the
8 plaintiffs' motions for class certification without addressing
9 whether the putative representatives met the requirements for
10 class certification. Therefore, we must review these questions
11 anew. See Robidoux, 987 F.2d at 935.

12 To obtain class certification, the plaintiffs must show that
13 "(1) the class is so numerous that joinder of all members is
14 impracticable, (2) there are questions of law or fact common to
15 the class, (3) the claims or defenses of the representative
16 parties are typical of the claims or defenses of the class, and
17 (4) the representative parties will fairly and adequately protect
18 the interests of the class." Fed. R. Civ. P. 23(a).

19 Additionally, the plaintiffs must satisfy one of three criteria
20 set forth in Rule 23(b). In this case, the plaintiffs predicate
21 class certification upon a showing that the RAC and Belmont
22 defendants have "acted or refused to act on grounds generally
23 applicable to the class, thereby making appropriate final
24 injunctive relief or corresponding declaratory relief with
25 respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).
26

1 The defendants do, not present, and we cannot find, any
2 arguments that the plalintiffs do not satisfy the requirements set
3 forth in Rules 23(a), and (b)(2). Indeed, pattern of racial
4 discrimination cases for injunctions against state or local
5 officials are the "paradigmI' of Fed. R. Civ. P. 23(b) (2) class
6 action cases. 38 J. Moore & John E. Kennedy, Moore's Federal
7 Practice f 23.40111, at 258 (2d ed. 1993). Instead, the thrust
8 of the defendants' argument is that a class action may not be
9 prosecuted unless the named plaintiffs have stand, .,g. The
10 defendants' reliance n, O'Shea v. Littleton, 414 U.S. 488, 494
11 (1974) I is misplaced. The O'Shea plaintiffs could not establish
12 that they had allegedI a concrete and particularized injury-in-
13 fact at the onset of their lawsuit. Therefore, the O'Shea
14 plaintiffs never had standing to bring a class action suit
15 against the defendants, and therefore, according to the
16 defendants, t^v[t]here'was no class certification . . . as the
17 complaint was dismissed on grounds which did not require that
18 determination to be *lade." O'Shea, 414 U.S. at 494, n.3.

19 In this case, as xe earlier held, the RAC and the Belmont
20 plaintiffs did have! standing to bring this suit at the
21 commencement of this suit. Furthermore, these plaintiffs
22 satisfied the requisite conditions of class certification at the
23 time the plaintiffs first filed a complaint and at the time the
24 court ordered the plaintiffs to file three amended complaints;
25 they also satisfy u ese conditions as of today. Specifically,
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the plaintiffs satisfy the requirements of Rule 23(b)(2) because the plaintiffs seek injunctive relief and they predicate the lawsuit on the defendants' acts and omissions with respect to minority residents of Buffalo. The plaintiffs also satisfy the requirements set forth in Rule 23(a). First, there is no dispute that each proposed sub-class satisfies the numerosity requirement of Rule 23(a)(1). Second, the questions of law, which predominantly focus on whether the behavior of the defendants violated the FHA and the Fourteenth and Fifth Amendments of the Constitution, are, by necessity, common to the class because they do not depend on the plaintiff-variable but on the defendants, who are a constant. Furthermore, many of the questions of fact are common to the class because again, the class members all come from similar socio-economic and racial backgrounds. Other than the variables which go into the actual composition of the class, which as we have just noted are quite similar, the lawsuit focuses on the behavior of the defendants and not that of the plaintiffs. Third, the claims of the representative parties are typical of the class. The claims of the named plaintiffs are that they are financially eligible minorities who applied for federally-subsidized housing and were not told about certain programs. The variation in facts include such factors as when they applied for housing assistance and to whom they spoke. Thus, "each class member's claim arises from the same course of events and each class member makes similar legal arguments to

1 prove the defendant's' liability." Robidoux, 987
2 also 7A Charles A. Wright, et al., Federal Practice ana &
3 § 1764, at 243 & n.18 (1986 & Supp. 1994). Finally, we find that
4 the representative parties will fairly and adequately protect the
5 interests of the class. Even a cursory examination of the record
6 shows that the representative parties have vigorously prosecuted
7 this law suit despite the fact that at every turn the courthouse
8 doors have been slammed shut to them. We now open these doors,
9 certify the RAC and Belmont sub-classes, and ask these plaintiffs
10 to step on inside.

11 We remain puzzled, however, as to why the district court
12 took so long to rule on the question of class certification only
13 to hold not that the plaintiffs have not demonstrated that they
14 meet the necessary conditions for class certification, but that
15 the claims have become moot. In proclaiming our surprise, if not
16 astonishment, we note that housing discrimination suits of this
17 type are acutely susceptible to mootness because of the fluid
18 composition of the public housing population. Thus, while the
19 harm remains constant, those who suffer from the harm often
20 change identity. The plaintiffs obviously were well aware of
21 this fact and acted promptly to prosecute this suit. The
22 plaintiffs filed a motion for class certification on February 20
23 1990, approximately two and a half months after filing their
24 complaint. The district court never ruled on this motion, but
25 ordered the plaintiffs to separate their action into three
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1 amended complaints. On July 23, 1990, just thirteen days after
2 being so ordered, the various plaintiffs filed the three amended
3 complaints. On November 9, 1990, the RAC, Belmont, and BMHA
4 defendants filed motions to dismiss their respective complaints.
5 The main grounds upon which the defendants predicated their
6 motions to dismiss **were** standing and the lack of conditions
7 necessary for class certification. Then, two years later, on
8 August 19, 1993, the district court dismissed the complaints on
9 standing and mootness grounds.

10 Given the circumstances leading to the dismissal of this
11 suit and for reasons which become apparent in our discussion of
12 mootness infra, we feel compelled to state that, on remand, the
13 district court has the power to decide the merits of these claims
14 although the particular claim of the named plaintiffs may
15 themselves become "moot" at some point in the future. "[T]he
16 termination of a class representative's claim does not moot the
17 claims of the unnamed members of the class." County of Riverside
18 v. McLaughlin, 500 U.S. 44, 51-52 (1991) (quoting Gerstein v.
19 Pugh, 420 U.S. 103, 110-11, n.11 (1975) (citing Schall v. Martin,
20 467 U.S. 253, 256 n.3 (1984))). In fact, it is often the
21 invocation of class certification that preserves the merits of
22 the controversy for appellate review. McLaughlin, 500 U.S. at
23 51-52; see also Cook v. Colgate Univ., 992 F.2d 17, 19 (2d Cir.
24 1993) (controversy moot where district court ordered university
25 to give varsity status to women's hockey club, and all the non-

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class-certified, wome -litigants graduated by time appeal was heard).

Having certified these claims, We now turn to a more in-depth examination of the question of mootness.

VII. Hootness

While the standing doctrine evaluates a litigant's personal stake at the onset of/a case, .w, - U.S. at ___ n.4, 112 S. Ct. at 2141 n.4; Robidoux, 987 F.2d at 938, "the mootness doctrine ensures that the litigant's interest in ,ne outcome continues throughout the life of the lawsuit.1' Cook v. Colaate Univ., 992 F.2d at 19 (citing United States Parole Comm'n v. Geraahty, 445 U.S. 3818, 396-97 (1980); Stuk v. Slattery, 936 F.2d 1433, 1441 (2d Cir. 1991)). In general, ^Ha case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." Counts of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969) (internal quotation marks omitted)).

The mootness doctrine is riddled with exceptions, however. Among the exceptions| pertinent to this case are the "'voluntary cessation"' doctride, Davis, 440 U.S. at 631; United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) (defendants voluntarily ceased allegedly illegal conduct; not moot because there is no expectation that the defendants Will not reinitiate the challenged conduct), and the "capable of repetition" doctrine, Sosna v. Iowa, 419 U.S. 393, 399-400 (1975) (Iowa state court

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dismissed wife's petition for divorce because she failed to meet state's one-year residency requirement: not moot when wife met residency requirement because the problem to potential divorcees posed by the residency requirement was "capable of repetition, yet evading review"); Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972) (challenge against Tennessee law barring persons from registering to vote unless, at the time of the next election, they resided in the State for at least one year and in a particular county for at least three months: not moot when litigant became eligible to vote); Roe v. Wade, 410 U.S. 113, 125 (1973) (pregnant woman challenged anti-abortion statute; not moot when pregnancy terminated); southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911); see also DeFunis v. Odegaard, 416 U.S. 312, 319 (1974) (per curiam) (holding that equal protection claim in pre-Bakke affirmative action suit was mooted by plaintiff's being registered in his final quarter of law school).

The application of these various mootness doctrines depends in part on whether the court is presented with a **Class** action because, in general, if the claims of the named plaintiffs become moot prior to class certification, the entire action becomes moot. Board of Sch. Commissioners of Indianapolis v. Jacobs, 42 U.S. 128, 129-30 (1975) (per curiam). In contrast, class certification will preserve an otherwise moot claim. YCLauhliiz 500 U.S. at 51-52. In class actions . . . courts have come to recognize that an individual plaintiff may continue to represent

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4 i the interests of others even after any prospect of individual
 '21 recovery has vanished." 13A Charles A. Wright, et al., Federal
 1 r Practice and Procedure S 3533.9, at 391 (1984 6r Supp. 1994); see
 .! i a..&_s_a &_l_-stein, 420 U.S. at 110 n.11; Sp_sn.a,, 419 U.S. at 399-400:
 5 Schall, 467 U.S. at 256 n.3.

2 According to the defendants, this case cannot be analyzed
 under class action mootness doctrine because, until today, no
 3 class had been certified. The Supreme Court focused on the
 9 special problems associated with class action moouess, including
 the timing of class certification, in a series of cases decided
 in the mid-1970s: S sna, 419 U.S. at 399-400; Gerstein, 420 U.S.
 '2 110 n.11; Jacobs, 42 U.S. at 129-30; Pasadena City Bd. of Educ.
 '7 V. Suanaler, 427 U.S. 424, 429-31 (1976); Baxter v. Palmiaiano,
 425 U.S. 308, 310 n.: (1976); Youakim v. Miller, 425 U.S. 231,
 236 n.2 (1976); Franks v. Bowman Transm. Co., 424 U.S. 747, 752-
 57 (1976); Swisher v. Brady, 438 U.S. 204, 213-214 n.11 (1978).
 Where the claims of the named plaintiffs become moot prior to
 class certification, 'there are several ways in which mootness is
 not had. First, an intervener might have stepped in. SDanoler,
 427 U.S. at 430-31i (school desegregation case brought as class
 13 action would have tbeen moot because all named plaintiffs
 14 graduated and no class certification; mootness avoided by
 15 presence of the United States as an interrenor); Palmiaizro, 425
 16 U.S. 310 n.1 (althoLgh district court treated this priscn
 disciplinary procedqre challenge as a **CiaSS action, ClaSS ?ct**

certified: mootness avoided by stipulation for intervention of additional plaintiff). Second, under the appropriate circumstances, class certification may relate back to the filing of the complaint. McLauahlin, 500 U.S. at 52; Sosna, 419 U.S. at 402, n.11. Normally, the court has held circumstances appropriate where the claims are ~Irso inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." A. Lauahlin, 500 U.S. 52 (quoting Geraahlx, 445 U.S. at 399); Gerstein, 420 U.S. at 110 n.11 (class action challenging state practice of holding for trial without probable cause hearing; named class representatives convicted prior to Supreme Court review: not moot because the nature of pretrial detention is such that "it was most unlikely" that the courts would determine the constitutional challenge prior to conviction or release: furthermore, the case was capable of repetition). In such cases, the courts permit the class certification to relate back to the filing of the complaint and hold that the plaintiffs have properly preserved the merits of the case for judicial resolution. Swisher, 438 U.S. at 213 n.11 (1978); Sosna, 419 U.S. at 402 n.11.

But what if the claims are transitory in some sense, like the nature of the population of a public housing market? And, what result if a judge waits to rule on a motion for class certification for several years until the claims of the named

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2 I plaintiffs becomes moot and then dismisses a complaint on
3 I standing and mootness grounds without ever certifying the class?
4 I Given the circumstances of this case, in particular, the
5 I transitory nature of the public housing market and the court's
6 I failure to pass upon the plaintiffs' motion **for** class
7 I certification for over two years, we now hold that this class
8 I certification relates back to the original filing.

9 I The defendants also argue that HUD's and MC's voluntary
10 I cessation of the allegedly illegal conduct moots Lile claims of
11 I all the named and unnamed plaintiffs thereby defeating
12 I jurisdiction. Brief for Federal Appellees at 45 n.20. The
13 I plaintiffs disagree and cite various RAC published handouts
14 I including one received by Jessie Comer in June 1992 which defines
15 I the RAC Section 8 program as a federal rental assistance program
16 I established "to ensure decent, safe, and sanitary housing in
17 I privately owned buildings ~~in the City of Buffalo~~^{8U} (emphasis
18 I added). The RAC handout now expressly states that "Families with
19 I a Certificate are free to live anywhere in New York State with
20 I continued assistance." The plaintiffs also point out that
21 I Felicia Stokes never received notification that the geographic
22 I restriction had been removed, and Warda Thomas, an intervener,
23 I testified that she received the misleading RAC handout in
24 I February 1991, and has advised that FLAC certificate holders had
25 I to use the certificates in the City of Buffalo.

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The district court held that this voluntary **cessation** of the defendants' earlier practice transgressing the various housing statutes mooted the RAC plaintiffs' **statutory** claims. Comer v. U.S., 824 F. Supp. at 1123. We assume that the RAC defendants would contend that this notification moots not only the claims of the named defendants, but the claims of all unnamed plaintiffs, thereby mooting the RAC claims whether or not we use the class action line of cases. E.a., Armstrona v. Ward, 529 F.2d 1132 (2d Cir. 1976) (class action challenging prisoner treatment mooted when new facility closed., no reasonable expectation that new facility would re-open, all prisoners retransferred; state action covered all class members and there was no expectation that the wrong would be repeated as to any of them). Accordingly, the RAC plaintiffs would be unable to rely on the doctrine that voluntary cessation of allegedly illegal conduct does not generally moot the claims based on such conduct. Davis, 440 U.S. at 631 (citing W.T. Grant co., 345 U.S. at 633). We now hold that this notification does not moot the claims of any of the RAC plaintiffs.

The EIAc defendants, as the parties who voluntarily ceased the allegedly illegal conduct, bear the very heavy burden of demonstrating (1) with assurance that there is no reasonable expectation that the conduct will recur, Id. (citing W.T. Grant co., 345 U.S. at 633; SEC v. Medical Committee For Human Riuhsts, 404 U.S. 403 (1972)), and (2) interim relief or events have

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completely and irrevokably eradicated the effects of the alleged violation, Davis, 440 U.S. at 631 (citing DeFunis, 416 U.S. 312 and Indiana Employment Sec. Div. V. Burney, 409 U.S. 540, 541-42 (1973) (per curiam) (moot where state, which wrongfully suspended benefits, later voluntarily decided to grant full retroactive compensation: although plaintiff did obtain class certification, she apparently was the only member of the class)).⁵ The RAC defendants do not meet their heavy burden. The RAC defendants have not even met the burden of showing that the allegedly illegal conduct has ceased. HUD's July 1990 notice requiring PHAs to allow certificate holders to use their subsidies anywhere within the MSA the RAC plaintiffs claim is merely an explicit statement of the federal law upon which they had been relying to sue the RAC defendants on statutory grounds. See Brief for Appellants at 71. prior to the notification, the crux of the concern of the RAC plaintiffs was that RAC officials failed to communicate federal rights to minority applicants. The RAC defendants provide no assurances, other than this notification,

⁵This rationale may explain DeFunis, 416 U.S. at 319-20, where the Supreme Court held that DeFunis's equal protection claim was moot because DeFunis was in his final quarter of law school and the university made assurances that it would not stand in his way of graduating. But see Id. at 348-50 (Brennan, J. dissenting) (claim is not moot because DeFunis still had not graduated). Significantly, the majority wrote that: "DeFunis did not cast his suit as a class action, and the only remedy he requested was an injunction commanding his admission to the Law School. He was not only accorded that remedy, but he now has also been irrevocably admitted to the final term of the final year of the Law School course." Id. at 317.

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1 that **the** same behavior has not and Will not continue. In fact,
2 the plaintiffs provide some evidence, through the Warda Thomas
3 and Felicia Stokes testimony and the RAC handouts, that RAC has
4 not complied with this notification.

5 Even assuming the defendants had ceased the allegedly
6 illegal conduct, we will not dismiss **the** claims as moot if the
7 harm is "capable of repetition, yet evading review." Southern
8 pacific, 219 U.S. at 515 (holding case not moot when challenged
9 administrative order expired because ICC proceedings are
10 continuing and their consideration ought not be defeated by short
11 term orders "capable of repetition, yet evading review"⁸).
12 Otherwise, such orders effectively would create an administrative
13 power to dispose of public and private interests without judicial
14 review. &

15 The court also dismissed the claims in part because the
16 named plaintiffs no longer wished to live either in suburban
17 Belmont housing **or** RAC housing. For example, the district court
18 found that there was no injury-in-fact to Felicia Stokes because
19 although Stokes l^t'would have liked to' live outside the City,"
20 she no longer wished to move to the suburbs. Comer v. Kemp, a24
21 F. Supp. at 1125. This is really a mootness **argument**.

22 Again, we are not persuaded. Had the court promptly and
23 properly certified the class, this argument would not be
24 available. Jacobs, 420 U.S. at 129-30. Nevertheless, we need
25 not decide whether the potential mootness of the Claims Cf?e
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1 named plaintiffs moots the entire case because, as we stated
2 above, this is certainly the type of harm that is "capable of
3 repetition, yet evading review." Sosa, 419 U.S. at 399-400.

4 Neither the court nor the appellees made any other specific
5 arguments as to the mootness of either the RAC or the Belmont
6 claims except to the extent that the appellees contend that the
7 court did not, in a later order, abuse its discretion in denying
8 interveners standing to pursue these claims on mootness grounds.
9 We need not reach this question because we hold that the claims
10 set forth in the RAC and Belmont complaints are not moot.

11 VIII. Interveners

12 The district court never ruled on the merits of the motions
13 of the eleven proposed plaintiffs-interveners. Instead, on
14 November 5, 1993, the court dismissed their motions as moot
15 because, having dismissed the main causes of action against the
16 defendants, "there [wa]s no longer any case in which intervention
17 [wa]s possible.¹" Order at 1, Comer v Kemo, 89-1556 (W.D.N.Y.
18 Nov. 5, 1993). We now vacate the Order of the district court
19 because, with respect to the RAC and Belmont complaints, we
20 (1) hold that at least one named plaintiff had standing to sue,
21 (2) certify the RAC and Belmont sub-classes and hold that
22 certification relate back to the filing of the complaint, and
23 (3) hold that these class actions are not moot. We remand the
24 motions of the intervenors to the district court for a
25 consideration on the merits of these motions. Although there is
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1 assistance grant of \$19 a month. In the summer of 1990, Lewis
2 was living in a city apartment when her landlady told her to move
3 so that she could rent the apartment to someone else. At the end
4 of August 1990, Lewis applied for a Belmont Section 8 subsidy.
5 In her application, she indicated that she was paying more than
6 50% of her income for rent and utilities and that she had been
7 involuntarily displaced, thereby making her eligible for a
8 federal preference.; Belmont placed Lewis on a waiting list.
9 Early in 1991, Lewis called Belmont to inquire abc -2 *;L;re status
10 of her application. She was told that there were many people
11 ahead of her. Affidavit of Saren Lewis in Support of Plaintiff's
12 Motion to Intervene, / at 2, Comer v. KemD, NO. 89-1556 (W.D.N.Y.
13 Aug. 3, 1992) ("Lewis Aff."). When she called again in March
14 1992,, a Belmont Housing Programs Manager told her that she would
15 be considered for a subsidy only after all people who did not
16 live in the city were considered for a subsidy. At Lewis's
17 request,, the Manager placed this information in writing. (Letter
18 from Kathy O'Brien; Belmont Housing Programs Manager, to Saren
19 Lewis of 3/10/92, attached to Lewis Aff.). In the meantime,
20 Lewis has found housing in a ~MHA project which is 95% minority-
21 occupied. In May '1992, Lewis called Belmont once again to infont
22 Belmont that she ha@l to move out of the BMHA project quickly
23 because her next door neighbor physically assaulted and
24 threatened her with a knife. A Belmont staff agent told her that
25 there was nothing he could do for her. Lewis is now homeless,
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1 although living with a friend in a Buffalo apartment on a
2 temporary basis. Meanwhile, suburban families, such as the
3 family of affiant Ann Palmer, who applied for subsidies months
4 and years after Lewis, have received their subsidies. Lewis and
5 her small daughter continue to wait.

6 The stories of Dorothy Solomon and Betty Smith are similar
7 to that of Saren Lewis. All three are African-American single
8 parents who claim a federal preference. Solomon alleges that she
9 was never given information about Belmont's suburban housing
10 program. Smith alleges that Belmont officials told her that she
11 would have a better chance of receiving a subsidy if she moved to
12 the suburbs. The families of Dorothy Solomon and Betty Smith
13 continue to wait with Saren Lewis and many other African-American
14 families.

15 IX. Transfer

16 We will not transfer this case to another judge in part
17 because the BMX-A complaint has not been disposed of. We only
18 repeat what we have stated throughout this opinion -- that we are
19 puzzled why class certification took so long, especially in light
20 of our previous order to the court to proceed to the merits of
21 these complaints which present "a significant and serious claim
22 of racial discrimination in the local administration of the
23 public housing program," Comer v. Kemu, No. 92-6247 (2d Cir. Jan.
24 13, 1993) (affirming judgment of district court denying
25 plaintiffs' motion for a preliminary injunction). We do not
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1 expect that the court ouse doors will remain shut to these
2 plaintiffs, the class, members, or the interveners.

3 X. Jud ent as to Richard L. Higgins

1 We have been as ed to examine one final issue on appeal:
2 Did the court proper y 'dismiss the claims against state-defendant
3 Richard L. Higgins r garding federally-aided housing projects and
4 sever the claims aga nst him regarding the state aided housing
5 projects. Insofar a, this claim comes before us on the district
6 court's grant of Hig'ins's motion to dismiss the Lamplaint, we
7 accept as true the f ctual allegations of the complaint. See,
8 e.g., ~~Quare~~ D.S. 476^I U.S. r , 416 U.S. at 236 ;
9 Bankers Trust Co. v. Rhoades, 859 F.2d-1096, 1098 (2d Cir. 1988),
10 cert. denied, 490 U.S. 1007 (1989). In reviewing such motions,
11 we must read the complaint liberally drawing all inferences in
12 favor of the pleader'. See, e.g., Scheuer, 416 U.S. at 236;
13 Cosmas v. Hassett, 886 F.2d 8, 11 (2d Cir. 1989). The district
14 court must "deny thd motion [to dismiss] Unless it appears to a
15 certainty that a pla.intiff can prove no set of facts entitling
16 him to relief. Rever " , nergy Distrib. Corn. V. Merrill Lunch
17 Commodities Inc., 7r,8 F.2d 774, 779 (2d Cir. 1984).

18 A. Background Facts and the BMEA Complaint

19 We need only examine those facts necessary to deter?nir.e
20 whether the court pkoperly dismissed the BMHA complaint against
21 Richard L. Higgins.
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1 The BMHA is an independent housing authority established
2 under the provisions of article 5 of the former state housing
3 law. N.Y. Pub. Hous. Law § 403 (McKinney 1989). "[I]n
4 connection with a federal or municipal project, any federally-
5 aided program, New York has empowered BMHA, as a PHA, to
6 contract with the federal government to provide housing for low-
7 income individuals. N.Y. Pub. Hous. Law § 37(1)(i) (McKinney
8 1989). Pursuant to the Public Housing Law, a "federal project"
9 is "a project aided or financed in whole or in part, by the
10 federal government."^{iv} N.Y. Pub. Hous. Law § 3(15) (McKinney
11 1989). In contrast, a "state project" is one "aided or financed
12 in whole or in part by the state and not by the federal
13 government." Id. at § 3(16). And a "municipal project" is "a
14 project other than a state project or a federal project." Id. at
15 § 3(17).

16 BMHA and the City of Buffalo together administer 29 public
17 housing projects, 25 of which are federal projects, and 4 of
18 which are state projects. Only two of the state projects remain
19 in operation.

20 The plaintiffs contend that BMHA, the City of Buffalo, and
21 DHCR Commissioner Richard L. Higgins, have allowed the two non-
22 operational state projects to become uninhabitable and have taken
23 steps to transfer these projects to private ownership.

24 DHCR provides housing authorities with state funding for
25 their Section 8 programs. BMHA state-aided projects receive no
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federal funds. In fact, state and federal moneys cannot be used jointly to finance a project, N.Y. Pub. HOUS- Law 0 70 (McKinney 1989), and no state housing monies allocated to an authority or a municipality can be commingled with federal monies without DHCR Commissioner Higgins' approval. a N.Y. Pub. Hous. Law 5 75 (McKinney 1989).

In the BMHA/DHCR, loan/subsidy contract, BMHA has agreed that it will not obtain funds from any source other than the state without DHCR Commissioner Higgins' approval. Moreover, in each BMHA contract with D?C~, the authority has agreed to place the funds and income with respect to the relevant project in a separate fund earmarked for the operation of that project.

Jessie Comer, Rosemary Comer, Jewel Culverhouse, Hazel Grimes, and Annette Wccutcheon, individually and on behalf of themselves and all it ose similarly situated, (the "BMHA plaintiffs"), filed First Amended Complaint against the federal defendants: BMHA; Lawrence A. Grisanti, individually and in his official capacity as former Executive Director of the BMHA; the City of Buffalo; James D. Griffin, in his official capacity as Mayor of the City of Buffalo; and Richard L. Higgins, individually and &his official capacity as DHCR Commissioner (collectively, the I^kBMHA defendants"). The BMHA plaintiffs raise both **constitutional)and** statutory claims with respect to three sets of claims against the BMHA defendants: (1) BMHA's alleged unlawful sequeqatio and racial discrimination, (2) the alleged

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1 violation of the CDBG Program, and (3) the alleged unlawful
2 conversion of the Kensington Heights and **Ellicott** Mall public
3 housing projects. With respect to claims (1) and (2), the RAC
4 and BMHA Complaints are identical except for some minor
5 organizational differences. Comuare RAC Complaint, 11 124-129,
6 131-146 with BMHA Complaint, 89 222-226, 228-231, 233, 232, 244,
7 234-243. The major difference comes with the added third claim
8 which we need not review because the district court has severed
9 this claim from this action. Comer v. Kemu, 824 ;. Si+p. at
10 1134. Additionally, the- district court severed the segregation
11 claim with respect to the state funded projects. The district
12 court then dismissed the remaining claims of segregation and
13 racial discrimination in violation of the Constitution, the FHA,
14 and the CDBG.

15 **B. Analysis of the Dismissal of the Complaint Against Higgins**

16 Reviewing the facts in the light most favorable to the BMHA
17 plaintiffs as against Higgins, we find that there are no genuine
18 issues of material fact and that the district court properly
19 dismissed the claims against Higgins relating to the federally-
20 aided housing projects.

21 We begin with an examination of the common ground. BMHA is
22 a creation of New York state with the power to administer both
23 federal and state housing projects. BMHA and the City of Buffalo
24 together administer 29 public housing projects, 25 of which are
25 federal projects, and 4 of which are state projects.
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1 Significantly, and as we explained above, New York State DHCR
2 provides housing authorities with state funding for their Section
3 8 programs. BMHA administers both federal and state projects,
4 but state-aided projects receive no **federal** funds. In fact,
5 there is no commingling of state housing with federal housing
6 moneys without DHCR Commissioner Higgins' approval. N.Y. Pub.
7 Hous. Law 55 70, 75.

8 Nevertheless, these federal projects are not
9 administratively divided from the state projects. The BMHA
10 plaintiffs contend, and Higgins has not disputed, that BMHA
11 administers a single waiting list for both its state and federal
12 projects. Furthermore, HUD regulations specifically prescribe
13 that tenant selection policies and procedures shall be in
14 compliance with the nondiscrimination requirements of Title VI.
15 24 C.F.R. 960.204. Therefore, to the extent that these lists are
16 intermingled, and to the extent that tenant selection is racially
17 discriminatory, facts which the BMHA plaintiffs allege, then
18 those with authority over such projects are in violation of the
19 constitution, federal law, and state law-

20 The BMHA defendants contend that Higgins himself had no
21 authority to intervene. The BMHA plaintiffs contend that "[t]he
22 state Commissioner has the authority and responsibility . . . to
23 intervene in the operation of local housing authorities to assure
24 the protection of state and federal civil rights laws.

Commissioner Higgins' failure to exercise that authority with

1 respect to BMHA both as state a federal projects is the
2 gravamen of the claims against him in this action." Brief for
3 Appellants at 83 (citing N.Y. Pub. HOUS. Law §§ 223, 14(1)(d)).

4 Our question is two-fold: Does Higgins have authority to
5 remedy the effects of BMHA's discriminatory housing practices;
6 and If so, does Higgins have a qualified immunity? Although
- these questions are somewhat intermingled, we begin with the
question of authority.

17 If Higgins did have authority to intervene, h.ld he knew
18 about the discriminatory.practices in the tenant selection
19 process, then he could be. liable under 42 U.S.C. § 1983. Wriaht
20 v. Smith, 21 F.3d 496, 501 (2d Cir. 199.4); Moffitt v Town of
21 Brookfield, 950 F.2d 880, 886 (2d Cir. 1991); Meriwether v
22 Coughlin; 879 F.2d 1037, 1048 (2d Cir. 1989): Williams v. Smith,
23 781 F.td 319, 323 (2d Cir. 1986); United States v Oswald, 510
24 F.2d 583, 589 (2d Cir. 1975). As Higgins correctly points out,
25 the sole statutory authority on which the BMHA plaintiffs premisi
Higgins' authority, as DHCR Commissioner, to interfere with the
administration of federal housing projects is N.Y. Pub. Hous. L,~E
0 223, which provides that 1'[f]or all the purposes of this
chapter, no person shall, because of race . . . be subjected to
any discrimination." We agree with the BMHA defendants that the
DHCR Commissioner, as a creation of the State of New York, has
limited powers, and that, pursuant to N.Y. Rub. HOUS. Law 5 14,
the enumerated powers of the DHCR Commissioner do not extend to

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the enforcement of a y statute in federal projects. We~conclude
that the BMHA plaint'ffs do not allege sufficient facts to
demonstrate that Higgins has acted under color of state law with
respect to the federal projects. The fact that Higgins shares a
tenant list with the federal agencies is not enough to
demonstrate that Higgins had authority over these projects.

In summary, we affirm the judgment of the district court
dismissing the complaint against Higgins regarding the federal
projects and severing the remaining claims.

XI. Conclusion

In short, we find that we do not have jurisdiction over the
appeal from the dis 'issal of the claims against BMHA; we affirm
the judgment of the district court dismissing the complaint
against Higgins wit respect to the federal projects. We vacate
the judgment of the district court in all other respects and
remand for further proceedings not inconsistent with this
opinion.