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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2024

ROBERT WARTH, ET AL., *Petitioners,*

v.

IRA SELDIN, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

With the consent of the parties, the National Committee Against Discrimination in Housing, Inc. (NCDH) submits this brief *amicus curiae* in support of the petitioners, urging reversal of the judgment of the Court of Appeals for the Second Circuit. That decision, rendered on April 18, 1974, is reported at 495 F.2d 1187. It affirmed an order of the district court dismissing the complaint on the pleadings without a full evidentiary hearing.

NCDH was founded in 1950 with the objectives of establishing and implementing programs to eliminate racial

segregation and discrimination in housing and to broaden housing opportunities for minority group members, especially those of lower income. Since its inception, NCDH has carried out affirmative programs of research and education in the area of equal housing opportunity.

NCDH has complemented its research and education efforts with a vigorous legal program aimed at securing equal housing opportunity guaranteed under state and federal law. It has initiated litigation and participated as *amicus curiae* in numerous cases involving challenges to discriminatory housing practices and exclusionary land use controls. Among the important recent cases initiated by NCDH are *Dailey* v. *City of Lawton,* 425 F.2d 1037 (10th Cir. 1970), and *SASSO* v. *City of Union City,* 424 F.2d 291 (9th Cir. 1970). Among the important recent cases in which NCDH has participated as *amicus curiae* are *Reitman* v. *Mulkey,* 387 U.S. 369 (1967), *Jones* v. *Mayer,* 392 U.S. 409 (1968), *Curtis* v. *Loether,* 415 U.S. 189 (1974), and *Kennedy Park Homes Ass'n* v. *City of Lackawanna,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971).

In the course of its work, NCDH has analyzed the impact of suburban zoning and other land use policies and practices on housing, job, and educational opportunities for lower income minorities in the nation's metropolitan areas. We have found that, in many instances, suburban municipalities have exercised their zoning and other land use powers in a manner to isolate themselves from the problems of the metropolitan areas of which they are a part and to exclude lower income minorities.

Consequently, the question whether lower income minorities have standing to challenge such discriminatory land use practices is of the highest importance. The resolution of this issue by the Court will bear significantly on the efforts of NCDH to assist lower income minorities

in securing their legally protected right to equal housing opportunity, and to reverse the accelerating racial and economic polarization in metropolitan areas.[1]

QUESTION PRESENTED

Whether lower income minority persons who seek to reside in a community have standing to challenge racially discriminatory land use practices by that municipality which block the construction of housing in which they can live.

ARGUMENT

Lower Income Minority Persons Have Standing To Challenge Racially Discriminatory Land Use Practices by a Municipality Which Prevent Them from Residing in that Community.

Introduction

The court of appeals affirmed the dismissal of the complaint solely on the ground that the plaintiffs lacked standing to maintain the action. In reciting the familiar two-pronged test of standing announced in *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150, 152-53 (1970), it held that the complaint in this case did not sufficiently allege "injury in fact." The court of appeals believed that the plaintiffs did not allege a "personal stake" in the outcome of the litigation to satisfy the standing requirement.

NCDH contends that the court of appeals, in denying these plaintiffs standing, misapplied some and ignored other decisions of this Court. We argue that when the allegations of the complaint are placed against a proper reading of the applicable precedents, plaintiffs' harm will be shown sufficiently for standing purposes. In light of

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[1] In Monroe County, New York, of which the defendant Town of Penfield is a part, more than 95 percent of the black population resides in the central city of Rochester, and barely .01 percent lives in Penfield. United States Bureau of the Census, *Census of Population:* 1970.

the concerns of NCDH set forth above, we focus our attention on the alleged injury to the lower income, minority plaintiffs.[2]

Since the lower courts dismissed the complaint at the pleading stage, before an evidentiary hearing was held, this Court is obliged to undertake the same limited inquiry. Consequently, the settled rules for construing complaints at this early stage of the proceeding are fully applicable.

> For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted .... And, the complaint is to be liberally construed in favor of plaintiff. *Jenkins* v. *McKeithen,* 395 U.S. 411, 421 (1969).

Accord, Scheuer v. *Rhodes,* 416 U.S. 232 (1974); *United States* v. *SCRAP,* 412 U.S. 669 (1973).

This Court has, at least since the inception of the Federal Rules of Civil Procedure, admonished strongly against dismissing complaints "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957).

1. The Plaintiffs Are Injured in Fact

Petitioners Broadnax, Reyes, and Sinkler are lower income minority residents of Rochester. These plaintiffs have been unable, because of their race and economic status, to locate housing in Penfield, a suburb of Rochester. They allege that the absence of dwellings they can afford is a

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[2] While we argue primarily for the standing of the lower income minority plaintiffs, we maintain that the court of appeals erroneously applied this Court's decisions in denying standing to the organizational plaintiffs. "It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club* v. *Morton,* 405 U.S. 727, 739 (1972); *accord, NAACP* v. *Button,* 371 U.S. 415 (1963); *United States* v. *SCRAP,* 412 U.S. 669 (1973).

result of the defendants' unlawful conduct. The petitioners claim that the defendants, officials of Penfield, discriminate against them through maintenance and administration of their zoning and other land use policies and practices.

Notwithstanding the plaintiffs' allegations that the defendants' practices are unlawful both on their face and as applied, the court of appeals focused almost exclusively on the facial content of the zoning ordinance.[3] It largely ignored the plaintiffs' explicit allegations that the zoning law has been improperly administered. The lower court opinion initially noted, then ignored, the allegation of unlawful application of the ordinance. The plaintiffs claim that the defendants, on several occasions, refused to approve plans for the construction of low and moderate income housing these minority petitioners can afford.

The complaint alleged that the defendants have "administered the provisions of the said zoning ordinance by refusing to grant variances, building permits, and by use of special permit procedures and other devices so as to effect and propagate the exclusionary and discriminatory policy, plan and/or scheme." Complaint paragraph Sixteenth; see also paragraph Eighteenth. As the court of appeals expressly noted: "Appellants' complaint goes beyond the fact of the town's zoning laws and further alleges certain affirmative acts . . . ." 495 F.2d at 1189. As the court also noted, these affirmative acts involved blocking the construction of a number of proposals for multifamily housing in Penfield. These included at least one proposed project for what the court characterized as " 'low moderate income housing' " *ibid,* precisely the kind of

[3] The irony of the defendants' contention that these non-resident plaintiffs have no interest in Penfield's land use practices is that the zoning ordinance itself recognizes that concern. In the provisions for "planned unit development," the ordinance requires the builder to consider the needs of "existing and *potential* town residents at all economic levels." Penfield Zoning Ordinance, §29-1120.B.(1) (emphasis added).

honsing for which plaintiffs were potential residents. See Complaint paragraph Fifth; Complaint 1 paragraph Seventh. But in its discussion of the standing of the individual plaintiffs, the court ignored these "affirmative acts" and focused on the zoning law alone. 495 F.2d at 1191-93.

We contend that even under an analysis limited to the facial content of the ordinance, the plaintiffs allege injury in at least two respects. First, the ordinance severely restricts certain types of housing which would be in the price range these lower income minority persons can afford. For example, while the ordinance allows mobile home parks (but not mobile homes on individual lots) and multi-family dwelling units, it limits such housing to a fraction of the land available for residential construction. Less than one percent of all vacant land in Penfield, the plaintiffs allege, is zoned for this type of housing. Because of the absence of land for apartments and mobile homes, builders are unable to construct housing these plaintiffs can afford.

A second source of injury to these lower income minority plaintiffs, from the face of the ordinance, arises out of the provisions governing the construction of single-family detached housing. The plaintiffs allege that 98 percent of all the vacant land in Penfield is zoned in this manner. Contractors cannot build housing for these plaintiffs on that land, however, because the requirements imposed by the ordinance raise the cost beyond that which these plaintiffs can afford. By imposing requirements relating to such factors as large lot sizes, minimum floor space, and density, the ordinance precludes the construction of housing which these plaintiffs can purchase.

Moreover, the plaintiffs' claim is based not only on the maintenance of Penfield's zoning law, but, as the lower court noted, on its application to block specific proposals

for housing in which they could live. 495 F.2d at 1189. Once the nature of the defendants' conduct is fully disclosed by an examination of the complaint and accompanying affidavits,[4] the direct injury to the plaintiffs becomes clear. Their standing to challenge these unlawful actions follows, if the decisions of this Court are accorded their proper significance.

The two-pronged test of standing set forth in the *Camp* and *SCRAP* cases, *supra,* is surely met here. The interest plaintiffs seek to protect—the right to equal housing opportunity without discrimination—is clearly within the zone of interests protected by 42 U.S.C. 1981, 1982, and 1983, as well as the Fourteenth Amendment to the United States Constitution. The court of appeals apparently believed that the plaintiffs satisfied that requirement as it did not discuss the point.

The second part of the test—whether injury in fact is alleged—is also satisfied by the allegations in the complaint and the facts in the affidavits. The plaintiffs contend they have been harmed because the defendants' conduct has prevented the construction of housing they can afford. The injurious result has adversely affected the minority plaintiffs in several ways: denial of decent, safe, and sanitary

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[4] It is not clear whether the presence of plaintiffs' affidavits converts defendants' motion to dismiss into a motion for summary judgment under Rule 12(b), Fed.R.Civ.P. We believe it does not. See *Laird* v. *Tatum,* 408 U.S. 1, 2-3 (1972). But even if the case is considerd in the posture of a motion for summary judgment, the district court is still obligated to treat the well-pleaded allegations as true (in the absence of contradictory affidavits). *Cf. England* v. *Louisiana State Board of Medical Examiners,* 263 F.2d 661, 674 (5th Cir.), *cert. denied,* 359 U.S. 1010 (1959). Of course, plaintiffs' complaint should be evaluated factually as supplemented by their affidavits. *Ellis* v. *Carter,* 291 F.2d 270, 275 (9th Cir. 1961).

housing;[5] denial of employment opportunities; denial of quality education for their children; and denial of the right to choose where to live. Each of these deleterious effects, standing alone, would suffice to meet the "injury in fact" test of standing. In *United States* v. *SCRAP, supra* at 688, where the Supreme Court sustained plaintiffs' standing, the injury was "far less direct and perceptible."

In *United States* v. *SCRAP, supra,* an organization composed of law student-environmentalists sued to restrain the Interstate Commerce Commission from raising railroad freight rates. They alleged that the increase in charges would decrease the use of the railroads for shipping discarded materials for recycling. This, in turn, would cause manufacturers to produce more non-recyclable commodities. The result would have an adverse impact on the environment, the plaintiffs contended, because more natural resources would be used and more litter would be strewn in public places.

This Court held that, so long as the plaintiffs had alleged a "specific and perceptible harm," they had standing to challenge the rate increase. It made no difference that the harm generated by the rate hike traveled an "atten-

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[5] Plaintiff Broadnax, for example, described the conditions under which she and her family are forced to live in the inner city of Rochester: "The wiring in the house is so old and defective that there is some electrical short in the apartment at least every two weeks which requires our resetting fuses. The house foundation is now crumbling very badly. Since the foundation has started crumbling, there have been mice and rats coming into the house. The mice and rat infestation is now so bad that they come through the heating vents into the rooms of the apartment itself. I have already caught two mice in the children's bed. To have rats and mice infesting the house causes great anxiety among the children. One way that I try to reduce the danger of my children getting bitten is to leave the light on in the bedroom all night. The children are now afraid to go to sleep unless there is a light on in the room." Broadnax Affidavit, paragraph 9.

uated line of causation to the eventual injury." *Id.* at 688. The important point was that the plaintiffs had alleged "injury in fact," and were prepared to prove it. In the opinion below, the court of appeals never referred to the *SCRAP* case, an omission which underscores its erroneous conclusion.

In *Barlow* v. *Collins,* 397 U.S. 159 (1970), tenant farmers sued to enjoin a Department of Agriculture regulation which allowed federal crop assistance subsidies to be assigned (prior to payment to the tenant farmer) to a landlord for rent. The tenant farmers argued that the regulation would cause them injury in fact in the following way: If future federal payments could be assigned for rent, landlords would require that it be done as a condition to tilling their soil.

Thus, the tenant farmers, in the pre-harvest period, would be without any cash to purchase necessities, such as food and clothing. They would then have to go to the landlord for these items, or for credit to buy such goods. This process would make the tenant farmers totally dependent on the landlord, and thus, they would lose whatever economic independence they had before the promulgation of the regulation.

The line of reasoning from the alleged illegal action to the ultimate injury to the plaintiffs in *Barlow* follows the same sinuous yet deliberate course as in *SCRAP.* In each of these cases, the harm was perceptible but not direct, cognizable but not obvious. But neither directness nor magnitude has been required under the decisions of this Court.

In *Trafficante* v. *Metropolitan Life Insurance Co.,* 409 U.S. 205 (1972), white and black residents of a segregated apartment building sued to enjoin racial discrimination practiced by the owner. They alleged that the management's policy of excluding minorities adversely affected

their opportunities to meet and associate with members of minority groups. This injury, they asserted, was sufficient to confer standing on them to attack the defendants' racially exclusionary conduct. Again the injury to the plaintiffs was several steps removed from the allegedly illegal practices. Nonetheless, this Court sustained the standing of the residents to maintain the action.

Although the challenge in the instant case is not to private discrimination under 42 U.S.C. 3610, as in *Trafficante,* but rather to governmental discrimination under 42 U.S.C. 1981, 1982, and 1983, the applicable criteria for determining standing are the same. See *United States* v. *SCRAP, supra* at 689 n.14. Where 42 U.S.C. 3610(a) uses the phrase "any person who claims to have been injured," 42 U.S.C. 1983, for example, uses the words "the party injured." This phrase in Section 1983 should, for standing purposes, be construed as broadly as the nearly identical language in Section 3610 was construed in *Trafficante.* Both statutes are employed by injured plaintiffs in their roles as "private attorneys general." *Trafficante, supra* at 211. Thus, here, as in *Trafficante, Barlow,* and *SCRAP,* the issue is one of statutory, not constitutional standing.[6]

In the present appeal, the alleged injury to the plaintiffs caused by defendants' maintenance of their zoning scheme is more substantial and far more direct than that found sufficient in *SCRAP, Barlow,* and *Trafficante.* Pe-

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[6] It is noted that, while no claim is made here under the Federal Fair Housing Act, as in *Trafficante,* this Court is authorized to cure "[d]efective allegations of jurisdiction," 28 U.S.C. 1653; *cf. Willingham* v. *Morgan,* 395 U.S. 402, 407 n.3 (1969), if the Court believes the plaintiffs do not have standing under 42 U.S.C. 1981, 1982, and 1983. Since standing is jurisdictional, this Court may correct the inadvertently omitted reference to 42 U.S.C. 3601 *et seq.,* or it may vacate the judgment and remand the case so that the plaintiffs may seek leave to amend the complaint. Rule 15, Fed.R.Civ.P.; *Sierra Club* v. *Morton,* 405 U.S. 727, 735 n.8 (1972); see *Spomer* v. *Littleton,* 414 U.S. 415 (1974).

titioners Broadnax, Sinkler, and Reyes are lower income minority persons who seek decent housing and the decent living environment that Penfield affords. As the court of appeals correctly pointed out, they have no interest in land within Penfield. 495 F.2d at 1191. But that is the essence of their complaint—that the defendants' zoning scheme prevents them from acquiring an interest in land, either by purchase or lease, by excluding housing in which they can live. Thus even under an analysis limited to the impact of the zoning law alone, the line of causation between the defendants' conduct and the injury to the plaintiffs is clear and direct, not "attenuated" as it was in *SCRAP* (where this Court nonetheless upheld plaintiffs' standing).

Further, in the instant case, the injury to plaintiffs is caused not merely by the maintenance of zoning laws, but, as the lower court expressly recognized in its statement of the facts, by "affirmative acts" blocking proposals for the construction of multifamily housing in which they were potential residents. 495 F.2d at 1189. The court contended, however: "In no case do appellants allege any involvement in these proposals." *Ibid.* It is difficult to conceive how these plaintiffs—lower income minority persons—could have alleged any closer involvement than they already have. Their involvement, according to the complaint, lies in the fact that they are potential residents of low and moderate income housing, and the injury defendants cause them lies in the exclusion of such housing from Penfield by means, not only of their maintenance of zoning laws, but also by "affirmative acts" blocking specific projects.

As a direct result of defendants' conduct, these plaintiffs are unable to acquire land, to lease an apartment, or to purchase a home within the municipal borders, conditions which the court of appeals suggested were essential elements for standing. 495 F.2d at 1191. If the defendants explicitly prohibited minorities from living in their town, non-resident blacks or hispanics would surely have stand-

ing to challenge that ordinance. See *Loving* v. *Virginia,* 388 U.S. 1 (1967); *cf. Buchanan* v. *Warley,* 245 U.S. 60 (1917). Here, the defendants accomplish the same result somewhat more subtly than by use of express language imposing racial and ethnic disabilities. Federal proscriptions against exclusionary devices nullify "sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson,* 307 U.S. 268, 275 (1939).

It would be a harsh rule of standing which required, as the court of appeals suggests, that these plaintiffs must first live in Penfield before they can challenge land use practices which exclude them. 495 F.2d at 1191. It is defendants' alleged discriminatory conduct, not the plaintiffs' choice, which prevents them from residing in the community. If physical presence in a municipality were an essential element of standing, then the ability of injured non-residents to challenge unlawful land use practices would be committed to the sole discretion of the offending party. A community which successfully excludes all lower income minorities from its borders could effectively insulate itself from legal attack. In short, the most egregious violations would be the least likely to be remedied.

Just last May, this Court confronted a similar contention and rejected it. In *Allee* v. *Medrano,* 94 S. Ct. 2191 (1974), union organizers brought suit to enjoin the alleged harassment of their activities by public officials. The defendants argued that the case was not justiciable (moot) because the plaintiffs had ceased their organizational efforts. This Court rejected that argument because the plaintiffs "abandoned their efforts as a result of the very harassment they sought to restrain by this suit." *Id.* at 2197. That is precisely the point here. Plaintiffs in the instant case are unable to live in Penfield because of defendants' discriminatory conduct which plaintiffs seek to restrain by this suit.

2. Plaintiffs Have Standing Independent of Developers and Landowners.

The court of appeals also indicated that the plaintiffs might have standing if they joined with landowners or contractors in challenging defendants' practices. 495 F.2d 1191-92.[7] In other words, according to the lower court, even if the defendants' alleged discriminatory conduct has directly prevented the construction of housing, these low and moderate income minority plaintiffs cannot challenge municipal action which effectively excludes them unless the developer or the property owner is also a plaintiff. This "piggy-back" theory has no basis in precedent or reason.

In *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Doe* v. *Bolton,* 410 U.S. 179 (1973), this Court held that women, who had once been pregnant, could challenge abortion statutes which prevented them at the time from terminating their pregnancies. The anti-abortion laws in issue did not impose any penalty upon a woman who underwent an abortion. And clearly a woman needs the aid of others (physicians, nurses, etc.) to terminate a pregnancy.

Nonetheless, this Court held that such women have standing, and did not require attending physicians or nurses to join with them in challenging a statute which criminalized only the conduct of the attendants. Their position with respect to the abortion statute is precisely the same as the minority plaintiffs here who seek housing in Penfield. In both cases, the plaintiffs need the assistance of others in order to secure their rights. Just as the women in *Wade* and *Bolton* needed the assistance of members of the medical profession, so the plaintiffs here need the as-

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[7] Citing *Park View Heights Corp.* v. *City of Black Jack,* 467 F.2d 1208 (8th Cir. 1972), and *Dailey* v. *City of Lawton,* 425 F.2d 1037 (10th Cir. 1970), the court said: "In both cases, the court permitted potential residents of the proposed projects to join [with the developers] as plaintiffs." 495 F.2d at 1192.

sistance of builders or landowners to secure decent housing in Penfield. The women in *Wade* and *Bolton* were accorded standing; so should these plaintiffs here.

Similarly, in *James* v. *Valtierra,* 402 U.S. 137 (1971), low income persons challenged, on its face, a California referendum provision which they claimed prevented the construction of housing they could afford. At the time suit was instituted, no project was under consideration nor were any landowners plaintiffs in the litigation.[8] In entertaining the suit, this Court was not disturbed because a builder did not join with the low income plaintiffs in challenging the referendum procedure which purportedly excluded them.[9] Nor did the Court reject the suit because of the absence of a viable project whose construction was adversely affected.[10]

Granting such independent standing to lower income minorities also has sound legal support in numerous decisions by lower federal courts. They have consistently

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[8] Although a potential housing facilitator, the public housing authority, was a nominal defendant in *Valtierra,* this Court should not decide the question of standing "on the basis of the identity of the parties named as defendants in the complaint." *Laird* v. *Tatum,* 408 U.S. 1, 10 n.6 (1972).

[9] Although the standing of the plaintiffs was not directly at issue in *Valtierra,* the decision has precedential value. Standing is a jurisdictional concept, and federal courts have an affirmative obligation in each case to insure that their jurisdiction is properly invoked. "[I]t is the duty of this court to see to it that the jurisdiction [of lower federal courts], which is defined and limited by statute, is not exceeded." *Louisville & Nashville R.R. Co.* v. *Mottley,* 211 U.S. 149 (1908); *accord, City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973). Thus a precedent used for jurisdictional purposes has greater weight than if it were employed for other reasons, even though the precise jurisdictional issue was not expressly discussed by the Court.

[10] It is true that, in *Valtierra,* the referendum mechanism had been used earlier to block low income housing projects. But that fact is present here also as these plaintiffs allege that Penfield has turned down several such projects in the past.

entertained suits in which lower income minorities who are potential residents of a community or a proposed project have challenged municipal land use practices which prevent, impede, or interfere with the construction of housing they can afford. In *Park View Heights Corp.* v. *City of Black Jack,* 467 F.2d 1208 (8th Cir. 1972) and *Sisters of Providence* v. *City of Evanston,* 335 F.Supp. 396 (N.D. Ill. 1971), several sets of plaintiffs, including lower income minority potential residents of subsidized housing, challenged allegedly discriminatory land use practices. The courts, after examining each class of plaintiffs, held that the case was justiciable as to each, emphasizing the injury to the lower income minorities. [11]

In *Banks* v. *Perk,* 341 F.Supp. 1175 (N.D. Ohio 1972) *aff'd in relevant part,* 473 F.2d 910 (6th Cir. 1973), lower income minority prospective residents were the only plaintiffs in the case. The builder whose project was blocked by municipal conduct was conspicuous by his absence. Nonetheless, the individual minority plaintiffs had standing to challenge the discriminatory conduct.

And in the recent case of *Cornelius* v. *City of Parma,* 374 F. Supp. 730 (N.D. Ohio 1974), *vacated and remanded,* — F.2d — No. 74-1401 (6th Cir. Oct. 22, 1974), where, again, the builder was not a plaintiff, lower income

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[11] See also *United Farmworkers* v. *City of Delray Beach,* 493 F.2d 779 (5th Cir. 1974); *Morales* v. *Haines,* 486 F.2d 880 (7th Cir. 1973); *King* v. *New Rochelle Municipal Housing Authority,* 442 F.2d 646 (2d Cir. 1971), *cert. denied,* 404 U.S. 863 (1971); *Dailey* v. *City of Lawton,* 425 F.2d 1037 (10th Cir. 1970); *Kennedy Park Homes Ass'n* v. *City of Lackawanna,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971); *Cole* v. *Housing Authority,* 435 F.2d 807 (1st Cir. 1970); *Ranjel* v. *City of Lansing,* 417 F.2d 321 (6th Cir. 1969), *cert. denied,* 397 U.S. 980 (1970); *Crow* v. *Brown,* 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd* 457 F.2d 788 (5th Cir. 1972); *Gautreaux* v. *Chicago Housing Authority,* 265 F. Supp. 582 (N.D. Ill. 1967).

minority non-residents sued to enjoin allegedly discriminatory land use practices, both on their face and as applied, of a Cleveland, Ohio suburban community. The district court dismissed the complaint on grounds, *inter alia,* that the builder was not itself contesting Parma's conduct. 374 F. Supp. at 736. The court of appeals vacated the judgment because "the complaint appears to state a cause of action alleging racial discrimination . . ." and remanded the case for trial.[12] This, we contend, is what the court of appeals in the instant case should have done and what this Court should do to correct the lower court's basic error.

Granting independent standing to lower income minorities to attack municipal land use practices which exclude them also makes eminently good practical sense. After all, they are "the real losers" and "the true parties in interest" when governmental action, as in this case, prevents their obtaining better housing. *CMHA* v. *City of Cleveland,* 342 F. Supp. 250, 256 (N.D. Ohio 1972), *aff'd sub nom. CMHA* v. *Harmody,* 474 F.2d 1102 (6th Cir. 1973). If future tenants or residents could only establish the justiciability of their claim derivately through housing sponsors or landowners, a great deal of discriminatory behavior by government would forever go unchallenged. Contractors, for example, are reluctant to bear the financial burdens and incur local wrath by challenging dis-

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[12] The full text of the court of appeals opinion is as follows:

> "On consideration of the briefs and records and oral arguments in the above-styled appeal; and
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> Noting that the complaint appears to state a cause of action alleging racial discrimination in the exclusion of black citizens from equal access to housing, jobs and educational opportunities in the City of Parma, Ohio, which requires a factual hearing,
>
> The judgment of the District Court is vacated and the case is remanded for trial."

criminatory municipal action.[13] And local property owners may well, after a controversy has erupted over the construction of lower income minority housing on their land, be relieved to see the project stymied by municipal action.

3. An Effective Remedy Is Available.

The court of appeals also denied standing because, in its view, effective relief could not be provided even if the plaintiffs prevailed.[14] "Indeed, appellants' prayer for relief demonstrates their lack of personal stake in the outcome and their lack of standing." 495 F.2d at 1192. The lower court apparently believed that ordering the relief requested would not produce the housing needed by the plaintiffs.

> Granting this relief would not clear roadblocks to currently planned housing which appellants hope to occupy. It would not benefit appellants in any way in the foreseeable future. *Id.* at 1192-93.

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[13] As one commentator pointed out regarding the reluctance of builders to institute litigation challenging such misconduct: "[I]s there any reason to suspect that builders familiar with the experience of Joseph Girsh will imitate his example of eight years of litigation, three trips to the Supreme Court of Pennsylvania, three cases pending, all as a means of constructing apartment houses?" Moskowitz, *Standing of Future Residents in Exclusionary Zoning Cases,* 6 Akron L. Rev. 189, 213 (1973). For case decision, see *In re Girsh,* 437 Pa. 237, 263 A.2d 395 (1970).

[14] There is serious doubt whether the question of relief is properly to be considered in evaluating a plaintiff's standing. "[T]he concept of standing focuses on the *party* seeking relief, rather than on the precise nature of the *relief* sought." *Jenkins* v. *McKeithen, supra* at 423 (1969) (emphasis added). In examining the nature of the relief sought, the court of appeals might have confused the standing issue with other aspects of justiciability, such as "ripeness" or "political question," where the relief is properly a part of the inquiry. See *Laird* v. *Tatum,* 408 U.S. 1 (1972); *United States* v. *Richardson,* 94 S. Ct. 2940 (1974).

First, it should go without saying that the scope of relief is properly a matter left to the trial judge after a full evidentiary hearing on the merits of the plaintiffs' claim. After such a trial, a judge might well deny all relief, grant only part of the plaintiffs' request, or enter an order different from any judgment proposed by the parties. This is particularly true with respect to equitable relief, where the trial court must fashion his order in light of a complete factual record. Granting relief, like dismissing a complaint, should only be undertaken after a full and fair evidentiary hearing has been conducted. *Jenkins* v. *McKeithen, supra; see Public Affairs Associates* v. *Rickover,* 369 U.S. 111 (1962); *Scheuer* v. *Rhodes, supra.*

Second, it is important to stress that plaintiffs in this case seek not only declaratory, but also injunctive relief. We contend that both forms of remedy would remove "roadblocks" that prevent the construction of dwellings the plaintiffs could afford. A declaratory judgment alone would eliminate obstacles which, according to plaintiffs' factual allegations, are major barriers to building subsidized housing for lower income minorities. Moreover, the record shows that builders have sought in the past, and indeed currently seek, to construct housing for lower income minorities, only to be stifled by the defendants' actions. Properly tailored declaratory relief might well result in this housing getting built.

Third, and most important, injunctive relief could directly produce the needed housing. If the plaintiff-petitioners establish through an evidentiary hearing that the defendants have engaged in racial discrimination, they will be entitled to a decree which requires the defendants to take affirmative action to correct the effects of their past discrimination. *E.g., Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Green* v. *County School Board,* 391 U.S. 430 (1968); *Louisiana* v.

United States, 380 U.S. 145 (1965). Such a decree might well require the defendants to develop and implement an affirmative program which would actively encourage builders and sponsors of subsidized housing to construct dwellings in Penfield and to take other steps to assure that housing is provided for the plaintiffs and the class they represent. See *Garrett* v. *City of Hamtramck,* 335 F. Supp. 16 (E.D. Mich. 1971), *supplemental order,* 357 F. Supp. 925 (1973).

4. This Court's Recent Decisions Denying Standing Are Inapplicable.

This Court's recent decisions denying standing do not lead to a different conclusion. See *Schlesinger* v. *Reservists Committee to Stop the War,* 94 S. Ct. 2925 (1974); *United States* v. *Richardson,* 94 S. Ct. 2940 (1974); *O'Shea* v. *Littleton,* 414 U.S. 488 (1974); *Linda R. S.* v. *Richard D.,* 410 U.S. 614 (1973); *Laird* v. *Tatum,* 408 U.S. 1 (1972); *Sierra Club* v. *Morton,* 405 U.S. 727 (1972).[15] In each of these cases, the plaintiffs failed to allege that they were "injured in fact" by the defendants' purportedly unlawful conduct. The substantial harm inflicted upon these plaintiffs by the defendants' actions is a far cry, for example, from the minimal, subjective, and speculative injury alleged in *Laird* v. *Tatum, supra.*

Nor are we here concerned with vague and non-particularized challenges to local systems of criminal justice which would result in "an ongoing federal audit of state criminal proceedings." *O'Shea* v. *Littleton, supra* at 500.

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[15] Some of these cases, to be sure, may more properly be classified as dealing with aspects of justiciability other than standing. The plaintiffs in *United States* v. *Richardson, supra,* appeared to be seeking to undertake responsibilities which the Constitution commits solely to Congress. And in *Linda R.S.* v. *Richard D. supra,* the plaintiff sought an order directing prosecutorial authorities to exercise their power in a specified way, a matter historically committed to their sole discretion.

These "generalized grievances about the conduct of government," *Flast* v. *Cohen,* 392 U.S. 83, 106 (1968), are clearly inadequate bases upon which standing may be predicated. See also *Sierra Club* v. *Morton, supra.* Such judicial incursions would raise serious questions under the separation of powers doctrine and might well "create a remarkably illogical system of judicial supervision of the coordinate branches of the Federal Government." *United States* v. *Richardson, supra* at 2952 (concurring opinion of Powell, J.). "[I]njury in fact" is what is needed, *Data Processing* v. *Camp, supra* at 152, not "injury in the abstract." *Schlesinger* v. *Reservists Committee, supra* at 2930.

In sharp contrast, the present plaintiffs allege specific injury "in a form traditionally capable of judicial resolution." *Id.* at 2932. They claim racial and economic discrimination against municipal defendants under statutes expressly designed to remedy official misconduct of this nature. *E.g.,* 42 U.S.C. 1983; *Brown* v. *Board of Education,* 347 U.S. 483 (1954).

> The irreplaceable value of the [judicial] power . . . lies in the protection it has afforded the constitional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. *United States* v. *Richardson, supra* at 2954.

The case at bar is precisely of that order: a challenge by representatives of "minority groups against . . . discriminatory government action." These plaintiffs allege they have been injured in fact by the policies and practices of the defendants. That allegation of harm to their right to equal housing opportunity is sufficient to give them standing. They should be accorded an evidentiary hearing so that the full scope and serious nature of their claims can be presented.

CONCLUSION

For the reasons explicated in the foregoing submission, NCDH respectfully urges this Court to reverse the judgment below, and remand the case for a trial on the merits.

Respectfully submitted,

MARTIN E. SLOANE
ARTHUR D. WOLF

National Committee Against
Discrimination in Housing, Inc.
1425 H Street, N.W., Ste. 410
Washington, D.C. 20005
(202) 783-8150

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Certificate of Service

I, Martin E. Sloan, a member of this Court, hereby certify, pursuant to Rule 33 of this Court, that the foregoing Brief Amicus Curiae has been served on counsel by placing copies of it in the United States mail, air mail, postage prepaid, addressed as follows:

William Ermstrom, Esq.
Harris, Beach & Wilcox
Two State Street
Rochester, New York 14614

Emmelyn Logan-Baldwin, Esq.
510 Powers Building
Rochester, New York 14614

this 29th day of November, 1974.

MARTIN E. SLOANE
ARTHUR D. WOLF
National Committee Against
Discrimination in Housing, Inc.
1425 H Street, N.W., Ste. 410
Washington, D.C. 20005
(202) 783-8150