TABLE OF CONTENTS

Page

CITATIONS

Page

CASES:

Page

Page

Page

FEDERAL STATUTES:

OTHER MATERIALS:

In The

Supreme Court of the United States

October Term, 1974

No. 73-2024

ROBERT WARTH, Individually and on behalf of all other persons similarly situated, LYNN REICHERT, Individually and on behalf of all other persons similarly situated, VICTOR VINKEY, Individually and on behalf of all other persons similarly situated, KATHERINE HARRIS, Individually and on behalf of all other persons similarly situated, ANDELINO ORTIZ, Individually and on behalf of all other persons similarly situated, CLARA BROADNAX, Individually and on behalf of all other persons similarly situated, ANGELEA REYES, Individually and on behalf of all other persons similarly situated, ROSA SINKLER, Individually and on behalf of all other persons similarly situated, METRO-ACT OF ROCHESTER, INC., HOUSING COUNCIL IN THE MONROE AREA, INC., ROCHESTER HOME BUILDERS ASSOCIATION, INC.,

Petitioners,

vs.

IRA SELDIN, Chairman, JAMES O. HORNE, MALCOLM M. NULTON, ALBERT WOLF, JOHN BETLEM, as members of the Zoning Board of the Town of Penfield; GEORGE SHAW, Chairman, JAMES HARTMAN, JOHN D. WILLIAMS, RICHARD C. ADE, TIMOTHY WESTBROOK, as members of the Planning Board of the Town of Penfield; IRENE GOSSIN, Supervisor, FRANCIS J. PALLISCHECK, DR. DONALD HARE, LINDSEY EMBREY, WALTER W. PETER, as members of the Town Board of the Town of Penfield, and the TOWN OF PENFIELD, NEW YORK,

Respondents.

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

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (A. 952)* is reported at 495 F.2d 1187 (2d Cir. 1974). The opinion of the District Court for the Western District of New York (A. 948), dated December 27, 1972, is not officially reported.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Second Circuit was entered on April 18, 1974. The petition for a writ of certiorari was filed on July 15, 1974 and certiorari was granted on October 15, 1974. Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1).

QUESTION PRESENTED

WHETHER PLAINTIFFS' HAVE STANDING TO SEEK JUDICIAL REVIEW OF PENFIELD'S RACIALLY DISCRIMINATORY AND EXCLUSIONARY ZONING ORDINANCE AND DEFENDANTS' ZONING PRACTICES WHICH DEPRIVE PLAINTIFFS OF CONSTITUTIONAL AND STATUTORY RIGHTS AND CAUSE THEM TO SUFFER ECONOMIC DAMAGE, PHYSICAL AND EMOTIONAL HARDSHIP, AND LOSS OF THE SOCIAL BENEFITS OF LIVING IN AN INTEGRATED COMMUNITY.

CONSTITUTIONAL PROVISIONS

Article III §2, clause 1, of the Constitution of the United States provides:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be

*Numbers preceded by "A" refer to pages of the Appendix.

made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

This case also involves the First, Ninth, and Fourteenth Amendments to the Constitution of the United States which are set forth in Appendix C of the Petition for Writ of Certiorari.

STATUTES INVOLVED

The statutory provisions involved are the Civil Rights Act of 1866, 42 U.S.C. §1982, the Civil Rights Act of 1870, 42 U.S.C. §1981, and the Civil Rights Act of 1871, 42 U.S.C. §1983. The pertinent portions of these statutory provisions are set forth in Appendix C of the Petition for Writ of Certiorari.

STATEMENT OF CASE

The question in this case is whether parties have standing to challenge a suburban town's zoning practices and policies which are racially discriminatory and exclusionary. Plaintiffs-petitioners are individuals[1] and organizations whose members are adversely affected by the Town of Penfield's zoning ordinance and by defendants' administration of that law.

Defendants-respondents are the public officials[2] responsible for perpetuating the racially discriminatory and exclusionary

[1]Plaintiffs instituted this action on behalf of themselves and all other persons similarly situated. (A. 9-10). Although the District Court denied plaintiffs' request for class action certification, the propriety of that order is not presently before this Court.

[2]Defendants are the individual members of the Zoning Board, Planning Board, and Town Board of the Town of Penfield, Monroe County, New York.

housing pattern in Penfield. Additionally, the Town of Penfield, a municipal corporation in the metropolitan area of Rochester, New York, is a defendant-respondent in this action.

The individual plaintiffs and Metro-Act of Rochester, Inc. [hereinafter, "Metro-Act"] instituted this action alleging that the challenged zoning ordinance, as enacted and administered, excludes minority, low income persons from living in the Town of Penfield. Subsequently, petitioner, Housing Council in the Monroe County Area, Inc. [hereinafter, "Housing Council"] requested to be added as a party plaintiff and petitioner, Rochester Home Builders Association, Inc. [hereinafter, Home Builders or "The Association"] sought leave to intervene. The pleadings allege that the individuals, as well as the organizations and their members, are suffering the deprivation of constitutional[3] and statutory[4] rights as a result of the discriminatory and exclusionary zoning ordinance and defendants' implementation of that ordinance.

The District Court for the Western District of New York held that petitioners lacked the requisite standing and failed to state a claim upon which relief could be granted. Accordingly, the District Court dismissed the complaint and denied the requests for intervention. The Second Circuit affirmed solely on the ground that petitioners lack standing. *Warth v. Seldin*, 495 F.2d 1187, 1189 (2d Cir. 1974) (A. 952). This Court then granted plaintiffs'[5] petition for writ of certiorari to review the question of standing.

---

[3]Petitioners allege the deprivation of rights secured by the First, Ninth and Fourteenth Amendments to the Constitution of the United States.

[4]Petitioners allege the deprivation of rights secured by the Civil Rights Act of 1866, 42 U.S.C. §1982, the Civil Rights Act of 1870, 42 U.S.C. §1981, and the Civil Rights Act of 1871, 42 U.S.C. §1983.

[5]Unless otherwise indicated, references to "plaintiffs" include the Home Builders and Housing Council.

Penfield's racially discriminatory and exclusionary zoning ordinance and defendants' administration of that law

For purposes of this review, plaintiff's factual allegations must be accepted as true. These allegations reveal that the purpose and effect of Penfield's zoning ordinance,[6] as enacted and administered, are to prohibit nonwhite and nonaffluent persons from residing in the Town of Penfield. (A. 15, 641) The ordinance effectively bars the construction of any multiracial, low and moderate income housing in this suburban town. (A. 508, 943-44) Indeed, experts who have examined the ordinance have concluded:

> "Overall, the residential control aspects of the Penfield zoning ordinance must be classified as highly restrictive — essentially disallowing the construction of any new housing for low and moderate income individuals. Furthermore, in terms of public health, safety and welfare, there is no apparent justification to support the highly restrictive requirements of the residential (housing) provisions of the Penfield zoning ordinance. The zoning ordinance is not based on any current comprehensive plan and its provisions (for large lots, etc.) are neither explained nor justified within the ordinance nor within any planning document (known to these reviewers)." (A. 943, 944) (Footnote omitted.)

Defendants have accomplished this highly restrictive and exclusionary residential control by mandating excessive requirements for house set back, lot size, lot width, minimum floor area and habitable space. (A. 933, 943) In 1972, when this action was commenced, it was impossible to construct a single family dwelling in Penfield in conformity with the ordinance which cost less than $29,115.00 — a price far beyond the reach of minority, low income persons. (A. 936) Pursuant to the zoning law, ninety-eight percent of all vacant land in the Town of Penfield is restricted for construction of such single family

---

[6]The Penfield Zoning Ordinance is set forth at A. 36-116.

housing. (A. 937) Only three-tenths of one percent of the vacant land is available for multi-family structures. (A. 939) Yet, even on this limited space, construction of multi-racial, low and moderate income housing is precluded because the zoning ordinance requires excessively low density for the apartment units and other unnecessary costs such as two parking spaces per unit and an enclosed garage for every unit. (A. 938, 939) The construction of townhouses, use of mobile homes, or implementation of planned unit development are alternatives for providing adequate housing for minority and low income families. However, defendants have established a series of rigid dimensional and density requirements which effectively prohibit the use of any of those alternatives. (A. 940-43)

In the posture of the instant case, the conclusion of the experts who have examined the ordinance is uncontradicted and binding upon this Court. Those experts agree that "The Penfield Zoning ordinance is basically an inflexible control mechanism which has the *effect of producing economically and racially stratified housing arrangements* without apparent regard for the housing needs either of its own citizenry or for the citizenry within the larger metropolitan community." (A. 944) (emphasis added). This conclusion is consistent with the findings of the 1970 study of "Housing in Monroe County, New York":

> "Thus, while there is a great need for low and moderate cost housing merely providing a greater number of such units will not necessarily eliminate all of the constraints operating in and distorting the housing market in Monroe County. The community is left with a special category of housing demand: a demand for equal housing opportunities for nonwhites. The complete rejection by suburban communities of all low and moderate income housing is testimony to the severity of the problem of prejudice involved. While many community groups and agencies — as well as individual citizens — have been working for open housing, their

> various efforts have proved insufficient. Racial prejudice and discrimination must be considered one of the most serious obstacles blocking the construction of low/moderate income housing where it is needed." (A. 276-77).

Equally arbitrary and discriminatory is defendants' administration of the zoning ordinance. Defendants have obstructed any attempts to build multiracial, low and moderate income housing in Penfield (See affidavit of Ann McNabb (A.615-642)) In September, 1969, for example, Penfield Better Homes Corporation, a member of petitioner Housing Council, submitted an application for the rezoning of land in the Town of Penfield for construction of low and moderate income housing. The proposed Highland Circle project was designed to include a complex of cooperative housing units which would be sold to persons earning approximately $5000 to $8000 per year (A.630) This proposal was submitted to the Planning Board only after comprehensive studies had been conducted by the Better Homes Corporation. (A.630) Yet, by resolution of the Penfield Planning Board, this proposal was denied on the grounds that the 1) townhouse construction proposed would constitute an inappropriate use of the land and *would not be consistent with existing character of the neighborhood;* 2) the proposed use would create traffic problems within the area; and 3) the proposed use would create problems of erosion during and after the construction. (A.631) Data previously supplied to the Planning Board directly contradicted the specific reasons for denial of the application (A.631-32) A survey by the County of Monroe, Director of Public Works, revealed that increased traffic would not create any problem with respect to the existing traffic facilities in the area. Furthermore, a thorough review of the proposed apartment site demonstrated that, if certain precautions were taken, construction could proceed in the area without any detrimental effect. The Town Board, however, denied an application by Penfield Better Homes for a public

hearing to reconsider zoning for the Highland Circle project. (A.632)

So too, defendants have frustrated other proposals for Planned Unit Development projects and multiracial low and moderate income housing units. (A.633-42) Ann McNabb, a resident of Penfield, a member of petitioner Metro-Act, and a director of Penfield Better Homes Corp., has been a participant in the submission of project proposals for low and moderate income housing in Penfield and "has an ongoing knowledge" of the various attempts to bring such housing to that Town. (A.617) Based on her personal knowledge she alleges that defendants have (1) delayed action on proposals for inordinate periods of time; (2) denied approval of proposals for arbitrary reasons; (3) failed to provide necessary supporting services for such housing; and (4) amended the zoning ordinance to make the approval of such units virtually impossible. (A.621)

Finally, officials of the Town of Penfield have even threatened members of Rochester Home Builders Associations. It is alleged that

> "One or more officials of the Town of Penfield have attempted to coerce Plaintiffs' members to prevent Plaintiff from bringing this action, and have threatened Plaintiff's members that if this action were brought, Plaintiff's members would be prevented from doing business in the Town of Penfield and/or would be given great difficulty in obtaining necessary approvals, cooperation and/or appropriate treatment by government officials of said town, which would thus prevent them from carrying out their ordinary and necessary business in due course in said town." (A.158-59)

Two controlling and binding facts emerge from plaintiffs' allegations. First, Penfield's zoning ordinance has a racially discriminatory and exclusionary impact. Secondly, defen-

---

[7]In 1970, only 60 of the 23,782 persons residing in Penfield were black. (A. 470, 549).

dants' administration of the ordinance perpetuates the economically and racially stratified housing arrangements in that town. Although the Second Circuit was required to accept these alleged facts as true, it, nevertheless, held that plaintiffs do not have standing to seek judicial review of the ordinance and defendants' zoning practices. In so doing, the court ignored the actual physical, economic and social injury suffered by the individual and organizational plaintiffs as a result of the zoning law and defendants' practices and policies in administering the ordinance.

Plaintiffs Are Suffering Injury In Fact.

A. Plaintiffs, Ortiz, Broadnax, Reyes and Sinkler, are black or Spanish-surnamed persons of low or moderate income who have been excluded from the Town of Penfield because of their race and low income level. Plaintiff Ortiz, for example, is a Spanish-surnamed American who was dissatisfied with raising his children in the "ghetto environment" which exists in the decaying inner city of Rochester, New York. (A.369) Accordingly, in 1968 he began searching for a home in one of the surrounding suburban towns. Since at that time, and until May, 1972, he was working in the Town of Penfield, he initiated inquiries about renting or buying a home in that suburb. (A.370) However, no multiracial, low and moderate income housing units were available and, thus, petitioner was forced to reside in Wayland, New York, which is forty-two miles from his job in Penfield. Petitioner described his inconvenience and cost as follows:

> "Since I was unable to locate housing near my work in the Town of Penfield (employment dating from my arriving in Rochester in 1966 to May 1972) I have been forced by reason of the exclusionary practices of the Town of Penfield to reside in Wayland, New York, Town of Springwater (1971 through May 1972) forty-two miles from my work in Penfield. I worked five days

> a week, eight hours a day at St. Joseph's. I was at work by 7:30 in the morning. Travel one way to the job in Penfield took at least one hour and ten minutes one way - in bad weather, the time involved one way to work was about two hours. The maximum distance from my job if I had been able to live in the Town of Penfield would have involved driving time of no more than twenty minutes to the job at St. Joseph's.
>
> "... there was at least $2.56 involved each day in gasoline costs for my automobile or $12.80 involved in gasoline costs alone for my automobile to and from my work each week. Thus, in costs of gasoline alone, commuting to and from the job in Penfield has cost me $666.00 per year." (A.375-77)

The injury suffered by Ortiz is not limited to the burdensome commuting problems and costs. Rather, as he concluded, "Because our living environments are dictated by laws, practice and policies which prevent us from living where we might wish, we are forced, for example, to accept as a way of life, poor schools for our children, reduced job opportunities, inferior community services and added expenses of reaching employment."

Plaintiffs Broadnax, Reyes and Sinkler and their respective families, have also suffered actual injury as the result of defendants' exclusionary practices and policies. These plaintiffs sought housing in the Town of Penfield (A.417-18, 428, 453), but were excluded because of their race and income levels. (A.421, 431-32, 453) The inner city environment in which they must reside is characterized by dilapidated, substandard housing, uncontrolled violence and insufficient or nonexistent community services. (See affidavits of Broadnax, Reyes and Sinkler (A.404-455)) Clara Broadnax describes the deplorable conditions which she and her children are forced to endure:

> "The defects in our apartment include many leaks in the roof, bad wiring, roach infestation, rat and mice infestation, crumbling housing foundation, broken front door, broken hot water heater, etc. There are at least six

holes in the roof. When it rains, the rain comes down through the ceiling and leaks into the living room and kitchen. The rain leaks so heavily that it follows the electric wiring and flows from the light fixtures. 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." (A.410-12)

As a result of defendants' practices and policies of excluding low income persons and members of minority groups, plaintiffs are being denied their right to raise their children in an integrated environment and obtain the benefits of the improved housing conditions and community services in Penfield. One of the prime concerns of these plaintiffs is the educational disadvantages which their children are forced to suffer. Plaintiff Sinkler states:

"I have sought housing accommodations in the Rochester metropolitan area, including the Town of Penfield - all to no avail because I am a black person of low income. I would like an opportunity to live in the Town of Penfield; I believe I have a right to live in the Town of Penfield and to have access to decent housing in a decent environment.

"One of the most important reasons for my desiring to have an opportunity to live with my family in decent housing in a decent environment is my great concern that my children have an adequate education. I have

> already noted that I found the instruction in the public kindergarten and first grade to be so inadequate that I transferred my child to a parochial school. I understand that the public school in my area, School No. 20, has been rated among studies of Rochester City Schools as one of the lowest in terms of effective instruction of students. On the other hand, the Town of Penfield's schools rate high in studies which evaluate area schools. The Town of Penfield by its exclusionary policies, practices and laws has and continues, therefore, to cause me real harm by denying me the opportunity to reside there." (A.453-55)

B. Plaintiffs Warth, Reichert, Vinkey, and Harris suffer actual injury as a direct result of Penfield's exclusionary zoning ordinance and defendants' administration of that law. These plaintiffs are property owners residing in the City of Rochester, New York. Defendants' exclusion of multi-racial low and moderate income housing units forces the City of Rochester to assume the ever increasing burden of providing such housing, much of which is tax abated. As the amount of tax abated property in the City increases, individual property owners and taxpayers, such as plaintiffs, must assume a larger burden of the taxes which are needed to finance essential services. (A.5, 461-62, 474) The tax rate in Rochester, for example, has continually risen from $42.06 per $1,000 assessed valuation in 1959 to $80.95 in 1972. (A.474) This increased financial burden on property owners residing in the City of Rochester is attributable, in part, to the fact that Penfield refuses to provide its "fair share" (A.500) of tax abated, low and moderate income property and thus forces the City and its taxpayers to assume the cost. (A.456-461, 471, 474)

Plaintiffs Warth, Reichert, Vinkey and Harris have such a personal economic stake in the continuance of this litigation as to ensure the requisite concrete adverseness. Each of these plaintiffs is being forced to assume not only the economic hardship caused by spiraling property taxes, but also the social and

environmental problems resulting from the concentration of multi-family, low and moderate income housing units in the urban area. "The effect of Penfield's exclusionary practices which create a concentration of low, moderate housing in the City of Rochester and produce . . . a density crush, also has direct effect on the City of Rochester residents in incidents of crime and provisions for law enforcement." (A.483)

C. Similarly, the organizational plaintiffs are injured by defendants' zoning practices and policies. Metro-Act and its members have suffered direct injury as a result of defendants' practices and policies and, consequently, have a personal stake in the resolution of this matter. Metro-Act, a non-profit corporation, was founded in 1965, after the riots in the inner city of Rochester (A. 181), and is now composed of approximately 350 individual members, many of whom reside in Penfield. (A. 183) One of its primary purposes is to pursue activities designed to secure open housing in the Rochester suburbs. Specifically, Metro-Act, has presented the Town of Penfield with a number of proposals to end the racially exclusionary zoning practices and policies existing in Penfield. (A.193-195) Robert Warth, President of Metro-Act in 1971-72, commented on defendants' unwillingness to consider such proposals:

> "After making such a tremendous effort to discuss the Penfield housing problems with the Town Board officials and meeting with an attitude of unwillingness on the part of the Town of Penfield officials to consider Metro Act's proposals or even to meet and discuss the proposals, Metro Act members had the clear impression that the objective of the Town of Penfield was to delay indefinitely any real meeting with Metro Act members or a real consideration of the Metro Act proposal. Under the circumstances, there was no other alternative than to initiate this lawsuit." (A.195)

As a result of the exclusionary zoning ordinance and defendants' administration of the law, Metro-Act members are suffering direct injury in that they are losing the benefits of

living in an integrated community. As Mr. Warth stated, "Metro-Act is working for open housing in the suburbs because, in part, only by providing maximum choice in housing can Metro-Act members and their children be spared an eventual repeat of ghetto confrontations and riots .... Metro-Act members believe that it is to their own children's benefit to learn early in life to come to healthy terms with different races and ethnic groups." (A.184) Although the injury resulting from the denial of interracial associations is not economic, it nevertheless is such a real and concrete harm, resulting directly from defendants' illegal practices and policies, as to ensure the requisite adverseness.

The Housing Council has standing to assert that its members are adversely affected by defendants' exclusionary and racially discriminatory zoning practices and policies. This Council is a nonprofit corporation which was organized in response to a recommendation in a 1970 study by the Rochester Center for Governmental and Community Research. (A.171) The study was prepared for the Metropolitan Housing Committee, which was appointed jointly by the City and County Managers under authorization from the Rochester City Council and the Monroe County Board of Supervisors. It was recommended in the study that a housing council be established, composed of representatives of relevant agencies, institutions and groups interested in housing, in order to channel the fragmented and uncoordinated housing efforts in the community into meaningful action. Accordingly, the Housing Council's purposes, as stated in its constitution, include the following:

> "The Corporation shall be organized and operated exclusively for the purpose of receiving, maintaining, or administering one or more funds of real or personal property, or both, and using and applying the whole or any part of the income and principal thereof for the charitable purpose of combating community deterioration, eliminating racial and economic prejudice and discrimination in housing, and lessening the bur-

dens of government in the Monroe County area of New York . . ." (A.172)

The Housing Council's membership is comprised of seventy-one (71) public and private organizations which are actively participating in efforts to eliminate racial and economic discrimination in the housing market. (A.173) At least seventeen (17) of the charter member groups have been involved, are involved, or hope to be involved directly in the development and construction of low and moderate housing. (A.174) Indeed, at least one such group, Penfield Better Homes Corporation, has been actively attempting to develop multi-racial low and moderate income housing in the Town of Penfield, but has been stymied by its inability to secure the necessary approvals from the defendants in this action. Moreover, several of the charter member groups, including the Monroe County Department of Social Services, the City of Rochester's Department of Urban Renewal and Economic Development, and the Urban Renewal Agency, are government agencies which are directly involved in the production of adequate, multi-racial, low and moderate income housing in the metropolitan Rochester area. (A.174-75) The remaining charter groups include organizations composed of minority persons who are prohibited from living in Penfield. (A.175)

Petitioner, Housing Council, urges that Penfield's restrictive zoning ordinance and defendants' illegal actions are inflicting harm upon its members. Those members who are engaged in the development and construction of low and moderate income housing are suffering economic injury resulting from the loss of profits. The low income minority persons who are represented by Housing Council are forced to endure the same hardships inflicted upon plaintiffs Ortiz, Broadnax, Reyes, and Sinkler. The other members are being thwarted in their efforts to pursue specific activities designed to further the organization's purpose of receiving and administering funds of real or personal property and using the income and principal to combat community

deterioration and eliminate discrimination in the housing market.

Finally, the Rochester Home Builders and its members are injured by defendants' zoning ordinance and practices. This organization is a nonprofit trade association of persons and companies engaged in construction, development, and maintenance of residential housing in the metropolitan Rochester area. Over 110 of its members are engaged directly in the construction of sale and rental housing to the public at large. During the past 15 years, approximately 80% of the private housing units constructed in the metropolitan Rochester area — including the Town of Penfield — were constructed by members of this association. (A. 147)

The Home Builders Association and its members have suffered substantial economic injury as a consequence of defendants' exclusionary zoning practices and policies. Indeed, the uncontradicted affidavit submitted in support of the motion to intervene states that members of the Association have been unable to construct low and moderate income housing in Penfield as a result of the zoning ordinance and defendant's administration of that law:

> "The Rochester Home Builders Association alleges that they have been subject to the same discriminatory and exclusionary zoning practices as alleged in Plaintiffs' Complaint, and as a result thereof have been unable to construct housing and provide same for all of the metropolitan Rochester area population which is entitled to the opportunity to purchase such housing, and that specifically members of the Rochester Home Builders Association have been denied relief from such zoning ordinances permitting them to construct such housing." (Emphasis added (A. 141-42)

The Association specifically alleges that Penfield's restrictive zoning ordinance and defendant's implementation of the law has prevented, and continues to prevent, members of the Association

from developing, selling and renting housing to all the persons in the metropolitan Rochester area. (A. 154-56) As a result, members of this organization are being deprived of substantial business opportunities and profits and have suffered damage in the amount of $750,000.00. (A. 151) Petitioners submit that it is difficult, indeed, to imagine a party with a greater economic stake in the outcome of this litigation than the Home Builders Association and its members.

Petitioners contend that each and every plaintiff in this action is suffering actual injury as a result of Penfield's restrictive zoning ordinance and defendants' practices and policies in administering that law. In these circumstances, each plaintiff has a sufficient stake in the outcome of this litigation to guarantee that the issues will be presented in an adversary context and in a form capable of judicial resolution. Accordingly, petitioners urge that the Second Circuit erred in its determination that plaintiffs lack the requisite standing to seek judicial review.

SUMMARY OF ARGUMENT

1. Petitioners are urging that they, as traditional Hohfeldian parties, have standing under the well established principles which govern the right of a party to seek judicial review. They are not requesting this Court to adopt any novel standing principles.

The standing concept embodies the Article III limitation on the federal courts jurisdictional powers, as well as policy considerations regarding the proper exercise of that power in a tripartite system of government. See e.g. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S. Ct. 829 (1970); *Flast v. Cohen*, 392 U.S. 83, 88 S. Ct. 1942 (1968). The "gist" of the constitutional restriction is whether plaintiffs have alleged such a personal stake in the outcome as to assure that the issues will be presented in an

adversary context and in a form historically viewed as capable of judicial resolution. *Flast v. Cohen*, supra; *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962). In order to satisfy the constitutionally mandated "case" or "controversy" requirement, plaintiffs must allege injury in fact, economic or otherwise, flowing directly from the illegal action. *Association of Data Processing Service Organizations, Inc. v. Camp*, supra.

Plaintiffs contend that the material allegations, which must be taken as admitted, establish that each petitioner is suffering injury in fact as a result of defendants' racially discriminatory and exclusionary zoning ordinance and zoning practices. Moreover, plaintiffs submit that the policy considerations demand, rather than bar, the exercise of judicial review. Indeed, the "irreplaceable value" of the federal court's power of judicial review "lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government actions." *United States v. Richardson*, —— U.S. ——, ——, 94 S. Ct. 2940, 2954 (1974) (Mr. Justice Powell, concurring).

2. Plaintiffs Ortiz, Broadnax, Reyes and Sinkler are low income, minority persons who have sought housing in Penfield but have been excluded from living in that Town because of their race and income level. As a result, they are forced to live in the inner city of Rochester which is characterized by dilapidated, substandard housing and uncontrolled violence. So too, their children are required to attend the inferior city schools. Although this Court has not previously addressed the issue, numerous lower courts have held that low income minority persons have standing to seek judicial review of racially discriminatory and exclusionary zoning practices and policies. See, e.g. *Park View Heights Corporation v. City of Black Jack*, 467 F. 2d 1208 (8th Cir 1972); *Crow v. Brown*, 457 F. 2d 788 (5th Cir. 1972), affirming 332 F. Supp. 382 (N.D. Ga. 1971). The injury which these individuals suffer is certainly such

concrete harm as to ensure that the dispute will be presented in an adversary context. Moreover, it is manifest that there is a "logical nexus" between these plaintiffs' injury and the claims sought to be adjudicated. *Flast v. Cohen*, supra at 102, 88 S. Ct. at 1953. Such inquiries into the nexus are "essential to assure that the litigant] is a proper and appropriate party to invoke federal judicial power" Id. Here, it is beyond doubt that low income minority persons, who are the victims of defendants' discriminatory practices, are the proper parties to such judicial review. To hold otherwise would undermine this nation's commitment to the goal of a decent home and a suitable living environment for every family and would hasten the day when urban centers, such as Rochester, will become black segregated cities surrounded by solid white suburban perimeters.

3. Plaintiffs Warth, Reichert, Vinkey and Harris are property owners residing in the City of Rochester which is adjacent to the Town of Penfield. They allege that defendants' refusal to permit construction of low and moderate income housing forces the City of Rochester to provide such housing, which is tax abated. As a result, property owners, such as plaintiffs, are forced to pay increased property taxes which are necessary to finance essential municipal services. Such economic injury assures that these plaintiffs have a personal stake in the outcome of the litigation. Indeed, the injury, here, is similar to the economic harm suffered by plaintiffs in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 678, 93 S. Ct. 2405, 2411 (1973). Standing is not to be denied because the injury is slight or because many persons suffer the same harm. See *United States v. SCRAP*, supra; Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601 (1968). Moreover, the line of causation between plaintiffs' injury and defendants' illegal acts is more direct than in *Barlow v. Collins*, 397 U.S. 159, 90 S. Ct. 832 (1970) and *United States v. SCRAP*, supra. Finally, the fact that the white

property owners are not themselves the immediate victims of the discrimination does not deprive plaintiffs of standing. See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400 (1969); *Buchanan v. Warley*, 245 U.S. 60, 38 S. Ct. 16 (1917). Since plaintiffs have established economic injury resulting from defendants' discriminatory and exclusionary practices and policies, they are reliable private attorneys general to litigate the issue of public interest in the case. *Sierra Club v. Riortas*, 405 U.S. 727, 737, 92 S. Ct. 1361, 1367 (1972); *Association of Data Processing Service Organizations, Inc. v. Camp*, supra at 154, 90 S. Ct. at 830; *Scripps-Howard Radio v. Federal Communications Commission*, 316 U.S. 4, 62 S. Ct. 875 (1942).

4. Organizational plaintiffs have standing to seek judicial review of policies and practices which cause injury to the organization or its members. *United States v. SCRAP*, supra; *Sierra Club v. Morton*, supra; *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328 (1963).

Metro-Act and its members are suffering injury in fact flowing directly from defendants' zoning practices and policies. The organization and its members are being forced to pay increased property taxes as a result of defendants' illegal acts. Moreover, the Metro-Act members who reside in Penfield are being denied the important benefits derived from interracial associations and living in an integrated community. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 93 S. Ct. 364 (1972). Although the denial of such benefits is not economic injury it nevertheless assures that the dispute will be presented in an adversary context and satisfies the case or controversy requirement. See *United States v. SCRAP*, supra, at 686, 93 S. Ct. at 2415; *Sierra Club v. Morton*, supra at 734, 92 S. Ct. at 1366. Additionally, it is clear that the interest which Metro-Act seeks to protect — the right of its members to receive the benefit of interracial associations — is within the zone of interest sought

to be protected by the First Amendment. *Healy v. James*, 408 U.S. 169, 92 S. Ct. 2338 (1972). Furthermore, there is a direct nexus between the harm to Metro-Act's members and defendants' discriminatory and exclusionary zoning ordinance and practices. "It should be obvious that the exclusion of any person or group — all Negro, all oriental, or all white — . . . infringes upon the freedom of the individual to associate as he chooses." *Gilmore v. City of Montgomery*, —— U.S. ——, ——, 94 S. Ct. 2416, 2427 (1974).

Housing Council also has standing to represent its members in this proceeding for judicial review. The organization's members include seventeen groups which have been, or will be, involved directly in the development of low and moderate income housing. One group, Penfield Better Homes Corporation, submitted a proposal to build such housing in Penfield but was unable to obtain defendants' approval. These members are suffering the loss of profits as a result of defendants' practices and policies. Such economic injury is sufficient to satisfy the case or controversy requirement. *Association of Data Processing Organizations, Inc. v. Camp*, supra, at 151, 90 S. Ct. at 829. The organization also includes charter member groups which are comprised primarily of low and moderate income persons who are excluded from Penfield. These persons suffer the same form of injury which is inflicted upon plaintiffs Ortiz, Broadnax, Reyes and Sinkler.

There can be little doubt but that Housing Council members are suffering such injury as to ensure the requisite adverseness. So too, the interest which the organization seeks to represent — the right to equal housing opportunity — is within the zone of interests sought to be protected by the Constitution and the Civil Rights Acts, 42 U.S.C. §1981-1983. See, e.g., *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 437, 93 S. Ct. 1090 (1973); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S. Ct. 2186 (1968); *Buchanan v. Warley*, supra. In these

circumstances, the Housing Council may represent its members in the instant action.

Finally, the Home Builders Association has standing to represent its members who have been denied substantial business opportunities and profits as a result of defendants' practices and policies. Such economic injury gives the Association a stake in the outcome of this litigation. See, e.g. *Barlow v. Collins*, supra; *Association of Data Processing Service Organizations, Inc. v. Camp*, supra; *Hardin v. Kentucky Utilities Comapny*, 390 U.S. 1, 88 S. Ct. 651 (1968). Additionally, it is well established that a trade association, such as Home Builders, has standing to represent its injured members. *American Motor Freight Traffic Association v. United States*, 372 U.S. 246, 83 S. Ct. 688 (1963).

Equally clear is the fact that since the Home Builders Association has properly invoked judicial review, it may assert the public interest in support of its claim. *Trafficante v. Metropolitan Life Insurance Company*, supra at 211, 93 S. Ct. at 367; *Sierra Club v. Morton*, supra at 737, 92 S. Ct. at 1362. To hold otherwise would frustrate the congressionally mandated, and judicially enforceable, guarantee that members of minority groups have the "freedom to buy whatever a white man can buy [and] the right to live wherever a white man can live." *Jones v. Alfred H. Mayer Co.*, supra at 443, 88 S. Ct. at 2205.

5. Plaintiffs urge that the standing doctrine in this civil rights case must be construed at least as broadly as it has been interpreted in other cases, including those involving environmental matters. The denial of standing here would undermine this nation's commitment to the eradication of racism and would hasten the "establishment of two societies: one predominately white and located in the suburbs, . . . and one largely Negro located in central cities."[8]

---

[8]Report of the National Advisory Commission on Civil Disorders 220 (1968).

ARGUMENT

Plaintiffs' have standing to seek judicial review of Penfield's racially discriminatory and exclusionary zoning ordinance and defendants' zoning practices which deprive plaintiffs of constitutional and statutory rights and cause them to suffer economic damage, physical and emotional hardship, and loss of the social benefits of living in an integrated community.

It must be noted at the outset that plaintiffs are not requesting this Court to depart from any of its established standing principles. Plaintiffs do not contend that they have standing simply by virtue of their status as taxpayers[9] or citizens.[10] Nor is it suggested that standing is conferred merely because plaintiffs are interested parties who are willing to pay the substantial costs of the litigation.[11] Rather, plaintiffs are urging that they, as traditional Hohfeldian[12] parties, have standing under the well established principles which govern the right of a party to seek judicial review.

Although standing has been called one of "the most amorphous [concepts] in the entire domain of the law,'"[13] it is now manifest that the "fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast*

---

[9]See *United States v. Richardson*, —— U.S. ——, 94 S.Ct. 2940 (1974).

[10]See *Schlesinger v. Reservists Committee to Stop the War*, —— U.S. ——, 94 S.Ct. 2925 (1974).

[11]See Scott, Standing in the Supreme Court — A Functional Analysis, 86 Harv. L. Rev. 645, 676 (1973).

[12]See Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033 (1968).

[13]*Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952 (1968) (quoting, Hearings on S.2097, 89th Cong., 2d Sess. 465, 498 (1966)).

v. Cohen, 392 U.S. 83, 99, 88 S. Ct. 1942, 1952 (1968). Moreover, it is clear that the standing concept embodies both constitutional limitations on the federal court's jurisdictional powers and policy considerations regarding the exercise of such power. See, e.g., *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154, 90 S. Ct. 827, 830 (1970); *Flast v. Cohen*, supra. Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601 (1968).

The "gist" of the constitutional restriction on the court's judicial power to review only "cases" or "controversies"[14] is whether plaintiffs have

> ". . . alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

Baker v. Carr, 369 U.S. 186, 204, 82 S. Ct. 691, 703 (1962). As this Court explained in *Flast v. Cohen*, supra at 101, 88 S. Ct. at 1953, "in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."

To satisfy the case or controversy requirement, plaintiffs must allege "some threatened or actual injury resulting from the putatively illegal action." *Linda S. v. Richard D.*, 410 U.S. 614, 617, 93 S. Ct. 1146, 1148 (1973). Indeed, the initial inquiry is "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." *Association of Data Processing Service Organizations, Inc. v. Camp*, supra at 152, 90 S. Ct. at 829.

---

[14]U.S. Const. Art. III §2.

The nonconstitutional policy considerations[15] have been expressed in various forms. See *Association of Data Processing Service Organizations, Inc. v. Camp*, supra at 153-154, 90 S. Ct. at 830 ("zone of interest" test); *Flast v. Cohen*, supra at 102, 88 S. Ct. at 1954 ("nexus" test); *Barrows v. Jackson*, 346 U.S. 249, 255, 73 S. Ct. 1031, 1034 (1953) (rule of self-restraint). However, underlying each such test is a policy consideration regarding the federal court's proper role in a tripartite system of government.

Plaintiffs submit that they have satisfied both the constitutional and nonconstitutional standing requirments. Each party has alleged[16] injury in fact resulting from Penfield's discriminatory and exclusionary zoning ordinance and defendants' administration of that law. It is this injury, economic and otherwise, which ensures that the issues will be presented in an adversary context and in a form capable of judicial resolution. Moreover, the policy considerations here demand, rather than bar, the exercise of judicial review. The federal court's proper role necessarily includes the power to review practices and policies which have a racially discriminatory and exclusionary purpose and effect. Indeed, as Mr. Justice Powell said regarding the power of judicial review:

> "The irreplaceable value of the power articulated by Chief Justice Marshall lies in the *protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action.* It is this role not some amorphous, general supervision of the operations

---

[15] But see *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 159, 167, 90 S.Ct. 827, 838 (Mr. Justice Brennan and Mr. Justice White, concurring and dissenting); Davis, The Liberalized Law of Standing, 37 U.Chi.L.Rev. 450 (1974).

[16] In the procedural posture of this case, these allegations must be taken as admitted by defendants. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S.Ct. 1843. 1849 (1969) ("For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted.")

> of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests."

United States v. Richardson, —— U.S.——, ——, 94 S. Ct. 2940, 2954 (1974) (concurring opinion) (emphasis added).

A. *Low income minority persons have standing to seek judicial review of defendants' discriminatory and exclusionary zoning ordinance and practices which exclude them from residing in Penfield and cause them to suffer physical and emotional hardship.*

Plaintiffs Ortiz, Broadnax, Reyes, and Sinkler have standing to challenge defendants' racially discriminatory and exclusionary practices and policies. These individuals are minority, low income persons who have sought housing in the Town of Penfield but have been excluded because of their race and income levels. Plaintiff Ortiz, as a direct result of defendants' discriminatory and exclusionary zoning practices and policies, was forced to live forty-two miles from his place of work in Penfield and suffer burdensome commuting problems and costs. Plaintiffs Broadnax, Reyes, and Sinkler have also been excluded from living in Penfield and have been forced to reside in the decaying inner city of Rochester, New York. Their living environment is characterized by dilapidated, substandard housing, uncontrolled violence, and insufficient or nonexistent community services. (A. 404-455) Plaintiffs' children are forced to attend the inferior schools in the City of Rochester. Indeed, one of Rosa Sinkler's primary reasons for desiring to live with her family in Penfield is the "great concern that [her] children have an adequate education." (A. 454) Plaintiff Sinkler states that

> "the public school in my area, School No. 20, has been rated among studies of Rochester City Schools as one of the lowest in terms of effective instruction of students. On the other hand, the Town of Penfield's schools rate high in studies which evaluate area schools." (A. 454)

Finally, these individuals are suffering the real harm of being unable to raise their children in an integrated community and obtain the benefits of interracial associations.

Manifestly, Andelino Ortiz, Clara Broadnax, Angelea Reyes, and Rosa Sinkler are not simply "concerned bystanders." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687, 93 S. Ct. 2405, 2416 (1973). Rather, they are individuals who, in their daily lives, suffer physical and emotional hardships as a direct consequence of defendants' refusal to permit low income minority persons to reside in Penfield.

Nevertheless, the Court of Appeals for the Second Circuit held that plaintiffs' injury is 'too abstract, conjectural and hypothetical to establish an Article III case or controversy." *Warth v. Seldin*, 495 F.2d 1187, 1193 (2d Cir. 1974) (A. 963) In so doing, the court erroneously relied upon *O'Shea v. Littleton*, 414 U.S. 488, 94 S. Ct. 669 (1974), which is readily distinguishable from the facts in the instant case. There, the "sole allegations were that defendants engaged in activities which deprived plaintiffs of constitutional rights." Id at 495, 94 S. Ct. at 676. This court held that there was no case or controversy since "[n]one of the named plaintiffs is identified as having himself suffered any injury in the manner specified." Id.

The instant case is in direct contrast to *O'Shea*. Unlike in *O'Shea*, plaintiffs allege that they are *personally* suffering the harm which results from defendants' exclusion of low income minority persons. The complaint and affidavits detail the daily injury which plaintiffs are forced to endure. Plaintiffs' specific allegations regarding their own deplorable living conditions and

their children's inferior education are neither conclusory nor abstract. In these circumstances, this Court's determination in *O'Shea* has no bearing whatsoever on the standing of plaintiffs to seek judicial review.[17]

Plaintiffs submit that they have alleged such injury in fact as to ensure that the dispute will be presented in an adversary context and in a form capable of judicial resolution. Indeed, although this Court has not previously addressed the issue, numberous lower courts have held that minority, low income persons have standing to seek judicial review of racially discriminatory and exclusionary zoning practices and policies. See, e.g., *Park View Heights Corporation v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972); *Crow v. Brown*, 457 F.2d 788 (5th Cir. 1972), affirming, 332 F. Supp. 382 (N.D. Ga. 1971); *Kennedy Park Homes Association, Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010, 91 S. Ct. 1256 (1971); *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970). Cf. *United Farmworkers of Florida Housing Project, Inc., v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974) (individual farmworkers have standing to challenge actions which have stymied efforts to build federally assisted low income housing and which have a racially discriminatory effect); *Shannon v. United States Department of Housing and Urban Development*, 436 F.2d 809 (3d Cir. 1970) (standing of parties to challenge site location of public housing).

The Second Circuit, however, attempted to distinguish these and other cases on the ground that they involved a particular housing proposal or project. The court stated, "Without deciding whether we approve these holdings, we note the standing of potential residents in these cases presents an issue very different from the one presented here. The focusing of the

---

[17]This Court's decision in *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, (1974), is also inapposite insofar as it is based upon the Court's reluctance to interfere with a state's administration of its criminal laws. Id. at 499, 94 S.Ct. at 677.

controversy in a particular project assures 'concrete adverseness.'" *Warth v. Seldin*, supra at 1192 (A. 961)

Plaintiffs contend that such a distinction ignores the undisputed[18] factual allegations as well as standing principles enunciated by this Court. The allegations reveal that Penfield's zoning ordinance prohibits multi-racial low and moderate income housing units and that public officials have obstructed any attempts to build such housing.[19] Members of the Home Builders Association have been unable to obtain the necessary relief from the zoning law to enable them to construct such housing units. (A. 154-55) Some members of the Association have even been threatened by Town officials. (A. 158-59) Metro-Act's proposals for revision of the zoning ordinance have been ignored by defendants. (A. 193-95) Specific project proposals, including the "Highland Circle Project," have been stymied by defendants' practice of delaying action on proposals, arbitrarily denying approval, failing to provide necessary support services, and amending the zoning ordinance to make approval virtually impossible. (A. 621) In these circumstances, it would be anomolous, indeed, to deny plaintiffs standing to challenge Penfield's refusal to permit construction of low and moderate income housing on the ground that no such housing is presently being constructed in that Town.

Moreover, contrary to the suggestion of the Court of Appeals, it is the injury in fact to the plaintiffs, rather than the existence or nonexistence of a project proposal, which assures concrete adverseness. See *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152, 90 S. Ct. 827, 829 (1970); *Flast v. Cohen*, 392 U.S. 83, 99, 88 S. Ct. 1942, 1952 (1968). The fact that a particular project is presently

---

[18]See note 16, supra.

[19]See, generally, affidavits of Kling, Taddiken and Fanley (A. 925-947) and McNabb (A. 615-642).

under consideration might ease plaintiffs' evidentiary burden of establishing, at the trial, the causal connection between defendants' actions and plaintiffs' injury. However, it is not determinative of the initial inquiry — whether plaintiffs have alleged "some threatened or actual injury resulting from the putatively illegal actions." *Linda S. v. Richard D.*, 410 U.S. 614, 617, 93 S. Ct. 1146, 1148 (1973).

Accordingly, plaintiffs Ortiz, Broadnax, Reyes, and Sinkler have alleged sufficient injury in fact to satisfy the case or controversy requirement. Moreover, it is evident that there is a "logical nexus" between plaintiffs' injury and the claims sought to be adjudicated. In *Flast v. Cohen*, supra at 102, 88 S. Ct. at 1953, this Court stated that "inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power." Here, it is beyond doubt that plaintiffs are the victims of defendants' discriminatory practices and policies and, as such, are proper parties to request judicial review. As Chief Justice Marshall said in *Marbury v. Madison*, 1 Cranch 137, 163 (1803):

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."

This nation is committed to the "goal of a decent home and a suitable living environment for every American family. . . ." 42 U.S.C. §1441. See also, *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 261, 89 S. Ct. 518, 525 (1969). Congress recently reaffirmed this commitment in the Housing and Community Development Act of 1974 which is directed toward the following objectives:

> "the conservation and expansion of the Nation's housing stock in order to provide a decent home and a suitable living environment for all persons, but principally those of low and moderate income; and . . .
>
> * * * *

> the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income and the revitalization of deteriorating or deteriorated neighborhoods to attract persons of higher income; . . ."

Act of August 22, 1974, Pub L. No. 93-383 §101(c).

To deny standing to plaintiffs Ortiz, Broadnax, Reyes and Sinkler would impede achievement of the national housing policy and would hasten the day when the City of Rochester will become a black, segregated city surrounded by a solid white suburban perimeter.

B. *Property owners who have suffered economic injury as a result of the zoning ordinance and defendants' administration of that law have standing to seek judicial review.*

Plaintiffs Warth, Reichert, Vinkey and Harris are property owners residing in the City of Rochester, New York, which is adjacent to the Town of Penfield. These plaintiffs are suffering economic injury as a direct result of Penfield's racially discriminatory and exclusionary zoning ordinance and defendants' administration of that law. They allege that defendants' refusal to permit construction of low and moderate income housing forces the City of Rochester to provide such housing, much of which is tax abated. As the amount of tax abated property increases, city property owners, such as plaintiffs, are forced to assume a larger burden of the taxes which are necessary to finance essential municipal services. The spiraling city property taxes are partly attributable to the fact that Penfield refuses to provide multi-racial low and moderate income housing[20] and, thus, forces the City and its residents to

---

[20]Penfield has no property with tax abatements attributable to housing. (A. 471)

assume the cost. See Affidavit of Warth, Reichert, Vinkey, and Harris (A.456-485).

Plaintiffs are also being subjected to the social and environmental harm resulting from the concentration of low and moderate income housing units in the City. Indeed, the concentration of low and moderate income housing increases the "density crush" which has a direct effect on "incidents of crime and provision for law enforcement." (A.483)

The Second Circuit, however, held that the property owners lack standing to challenge defendants' practices and policies. *Warth v. Seldin*, supra at 1190-91 (A.958, 959) The court based its determination on the discussion of "taxpayers" standing in *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942 (1968), *Doremus v. Board of Education*, 342 U.S. 429, 72 S.Ct. 394 (1952), and *Frothingham v. Mellon*, 262 U.S. 447, 43 S.Ct. 597 (1923). Plaintiffs submit that these decisions, as well as the more recent taxpayer cases,[21] are inapposite. As Justice Harlan stated, the essential inquiry in the taxpayer lawsuits is "whether taxpayers *qua* taxpayers may, in suits in which they do not contest the validity of their previous or existing tax obligations, challenge the constitutionality of the uses for which Congress has authorized the expenditure of public funds." *Flast v. Cohen*, supra at 117, 88 S.Ct. at 1961 (dissenting opinion).

Here, the issue is "fundamentally different." Id. Plaintiffs are not seeking to litigate this action as taxpayers contesting an expenditure of public funds. Rather, plaintiffs are suing as property owners who are suffering economic injury as a result of Penfield's zoning ordinance and defendants' zoning practices. The fact that this injury takes the form of increased property tax liabilities does not convert this litigation into a "taxpayer" suit. Indeed, plaintiffs are seeking to "vindicate interests that are personal and proprietary. The wrongs alleged and the relief

[21] *United States v. Richardson*, —— U.S. ——, 94 S.Ct. 2940 (1974); *Schlesinger v. Reservists Committee to Stop the War*, —— U.S. ——, 94 S.Ct. 2925 (1974).

sought . . . are unmistakably private, only secondarily are [plaintiffs'] interests representative of those of the general public." Id.

Plaintiffs' submit that their injury is identical to the harm suffered by petitioners in *United States v. Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669, 93 S.Ct. 2405 (1973). There, the case and controversy requirement was satisfied by allegations that members of various environmental groups "were forced to pay increased taxes" as a result of the freight rate structure issued by the Interstate Commerce Commission. Id. at 678, 93 S.Ct. at 2411. Similarly, here, standing is conferred upon plaintiffs by virtue of the fact that they must pay increased property taxes as a result of defendants' zoning practices and policies.

Standing should not be denied merely because many property owners suffer the same injury. As this Court said in *United States v. SCRAP*, supra at 688, 93 S.Ct. at 2416,

> "To deny standing to persons who are in fact injured simply because many others are also injured would mean that the most injurious and underspread government actions could be questioned by nobody. We cannot accept that conclusion."

Moreover, standing should not be denied on the ground that the injury to the property owners may be slight. Professor Davis has written that "an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613 (1968). So too, this Court has held:

> "Injury in fact reflects the statutory requirement that a person be adversely affected or aggrieved and it serves to distinguish a person with a direct stake in the outcome of a litigation - even though small - from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no

> more at stake in the outcome of an action than a fraction of a vote, see Baker v. Carr; 369 U.S. 186. 82 S.Ct. 691, 7 L.Ed.2d 663; a five dollar fine and costs, see McGowan v. Maryland, 366 U.S. 420 81 S.Ct. 1101, 6 L.Ed.2d 393; and a $1.50 poll tax, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169."

United States v. SCRAP, supra at 689 n.14, 93 S.Ct. at 2417 N.14.

Plaintiffs urge that this Court also reject the notion that the line of causation between the injury and the illegal acts is too attenuated. *Warth v. Seldin*, supra at 1191. (A.959) The line of causation is no more indirect than in *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832 (1970), and *United States v. SCRAP*, supra, where the Court found standing. In *Barlow*, tenant farmers eligible for payments under the upland cotton programs challenged an amended regulation issued by the Secretary of Agriculture. The regulation permitted tenant farmers to assign subsidy payments to secure " 'the payment of cash rent for land used (for planting, cultivating, or harvesting)' " Id. at 161-162, 90 S.Ct. at 835. The tenant farmers alleged that the amended regulations provided landlords with an opportunity to demand that the tenants assign the upland cotton program benefits as a condition for securing a lease to work the land. Id. at 162-63, 90 S.Ct. at 835. As a result,

> "the tenants are required to obtain financing of all their other farm needs - groceries, clothing, tools, and the like - from the landlord as well, since prior to harvesting the crop they lack cash and any source of credit other than the landlord. He, in turn, the complaint alleges, levies such high prices and rates of interest on these supplies that the tenants' crop profits are consumed each year in debt payments. Petitioners contend that they can attain a modest measure of economic independence if they are able to use their advance subsidy payments *** (to) form cooperatives to buy (supplies) at wholesale and reasonable prices in lieu of the excessive prices

> demanded by [the landlord] of *** captive consumers with no funds to purchase elsewhere. Thus, petitioners allege that they suffer injury in fact from the operation of the amended regulation."

Id. at 163, 90 S.Ct. at 836.

Similarly, in *United States v. SCRAP*, supra, this Court was asked to follow an "attenuated line of causation to the essential injury." Id. at 688, 93 S.Ct. at 2416. There, the challenged freight rate increase allegedly would cause "increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area." Id.

Here, the line of causation is certainly more direct than in either *SCRAP* or *Barlow*. Plaintiffs allege that defendants' exclusion of low and moderate income housing units forces the City to provide such housing for the entire metropolitan area. Since much of this housing is tax exempt, City property owners and taxpayers, such as plaintiffs, are required to pay increased taxes to support essential municipal services. If defendants believe that such allegations are in fact untrue, they "should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact. We cannot say on these pleadings that the [plaintiffs] could not prove their allegations which, if proved, would place them squarely among those persons injured in fact . . . and entitled . . . to seek review." *United States v. SCRAP*, supra at 689, 93 S.Ct. at 2417.

Accordingly, plaintiff property owners contend that they are traditional Hohfeldian parties who are injured in fact by Penfield's ordinance and defendants' practices. It is submitted that, for standing purposes, the principles enunciated in

Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16 (1917), are equally applicable to the instant action.[22] There, a white property owner and a black purchaser entered into a contract for the sale of real estate. The purchaser, however, refused to comply with the agreement because a zoning ordinance prohibited black persons from residing in the area in which the property was located. Subsequently, the white property owner sued for specific performance alleging that the zoning ordinance was unconstitutional and unlawful under the Civil Rights Acts of 1866[23] and 1870.[24] Justice Day, writing for a unanimous Court, concluded that the white property owner, who obviously suffered economic injury as a result of the discriminatory zoning ordinance, had standing to challenge the law.

Here, also, white property owners are challenging a racially restrictive zoning ordinance as unconstitutional and unlawful under the Civil Rights Acts of 1866 and 1870. Penfield's zoning law and defendants' practices have the same discriminatory and exclusionary effect as the challenged ordinance in *Buchanan*. Similarly, as in *Buchanan*, plaintiffs have suffered such economic injury as to ensure that the challenge to the ordinance will be presented in an adversary context and in a form historically capable of judicial resolution.

Finally, here, as in *Buchanan*, the fact that the white property owners are not themselves the immediate victims of the discrimination does not deprive plaintiffs of standing to challenge the exclusionary ordinance and practices. See also *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S.

---

[22]The continued vitality of *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16 (1917), was recently confirmed by this Court in *Village of Belle Terre v. Borass*, 416 U.S. 1, 6, 94 S.Ct. 1536, 1539 (1974) ("if the ordinance segregated an area only for one race, it would immediately be suspect under the reasoning of *Buchanan*. . . .)"

[23]42 U.S.C. §1982.

[24]42 U.S.C. §1981.

437, 93 S.Ct. 1090 (1973); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S.Ct. 400 (1969). Plaintiffs have established economic injury resulting from defendants' practices and policies and consequently are "reliable private attorney[s] general to litigate the issues of the public interest in the present case." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154, 90 S.Ct. 827, 830 (1970). As the Court recently said in *Sierra Club v. Morton*, 405 U.S. 727, 737, 92 S.Ct. 1361, 1367 (1972), "the fact of economic injury is what gives a person standing to seek judicial review . . . , but once review is properly invoked, that person may argue the public interest in support of his claim." Accord, *Scripps-Howard Radio v. Federal Communications Commission*, 316 U.S. 4, 62 S.Ct. 875 (1942); *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, 60 S.Ct. 693 (1940).

In these circumstances, it must be concluded that plaintiffs-property owners are suffering injury in fact as a result of defendants' discriminatory and exclusionary zoning ordinance and practices and have standing to request judicial review.

C. *Organizational plaintiffs have standing to seek judicial review of defendants' discriminatory and exclusionary zoning ordinance and zoning practices which cause injury to the organizations or their members.*

It is now well established that an organization has standing to seek judicial review of policies and practices which cause injury to the organization or its members. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S. Ct. 2405 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361 (1972); *N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S. Ct. 328 (1963); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163 (1958). As this Court said in *Sierra Club v. Morton*, supra at 739, 92 S. Ct. at 1368,

> "It is clear that an organization whose members are injured may represent those members in an proceeding for judicial review."

The organizational plaintiffs here contend that they or their members are suffering injury in fact as a result of Penfield's zoning ordinance and defendants' practices. Accordingly, these organizations have standing to invoke judicial review.

1. *Metro-Act and its members are suffering economic injury, personal hardship, and deprivation of the benefits of interracial associations.*

Metro-Act is a nonprofit Corporation composed of approximately 350 individual members who live in various sections of the metropolitan Rochester area, including the Town of Penfield (A. 183) It is alleged that "one effort of the corporation has been to inquire into the reasons for the critical housing shortage from low and moderate income persons in the Rochester area and to urge action on the part of citizens to alleviate the general housing shortage for low and moderate income persons." (A. 8-9) Specifically, Metro-Act has submitted to defendants various proposals to end Penfield's exclusionary zoning practices and policies. (A. 193-95) However, defendants have ignored Metro-Act's efforts and have indefinitely delayed any meaningful consideration of the proposals. (A. 195)

It is not suggested that Metro-Act has standing simply by virtue of its special interest in housing matters. See *Warth v. Seldin*, supra at 1193. (A. 963) Rather, Metro-Act contends that the organization and its members are suffering injury in fact as a result of the challenged zoning ordinance and defendants' administration of that law.

Initially, Metro-Act alleges that the organization, itself, and those members who reside in the City of Rochester are paying "greater and/or additional real estate taxes . . . than they would have had the defendants not acted as alleged." (A. 30) This

injury, which is identical to the injury suffered by the named plaintiffs Warth, Vinkey, Harris, and Reichert, is both real and concrete. (See discussion, supra at 31) Manifestly, such economic injury to the organization and its members ensures that Metro-Act will pursue this litigation in an adversary context and in a form capable of judicial resolution.

Additionally, Metro-Act contends that it has standing to represent those members who reside in the Town of Penfield and are suffering injury in fact due to the loss of social benefits resulting from interracial associations and living in an integrated community. It is alleged that "Metro-Act members believe that it is to their own children's benefit to learn early in life to come to terms with different races and ethnic groups." (A. 184) However, defendants' racially discriminatory and exclusionary practices and policies prevent Metro-Act members and their children from receiving the important benefits derived from living in an integrated community. Although such injury is not economic, it is real harm flowing directly from defendants' actions. Moreover, as this Court said in *United States v. SCRAP*, supra at 686, 93 S. Ct. at 2415, "In interpreting 'injury in fact' we made it clear that standing was not confined to those who could show 'economic harm.'" Accord, *Sierra Club v. Morton*, supra at 734, 92 S. Ct. at 1366.

Recently, this Court held that the loss of benefits from interracial associations is the type of harm which can ensure concrete adverseness and satisfy the case or controversy requirement. In *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 93 S. Ct. 364 (1972), black and white plaintiffs alleged that they had been injured in that

> "(1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business, and professional activities

> from being 'stigmatized' as residents of a 'white ghetto'."

Id. at 208, 93 S. Ct. at 366. This Court held that plaintiffs, indeed, had been injured by the "loss of important benefits from interracial associations" and, thus, had standing to challenge the discriminatory housing practices. Id. at 210, 93 S. Ct. at 367. In so doing, this Court said:

> "The dispute tendered by this complaint is presented in an adversary context. *Flast v. Cohen*, 392 U.S. 83, 101, 88 S. Ct. 1942, 1953, 20 L.Ed. 947. Injury is alleged with particularity, so there is not present the abstract question raising problems under Art. III of the Constitution. The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, 'the whole community,' 114 Cong. Rec. 2706, and as Senator Mondale who drafted §810(a) said, the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living quarters.' 114 Cong. Rec. 3472."

Id. at 211, 93 S. Ct. at 368.

Similarly, here, injury is alleged with particularity. Metro-Act members living in Penfield are harmed by the exclusion of minority persons from Penfield in that they suffer the loss of important benefits from interracial associations. The Second Circuit, however, denied standing and distinguished *Trafficante* on the ground that the decision there "focused on the peculiarities of one piece of legislation." *Warth v. Seldin*, supra at 1194 (A. 964)

The fact that *Trafficante* focused[25] on the Civil Rights Act of 1968 is not determinative of whether plaintiffs there — or, Metro-Act members here — alleged such injury in fact as to assure that the dispute will be presented in an adversary context.

---

[25]See, *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 n.8, 93 S.Ct. 364, 367 n.8 (1972)

Indeed, a congressional enactment alone cannot confer standing upon persons who have not alleged any actual or threatened harm. See *Schlesinger v. Reservists Committee to Stop the War*, ——U.S.——,—— n.14, 94 S.Ct. 2925, 2933 n.14 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 493 n.2, 94 S. Ct. 669, 675 n.2 (1974); *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3, 92 S. Ct. 1361, 1365 n.3 (1972). This Court noted in *O'Shea v. Littleton*, supra at 493 n.2, 94 S. Ct. at 669 n.2, that

> "[Congressional enactments] do not purport to bestow the right to sue in the absence of any indication that invasion of the statutory right has occurred or is likely to occur. . . . Perforce, the constitutional requirement of an actual case or controversy remains [Plaintiff] still must show actual or threatened injury of some kind to establish standing in the constitutional sense."

Accordingly, the relevance of *Trafficante* to the instant action lies not in its focus on the Civil Rights Act of 1968, but rather in its determination that the Article III requirement of injury in fact is satisfied by allegations that parties are being denied important benefits from interracial associations.[26]

Metro-Act members have been denied the social benefits from living in an integrated community. It is alleged that Penfield's discriminatory zoning ordinance and defendants' implementation of that law have the effect of excluding minority persons from residing in the Town of Penfield. (A. 15) Indeed, in 1970, only 60 of Penfield's 23,782 residents were black. (A. 470) As a result, Metro-Act members who reside in Penfield daily suffer the loss of benefits from interracial associations. In these circumstances, the organization may represent its injured

---

[26]The Court's focus on the Civil Rights Act of 1968 is relevant only to the question whether the Court should exercise judicial self-restraint. Besides the Article III jurisdictional question, "problems of standing ... involve a 'rule of self-restraint.'" *Association of Data Processing Services Organizations v. Camp*, 397 U.S. 150, 154, 90 S.Ct. 827, 830 (1970). A Congressional enactment which confers standing obviates the Court's need to consider whether judicial self-restraint is required. Id.

members in this proceeding for judicial review. "[I]n terms of Article III limitations on federal court jurisdiction ... the dispute sought to be adjudicated [here] will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast v. Cohen*, 392 U.S. 83, 101, 88 S. Ct. 1942, 1953 (1968).

Moreover, Metro-Act contends that policy considerations which underlie the standing doctrine[27] require judicial review of defendants' zoning ordinance and practices. Whether the policy considerations are examined in terms of "zone of interest"[28] or "nexus",[29] it is clear that the test is satisfied here. Certainly, the interest which Metro-Act seeks to protect — the right of its members to receive the benefits of interracial associations — is within the zone of interests sought to be protected by the First Amendment. "While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedom of speech, assembly, and petition. (citations omitted)" *Healy v. James*, 408 U.S. 169, 181, 92 S. Ct. 2338, 2346 (1972).

Additionally, there is a direct nexus between the harm to Metro-Act members and defendants' discriminatory and exclusionary practices and policies.[30] As this Court recently stated

---

[27]See *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154, 90 S.Ct. 827, 830 (1970); *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952 (1968); *Barrows v. Jackson*, 346 U.S. 249, 999, 73 S.Ct. 1031, 1034 (1952). But see *Association of Data Processing Service Organizations, Inc. v. Camp*, supra at 167, 90 S.Ct. at 830 (Mr. Justice Brennan and Mr. Justice White, concurring and dissenting)

[28]*Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 90 S.Ct. 827 (1970).

[29]*Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942 (1968).

[30]*Linda S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146 (1973) is readily distinguishable from the instant action. There, as here, plaintiff suffered injury in fact. However, there, unlike here, plaintiff failed to establish that her injury resulted from enforcement of the challenged statute. Id. at 618, 93 S.Ct. at 1146.

in an analogous context, "It should be obvious that the exclusion of any person or group — all-Negro, all-oriental, or all-white — from public facilities infringes upon the freedom of the individual to associate as he chooses. . . . Because its exercise is so largely dependent on the right to own or use property . . . any denial of access to public facilities must withstand close scrutiny and be carefully circumscribed." *Gilmore v. City of Montgomery*, ——U.S.——, ——, 94 S.Ct. 2416, 2427 (1974).

Finally, Metro-Act contends that, since its members have been injured in fact, the organization may proceed as a private attorney-general and "litigate the issues of the public interest in this case." *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 154, 90 S. Ct. 827, 830 (1970). Accord, *Sierra Club v. Morton*, 405 U.S. 727, 737, 92 S. Ct. 1361, 1367 (1972). *Scripps-Howard Radio v. Federal Communications Commission*, 316 U.S. 4, 62 S. Ct. 875 (1942). Manifestly, the public has an interest in the eradication of racially discriminatory and exclusionary zoning practices and policies. The District Court's conclusion in *Crow v. Brown*, 332 F.Supp. 382, 390 (N.D. Ga. 1971), aff'd 457 F.2d 788 (5th Cir. 1972), is certainly applicable here:

> "by legislative act and judicial decision, this nation is committed to a policy of balanced and dispersed public housing. . . . Among other things, this reflects the recognition that in the area of public housing local authorities can no more confine low income blacks to a compacted and concentrated area than they can confine their children to segregated schools." (citations omitted) (footnotes omitted).

2. *Housing Council has standing to represent those members who are injured by defendants' zoning practices and policies.*

Housing Council is a nonprofit corporation organized for the purpose of receiving and administering funds of real and personal property, "and using and applying the whole or any part

of the income and principal thereof for the charitable purpose of combating community deterioration [and] eliminating racial and economic prejudice and discrimination in housing. . . ." (A. 172) The organization is specifically designed to undertake activities to increase "the supply of decent, safe and sanitary housing in a quality living environment throughout the county and Metropolitan Rochester area for all persons, especially those with low and moderate income." (A. 172)

The Housing Council's seventy-one members include at least seventeen groups which have been, or will be, involved directly in the development of low and moderate income housing. (A. 174) Indeed, at least one such group, Penfield Better Homes Corporation, submitted a proposal for a multi-racial low and moderate income housing project in the Town of Penfield but was unable to obtain defendants' approval of this project. (A. 629-31).

The Housing Council's membership also includes governmental agencies which have a direct interest in the provision of low and moderate income housing in the Rochester metropolitan area. (A. 174-75) Additionally, the large majority of the charter member groups have memberships which are comprised primarily of low and moderate income minority persons who are excluded from residing in Penfield. (A. 175)

Plaintiff-Housing Council contends that its members have been injured in fact by the Town's discriminatory and exclusionary zoning ordinance and defendants' implementation of that law. Those members who are engaged in the development of low and moderate income housing, but who are frustrated by defendants' practices and policies, are suffering economic injury. Manifestly, the loss of profits is sufficient injury to satisfy the case or controversy requirement and assure concrete adverseness. See *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 151, 90 S. Ct. 827, 829 (1970)[31] Similarly, the low income minority persons who

[31] See also 47-50, infra.

are excluded from living in Penfield because of their race and income level are suffering injury in fact. The daily hardships which these persons are forced to endure as a result of their confinement to the decaying inner city is concrete harm flowing directly from defendants' practices and policies.[32]

Notwithstanding the injury to Housing Council's members the Second Circuit held that the organization does not have standing to represent its members in this proceeding. *Warth v. Seldin*, supra at 1194 (A.966)[33] In so doing, the Second Circuit ignored the mandate of this Court in *Sierra Club v. Morton*, supra at 739, 92 S.Ct. at 1368:

> "It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. NAACP v. Button, 371 U.S. 415, 428, 83 S.Ct. 328, 335. 9 L.Ed. 2d 405."

Accordingly, the proper inquiry is whether Housing Council's members satisfy the constitutional and nonconstitutional standing requirements. Here, there can be little doubt but that

---

[32]See discussion, supra at 27.

[33]The Second Circuit doubted that an organization has "standing" to represent its members in cases brought under the Civil Rights Act. *Warth v. Seldin*, 495 F.2d 1187, 1194 (1974). But see *Park View Heights Corporation v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972) and cases cited therein. The court apparently was uncertain whether an organization is a "person" or "citizen" within the meaning of the civil rights statutes, 42 U.S.C. §§1981-1983.

Plaintiffs submit that the court confused two separate issues. Whether an organization is a person or citizen within the context of those statutory provisions is a question which relates solely to whether plaintiffs have stated a proper claim for relief. That issue has no relationship whatsoever to the standing issues here: (1) Have the organizations or their members been injured in fact? (2) Is the interest they seek to protect arguably within the zone of interests protected by the statute? *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827 (1970). The standing issue, as discussed in *Data Processing*, is separate and distinct from the question whether the injured party has stated a proper claim for relief under a specific statutory or constitutional provision. See *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952 (1968).

the Council's members are suffering such injury as to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends. . . ." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703 (1962). Moreover, the "interest sought to be protected is arguably within the zone of interests to be protected" by the statutory and constitutional guarantees here in question. *Association of Data Processing Service Organizations, Inc. v. Camp*, supra at 153, 90 S.Ct. at 830. The right to equal housing opportunity is protected by the Constitution of the United States and by the Civil Rights Acts, 42 U.S.C. §§1981-1983. See, e.g., *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 437, 93 S.Ct. 1090 (1973); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S.Ct. 400 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186 (1968); *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16 (1917). As this Court stated in its discussion of the constitutionality of the Civil Rights Act of 1866, 42 U.S.C. §1982,

> "Negro citizens, North and South who saw in the Thirteenth Amendment a promise of freedom - freedom to go and come at pleasure and to buy and sell when they please - would be left with a mere paper guarantee if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep."

Jones v. Alfred H. Mayer Co., supra at 443, 88 S.Ct. at 2205.

In these circumstances, the Housing Council has standing to represent its injured members in this proceeding for judicial review of defendants' zoning practices and policies.

3. *Rochester Home Builders Association has standing to represent its members who are suffering economic injury as a result of defendants' racially discriminatory and exclusionary zoning practices and policies.*

The Rochester Home Builders Association is a nonprofit trade association representative of persons and firms engaged in construction and development of residential housing in the Rochester metropolitan area, including the Town of Penfield. (A.145-46) During the past fifteen years, members of the Association have constructed over eighty percent of the housing units in the County of Monroe and the Town of Penfield. (A.147)

The Home Builders request for permission to intervene in the action was denied by the District Court and the Second Circuit affirmed solely on the ground that the Association lacks standing. The court stated that "Rochester Home Builders has not tied its claim of standing to specific acts of appellees which have affected its members." *Warth v. Seldin*, supra at 1195. (A.966, 967)

Once again, the Second Circuit ignored the material allegations which must be accepted as admitted by defendants. See, e.g., *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S.Ct. 1843, 1849 (1969). Those allegations reveal that defendants

> "A. 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 plan, policy, and/or scheme, heretofore referred to; and
>
> "B. Have failed to amend, modify or alter or waive the provisions of said ordinance, including amending, waiving, altering and/or modifying the provisions of the zoning map, the requirements pertaining to setback, minimum lot size, population density, use density, floor area, utilities, traffic flow, and other requirements, so as

> to effect and propagate the exclusionary and discriminatory policy, plan or scheme hereinabove and hereafter referred to; and
>
> "C. Refused to grant necessary tax abatement or otherwise failed as duly constituted legislative and administrative bodies, and through their agents and employees to cooperate with and assist and accommodate applications by Plaintiff's members and others for construction of low and moderate income single family and multiple unit housing in the Town of Penfield." (A.154-55)

Additionally, it is specifically alleged that defendants' practices and policies have "(a) prevented plaintiff's members from development, sale, and/or rental of housing to all those members of the metropolitan Rochester area who might require housing and (b) deprived plaintiff of substantial business opportunities and profits." (A.156) Indeed, the Association claims that its members have suffered damages in the sum of Seven Hundred and Fifty Thousand Dollars ($750,000) as a result of Penfield's zoning ordinance and defendants' implementation of that law. (A.159)

The Home Builders Association has alleged that its members are suffering concrete, economic injury flowing directly from defendants' zoning practices and policies. It is clear that such economic harm confers a personal stake in the outcome and assures that the issues will be presented in an adversary context, as required by Article III of the Constitution of the United States. See, e.g., *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832 (1970); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827 (1970); *Hardin v. Kentucky Utilities Company*, 390 U.S. 1, 88 S.Ct. 651 (1968). Since the Association has established that its members are injured, it may properly represent these members in this action for review of Penfield's zoning ordinance and defendants' practices. See *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368 (1972); *American Motor Freight Traffic Association v.*

United States, 372 U.S. 246, 247, 83 S.Ct. 688, 689 (1963) (trade association has standing to represent its injured members in a proceeding for judicial review).[34]

Equally clear is the fact that the Association may act as a private attorney general and assert the public interest in support of its claim. The theory that a private litigant may argue the public interest "is not uncommon in modern legislative programs. . . ." *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205, 211, 93 S.Ct. 364, 367 (1972) (citations omitted). The concept originated in *Scripps-Howard Radio v. Federal Communications Commission*, 316 U.S. 4, 62 S.Ct. 875 (1942). There, a competitor radio station challenged an FCC order which allowed a nearby station to change its frequency and increase its power. Id. at 5, 62 S.Ct. at 877. In reviewing the claim, the Court permitted the competitor to assert that the order did not serve the public interest. This Court recently explained that *Scripps-Howard* established a dual proposition: (1) the fact of economic injury gives a party standing to involve judicial review; and (2) once review is properly invoked, that party may argue the public interest in support of its claim. *Sierra Club v. Morton*, supra at 737, 92 S.Ct. at 1362.

Accordingly, the Home Builders Association contends that by virtue of the economic injury to the Association's members, it has standing to request review of Penfield's zoning ordinance and defendants' zoning practices. As the Eighth Circuit observed in *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1212 (1972):

> "It is as important to protect the right of sponsors and developers to be free from unconstitutional interferences in planning developing, and building an integrated

---

[34]The necessity of permitting the Association to represent its members is especially apparent in view of the threats which Penfield officials have made against individual members. (A. 158-59)

housing project, as it is to protect the rights of potential tenants of such projects."

Furthermore, since judicial review is properly invoked, the Association may assert the public interest and seek to vindicate the national commitment to equal housing opportunity. To hold otherwise would frustrate the congressionally mandated, and judicially enforceable, guarantee that members of minority groups have the "freedom to buy whatever a white man can buy [and] the right to live wherever a white man can live." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443, 88 S.Ct. 2180, 2205 (1968).

CONCLUSION

Petitioners, here, are seeking to invoke the federal court's power to review racially discriminatory and exclusionary zoning practices and policies. They urge that the standing doctrine in this civil rights action should be construed at least as broadly as it has been interpreted in other areas of the law. To hold otherwise would impede the courts in performance of "the most important single task to which American law must address itself, . . . the task of eradicating racism. . . . [I]f justice is the business of law, then, easily and by far, the first item on our law's agenda is and always ought to have been the use of every resource and technique of the law to deal with racism."*

Accordingly, the Court should hold that petitioners herein have standing to challenge Penfield's zoning ordinance and defendants' implementation of that law. The judgment of the

*Black, The Supreme Court 1966 Term, Forward: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69-70 (1967)

Second Circuit should be reversed and the case remanded for further proceedings.

Respectfully submitted,

EMMELYN LOGAN-BALDWIN, ESQ.
510 Powers Building
Rochester, New York 14614
Tel: (716) 232-2792

DAAN BRAVEMAN, ESQ.
Monroe County Legal Assistance Corporation — Greater Upstate Law Project
80 West Main Street
Rochester, New York 14614
Tel: (716) 454-6500

SANFORD LIEBSCHUTZ, ESQ.
Liebschutz, Rosenbloom & Samloff
101 Powers Building
Rochester, New York 14614

MICHAEL NELSON, ESQ.
20 Weldon Street
Rochester, New York 14611

Attorneys for Petitioners

On the brief:
Daan Braveman, Esq.

Dated: November 27, 1974