TABLE OF CONTENTS

Table of Citations

Page

In The

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2024

ROBERT WARTH, *et al.*,

Petitioners,

vs.

IRA SELDIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS

Question Presented

The only question before this Court is whether the various individual and corporate petitioners have standing to challenge, on Constitutional and statutory theories, the zoning ordinance of the Town of Penfield, New York, and fifteen years' administration of that ordinance.

Statement of the Case

This case presents a challenge, on constitutional and federal statutory grounds, to the zoning ordinance, and its ad-

ministration, of the Town of Penfield, New York, which is a town located in Monroe County outside the City of Rochester, New York. (A. 13-14).[1] The defendants in the district court, respondents here, are the Town of Penfield and the individuals who comprise its zoning board, its planning board, and its town board. (A. 10-13).

The plaintiffs in the district court, all of whom are petitioners in this Court, were (1) low-income minority individuals (petitioners Ortiz, Broadnax, Reyes, and Sinkler) who reside outside the Town of Penfield and who contend that they have been excluded from Penfield by its zoning ordinance and its administration of the zoning ordinance; (2) real property owners and taxpayers of the City of Rochester (petitioners Vinkey, Reichert, Warth, Harris, and Ortiz) who contend that the real property taxes they must pay to the City of Rochester are increased because of Penfield's zoning ordinance and its administration of the zoning ordinance; and (3) petitioner Metro-Act of Rochester, Inc. ("Metro-Act"), a social-action corporation active in the Rochester metropolitan area.

The original plaintiffs moved (A. 165-69) for an order making petitioner Housing Council in the Monroe County Area, Inc. ("Housing Council") an additional party plaintiff. Housing Council is a corporation composed of governmental agencies and private organizations whose purpose is to study, coordinate and assist housing development in the Rochester metropolitan area.

Additionally, petitioner Rochester Home Builders Association, Inc. ("Home Builders") moved (A. 137-38) for an order allowing it to intervene. Home Builders is a trade association whose members are active in the home construction industry in the Rochester metropolitan area. (A. 145-46).

---

[1] Numbers preceded by "A" refer to pages in the Appendix.

Respondents, defendants below, moved (A. 120-23): under Fed. R. Civ. P. 12(b) (1), for an order dismissing the complaint on the ground that none of the plaintiffs had standing; under Fed. R. Civ. P. 12(b) (6), for an order dismissing the complaint on the ground that it failed to state a claim; in the alternative, under Fed. R. Civ. P. 12(e), for an order for a more definite statement; and, under Fed. R. Civ. P. 23(c) (1), for an order that the case may not proceed as a class action. Additionally, respondents opposed plaintiffs' motion to add Housing Council as a party plaintiff and Home Builders' motion to intervene.

The District Court for the Western District of New York, in an unpublished opinion (A. 948-51), held (1) that the original plaintiffs lacked standing, (2) that the complaint failed to state a claim, (3) that the action should not proceed as a class action, (4) that Housing Council lacked standing, (5) that Home Builders lacked standing, and (6) that, in the exercise of discretion, Home Builders should not be permitted to intervene. Accordingly, it denied plaintiffs' motion to add Housing Council, denied Home Builders' motion to intervene, and granted respondents' motion to dismiss.

On appeal by all the original plaintiffs, Housing Council, and Home Builders, the Court of Appeals for the Second Circuit affirmed, reaching only the ground that all appellants lack standing. *Warth v. Seldin*, 495 F.2d 1187 (2d Cir. 1974).

On October 15, 1974, this Court granted certiorari to review the questions of standing. ——U.S.——, 95 S. Ct. 40.

The above outline of who the petitioners are should be supplemented with an indication of who they are not. None resides in Penfield. None owns any real estate in Penfield. None owns any interest in real estate in Penfield. None proposes to acquire any real estate in Penfield. None pays any real estate taxes to Penfield. None is a builder. None is a developer. None proposes to construct any housing in Penfield. None has ever applied to any of respondents for a variance from Penfield's

zoning ordinance. None has ever applied to any of respondents for a building permit in Penfield. None has ever sought an amendment to the zoning ordinance.

It is respondents' position in this Court that none of the petitioners has standing to sue.

Summary of Argument

A. Low-income minority petitioners lack standing under the various tests announced by this Court. Of these the practical, litigation-oriented test of *Baker v. Carr*, 369 U.S. 186 (1962), which looks from the vantage point of the complaint to the efficacy of the trial and its outcome, seems the most useful here. These petitioners do not have "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." 369 U.S. at 204. Especially where as here the legal ground of the case is constitutional, it is essential that a plaintiff be prepared to get down to cases, to bring facts to the law, and that the Court scrutinize the complaint to assure that he is prepared to do so.

The petitioners here, in their complaint and lengthy motion papers, have alleged little more than information about their incomes, their dissatisfaction with their present residences and statistical information about housing in Penfield which they say they have seen. Allegations about anything any respondent did that actually affected any of them are wholly absent, and allegations about their own efforts to locate housing in Penfield are perfunctory and conclusory: in essence, they say no more than that "I looked around and found nothing."

These petitioners' allegations do not establish direct injury as a result of the enforcement of Penfield's zoning ordinance, *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923); or injury in fact, *Association of Data Processing Service Organizations,*

Inc. v. Camp, 397 U.S. 150, 152 (1970); or that there is any nexus between their residential situations and zoning in Penfield, *Flast v. Cohen*, 392 U.S. 83 (1968); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973).

Neither governmental action complained of nor injury is alleged with particularity. What is alleged amounts to no more than an inference of injury by virtue of an asserted tendency of the ordinance. This is not enough. *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Linda R.S. v. Richard D., supra.*

In the area of "open housing" litigation, the standards of concreteness and specificity are no less prerequisites of standing. Without exception recognized plaintiffs have been persons with an interest in a particular property or particular project, a legal interest or a real and definite factual expectation. See citations and discussions at pages 18-25 below.

Particularly in a case such as this one in which constitutional review of a complicated and highly local legislative mechanism is sought, plaintiffs must, especially in light of the practical considerations of *Baker v. Carr*, *supra*, be able to give the lawsuit focus and body and to show the Court the challenged legislative mechanism in operation, manifest in their own cases. These petitioners are not such plaintiffs.

B. Taxpayer petitioners lack standing under *Doremus v. Board of Education*, 342 U.S. 429 (1952), under which standing requires direct financial injury to the taxpayer as a result of a measurable appropriation or disbursement by the government to which he is a taxpayer. The *Doremus* requirements of directness and measurability were borrowed from *Massachusetts v. Mellon*, 262 U.S. 447 (1923), which was made subject to a single exception by *Flast v. Cohen*, 392 U.S. 83 (1968). *Flast*, however, expressly re-affirmed *Doremus* as the test for non-federal taxpayer standing.

The taxpayer petitioners here do not attack a taxing or spending measure and make no challenge at all to any action or program of the government to which they are taxpayers, the City of Rochester. Because of these deficiencies, they cannot allege any measurable pocketbook injury with any kind of direct causal connection to the zoning ordinance attacked.

C. Organizational petitioners lack standing because none has anything more than an interest in a problem. *Sierra Club v. Morton*, 405 U.S. 727 (1972). The only organizational petitioner that seeks standing in its own right is petitioner Metro-Act of Rochester, Inc. ("Metro-Act"), which claims standing as a taxpayer of the City of Rochester. As in the case of the individual taxpayer petitioners, such status is insufficient.

Each organizational petitioner seeks derivative standing to substitute for its members, although there are no "special circumstances" justifying such substitution, as there were in, for example, *National Motor Freight Traffic Ass'n., Inc. v. United States*, 372 U.S. 246 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); or *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

Petitioner Metro-Act seeks derivative standing because of its members who are City of Rochester taxpayers, but this fails for the same reason the individual taxpayer petitioners fail. Metro-Act also seeks derivative standing because of its low-income minority members who might want to move to Penfield, but this fails for the same reason the individual low-income minority petitioners fail. Metro-Act also seeks derivative standing because of its members who reside in Penfield. But that claim was not made in the complaint. More importantly, Metro-Act has not demonstrated how any of its Penfield members has been injured by any administrative action or policy of any of respondents; there is no allegation, for example, that any Metro-Act Penfield member has ever applied for a zoning variance, zoning amendment, building permit, or special permit.

Petitioner Housing Council in the Monroe County Area, Inc. ("Housing Council") seeks only derivative standing. One of its members, Metro-Act, lacks standing in its own right and cannot give Housing Council derivative standing. Its members who are governmental agencies can give it no standing because there is no showing that any has anything other than an interest in a problem. Its members who are organizations that are themselves comprised of low-income minority members cannot give double derivative standing for the same reason the individual low-income minority petitioners lack standing. Penfield Better Homes Corporation cannot give Housing Council derivative standing because it cannot pursue its own claims in its own right.

Petitioner Rochester Home Builders Association, Inc. ("Home Builders"), seeks only derivative standing. But it makes no showing that any of its members are prepared, or even willing, to construct low-income housing in Penfield or that any of them has ever tried in the past.

Argument

Each of the various individual and corporate petitioners lacks standing to challenge, on various constitutional and statutory theories, the zoning ordinance of the Town of Penfield, New York, and fifteen years' administration of that ordinance.

We are well aware that standing is the type of inquiry that must largely be made on a case by case basis. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970). General principles from and specific textual passages of specific cases may illustrate the standing issues in a particular case, but the standing question in that particular case must focus on its particular plaintiffs. *Flast v. Cohen*, 392 U.S. 83, 99 (1968). No plaintiff has ever been granted standing to sue who lacked as many of the indicia of plaintiffhood as do these petitioners.

A. *Low-Income Minority Individuals*

Petitioners Ortiz, Broadnax, Reyes and Sinkler lack standing under the tests announced by this Court.

Of these tests the one in *Baker v. Carr*, 369 U.S. 186 (1962), seems to us the most useful for the purposes of this case. Both that case and this one involved state or local legislation measured against the Fourteenth Amendment. Unlike *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973), and *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), for example, the standing issue in *Baker v. Carr* did not arise out of a federal agency context in which specific congressional legislation could be invoked as a guide; nor does it here. The standing issue in *Baker v. Carr* was not influenced, as it seems to have been in *Flast v. Cohen*, 392 U.S. 83 (1968), by the presence in the case of issues on the merits arising from the Establishment Clause of the First Amendment. The same is true in this case.

In ruling on the standing question in *Baker v. Carr*, the Court looked ahead from the vantage point of the complaint to the trial, and beyond the trial to the outcome of the litigation. The gist of the question of standing, the Court said, is whether the plaintiff has "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." 369 U.S. at 204.

The idea is not simply to itemize the plaintiff's characteristics, isolated from the practical considerations of litigation. Standing, under *Baker v. Carr* at least, does not emerge from a recitation of details that describe and identify the plaintiff. It is not enough to allege, as the plaintiffs have done in the case now before the Court, that in effect, "We are real people with real problems." That much is true of all people. See *Schlesinger v. Reservists Committee to Stop the War*, ——U.S.——, 94 S. Ct. 2925 (1974).

Baker v. Carr formulates a practical test of standing. Its test does not ask theoretical questions. It asks what this plaintiff, personally, has to gain from this lawsuit. It asks whether, at a trial, this plaintiff will bring facts to the law. It asks not only whether there are differences between the parties but whether there is a "concrete adverseness" which promises at a trial to cause unparticularized constitutional concepts to coalesce into a factual precipitate.

What is a bare jurisdictional minimum in terms of these considerations, that is, what crystalizes the plaintiff's differences with the defendants into a case or controversy within the meaning of Article III, and what in terms of these considerations is a matter rather of judicial wisdom about the probable efficacy of a trial, is disputable. But, perhaps because of the greater danger of abstractness and the more far-reaching effects of the decision when the legal ground of the lawsuit is constitutional rather than statutory, the Court in *Baker v. Carr* referred the importance of a personal stake in the outcome, of concrete adverseness and of a sharp presentation of the issues to the courts' need for "illumination of difficult constitutional questions."[2] When the law to be applied is the Constitution, more than ever it is essential that a plaintiff get down to cases and that the Court scrutinize the complaint to assure that he is really prepared to do so.

These petitioners are not.

Of petitioner Andelino Ortiz the complaint tells us only that he is a resident of Wayland, New York and the owner of real

---

[2]The recognition of the necessity in constitutional litigation of a personal stake in the outcome of the lawsuit was not new with *Baker v. Carr*. This Court has long held that it is insufficient for a would-be plaintiff to show "merely that he suffers in some indefinite way in common with people generally," *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923), or that he merely seeks "to require that the Government be administered according to law and that the public moneys be not wasted," *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922). Rather, he must allege "a direct injury," *Ex parte Levitt*, 302 U.S. 633, 634 (1937), "an injury peculiar to himself," *Tyler v. Judges*, 179 U.S. 405, 406 (1900).

property in the City of Rochester, New York; that he is of Spanish/Puerto Rican extraction; that he was at one time employed in the Town of Penfield; and that he "has been excluded from living near his employment as he would desire by virtue of" the zoning ordinance and administration of the Town of Penfield. (A. 6-7).

Mr. Ortiz's 39-page affidavit (A. 362-401), submitted in opposition to respondents' motion to dismiss in the district court, does not reveal what he stands to gain from this litigation or what concrete differences he has with any of the respondents. It gives some additional facts about his background — his age, his family, his earnings at the time the lawsuit was commenced. (A. 364-67). It says that he was no longer working in the Town of Penfield at the time of the original motion (A. 366) and was unemployed as of that time. (A. 367-68). It expresses dissatisfaction with his residences since 1966. (A. 365, 368-69, 372-73). It says that he owns a house near Wayland, New York, which he purchased in 1968 for $9,500.00 (A. 372) and that the house he owns in Rochester has been converted into rental property. (A. 373-74). It discusses his residential expenses (A. 374-75) and his commuting expenses when he was working in Penfield (A. 376-77).

The balance of the affidavit incorporates some statistical information on housing costs compiled by petitioner Metro-Act (A. 370-72) and recites at considerable length the reasons why Mr. Ortiz regards the Town of Penfield as a more desirable place to live than the Springwater/Wayland area where he presently resides (A. 377-400). These include better schools (A. 377-80, 383-91), better municipal services (A. 381, 395-98), better recreational facilities and services (A. 381-83, 391-95), better shopping opportunities (A. 398-99), and better summer employment possibilities for his children (A. 399-400). This comparative information, Mr. Ortiz says, has been called to his attention by petitioner Metro-Act. (A. 377, 383).

Mr. Ortiz speaks repeatedly of his being excluded from Penfield, but this assertion rests entirely on two things: (1) statistical information about the cost of housing in Penfield, which was compiled by Metro-Act and which Mr. Ortiz says he has seen (A. 371-72) and (2) a recitation of Mr. Ortiz's efforts to find housing in Penfield.

The whole of this recitation of efforts is as follows:

> Since my job at that time and continuing until May of 1972 was in the Town of Penfield, *I initiated inquiries* about renting and/or buying a home in the Town of Penfield. However, because of my income being low or moderate, I found that there were no apartment units large enough to house my family of wife and seven children, nor were there apartment units that were available reasonably priced so that I could even afford to rent the largest apartment unit. I have been *reading ads* in the Rochester metropolitan newspapers since coming to Rochester in 1966 and during that time and to the present time, I have not located either rental housing or housing to buy in Penfield. (A. 370) (emphasis added)

These are rather casual efforts, initiating inquiries and reading ads. The initiative exerted by the other individual petitioners is similarly scant.

Petitioner Clara Broadnax, in her affidavit of 17 pages (A. 404-21), says that she "bought newspapers and read ads and walked to look for apartments until I found the place where I now reside. I found that there was virtually no choice of housing in the Rochester area." (A. 407). In connection with the efforts she made she does not mention Penfield.

Petitioner Angela Reyes, in her affidavit of 13 pages (A. 422-34), says that moving into her present house in the City of Rochester

> was the culmination of my husband and my shopping around the entire Rochester area to locate a house which we could afford to buy. We began this search by con-

> tacting a real estate broker and finally securing the help and interest of one real estate broker. . . . [O]ur investigation for housing included the Rochester bedroom communities of Webster, Irondequoit, Penfield and Perinton. Our search over a period of two years led us to no possible purchase in any of these towns. (A. 427-28).

She says that there was in Penfield "no possibility of finding a house costing less than $35,000.00." (A. 429). She says that she has two small sons (A. 424) and has a disposable income for housing purposes of approximately $231.00 per month (A. 428).

Yet her allegations about the housing situation in Penfield are unexplained, undocumented and conclusory. She does not say what efforts she or anyone on her behalf ever actually made to find housing in Penfield. She does not say what properties, if any, she actually looked at. She does not say what she has looked for — a house to own or rent, a duplex, an apartment, a mobile home, or whether the scope of her "shopping around" was limited by personal preferences or by necessities. She does not say how she has determined the minimum costs of housing to which she swears or to what kinds of "house" the $35,000 figure applies. We do not know either what unexpressed refinements of meaning are contained in the phrases "no possible purchase" and "no possibility of finding."

Petitioner Rosa Sinkler, in her affidavit of 21 pages (A. 435-55), says that "there is just no housing to rent in the City of Rochester for a person of my low income." (A. 451). She says,

> In the past I have searched for alternate housing in the Rochester metropolitan area and I am continually alert to other possibilities for housing. . . . Realistically, after careful search for adequate housing in the Rochester metropolitan area over a six year period, I have found that a black person has no choice of housing in the Rochester metropolitan area. (A. 452).

She says, "For example, there are no apartments available in the Town of Penfield which a person of my income level can afford." (A. 452-53). "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." (A. 453)

None of the four makes any allegation about anything that any of the respondents actually did, any action they took or refused to take.

From none of the angles from which standing may be examined does it appear that any of these four persons has it. There is no nexus here between the petitioners' own situations and the governmental action of which they complain. *Flast v. Cohen*, 392 U.S. 83 (1968). There are no allegations which suggest any direct injury as a result of the enforcement of Penfield's ordinance. *Massachussetts v. Mellon*, 262 U.S. 447, 488 (1923). "[A]t least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973) (footnote omitted). A "party seeking review must *himself* have suffered an injury." *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (emphasis added). And the injury must be injury in fact. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152 (1970). Speculative or conjectural injury is not enough. *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974). There are in the some nine hundred pages of the record really no allegations, except of the most conclusory sort, of injury that happened to a petitioner because of something that a respondent did.

On the subject of the directness of injury and its causation, it is true that this Court has found standing when the injury was not highly "direct and perceptible," when the line of causation

was "attenuated." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973). But, aside from the difference here that papers warranting summary judgment on the standing issue were made available to the district court (*id.* at 689),[3] there was a definite starting point for the line of causation in *SCRAP*, a specific agency action. The petitioners did not challenge the whole of the Interstate Commerce Commission Act, as petitioners here have challenged the whole of the Penfield zoning ordinance, and 38 years' ad-

---

[3]Petitioners, relying on *Jenkins v. McKeithen*, 395 U.S. 411, 421, *rehearing denied*, 396 U.S. 869 (1969), argue that all their factual allegations, even if unsupported, must be accepted as true. Petitioners' position reaches too far. The record in this case, as printed in a two-volume Appendix, consists of 56 pages of complaint and proposed intervenor's complaint (A. 1-35, 144-63), 81 pages of Penfield's zoning ordinance (A. 36-116), a 10-page affidavit by respondents' counsel (A. 124-33), 15 pages of affidavits and an exhibit in support of petitioners' motions to add new parties (A. 139-43, 170-79), and 767 pages of affidavits and exhibits in opposition to respondents' motion to dismiss (A. 180-947), including an affidavit by each named plaintiff. This case is much different from cases such as *SCRAP*, where the Court has only the pleadings.

Such a record, with petitioners clearly having and taking every opportunity to put forth every fact in support of their position, is precisely the situation contemplated by Federal Rule of Civil Procedure 12(b)'s conversion of a Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment. *Carter v. Stanton*, 405 U.S. 669, 671 (1972). Petitioners had every opportunity to place in the record every fact they deemed relevant, and the court was free to consider their affidavits. Fed. R. Civ. P. 43(e). Although the district court did not indicate whether it treated respondents' motion as a Rule 56 motion, the court of appeals clearly relied on petitioners' affidavits.

Actually, Rule 12(b)'s conversion feature is technically inapplicable here. Since standing is necessary to jurisdiction, respondents' motion to dismiss for lack of standing was probably granted under Rule 12(b)(1), not under Rule 12(b)(6) (although the district court also dismissed the complaint for failure to state a claim, which had to be under Rule 12(b)(6)). In any event, the court was free to consider the affidavits under Rule 43(e).

We certainly acknowledge that many of petitioners' factual showings were, for purposes of the motions, uncontested below and may be so considered by this Court. But that concession does not extend to all of petitioners' conclusory "facts" when they are unsupported by anything in the record. For example, petitioners' mere use of phrases like "racial discrimination" and "injury in fact" and "exclusion" does not elevate such conclusions into "facts" where the record gives them no support. And a claim by a petitioner that he "searched" for housing in Penfield is really of little assistance to this Court in the absence of supporting details.

ministration of it by the Commission, as petitioners here have challenged 15 years' administration by respondents and their predecessors. (A. 17). Agency action was alleged with particularity in *SCRAP*, and so was injury. In the present case, not only is the line of causation not traced but the end points, government action and injury, are completely out of focus. By the standards of *Baker v. Carr*, with its view to a sharp presentation of the issues, the present case is readily distinguished from *SCRAP*.

These petitioners have tried to spell out injury in two ways. The factual descriptions in their affidavits dwell almost completely on the first of these: that they individually do not have very much money. But that situation is not a direct injury resulting from the enforcement of the Penfield zoning ordinance. The allegation of low income and certain of its attendant circumstances is being put to double service in the complaint and motion papers. Insofar as it recites the occasion for injury it could be an appropriate starting point, but it is nowhere causally connected to the respondents; it will therefore not suffice under existing cases, and the concept which underlies them, as injury in fact.

The petitioners also allege that, as a function of their low income, they are excluded from residing in Penfield because of the zoning ordinance and its administration. The injury under this theory is not poverty but exclusion on the basis of it: Penfield's zoning is such, petitioners say, that persons of low income are excluded from the Town and consigned to bad living conditions — shabby homes, high crime rates, poor schools. In the vastness of the record, however, the petitioners never get beyond this formula statement.

Injury of this kind, exclusion and consignment to bad neighborhoods, is not, as set forth in petitioners' papers, injury in fact; it is injury by supposition. The record is devoid of events. For purposes of standing, "injury or threat of injury must be

both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). Here the allegation of injury by exclusion is wholly by general assertion and inference. *Id.* at 497.

The complaint of these petitioners alleges that Town officials have failed to grant variances, building permits and special permits (A. 17), but their affidavits reveal that none of them has ever applied for any of these things. The complaint says that the respondents have failed to amend the zoning ordinance in the ways petitioners would have it amended (A. 19), but their affidavits show that none of these petitioners has engaged with any official or body of the Town over such a proposal, or in any manner whatever attempted to exert an influence over either the administrative or the political process in the Town of Penfield.

Far from having availed themselves of any local governmental procedures, none of these four took action of their own, so far as their papers reveal, which was calculated to locate housing in Penfield. There does not appear in the record any profound commitment to finding a home there or the kind of effort which reflects such a commitment. The richest allegation in the record is of a desultory "shopping around" leading to the conclusion "no possibility." (A. 427-29)

In its essence the complaint here is generally similar to the one described in *O'Shea v. Littleton*, *supra*, 414 U.S. 488, alleging that the respondents have engaged in and continue to engage in a pattern of conduct which deprives the plaintiffs of their constitutional rights. *Id.* at 495. But if that is the tendency of Penfield's zoning, one cannot tell it from anything these petitioners have done; they allege the tendency, but they have never tested it.

The absence of injury here means the absence of a personal stake in the outcome of the litigation. Officials of the Town have denied nothing to any of the petitioners which a judgment of the district court can provide them. If the worst allegations of the

complaint were true, moreover, and the district court ordered a redrawn zoning ordinance, it is far from clear that any of these individual petitioners would be affected by that judgment. Would petitioner Reyes, for example, be interested in "shopping around" at some future time? That is a matter of speculation, as it is a matter of speculation what she has looked for in the way of housing in the past and what she would be looking for in the future. What resulted might not suit her residential preferences or her needs. Penfield itself might not be suitable.

Even where the plaintiff's injury is real and personal, far more so than it is here, the nexus between the status asserted and the claim presented is "essential to assure that he is a proper and appropriate party to invoke federal judicial power." *Linda R.S. v. Richard D.*, *supra*, 410 U.S. at 618, quoting *Flast v. Cohen*, *supra*, 392 U.S. at 102. Even if petitioners were granted the relief requested, the prospect that a redrawn ordinance would in the future result in housing satisfactory to them wherein they would choose to take residence or be in a position to take residence can, at best, be termed only speculative. Cf. *Linda R.S. v. Richard D.*, *supra*, 410 U.S. at 618.

Linda R.S. did not claim injury by mere virtue of statutory tendency. She sued on behalf of herself and her minor daughter to have a Texas child support statute declared unconstitutional and to enjoin law enforcement officials from refusing to enforce it against fathers of illegitimate children. She was the mother of an illegitimate child, whose father was not supporting it. She had made application to the local district attorney, and he had refused to take action. Her adverseness to both father and public officials could hardly have been more concrete, or her economic injury more factual; and her personal stake in the outcome was the receipt of financial support by virtue of the coercive effect of criminal prosecution. But the hiatus between prosecution and support defeated her standing; her stake in the outcome was insufficient because of the intervening contingency.

In denying standing, the Court in the case of Linda R.S. noted "the unique context of a challenge to a criminal statute." 410 U.S. at 617. But there is one distinction that it would not be proper to draw between that case and this one: namely that, if the requested relief were granted, achievement of the desired effect would be out of Linda's hands, while it would be within the power of these petitioners to obtain it. There are no guarantees in either case of plaintiffs' achieving the desired objective, child support in the one case or a residence in Penfield in the other. If the statute's protection had been extended to her case, however, Linda would have had the continuing coercive power of it at her disposal. The particularity of her need and the extent of her past effort promised that she would use it — much more so than the alleged "shopping around" and reading of ads promises that the present petitioners will ever benefit from the new zoning ordinance they have requested. Her injury was a good deal less suppositious, and her stake in the outcome was certainly no more so, than that of these petitioners.

In *Linda R.S. v. Richard D.*, moreover, a sharpened presentation of the issues was most likely. Constitutional review of the Texas statute would have taken place in the context of concrete adversary relationships, and the challenged law could have been scrutinized in operation, manifested in her dilemma. Here a far more complicated legislative scheme with far more complicated enforcement mechanisms is challenged, and none of these petitioners can show a federal court its workings.

All of the so-called "open housing" cases preceding this one, both in this Court and in the lower courts, involved degrees of concreteness and specificity totally lacking in the present suit.

For example, *Buchanan v. Warley*, 245 U.S. 60 (1917), the first of the "open-housing" cases decided by this Court, was a case between the immediate parties to a contract for the sale of a specific parcel of land. The case involved only the right of a property owner to sell to whomever he wishes. 245 U.S. at 73.

Similarly, *Barrows v. Jackson*, 346 U.S. 249, *rehearing denied*, 346 U.S. 841 (1953), was an action by property owners for damages because of a breach of a racially restrictive covenant; judgment for plaintiff would have caused "a direct, pocketbook injury" to the seller who had breached the covenant. 346 U.S. at 256. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), involved a lease of a house and attendant rights to recreation facilities. The white owner-lessor clearly had standing to enforce his own right to lease his own house to whomever he wished, even though part of his argument would also enforce the rights of minority lessees. 396 U.S. at 237.

In *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), plaintiffs were tenants in a particular apartment complex alleging that their own owner-landlord injured plaintiffs by a racially discriminatory renting policy. The rights of non-tenants were not involved at all, except as evidence of the owner-landlord's discrimination.

The action against the owner-landlord brought under Section 810(d) of the Civil Rights Act of 1968, not pleaded in this case, charged it with discrimination against nonwhite applicants in numerous identified ways and sought injunctive relief. The action was brought only after complaints filed by the plaintiffs with the Secretary of Housing and Urban Development and the subsequent efforts of that federal agency and the appropriate state agency had failed to secure voluntary compliance with the Act. The plaintiffs therefore not only were tenants of the complex in which the alleged abuses were being practiced but had sharpened and ripened the dispute with their owner-landlord by exhausting the administrative remedies available to them. The Court concluded, moreover, that both congressional intention and federal agency construction established that tenants such as plaintiffs were aggrieved persons within the meaning of the Act and indeed that the primary method of enforcing the Act was complaints by such persons.

This same degree of concrete specificity has also been involved in all, or at least nearly all, of the lower court cases constituting the recent "open housing" field. Petitioners and their friends cite to several lower court opinions that they contend should lead this Court to grant standing here. Actually, all those cases demonstrate is that so-called "open housing" has been an active field of litigation in the federal courts throughout the country; undoubtedly the mere existence of some of petitioners and some of the *amici* is proof enough of wide social concern in the issue. But none of the cases relied on has extended the standing principles enunciated by this Court far enough to include these petitioners.

In *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972), one corporate plaintiff had purchased a specific 11.9-acre parcel of land and had advanced "seed money" for a specific project's planning. The other corporate plaintiff was acting as a sponsor of the project and held title to the land. The Department of Housing and Urban Development had issued a "feasibility letter," which was "tantamount to a contractual obligation to assist a project." 467 F.2d at 1211. Further, architectural plans had been completed and approved, mortgage financing had been secured, and legal and organizational financing had been completed. *Id.* Defendant City of Black Jack had been newly incorporated, after vocal citizen opposition to the project, and almost immediately adopted a zoning ordinance that would forbid construction of the project. The court held that both corporate plaintiffs had standing because of their direct economic investment and interest in this project. The corporate plaintiffs also had standing to assert the constitutional and statutory rights of individuals who desired to move into the project. At least partly because the individual plaintiffs' rights would be litigated, the court granted them standing to challenge the zoning ordinance. The court's main concern was whether their claims were "ripe;" because the developers were prepared to proceed with the project and were

stopped only by the defendants' actions, the court found the individuals' claims sufficiently "concrete" to be ripe for adjudication. 467 F.2d at 1215. But it was plaintiffs' focus on a specific project, not their abstract complaints as to their present poor housing, that opened the federal court's door to them:

> As near as one can determine from the pleadings in this case, the plaintiffs need only to resolve this zoning controversy to begin construction of the apartments. 467 F.2d at 1215.

That is exactly the reasoning of the court below when it properly distinguished the present petitioners:

> The focusing of the controversy on a particular project assures "concrete adverseness." The concrete possibility of obtaining new and better housing gives potential residents a personal stake in the outcome. The relief requested is not hypothetical. *Warth v. Seldin, supra*, 495 F.2d at 1192.

In *Crow v. Brown*, 457 F.2d 788 (5th Cir. 1972), *aff'g.* 332 F. Supp. 382 (N.D. Ga. 1971), plaintiffs and an intervenor owned specific parcels of land, zoned for apartments, on which they proposed to build low-income, federally sponsored public apartments. They had prepared "elaborate plans" for the construction, and "all building code and planning requirements" were satisfied. 332 F. Supp. at 384. They were joined by plaintiffs and intervenors on the waiting list of the local public housing authority for low-rent public housing who claimed they were being denied access to low-rent housing outside racially concentrated areas. Again, the court of appeals in the instant case properly distinguished *Crow v. Brown. Warth v. Seldin, supra*, 495 F.2d at 1191 n.6 at 1192.

In *Kennedy Park Homes Ass'n., Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971), one corporate plaintiff had a commitment to purchase a specific parcel of land from another corporate plaintiff. A third corporate plaintiff had been organized as a housing or mort-

gagor company. The Federal Housing Authority had initially approved federal financial assistance. A professional housing consultant and an engineer had been hired. All that the specific project lacked was one sewer form, which defendant mayor refused to sign. If plaintiffs could obtain that signature, "the consummation of the project could be effected." 436 F.2d at 112. They were joined by "individual home seekers," 436 F.2d at 109, who were not otherwise mentioned in the court's opinion. The court of appeals in the instant case quite properly distinguished *Kennedy Park*. *Warth v. Seldin, supra*, 495 F.2d at 1191 n.6.

In *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970), *aff'g.* 296 F. Supp. 266 (W.D. Okl. 1969), the corporate plaintiff proposed to build a privately sponsored low-income housing project on a particular site. It owned the land in question, had applied for a zoning amendment, had done everything necessary to build, and had prepared preliminary plans and specifications. 296 F. Supp. at 268. The other plaintiff was a potential renter of space in that very project. As was true with *Park View*, the court of appeals below quite properly distinguished the concrete issues in *Dailey* from the abstract hopes involved here. *Warth v. Seldin, supra*, 495 F.2d at 1192.

In *United Farmworkers of Fla. Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974), the corporate plaintiff had acquired an option to purchase a specific parcel of land, which was already zoned for multiple family dwellings. Zoning was not even at issue; the only issue was the municipality's refusal to allow the proposed project to tie into existing sewer and water lines. 493 F.2d at 805. The project had been given high funding priority by the Farmer's Home Administration. 493 F.2d at 804 n.7. Individual farmworkers were also plaintiffs, but they were mentioned by the court only in affirming the denial of class action status. 493 F.2d at 812.

In *Southern Alameda Spanish Speaking Org. v. City of Union City*, 424 F.2d 291 (9th Cir. 1970), the corporate plaintiff had acquired an option on a specific parcel of land and had had it rezoned for multi-family residential use; it had paid $6,000 for the option. 424 F.2d at 294 n.5. "The rights asserted are those of a landowner (SASSO) to be free from arbitrary restrictions on land use." 424 F.2d at 294. The other plaintiffs are not identified by the court. *SASSO* was properly distinguished by the court of appeals in the instant case. *Warth v. Seldin, supra*, 495 F.2d at 1191 n.6 at 1192.

In *Sisters of Providence v. City of Evanston*, 335 F. Supp. 396 (N.D. Ill. 1971), one corporate plaintiff owned a specific parcel of land and had contracted to sell it to another corporate plaintiff who proposed to build a housing development, the sale being contingent on the parcel's rezoning. Both had standing because of their interest in the property, and plaintiff buyer was also allowed to assert rights of those who would be denied housing if the parcel were not rezoned. 335 F. Supp. at 400-01. Individual plaintiffs also had standing as potential residents of the project in question, and class action status was granted. 335 F. Supp. at 401-02. Two neighborhood groups interested in low and moderate income housing were also granted standing, at least so they could attempt to demonstrate that there was a compelling need that they represent rights of persons not immediately before the court. 335 F. Supp. at 401. As to each plaintiff, however, the court indicated that standing was only conditional. 335 F. Supp. at 400. The court of appeals in the instant case properly distinguished *Sisters*. *Warth v. Seldin, supra*, 495 F.2d at 1191 n.6 at 1192.

In *Banks v. Perk*, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part & rev'd in part*, 473 F.2d 910 (6th Cir. 1973), plaintiffs were and represented tenants in and applicants for public housing. They sought (1) to enjoin the revocation of building permits for two specific public housing projects and (2) to enjoin the previous site selection process for future housing.

As to the first item, they were joined by the corporation who would develop and administer the two projects. 341 F. Supp. at 1177.[4] This case was affirmed in part and reversed in part without opinion. 473 F.2d 910.

Similarly, plaintiff in *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973), had entered into a contract to purchase a specific house to be built by a specific builder. And in *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980, *rehearing denied*, 397 U.S. 1059 (1970), a developer had prepared plans and specifications for a project on a particular site, which had already been rezoned.

Other types of "housing" cases offer no assistance to petitioners. Residents in and applicants for public housing have been held to have standing to challenge specific site selections, *e.g.*, *Blackshear Residents Org. v. Housing Auth.*, 347 F. Supp. 1138 (W.D. Tex. 1972); *Banks v. Perk*, *supra*; *Gautreaux v. Chicago Housing Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967), as do neighbors of a specific project, *e.g.*, *Shannon v. United States Dept. of Housing & Urb. Dev.*, 436 F.2d 809 (3d Cir. 1970). Individuals have been held to have standing to sue for admission to a public housing waiting list. *E.g.*, *King v. New Rochelle Municipal Housing Auth.*, 442 F.2d 646 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971); *Cole v. Housing Auth.*, 435 F.2d 807 (1st Cir. 1970). A housing authority itself has standing. *E.g.*, *Cuyahoga Metropolitan Housing Auth. v. City of Cleveland*, 342 F. Supp. 250 (N.D. Ohio 1972), *aff'd sub nom. Cuyahoga Metropolitan Housing Auth. v. Harmody*, 474 F.2d 1102 (6th Cir. 1973). And, of course, individual displacees or prospective displacees of an urban renewal project have standing. *E.g.*, *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d

---

[4] *Amicus* National Committee Against Discrimination in Housing is simply mistaken when it says that the builder of the proposed projects "is conspicuous by his absence." Quite the contrary; the developer was a defendant and cross-claimed against the other defendants on plaintiffs' Count I.

920 (2d Cir. 1968);[5] *Garrett v. City of Hamtramck*, 335 F. Supp. 16 (E.D. Mich. 1971), supplemental order, 357 F. Supp. 925 (1973).

The case which petitioners Ortiz, Broadnax, Reyes and Sinkler seek to litigate has none of the specificity, concreteness, and factuality which are the prerequisites of standing. This is so with respect to each of the components of every available standing test. In the cases which we discuss in this brief, it is true that one or another of these components is sometimes more blurred than is usual — injury in *Flast*, for example, and causation in *SCRAP*. In none of them, though, is there such a complete lack of focus as there is here; nothing stands out clear in the foreground in this case.

There is no identified provision or governmental action challenged. There is no occasion alleged on which the petitioners engaged with any officials in the Town. There is no housing project or apartment complex or piece of ground in the complaint. There is no interest in property or application for residence. There is no investment of money or effort by the petitioners. There is no remedy sought which, if granted, will affect them personally.

What the complaint offers is a zoning ordinance which the petitioners allege is exclusionary on its face and the allegation that they, as low income persons who reside in the general metropolitan area of which Penfield is a part, are victims of its exclusionary tendencies. They must stand or fall on that much.

Under the litigation-oriented test of *Baker v. Carr*, these four petitioners could hardly be less suited to provide the district court with sharp presentation of the issues at a trial. If personal stake in the outcome, concrete adverseness and the concept of injury in fact from *Data Processing* are measured with a view to

---

[5] *Norwalk* declined to decide whether the association plaintiffs had standing. 395 F.2d at 937-38.

that practical end, then this constitutional challenge to fifteen years' of Penfield zoning, with all its complexities and wealth of local problems, must fall for the lack of standing of the petitioners.

B. ***Taxpayers***

Petitioners Vinkey, Reichert, Warth, Harris, and Ortiz sue as "property owners and taxpayers of the City of Rochester," claiming that they

> are aggrieved in that they are paying a greater proportionate share of real estate taxes to the City of Rochester than are other residents of the Rochester metropolitan area to their respective towns because the City of Rochester has and must continue to permit more than its fair share of tax abated housing projects within its territorial limits to meet the low and moderate income housing requirements of the metropolitan Rochester area by reason of the exclusionary practices of [respondents]. (A. 5).

As such, they have no standing to bring this lawsuit.[6]

The lack of standing of these taxpayer petitioners can be expressed largely in terms of a single decision, *Doremus v. Board of Education*, 342 U.S. 429 (1952). For non-federal taxpayer standing, *Doremus* requires direct financial injury to the taxpayer as a result of a measurable appropriation or disbursement by the government to which he is a taxpayer. Moreover, although the law relating to federal taxpayer standing first announced in *Massachusetts v. Mellon*, 262 U.S. 447 (1923), has been made subject to an exception in *Flast v. Cohen*, 392 U.S. 83 (1968), the law of *Doremus* remains solid. Indeed, that law was expressly reaffirmed in *Flast v. Cohen*.

Doremus, in which taxpayers challenged Bible reading in school under the Establishment Clause, was distinguished by

---

[6]None of the four *amici curiae* supports the taxpayer petitioners.

the Court from *Everson v. Board of Education*, 330 U.S. 1 (1947), another Establishment Clause case involving a law that provided for the reimbursement of parents of parochial school children for their expenditures for their children's public transportation to and from school, on the ground that *Everson* involved a "measurable appropriation or disbursement ... occasioned solely by the activities complained of. This complaint does not." 342 U.S. at 434.

Doremus defined taxpayer's standing as follows:

> The taxpayer's action can meet this test, but only when it is a *good-faith pocketbook action. It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference.* If appellants established the requisite special injury necessary to a taxpayer's case or controversy, it would not matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation *but of possession of the requisite financial interest* that is, or is threatened to be, injured by the unconstitutional conduct. We find no such *direct and particular interest* here. 342 U.S. at 434-35 (emphasis added).

In order to acquire standing as a taxpayer under *Doremus*, then, one must suffer measurable pocketbook injury as a direct result of a particular appropriation or disbursement; both the wrong done and the injury suffered, in other words, must be financial.

The taxpayer petitioners in the instant case allege neither measurable appropriation nor direct injury. Their claim is not that the City of Rochester spends too much money but that the City of Rochester does not tax all its property owners uniformly; their only claim against the Town of Penfield is that Penfield spends no money at all for services they favor. Any injury they may have suffered at the hands of the City of Rochester's tax collectors is in no way connected with — let alone directly caused by — the existence or operation of Penfield's zoning

ordinance. Indeed, any causal connection between Penfield's zoning practices and the tax burden upon residents of the City of Rochester is at best speculative and involves a number of intervening contingencies over which respondents have no influence whatever — the zoning, housing, taxing and spending practices of the City of Rochester and of other surrounding municipalities. Any injury to these taxpayers is by definition indirect and incapable of calculation.

The *Doremus* standards of directness and measurability were borrowed from *Massachusetts v. Mellon, supra.* That case involved a federal taxpayer's challenge to the Maternity Act, which entailed an expenditure of federal monies with the object of reducing maternal and infant mortality; the complaint alleged that the Act exceeded Congress's legislative power. This Court held that the plaintiff lacked standing:

> The party who invokes the [nullification] power [of a federal court] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some *direct* injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. 262 U.S. at 488 (emphasis added).

The Court thought that the plaintiff's interest as a federal taxpayer was so remote and minuscule as not to give standing, but this was by contrast to the position of the local taxpayer: "The interest of a taxpayer of a municipality in the application of its monies is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate." 262 U.S. at 486, citing *Crampton v. Zabriskie*, 101 U.S. 601, 609 (1879).

The recognition given in *Massachusetts v. Mellon* to local taxpayers' potential standing does not, however, extend to the taxpayer petitioners here. The direct and immediate interest approved in that case was of a "taxpayer *of* a municipality in the application of *its* monies." 262 U.S. at 486. The City of

Rochester taxpayers in the present case are not "of" Penfield, and they do not attack an "application" of Penfield's monies.

Flast v. Cohen, supra, involved the standing of federal taxpayers to challenge, under the Establishment Clause, provisions of the Elementary and Secondary Education Act of 1965 that authorized grants to support education in parochial schools. Although it was not a local taxpayer case, *Flast* is significant: before *Flast*, no federal taxpayer had ever been recognized to have standing as such to challenge federal legislation, and the doctrine of *Massachusetts v. Mellon*, that a federal taxpayer's interest in federal spending measures is too remote and minuscule to support standing, did not invite exceptions. Since *Massachusetts v. Mellon* provided important underpinnings for *Doremus*, it is worth examining the effect of *Flast* upon *Doremus*.

This Court in *Flast* expressly endorsed *Doremus*. The federal taxpayer

> will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, §8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus v. Board of Education* . . . 392 U.S. at 102.

The subject of the taxpayer's alleged grievance must be, then, under *Flast* as well as under *Doremus*, a spending measure or a taxing measure. Potential or speculative financial implications are insufficient. *Flast*, or at least *Flast's* result, has been recently re-affirmed by this Court, *Schlesinger v. Reservists Committee to Stop the War*, —— U.S. ——, 94 S. Ct. 2925 (1974); *United States v. Richardson*, —— U.S. ——, 94 S. Ct. 2940 (1974), and once again taxpayers not asserting Establishment Clause claims were denied standing. A zoning ordinance is not the sort of legislation which *Doremus* and *Flast*, especially when read in

light of *Schlesinger* and *Richardson*, authorize a taxpayer to challenge.

Doremus set up a second, and cumulative, requirement for the taxpayer plaintiff. Not only must the measure under attack be a spending or taxing measure, but also the taxpayer must allege a good faith pocketbook injury. This Court did not dwell on good faith pocketbook injury in *Flast*, however, but spoke rather of the status asserted by the plaintiff and the nexus between not only that status and the challenged law, but also that status and the legal ground of the plaintiff's case. That legal ground in *Flast* was the Establishment Clause, and that fact is important in distinguishing cases.

In fact, the Court began with just this premise: "in ruling on standing, it is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." 392 U.S. at 102. The Court immediately said that "standing requirements will vary in First Amendment religion cases depending upon whether the party raises an Establishment Clause claim or a claim under the Free Exercise Clause." *Id.* This conclusion was contrasted with taxpayer's cases in particular: in Establishment Clause cases, as opposed to the general run of federal taxpayer cases, it does not matter whether the taxpayer's financial stake is remote and minuscule because, in Madison's words, "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." *Id.* at 103.

There is a logical or doctrinal basis, therefore, for finding standing in an Establishment Clause case even in the absence of good faith pocketbook injury, because the Establishment Clause is a specific constitutional limitation imposed upon Congress's taxing and spending power: it exists specifically for the benefit of the federal taxpayer.

Apart from the doctrinal basis for allowing this kind of plaintiff's status to suffice in Establishment Clause cases, there is a practical basis as well. Because of the nature of the clause governmental breach of it does not necessarily or usually result in the sort of individualized injury that confers standing in other kinds of cases.[7] Thus, for example, even when there is no coercion of school children to participate in official prayers or Bible-reading exercises, parents of the children have Establishment Clause claims and the standing to raise them. *Engel v. Vitale*, 370 U.S. 421 (1962); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963). *Flast*, *Engel* and *Abington* reflect an understanding that the Establishment Clause checks in its incipiency forbidden governmental conduct in the area of religion. It intercepts such conduct before the Free Exercise Clause has come into play and before plaintiffs of the ordinary kind have been created. The citizenry at large and, in any event, taxpayers are adversely affected by any establishment of religion or laws respecting such an establishment even though their individual free exercise of religion is not affected; for establishment inflicts an injury in fact which is by its nature abroad in the land.

Even if the *Doremus* doctrine were altered by *Flast*, therefore, it would be altered as it related to taxpayer standing in Establishment Clause cases and not as it affected taxpayer standing in other kinds of cases. See also *Schlesinger v.*

---

[7] *Flast* is not unique in this view of the plaintiff's relationship to his Establishment Clause claim. In *Engel v. Vitale*, 370 U.S. 421, 430 (1962), this Court noted that "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." In *School District of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963), this Court quoted *Engel* with approval and added: "The distinction between the two clauses is apparent — a violation of the Free Exercise Clause is predicted on coercion while the Establishment Clause violation need not be so attended." See also *Schlesinger v. Reservists Committee to Stop the War*. —U.S.—, 94 S. Ct. 2925 (1974); and *United States v. Richardson*, —U.S.—, 94 S. Ct. 2940 (1974).

Reservists Committee to Stop the War, supra; United States v. Richardson, supra.

In a case like the instant one, involving a challenge to a zoning ordinance mounted under the Fourteenth Amendment and federal civil rights statutes, there are neither doctrinal nor practical considerations which favor departure from the *Doremus* injury test of standing. The constitutional and statutory provisions on which the complaint rests all, unlike the Establishment Clause, focus on the individual; real violation of them singles out and hurts specific people. No dispensation from the usual requirement of taxpayer standing is needed to produce plaintiffs who can ride herd on the government to enforce these laws.

Nothing in the nature of the laws relied upon here, moreover, would justify such a dispensation. Even if the federal taxpayer status recognized by the Court in *Flast* were not regarded as satisfying the "injury in fact" test of *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and *Barlow v. Collins*, 397 U.S. 159 (1970), it did serve to give standing to challenge federal disbursements of tax moneys as violative of the Establishment Clause, because that clause was intended to prohibit just such spending. There is not, however, any logical nexus between the status asserted by petitioners Vinkey, Reichert, Warth, Harris, and Ortiz as Rochester taxpayers and their claim that the zoning ordinance of the Town of Penfield violates the Fourteenth Amendment rights of persons other than themselves.

These taxpayer petitioners are not taxpayers of the Town of Penfield, as *Doremus* requires; they are not challenging a taxing or spending measure, as *Doremus* requires; they have not alleged a direct and measurable pocketbook injury as *Doremus* requires.

Before this Court the taxpayer petitioners have shifted their ground; they now say that they are not asserting taxpayer status

at all. Rather, they say, their real estate taxes cause them financial injury that satisfies the injury in fact test of *Association of Data Processing Service Organizations, Inc. v. Camp.* 397 U.S. 150 (1970), and *Barlow v. Collins*, 397 U.S. 159 (1970). But that is the claim in all taxpayer standing cases; taxpayer plaintiffs always seek standing because they have to pay taxes. It is, after all, the essence of taxpayer status that the taxpayers have to pay to the extent that their governments adopt taxing and spending measures. If the City of Rochester chooses to have tax-abated housing in excess of its "fair share," whatever that may be, the City's taxpayers must bear the cost of that choice. And if that causes them the type of injury recognized by *Doremus*, their remedy is against the City of Rochester, not against the rest of the world. Petitioners' attempt to assert taxpayer injury without satisfying any of the *Doremus* taxpayer standing requirements must fail. None of them possesses any of those characteristics which turn taxpayers into plaintiffs with standing to sue.

C. *Organizational Petitioners*

Three organizations, petitioners here, also seek standing to challenge Penfield's zoning ordinance and practices. The standing principles discussed above apply, of course, to organizations as well as to individuals, and the organizational petitioners clearly lack standing.

It is unclear precisely to what extent an organization can have standing merely to represent its members' interests, to serve as a substitute plaintiff in their stead, when some or all of the members could easily institute their own action. The court below thought that an organization has such standing only when it can demonstrate "special circumstances," *Warth v. Seldin, supra,* 495 F.2d at 1194, 1195, and such an approach makes sense to us.

To be sure, this Court has stated as *dictum* that "[i]t is clear that an organization whose members are injured may represent

those members in a proceeding for judicial review." *Sierra Club v. Morton*, *supra*, 405 U.S. 727, 739 (1972). But the Court cited only *NAACP v. Button*, 371 U.S. 415 (1963). *Button* involved an alleged statutory infringement of the right of the NAACP, its members, and its lawyers to associate together for the purpose of assisting persons who seek legal redress of their constitutionally guaranteed and other rights. But the right to associate, although certainly a right that vitally affects an organization, is a right peculiarly of the organization's members; it is, after all, their association that creates the organization. Accordingly, this Court held that the NAACP had standing to assert its own rights and the rights of its members. 371 U.S. at 428.

Button, in turn, relied on *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961); *Bates v. City of Little Rock*, 361 U.S. 516, 523 & n.9 (1960); and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-60 (1958). Each of those cases, however, involved a statute requiring disclosure of membership lists, over a claim that such disclosure would result in economic or other reprisals. Requiring the members themselves to claim the right to withhold the membership lists might have rendered the standing requirement itself unconstitutional,[8] and the organization was the only party available to make the claim.

No such special circumstances are involved in the present case. None of the organizational petitioners claims rights that are vital, or even important, to its organizational existence. Each seeks merely to substitute for its members.

Further, no organizational petitioner possesses any characteristics other than an interest in a problem. None even approaches the type of organizational characteristics involved in

---

[8] "To require that it [the right to withhold membership lists] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion." *NAACP v. Alabama ex rel. Patterson*, *supra*, 357 U.S. at 459.

National Motor Freight Traffic Ass'n., Inc. v. United States, 372 U.S. 246, 247 (1963).

In any event, we think it clear that, when an organization has standing to represent its members, it has only such standing as its members would have. In other words, an organization does not increase or create standing by claiming it derivatively.

1. *Metro-Act*

Petitioner Metro-Act of Rochester, Inc. ("Metro-Act") was an original plaintiff in the district court, quite obviously serving as the action's promoter. It is a social-action organization "with its main purpose being to alert ordinary citizens to problems of social concern" (A. 8) by "inquir[ing] into the reasons for the critical housing shortage for low and moderate income persons in the Rochester area" and by "urg[ing] action on the part of citizens to alleviate the general housing shortage for low and moderate income persons." (A. 8-9). Despite these interests, the areas of Metro-Act's social concern are far broader than housing or zoning:

> Among its stated purposes are 1) to achieve democracy for all irrespective of race, religion or national origin; 2) to encourage the Rochester community to provide better housing, better education, greater employment opportunities and to secure human and civil rights for all its residents. (A. 181).[9]

Metro-Act's efforts in the housing area began with a 1966 "fact sheet" (A. 185-86, 196-200) comparing low-income housing in Rochester and other upstate New York cities. Its initial focus was on the City of Rochester in an attempt to persuade the City of the need for and desirability of additional low-income housing within the City. (A. 186-87, 201-32). When

---

[9]Metro-Act's presently "active issues" are "housing, environment, tax reform, media responsibility, national priorities, individual freedoms, Community Chest, education and membership." (A. 183).

little progress was attained within the City of Rochester, Metro-Act shifted its attention to the suburban townships and in February 1969 began advocating federally assisted rent subsidy leasing programs. (A. 187-88, 233-44).

In April 1970 the Metropolitan Housing Committee published its report (A. 188-89, 245-320), which, among other things, recommended formation of a housing council. Metro-Act supported this recommendation and, when the Housing Council was formed in the summer of 1971, became a charter member. (A. 189, 322). Metro-Act initiated the Housing Council's "Political Action Committee" (A. 189-90), which, together with Metro-Act, worked with the Monroe County Legislature on the County's housing problems. (A. 190-91, 324-56).

Finally, Metro-Act's focus fell on Penfield. Discussions were held "[a]ll during the month of December 1971 and early January 1972," and a meeting was held in early January 1972. (A. 193). In response to town leaders' request for "a concrete proposal for change" (A. 194) to Penfield's 81-page printed zoning ordinance (A. 36-116), Metro-Act submitted a 4 1/4-page discussion paper (A. 357-61), which commenced with an express threat of litigation. (A. 358). When a scheduled January 18, 1972, meeting had to be cancelled and the Town's Supervisor suggested a February alternative date (A. 194-95), Metro-Act commenced this action on January 24, 1972. (A. v)

Metro-Act, then, clearly has nothing more than an "interest in a problem." That is insufficient for standing purposes. *Sierra Club v. Morton, supra,* 405 U.S. at 739. And, with due respect to what respondents and we believe to be Metro-Act's sincerity and dedication to the social issues it advocates, it is, we fear, precisely that type of "other bona fide 'special interest' organization however small or short-lived" that this Court contrasted with the Sierra Club, "a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's

depredations," 405 U.S. at 739, even as standing was denied the Sierra Club.

Metro-Act asserts various bases in its hope that this Court will award it standing. The only basis Metro-Act asserts on its own organizational behalf is that it, as an organization, must pay higher real estate taxes to the City of Rochester (A. 30), even though Metro-Act fails to allege that it owns any real property, and even though it is a non-profit organization. (A. 8, 181). In any event, the lack of standing of City of Rochester taxpayers to challenge the Town of Penfield's zoning ordinance and practices is discussed above, and that discussion is totally applicable here.

Metro-Act also claims standing to represent its members, which, in special circumstances, it may do to the extent its members would have standing. No special circumstances are present in any of Metro-Act's purported bases. First, Metro-Act claims to derive standing because some of its members are taxpayers of the City of Rochester.[10] But, as discussed above, such individuals lack standing in their own right, and Metro-Act cannot gain more standing here. Second, Metro-Act claims to derive standing because some of its members are low-income residents of the City of Rochester who might want to move to Penfield. But, as discussed above, such individuals lack standing in their own right, and Metro-Act cannot gain more standing here.

Third, Metro-Act claims to derive standing because some of its members[11] are residents of the Town of Penfield. Of course, the classes sought to be represented by the named plaintiffs did not include any Penfield residents (see A. 9), and the complaint

---

[10] As to this basis, Metro-Act is an unnecessary plaintiff. At least one of the petitioners, Robert J. Warth, who claims individual standing as a City of Rochester taxpayer (A. 4, 30-31) is a member, indeed president, of Metro-Act. (A. 180).

[11] Apparently about 32 Metro-Act members, rather than the "many" referred to by petitioners (Br. 13), are Penfield residents. (A. 183).

makes no mention of any Penfield resident, whether Metro-Act member or not, other than respondents.[12] One of the affidavits, however, states that Metro-Act members desire to "be spared an eventual repeat of ghetto confrontations and riots" (A. 184) (which, of course, occurred in Rochester (A.181), not Penfield) and added that

> Metro-Act supports quality, integrated education. 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).

Metro-Act's attempt to construct these meager and generalized allegations into standing in a zoning case is an obvious belated attempt to restructure its complaint on appeal to emulate the successful plaintiffs in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), decided by this Court several months after the instant complaint was filed. But no *Trafficante*-type claims are raised in the complaint. No Penfield resident is a plaintiff here, although Metro-Act doubtless could have secured a Penfield plaintiff. Ann McNabb, a Metro-Act member and Penfield resident (A. 615), submitted an affidavit for petitioners which takes in the present appendix, with exhibits, 309 pages (A. 615-924). But Ms. McNabb is not a plaintiff and seeks no variance from Penfield's zoning ordinance in order to subdivide her property.

Trafficante was an action under Section 810 of the Civil Rights Act of 1968, 42 U.S.C. § 3610. This Court expressly declined to rule on the standing questions under 42 U.S.C. § 1982. 409 U.S. at 209 n.8; *id.* at 212 (White, *J.*, concurring). Petitioners here did not rely below and do not rely in this Court upon the 1968 Act. More importantly, *Trafficante* granted standing only to residents of "the same housing unit," 409 U.S. at 209, 212, that is charged with racial discrimination. It was this focus on a particular housing unit that gives that case

[12]Metro-Act made a standing claim on behalf of its Penfield members for the first time in the Court of Appeals. *Warth v. Seldin, supra,* 495 F.2d at 1193 n.7.

"concrete adverseness," *Baker v. Carr*, 369 U.S. at 204, that provides the who, when, where, and why of alleged racial discrimination which are totally lacking here. Racial discrimination cases are too important to be tried "in the air." *Giles v. Harris*, 189 U.S. 475, 486 (1903). Metro-Act's belated attempt to discover standing from within Penfield fails for lack of concreteness.

2. *Housing Council*

The original plaintiffs moved the district court (A. 165-69) for an order making petitioner Housing Council in the Monroe County Area, Inc. ("Housing Council") an additional party plaintiff, apparently pursuant to Fed. R. Civ. P. 19(a). No amendment to the complaint was proposed, however, and, had the motion been granted, Housing Council would have been a plaintiff literally asserting no claims. The motion was, of course, denied. (A. 951).

Housing Council is a not-for-profit corporation (A. 170) organized and operated

> 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 burdens of government . . . (A. 172).

To this end, Housing Council promotes studies of and gives leadership to community planning, seeks to coordinate governmental, public, and private housing efforts and considerations, and provides or facilitates technical assistance to governmental, public and private housing efforts. (A. 172-73).

Housing Council is clearly a special interest group; in the words of its executive director, "[b]ecause of the interests of [its] constituent groups, Housing Council has a special interest in this

litigation . . . ." (A. 175). But this, of course, is insufficient to confer standing. *Sierra Club v. Morton, supra.*

Other than its special interest in housing, Housing Council does not claim standing in its own right. Rather, it seeks to derive standing from its members. First, Metro-Act is a Housing Council member (A. 178), but Housing Council can have no greater standing than does Metro-Act. Second, some of Housing Council's members are governmental agencies (A. 174-75, 177-79), but there is no allegation of how any of them have been or might be injured, except, of course, for their own special interests in the area. Third, some of Housing Council's member organizations are themselves made up of low and moderate income persons (A. 175), although there is no indication as to their places of residence. But, as discussed above, low and moderate income persons lack standing in their own right, and Housing Council cannot gain increased standing by its double derivative claim.

Last, some of Housing Council's members have been "or hope to be" involved in the development and construction of low and moderate income housing. (A. 174). Except for one, there is no indication of where the prospective sites are located, whether the sites are even in Penfield, whether applications for variances or building permits have been made and, if so, the result. Such recitations would not be formalistic requirements; they would supply the crucial "concrete adverseness," *Baker v. Carr, supra*, 369 U.S. at 204, that is lacking in this action by providing the where, when and why of respondents' alleged "discriminations." More than perhaps most fields, home construction does not take place "in the air," *Giles v. Harris, supra,* 189 U.S. at 486, and zoning considerations are concerned with specific parcels and specific proposed projects.

One Housing Council member, however, Penfield Better Homes Corporation, is identified as having actually attempted to secure approvals for moderate income housing within Pen-

field. (A. 174). But Penfield Better Homes Corporation is a nonprofit corporation (A. 616) and obviously cannot have the type of economic injury recognized in, for example, *Data Processing* and *Barlow v. Collins.*

Further, Penfield Better Homes Corporation's "proposal" simply lacks the requisite degree of specificity necessary to meaningful consideration in a zoning case. The proposal (A. 849-59) speaks only in the most general terms. To be sure, a specific site is mentioned as the one "we have in mind" (A. 852), but there is no indication as to its ownership. Although the proposal names a builder, general contractor, and architect (A. 853), there is no indication that planning had proceeded beyond a very general site plan (A. 854). Indeed, although the proposal hoped for Federal Housing Administration assistance (A. 630, 853), there is no indication that application to the FHA was ever made. An affidavit refers to "comprehensive studies" (A. 630), but these involved only a soil analysis (A. 860-63), a traffic count at respondents' request (A. 864-65), and, incredibly, a legal opinion (A. 866-80). These preliminary thoughts, even when added together, are far less than the concrete plans and specific preparedness of the developers, builders, and landowners who have been granted standing by the lower courts in other cases.[13]

---

[13] These cases, discussed above at pp. 20-25, include *United Farmworkers of Fla. Housing Project, Inc. v. City of Delray Beach,* 493 F.2d 799 (5th Cir. 1974); *Morales v. Haines,* 486 F.2d 880 (7th Cir. 1973); *Park View Heights Corp. v. City of Black Jack,* 467 F.2d 1208 (8th Cir. 1972); *Crow v. Brown,* 457 F.2d 788 (5th Cir. 1972); *Kennedy Park Homes Ass'n., Inc. v. City of Lackawanna,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971); *Dailey v. City of Lawton,* 425 F.2d 1037 (10th Cir. 1970); *Southern Alameda Spanish Speaking Org. v. City of Union City,* 424 F.2d 291 (9th Cir. 1970); *Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969), cert. denied,* 397 U.S. 980, *rehearing denied,* 397 U.S. 1059 (1970); *Sisters of Providence v. City of Evanston,* 335 F. Supp. 396 (N.D. Ill. 1971).

In any event, the Penfield Planning Board held two public hearings on the "proposal," in September 1969 and November 1969. (A. 629-31). Thereafter, the Planning Board denied the request because it felt that townhouses "would constitute an inappropriate use of this land and would not be consonant with existing character of the neighborhood," "would create traffic problems within the area," and "would cause serious erosion problems during and after construction."[14] (A. 881-82). Thereafter, Penfield Better Homes Corporation asked the Town Board for a further public hearing,[15] which, because the Planning Board had already held two public hearings, was denied in January 1970.[16] (A. 883-84). Thereafter, the record does not disclose any steps taken by Penfield Better Homes Corporation. It may have had further administrative remedies, and it certainly had the right to institute a special proceeding in state court, N.Y. Civ. Prac. Law & Rules Art. 78, within four months, N.Y. Civ. Prac. Law & Rules § 217. But that time has long since expired. If Penfield Better Homes Corporation cannot litigate its own claims, surely Housing Council cannot derive derivative standing to sue in its behalf.

3. *Home Builders*

Petitioner Rochester Home Builders Association, Inc. ("Home Builders") moved the district court for an order, pursuant to Fed. R. Civ. P. 24, allowing it to intervene as a party plaintiff. (A. 134-38). Its proposed intervenor's complaint

---

[14]Petitioners make no showing of what steps, if any, they would take to avoid the problems raised in the soil study. (A. 860-63).

[15]It does not appear from the record that Penfield Better Homes Corporation ever actually requested rezoning of the desired site.

[16]Both the Planning Board and the Town Board specifically stated that they recognized the need for moderate income houses in Penfield. (A. 882, 884).

(A. 144-64) is similar to the complaint of the original plaintiffs. The motion was denied. (A. 951).[17]

Home Builders is a nonprofit trade association (A. 145) whose members are active in the home construction industry in the Rochester metropolitan area (A. 146). Its members have built either "substantially all" (A. 142-43) or 80% (A. 147) of the private housing units constructed in the Town of Penfield during the last 15 years. Approximately eleven of its members have been active in the home construction industry in Penfield. (A. 146). Home Builders makes no claim that it has any statutory or other special role in Penfield's housing industry or that it has ever played any role on its members' behalf, whether before zoning boards, before planning boards, or in the courts. Compare *National Motor Freight Traffic Ass'n., Inc. v. United States*, *supra*, 372 U.S. at 247.

Home Builders claims no organizational standing in its own right; rather, it claims only derivative standing from its members, who, it alleges, have been injured because they have been prevented from constructing and selling or renting low and moderate income housing in Penfield. (A. 153, 156). But there is absolutely no specificity — there is no indication of what contractors are prepared to build what projects on what sites or what efforts have been taken to secure Town approval. Even the low-income residents of the City of Rochester at least allege that they "hope" or "desire" to move to Penfield. But the Home Builders do not even assert that any of its members even desires, let alone is prepared, to construct low-income housing in Penfield. This is truly "a mere declaration in the air," *Giles v.*

---

[17]The district court denied the motion for intervention both because of Home Builders' lack of standing and in the exercise of its discretion, pursuant to Fed. R. Civ. P. 24, because intervention would unduly delay or prejudice the adjudication of the rights of the original parties. (A. 951). The court of appeals did not reach the Rule 24 issue. *Warth v. Seldin*, *supra*, 495 F.2d at 1195. We do not read petitioners' brief as arguing that Home Builders should be allowed to intervene even if all the other petitioners lack standing.

Harris, *supra*, 189 U.S. at 486, coming nowhere near the "concrete adverseness," *Baker v. Carr*, *supra*, 369 U.S. at 204, required.[18]

Reference is made in the record to a few specific projects, in various stages of proposal, although there is no indication that any of them involved Home Builders members. Each is either moot or unripe, and none gives standing to Home Builders. Joseph Audino submitted a Planned Unit Development ("PUD") complex proposal (A. 623-24), as to which, after repeated consideration and various amendments (A. 624-28, 752-839), an agreeable compromise was reached (A. 627-28, 840). O'Brien Homes, Inc. submitted an apartment proposal (A. 633-36, 885-96) which, after modification (A. 636, 902-07), was on the Planning Board's table (A. 906) and had been referred to the Monroe County Planning Council for its recommendation. (A. 636). The Standco PUD complex proposal, which was approved for rezoning (A. 636), was awaiting a further public hearing for final approval (A. 637, 920). The Rock Lake PUD complex proposal was approved for rezoning (A. 636), but the developer apparently abandoned the proposal as economically unfeasible. (A. 637). An application by Zuric Development Corporation to rezone land to allow for smaller single-family houses in the $25,000 — $30,000 price range (hardly low-moderate income housing) was denied (A. 639-39, 921-23), "notwithstanding the Board's interest in the concept but upon the grounds that sewer capacity is unavailable at present." (A. 922). Last, an application by Angelo Castronova for rezoning for a proposed apartment complex (A. 639, 924) was viewed with disfavor "because of the unavailability of sanitary sewer capacity." (A. 924).

These sketchy outlines of various shifting proposals in an area that demands concrete specifics for meaningful evaluation

---

[18]Compare the specific allegations by specific builders in cases where builders have been granted standing, discussed at pp. 20-25 above.

cannot possible serve to give Home Builders standing to launch a broad-scale attack on an ordinance and 15 years of practice.

CONCLUSION

Although the merits of the case are not now before the Court, we urge the Court to keep in mind that this is a *zoning* case. As this Court has noted before, zoning in our federal system is a subject uniquely of local concern and resolution. *E.g., Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The Town of Penfield's zoning ordinance, which is "fairly typical for a suburban community," *Warth v. Seldin, supra*, 495 F.2d at 1189, is no doubt imperfect, but the "problems of government are practical ones and may justify, if they do not require, rough accomodations — illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). In such a complex area as zoning, no perfect alternatives exist; and federal judges are less well situated than local legislators and administrators to resolve the conflicting problems of municipal land use "for reason that they lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to" these problems. *Cf. San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 41, *rehearing denied*, 411 U.S. 959 (1973).

Of course the language used by this Court in *Dandrige* and *Rodriguez* is quoted from a different constitutional context — not in reference to standing questions under Article III but to questions of the appropriate form of review under the Fourteenth Amendment. Because of the intractable problems of many of the areas committed to local governance, federal courts will not ordinarily scrutinize local solutions strictly in Equal Protection cases but will give them the benefit of the constitutional doubt. This is so in the area of local zoning. *Village of Euclid v. Ambler Realty Co., supra; Village of Belle Terre v. Boraas, supra.*

In itself this is another question, not presently before the Court. But the wisdom which underlies this Court's usual form of Fourteenth Amendment review is relevant to the question of standing and in particular inheres in the test of *Baker v. Carr, supra.* Whether the presumption is in favor of or against constitutionality once a trial has been reached, the courts require plaintiffs who, because of their personal stake and their concrete adverseness with defendants, can assure a sharp presentation of the issues which will illuminate difficult constitutional questions in terms of the practical operation of the legislation under attack.

Where, as here, the legislation is complicated and highly local, and the Fourteenth Amendment challenge is broadside, effective constitutional litigation demands plaintiffs with direct and personal grievances in concrete opposition with the defendants over identified actions that really occurred. This is not such a case.

Respectfully submitted,

James M. Hartman
Douglas S. Gates
J. William Ernstrom
Luther C. Nadler
Harris, Beach and Wilcox
Two State Street
Rochester, New York 14614
Telephone: 716-232-4440

Attorneys for Respondents