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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

## REPLY BRIEF OF PETITIONERS

## ARGUMENT

This is a racial discrimination case. Plaintiffs' allegations of racial discrimination by the defendants are uncontroverted in the pleadings.[1] As a matter of law, in the posture of this case, plaintiffs' allegations of race discrimination must be accepted as true. *Jenkins v. McKeithen*, 395 U.S. 411, 89 S.Ct. 1843 (1969).

The defendants have enacted and are administering a zoning ordinance for the Town of Penfield that on its face and as administered is calculated to exclude minorities from residing in

[1] Defendants filed only a conclusory attorney affidavit in support of their motion to dismiss.

the town. Efforts of the defendants have been quite successful. According to United States Census figures, the population of the Town of Penfield in 1960 was 12,601 with 23 of that total being minority persons; the population of the Town of Penfield in 1964 was 17,337, with 22 of that total being minority persons; the population of the Town of Penfield in 1970 was 23,782, with 60 of that total being minority persons. (A. 470, 583 — 588). The total minority population of the Town of Penfield over this ten year period has always been less than 1/2 of 1%.

The root cause for the inflexible zoning ordinance and its rigid application is, as the Metropolitan Housing Committee observed about Penfield and other towns in the Rochester area, racial prejudice. (A. 276, 277) The Town of Penfield has even officially examined its exclusion of minority, low-income persons and concluded that it must do its part in building its "fair share" of housing for minority, low-income persons; it has recognized that the only way to end the exclusion is by fundamental amendment and change of its rigid zoning ordinance and its rigid application of that ordinance. (A. 487, 500, 501, 503 — 506, 508, 509)

In a study entitled Report of Penfield Housing Task Force on Moderate Income Housing and published by the Town of Penfield, June 5, 1972, the Town of Penfield calculated that its "fair share" of housing for minority, low-income persons, would be 2,000 units in the 1970 — 1980 period. (A. 502) The only feasible way to provide for this construction is by amendment of the zoning ordinance.

> "Penfield's Zoning Ordinance does not presently provide for this variety of housing styles and sizes. They could be accommodated by granting variances to the Ordinance; however, the frequent granting of variances is generally considered contrary to good zoning and planning practices. Instead we recommend that the Penfield Town Board adopt changes to the present Zoning Ordinance necessary to accommodate the broad

> variety of housing styles, sizes, and densities earlier recommended. These changes should be adopted as early as possible." (A. 508, 509)

This is a case of zoning to segregate by race that the Court alluded to in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 6, 94 S.Ct. 1536, 1539 (1974). This case is not, therefore, as defendants urge, simply an ordinary zoning case which should lead this Court to accept the ordinance at face value because zoning "... is a subject uniquely of local concern and resolution". (Respondents' Brief at 45.)

This Court has not tolerated and does not tolerate governmental participation in racial discrimination in any degree, directly or indirectly, because the Constitution forbids it. *Norwood v. Harrison*, 413 U.S. 455, 93 S.Ct. 2804 (1973) and *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125 (1960).

The Court did not adopt in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691 (1962), as defendants suggest (Respondents' Brief at 4 — 9) a special, practical test of standing for civil rights cases requiring the Court's projecting a decision on the merits in considering a question of standing. A plaintiff in a civil rights case is certainly not subject to a more rigorous standing requirement than a plaintiff in any other case. See *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827 (1970); *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832 (1970); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 93 S.Ct. 2405 (1973).

Faced with the defendants' rigid zoning ordinance and its inflexible application, the question then becomes what can be done to prevent further discrimination. Everything that could possibly have been done has been tried — all to no avail. Each minority plaintiff has actively sought housing in the Town of Penfield; there is none available. (A. 362 — 435) Penfield Better Homes, a member of plaintiff Housing Council in the

Monroe County Area Inc. located land, retained a builder, general contractor, architect and zoning authority in an effort to gain approval from the Town of Penfield for construction of Federal Housing Administration assisted housing. The defendants rejected the proposal as inconsistent with the neighborhood. (A. 629 — 633)

The Penfield Planned Unit Development was hailed by some as a possible opening in the town for the relaxation of the rigid, exclusionary ordinance. (A. 621, 622) However, when builder-members of the intervenor plaintiff Rochester Home Builders Association sought to submit proposals under the Planned Unit Development concept, the defendants amended the ordinance to insure that the general exclusion of minorities would be maintained. (A. 623 — 642) Because of the defendants' additional restrictions on these proposed developments, the developments have either been abandoned, delayed indefinitely, or transformed into exclusive housing.

Associations of persons including plaintiff Metro Act of Rochester, Inc. (Metro-Act) and Housing Council in the Monroe County Area, Inc. (Housing Council) have decried the continued efforts of the defendants to maintain their restrictive, exclusive zoning practices and have tried to persuade a different course. (A. 627 — 629) Yet the defendants proceeded to make their zoning ordinance more restrictive and have continued, project by project, to insure exclusive housing patterns. The defendants ignored the concrete suggestions of plaintiff Metro Act for changes in the ordinance. (A. 193 — 195) The Town of Penfield has acknowledged the exclusiveness of its ordinance (A. 487 — 573) but its study remains unheeded.

In these circumstances, it is an anomaly indeed for the court below to have focused its decision on the lack of a housing start. There is no "housing start" in the Town of Penfield that preceded the institution of this lawsuit because, as plaintiffs allege, the defendants have thwarted every attempt to build

multiracial, low income housing. In fact, intervenor plaintiff Rochester Home Builders Association alleges that the defendants threatened to cease any further co-operation with builders on the construction of exclusive housing in the Town of Penfield if this lawsuit were pursued. (A. 158, 159)

Frustrated at every juncture in efforts to end the exclusionary zoning of the defendants, those persons and organizations directly injured by the discrimination initiated this lawsuit. Those with the most at stake are the minority persons, Ortiz, Broadnax, Reyes, and Sinkler who are relegated to residing in inner city, ghetto environments of uncontrolled violence, declining municipal services and poor schools, for example. The City of Rochester property owners not only suffer from the declining city environment, but also have the pocketbook injury of paying ever increasing property taxes to buy city services as City of Rochester revenue bases are increasingly reduced by tax abated housing. Finally, members of the organizational plaintiffs are directly injured by the defendants' racial discrimination insofar as they have been deprived of the benefits of interracial associations, the loss of business opportunities in the construction of housing, and profits derived from those business opportunities. Defendants argue the lack of plaintiffs' standing only by ignoring the substantiated allegations of direct injury to each plaintiff in the record.

## POINT I

**Low income minority persons are the immediate victims of defendants' racially discriminatory and exclusionary practices and policies and, as such, have standing to seek judicial review of those practices and policies.**

Plaintiffs Ortiz, Broadnax, Reyes and Sinkler are black or Spanish-surnamed persons of low or moderate income who have sought housing in Penfield, but have been excluded because of their race and economic status. As a direct result of defendants' racially discriminatory and exclusionary zoning practices and policies, these individuals are confined to the decaying inner city of Rochester, New York, which consists of substandard housing, inadequate community services (A. 416 — 417, 425 — 426, 442), uncontrolled violence (A. 442 — 447), and inferior education (A. 433, 454)

Initially, defendants contest the standing of these plaintiffs on the ground that they exerted only "casual efforts" in searching for housing in Penfield (Respondents' Brief at 11). Plaintiffs, of course, challenge any unsupported assertion that their search for decent housing was "casual." More importantly, defendants' concentration on the extent of plaintiffs' efforts indicates that defendants have lost sight of the procedural posture of this case. This matter was not tried, but rather was decided on the basis of a motion to dismiss, pursuant to Rule 12 of the Federal Rules of Civil Procedure. In these circumstances, the material allegations of the complaint and supporting affidavits must be accepted as true. *Jenkins v. McKeithen*, 395 U.S. 411, 89 S.Ct. 1843 (1969).[2] These allegations reveal that the plaintiffs sought to escape the inner city environment and find housing in Penfield

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[2]Defendants suggest that their Rule 12(b) motion was converted into a Rule 56 summary judgment motion because the District Court decided on the basis of affidavits, as well as the complaint. Even assuming that this conversion process occurred, the District Court was required to accept plaintiffs' allegations as true since defendants submitted only an attorney's affidavit. See note 1, supra.

(A. 370, 417-418, 428, 453), but were denied because of their race and economic level. If plaintiffs are allowed the opportunity to proceed to trial, they will sustain the truth of these allegations. However, "[a]t this stage of the litigation we are not concerned with the truth of the allegations, that is, the ability of petitioners to sustain their allegations by proof. The sole question is whether the allegations entitle them to make good on their claim that they are being denied rights under the United States Constitution." *Gomillion v. Lightfoot*, 364 U.S. 339, 341, 81 S.Ct. 125, 127 (1960). Here, plaintiffs' allegations of discrimination entitle them to make good their claims that they are being denied rights under the Constitution and laws of the United States.

Defendants also assert that plaintiffs are simply suffering "injury by supposition" and that the "record is devoid of events." (Respondents' Brief at 15) Once again, defendants are ignoring the record and proceeding as if this case had been tried and the factual issues resolved in their favor.

The record is replete with instances of real concrete injury flowing directly from defendants' exclusion of multiracial low and moderate income housing. Plaintiff Ortiz was unable to find such housing near his job in Penfield and was forced to travel forty-two miles to work. (A. 375 — 377) The burdensome commuting problems and expenses are neither conjectural nor hypothetical. Similarly, defendants' exclusion of low income housing and denial of equal housing opportunities to low income, minority persons inflict injury upon Ms. Broadnax and her family. As a direct result, the Broadnax family is unable to escape from the deplorable housing conditions in the inner city and must live in a home with "leaks in the roof, bad wiring, roach infestation, rat and mice infestation, crumbling house foundation, broken front door, broken hot water heater, etc." (A. 410) Plaintiffs Sinkler and Reyes describe the similar hardships which they and their families are forced to endure as a

result of their inability to secure housing in Penfield. Such injury is hardly "injury by supposition."

Additionally, plaintiffs allege that their children are suffering real harm because they must attend the inferior Rochester schools, rather than the highly rated Penfield schools. (A. 453 — 455) The public schools in Rochester are so inadequate that Ms. Sinkler transferred her child to a parochial school even though she must pay the additional expenses of tuition and registration fee. (A. 488)

Finally, plaintiffs are suffering real, concrete injury in that they are the victims of defendants' racially discriminatory policies and practices. Defendants' mere passing reference to the racial discrimination claim (Respondents' Brief at 14 n.3) cannot obscure the uncontradicted allegations that the purpose and effect of defendants' zoning practices and policies are to exclude black and other minority individuals. Plaintiffs allege in paragraph fourteen of the complaint:

> "That the statute as enacted and/or administered by the defendants, has as its purpose and in fact, effects and propagates exclusionary zoning in said Town with respect to excluding moderate and low income multiple unit housing *and further tends to exclude low income and moderate income and non-white residency* in said town . . ." (Emphasis added) (A. 15)

Moreover, plaintiffs Ortiz, Broadnax, Reyes, and Sinkler specifically state in their affidavits that they have been excluded because of their race. (A. 363, 421, 434, 453) As plaintiff Ortiz states, ". . . my claim is that I, as a citizen of Spanish/Puerto Rican extraction am being denied the right and/or opportunity to reside in the Town of Penfield because of my race. . . ." (A. 363) The experts who have examined the ordinance agree that the law is "basically an inflexible control mechanism which has the effect of producing economically and *racially stratified housing arrangements* without apparent regard for the housing

needs either of its own citizenry or for the citizenry within the larger metropolitan community." (A. 944) (Emphasis added)

The complaint and affidavits allege a case of racial discrimination, as real and concrete as if defendants had passed an ordinance expressly excluding black and Spanish-surnamed persons from Penfield. Cf. *Gomillion v. Lightfoot*, supra; *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16 (1917). The injury to these individuals is the very injury suffered by the plaintiffs in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686 (1954). There, the Court held that to separate individuals "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Id. at 494, 74 S.Ct. at 691.

In these circumstances, it is simply a callous indifference to the facts to state that these plaintiffs merely are suffering "injury by supposition." Here, as in *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1216 (8th Cir. 1972), "[t]he individual plaintiffs have presented a strong case for consideration at this time. They allege that they are subject to the serious consequences of segregation in housing and education, as well as the economic consequences of decreasing access to jobs due to their inability to escape from the inner city." The injury inflicted upon these plaintiffs is certainly more substantial than the mere trifle which has served as the basis for standing in other cases. See *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669, 689 n.14, 93 S.Ct. 2405, 2417 n.14 (1973); Davis, *Standing: Taxpayers and Others*, 35 U.Chi. L. Rev. 601, 613 (1968).

Defendants, however, suggest that, even if plaintiffs are injured, the injury does not flow from Penfield's zoning ordinance and defendants' implementation of that law. Such a notion ignores the direct line of causation between defendants' racially discriminatory and exclusionary practices and policies

and plaintiffs' hardships. As a direct result of defendants' actions, plaintiffs are unable to buy or rent homes in Penfield and are, thus, forced to (1) reside in substandard houses in a decaying inner city environment; (2) send their children to inferior schools; (3) forego employment opportunities; and (4) suffer the stigma resulting from racial discrimination. Manifestly, the line of causation is far more direct than in either *United States v. SCRAP*, supra, or *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832 (1970) where this Court held that the standing requirement had been satisfied. If defendants, here, believe that plaintiffs' allegations are untrue they should have "demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact. We cannot say on these pleadings that [plaintiffs] could not prove their allegations, which, if proved, would place them squarely among those persons injured in fact . . . and entitled . . . to seek judicial review." *United States v. SCRAP*, supra at 689, 690, 93 S.Ct. at 2417.

It is further asserted that plaintiffs lack standing because there is no project proposal for low and moderate income housing. (Respondents' Brief at 25) Indeed, on this ground, defendants attempt to distinguish a number of lower court decisions which have held that potential residents of multiracial, low and moderate-income housing have standing to challenge practices and policies designed to exclude them. See, e.g., *Park View Heights Corporation v. City of Black Jack*, supra; *Crow v. Brown*, 457 F.2d 788 (5th Cir. 1972), affirming 332 F.Supp. 382 (N.D. Ga. 1971); *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970).

Contrary to any suggestion by defendants, there have been project proposals for low and moderate income housing. (A. 629 — 642) These proposals, including the "Highland Circle Project" (A. 629 — 632), have been denied in accordance with defendants' practices and policies of excluding low-income minority persons, such as plaintiffs. It is alleged that defendants

> "... frustrated attempts at the building of and prevented opportunities for low and moderate income housing units in the Town of Penfield, amended the PUD ordinance so as to make more difficult the availability of low and moderate income housing through planned unit development in Penfield and have failed or refused to re-zone as might be required for the construction of low and moderate income housing in the Town of Penfield. *Such policies and practices have the effect of specifically excluding low and moderate income persons, blacks, Spanish-Americans, and other minorities from living in the Town of Penfield.*" (A. 641 — 642) (Emphasis added)

Moreover, the uncontradicted allegations of the Rochester Home Builders Association reveal that defendants have furthered their exclusionary and discriminatory plan by 1) refusing to grant variances and building permits; 2) failing to modify various zoning requirements, including minimum lot size, population density, use density and floor space; and 3) refusing to grant necessary tax abatements. (A. 154 — 155) These are the "decisive facts in this case, which at this stage must be taken as proved. . . ." *Gomillion v. Lightfoot*, supra at 346, 81 S.Ct. at 130. In these circumstances, the lack of a present project proposal is simply testimony to the success of defendants' racially discriminatory and exclusionary actions.

Defendants also would have this Court deny standing on the ground that the low income, minority plaintiffs do not have an interest in property. (Respondents' Brief at 25) Of course, plaintiffs lack an interest in property in Penfield. The very gravaman of their complaint is that defendants deny plaintiffs the opportunity to acquire an interest in land because of their race and economic status.

The absence of a specific project proposal or interest in land does not negate the controlling fact that plaintiffs are suffering actual injury resulting directly from defendants' illegal actions. It is this injury which assures that plaintiffs will present the

dispute in an "adversary context and in a form historically viewed as capable of judicial resolution." *Flast v. Cohen*, 392 U.S. 83, 101, 88 S.Ct. 1942, 1953 (1968). See also *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827 (1970); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691 (1962).

Nor does the absence of a project proposal or interest in land impede the District Court's ability to grant effective relief. Initially, it should be noted that the "concept of standing focuses on the party seeking relief, rather than on the precise nature of the relief sought." *Jenkins v. McKeithen*, supra at 423, 89 S.Ct. at 1850. Moreover, even assuming that the nature of the relief is relevant to the inquiry here, it is manifest that the District Court could grant effective relief. The requested declaratory[3] and injunctive relief could remove the barriers to construction of multiracial, low and moderate income housing and restrain defendants from engaging in the types of actions which, thus far, have prevented the construction of such housing. Additionally, if plaintiffs sustain their allegations of racial discrimination, they will be entitled to relief which requires affirmative steps to cure the continuing effects of the past discrimination. See, e.g., *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267 (1971); *Louisiana v. United States*, 380 U.S. 145, 85 S.Ct. 817 (1965). Such relief could order defendants to devise a comprehensive plan to remedy the effects of their racially discriminatory practices and policies. See, e.g., *Gautreaux v. Chicago Housing Authority*, 503 F.2d 930 (7th Cir. 1974); *Hart v. Community School Board of Brooklyn*, 383 F.Supp. 699 (E.D.N.Y. 1974), appeal dismissed, 497 F.2d 1027 (2d Cir. 1974).

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[3]The District Court has a " 'duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.' " *Super Tire Engineering Company v. McCorkle*, 416 U.S. 115, 121, 94 S.Ct. 1694, 1698 (1974) (quoting *Zwickler v. Koota*, 389 U.S. 241, 254, 88 S.Ct. 391, 399 (1967).

Accordingly, it is submitted that plaintiffs Broadnax, Ortiz, Reyes and Sinkler have standing to seek judicial review of defendants' racially discriminatory and exclusionary practices and policies.

## POINT II

**Property owners of the City of Rochester who suffer from a decaying city environment and ever spiralling taxes as a result of defendants' racially exclusive zoning ordinance have standing to seek judicial review of the ordinance and its enforcement.**

The test for determining whether plaintiffs Vinkey, Reichert, Warth, Harris and Ortiz have standing to sue the defendants is the same test that this Court applies in determining whether the other plaintiffs have standing — that is, whether they allege injury in fact and whether the interest "... sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830 (1970); see also *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832 (1970); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 93 S.Ct. 2405 (1973). These plaintiffs are not litigating merely because they happen to be taxpayers of the City of Rochester. Thus, defendants' analysis of the taxpayer standing cases is inapposite. See, e.g., *Doremus v. Board of Education*, 342 U.S. 429, 72 S.Ct. 394 (1952); *Frothingham v. Mellon*, 262 U.S. 447, 43 S.Ct. 597 (1923). (Respondents' Brief at 26-33).

Plaintiffs Vinkey, Reichert, Warth, Harris and Ortiz sue because the exclusionary and discriminatory acts of the defendants are directly affecting them and causing them economic injury. One such injury is the actual increase in the property taxes which these plaintiffs are forced to pay as a result

of defendants' policies and practices. These plaintiffs allege that their property taxes have increased dramatically over the years because defendants' refusal to permit construction of low and moderate income housing forces the City of Rochester to provide such housing, much of which is tax abated. (A. 5, 6) Penfield has no tax abated housing properties. (A. 471) While the defendants have recognized their obligation to assume their "fair share" of providing such housing, (A. 502) they have yet to do so.

The pocketbook injury to these plaintiffs, however, is only a part of the injury. As long as the defendants are allowed to continue their exclusionary and discriminatory practices, the concentration of low and moderate housing in the City of Rochester will continue to produce a "density crush"; law enforcement authorities are generally less able to cope with problems; the city environment will continue to decline (A. 483)[4]

The plaintiffs in this case, like the plaintiffs in *United States v. Students Challenging Regulatory Procedures*, supra at 690, 93 S.Ct. at 2417, are entitled to their day in court. Certainly the plaintiffs must prove their claims upon trial. However, the only question now is whether the plaintiffs have alleged injury. Plaintiffs submit that the economic and environmental injury which they are forced to endure is sufficient to insure that the issues are presented in an adversary context and in a form capable of judicial resolution. *Flast v. Cohen*, 392 U.S. 83, 101, 88 S.Ct. 1942, 1953 (1968).

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[4]It is difficult to understand how defendants can assert (Respondents' Brief at 32) that plaintiffs have changed their position with respect to the standing of these plaintiffs. Plaintiffs have always asserted that they are property owners and taxpayers in describing their status.

## POINT III

**The organizational plaintiffs and their members suffer loss of associational rights and economic injury as a direct result of defendants' racially discriminatory acts and, therefore, have standing to seek judicial review of those acts.**

When a defendant engages in a course of conduct which causes injury to an organization or its members, the organization may sue in its own right and on behalf of its injured members. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361 (1972); *N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S.Ct. 328 (1963); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163 (1958). An organization is its members, the members are the organization. Harm to organization members is harm to the organization and vice-versa. This court in the cases noted above has found standing for organizations and their members regardless of whether the emphasis has been placed on harm to the organization or harm to its members. Thus, there is no real basis in law for defendants' suggestion (Respondents' Brief at 34 and 35) that the standing of the organizational plaintiffs in this lawsuit is somehow imperfect because the organizations themselves do not make claim of violation of rights vital to their existence but must instead base any legal right to standing in this lawsuit on that which they can claim "derivatively" through their members.

### 1. *Metro Act of Rochester, Inc.*

Contrary to defendants' suggestion (Respondents' Brief at 35, 36) the interest and involvement of Metro Act[5] and its

[5]The fact that Metro Act undertakes other activities than housing programs does not, as defendants suggest, (Respondents' Brief at 35) render it any less able to challenge defendants' discrimination. The question is whether the acts of the defendants injure Metro Act and/or its members.

members in efforts to end exclusionary housing patterns in the Rochester area have been continual, vital and effective. (A. 180-195) Metro Act and its members formulated and submitted plans for the construction of low, moderate income housing in the City of Rochester; the City responded favorably to those suggestions. Metro Act and its members were instrumental in the formulation of the Housing Council in the Monroe County Area, Inc. Metro Act and its members have been instrumental in causing the undertaking of comprehensive studies of housing problems in the Rochester area and the formulation of planned solutions to those problems. Detailed and concrete proposals were made by Metro Act and its members to the Town of Penfield for the correction of its exclusionary zoning but to no avail.

By no fair reading of the record in this case can Metro Act be described as having merely an interest in housing problems.[6] Defendants seem to complain (Respondents' Brief at 38) that Metro Act should have made its Penfield resident member, Ann McNabb, a plaintiff. However, the very purpose of an organization or an association as a plaintiff is litigating on behalf of the organization and its members. When Metro Act is plaintiff, its 350 separate members need not be plaintiffs as well.

### 2. *Housing Council In the Monroe County Area, Inc.*

The Housing Council in the Monroe County Area, Inc. (Housing Council) has been thwarted in efforts to accomplish its purpose by the discriminatory acts of the defendants. Housing

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[6]Nor is it fair for defendants to suggest (Respondents' Brief at 38) that Metro Act first raised associational right claims and standing of its Penfield members on appeal. The complaint and affidavits in opposition to the motion to dismiss were, of course, a part of the record before the District Court. In fact, there was submission of plaintiffs' papers to the District Court in this case prior to this Court's decision in *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 93 S.Ct. 364 (1972).

Council has, like Metro Act, been involved in analyzing the exclusionary housing patterns of Rochester communities, including the Town of Penfield, and formulating plans to solve those problems. (A. 170-176)

The membership of Housing Council has been directly damaged by the defendants' refusal to change its exclusionary zoning ordinance. The numerous minority members of Housing Council, like minority plaintiffs in this lawsuit, are being excluded from residing in Penfield. (A. 175) These persons suffer daily from the effects of confinement to a decaying inner city environment.

The experience of Penfield Better Homes is illustrative of the deep involvement of Housing Council members in efforts to increase the availability of mutiracial, low and moderate income housing in Penfield. (A. 849-859) Contrary to defendants' assertion (Respondents' Brief at 41), the Penfield Better Homes housing proposal was concrete and specific. A fifteen acre site in Penfield had been selected as well as a builder, general contractor, architect and housing consultant. Penfield Better Homes obtained a soil review, traffic survey and a legal opinion for the town to overcome any objections the town would have to the project. (A. 860 — 880) Notwithstanding, the defendants denied the re-zoning application of Penfield Better Homes because the proposed townhouse construction "... would constitute an inappropriate use of this land and would not be consonant with existing character of the neighborhood ..." (A. 881, 882)

Defendants suggest (Respondents' Brief at 42) that Penfield Better Homes might have challenged the denial of application in New York State courts. And indeed that might be true.[7] But it

[7]However, the excessive cost, as well as time necessary to litigate such question on a case by case basis would be most difficult for a non-profit group to sustain even if it could retain its land option long enough and, far more difficult than for the private builder who will rarely gamble on such economic loss.

does not follow that Penfield Better Homes as a member of an organization and along with other plaintiffs which have been injured by the discriminatory acts of the defendants cannot assert in federal court that these acts violate the Constitution and laws of the United States.

3. ***Rochester Home Builders Association, Inc.***

The Rochester Home Builders Association, Inc. (Rochester Home Builders), a trade association broadly representative of its members engaged in activities designed to foster and promote the housing industry and adequate housing for all members of the community (A. 146), has been injured by the acts of the defendants' exclusion of multiracial, low and moderate income housing.[8] Likewise, Rochester Home Builders members who have constructed over 80% of the private housing in Penfield in the last fifteen years and who complain that the defendants have subjected them to the same discriminatory treatment as the other plaintiffs (A. 144 — 147) have standing to complain of the exclusionary zoning ordinance and its enforcement.[9]

Defendants refused to grant members of Rochester Home Builders variances, permits, etc. to enable construction of multiracial, low and moderate income housing. (A. 141, 142; 154 — 156) Additionally, defendants have even "... attempted to

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[8]A suggestion by defendants (Respondents' Brief at 43) that Rochester Home Builders lacks the status to represent its members because it has not alleged previously appearing on their behalf is inappropriate. Rochester Home Builders has the requisite statutory authority, Section 202, New York Not-For-Profit Corporation Law. It has in fact previously appeared but its standing in this action is not dependent on past activity or the lack of it.

[9]Contrary to the assertion of defendants (Respondents' Brief at 43, footnote 17), the standing of Rochester Home Builders is sufficient to sustain its interest and position in this case even if all the other plaintiffs' cases were dismissed. Although not reached by the court below, the District Court's conclusion that it could not grant intervention because of the delay and prejudice to the adjudication of the rights of the original parties is clearly not sustained in the record.

coerce . . ." (A. 158) members of Rochester Home Builders from bringing this lawsuit and have threatened members of Rochester Home Builders that if the lawsuit were brought Rochester Home Builders ". . . would be prevented from doing business in the Town of Penfield and/or would be given great difficulty in obtaining necessary approvals, cooperation and/or appropriate treatment by government officials of said town, which would thus prevent them from carrying out their ordinary and necessary business in due course in said town". (A. 159)

It is alleged that Rochester Home Builders have tried to construct multiracial, low and moderate income housing[10] in the Town of Penfield and have been prevented by the discriminatory acts of the defendants. There is no support whatsoever for defendants' assertion (Respondents' Brief at 43) that Rochester Home Builders do not allege that any of its members desire to construct or are prepared to construct multiracial, low and moderate income housing in Penfield.

The defendants further claim that the Rochester Home Builders have failed to plead "concrete specifics" (Respondents' Brief at 44). Again, in the present posture of the lawsuit, plaintiffs' allegations are accepted on their face. Plaintiffs allege that all efforts of builders to construct multiracial, low and moderate income housing have been frustrated by the defendants as part of their policy and practice to exclude minority residents. (A. 623 — 642)

At time of trial, proof will be presented of the specific acts of defendants' denying Rochester Home Builders permits, variances, etc. and thereby preventing construction of multiracial, low and moderate income housing and of Rochester

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[10]Low and moderate income housing is defined as housing which sells for under $20,000 per unit and rents for under $175 per unit. Low and moderate income families are those having incomes between $5,500 and $11,000 per year. (A. 492, 493, 929, 930)

Home Builders' interest and willingness to proceed with such projects. However, if the defendants are allowed to continue in their course of conduct, it can hardly be expected that Rochester Home Builders will propose further projects knowing in advance they would have no opportunity of acceptance by the town.

## CONCLUSION

Each plaintiff has standing to sue because each is injured in fact by defendants' racially discriminatory and exclusionary practices and policies. Accordingly, the judgment of the Second Circuit should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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