22-2710

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CITIZENS UNITED TO PROTECT OUR NEIGHBORHOODS,
HILDA KOGUT, ROBERT ASSELBERGS, CAROLE GOODMAN,

Plaintiffs-Appellants,

—against—

VILLAGE OF CHESTNUT RIDGE, NEW YORK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants Citizens United to Protect Our Neighborhoods ("The Association Plaintiff" or "CUPON"), Hilda Kogut, Robert Asselbergs, and Carole Goodman ("Individual Plaintiffs") (together, the "Plaintiffs") alleged that acts of the Defendant-Appellee Village of Chestnut Ridge, New York (the "Village") violated the Establishment Clause of the First Amendment of the United States Constitution.

The Village moved to dismiss because the District Court lacked subject matter jurisdiction as the Plaintiffs inadequately alleged Article III standing. The Individual Plaintiffs claimed they had Article III standing based upon the theories of taxpayer, direct-exposure, and denial-of-benefit standing. The Association Plaintiff claimed it had Article III standing based upon the theories of associational and organizational standing.

The District Court agreed with the Village because the Plaintiffs did not adequately allege standing under Article III of the Constitution of the United States. It did not matter whether the District Court deliberated for one day or three-and-a-half years before rendering its decision because the Plaintiffs failed to establish that they had standing to sue and, concomitantly, any right to be heard in the District Court.

Nonetheless, the Village agrees that this Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether individual plaintiffs sufficiently allege that they are the proper party to challenge the Village's New Zoning Law under Article III and the Court's prudential standing doctrines based on theories of taxpayer, direct exposure, or denial of benefit standing, where the individual plaintiffs fail to set forth allegations of a concrete, particularized injury.

Proposed Answer: No.

2. Whether an association defendant sufficiently alleges that it was the proper party to challenge the Village's New Zoning Law under Article III and the Court's prudential standing doctrines based on theories of associational and organizational standing,[1] when its individual members lack standing and the association defendant fails to otherwise set forth a concrete, particularized injury.

Proposed Answer: No.

[1] CUPON's organizational standing argument is relegated entirely to one footnote and is therefore "not adequately raised or preserved for appellate review." *See U.S. v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993) ("[w]e do not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review"). The Village will address the argument out of an abundance of caution.

STATEMENT OF THE CASE

The Village is a municipal corporation located within the Town of Ramapo in the County of Rockland, which, through its governing body, the Board of Trustees, adopted a local law with regard to Residential Places of Assembly and Houses of Worship (the "New Zoning Law"). JA 17, 19-20, 36 [Compl. ¶¶ 2, 11, 17, 92]. The Association Plaintiff is a "civic membership organization that advocates for, among other things, sensible and fair land use reform for all citizens of Chestnut Ridge." JA 18 [Compl. ¶ 5]. The Individual Plaintiffs are "municipal taxpayers and members of CUPON, residing in the Village of Chestnut Ridge." JA 18 [Compl. ¶ 7]. Plaintiffs commenced this action with the filing of a complaint seeking a declaration that "acts of [the Village] violated the First Amendment of the Constitution," specifically the Establishment Clause, and an injunction against the Village "enjoining enforcement of the Village's Zoning Laws as they pertain to houses of worship" ("Complaint"). JA 41 [Compl. ¶¶ B-C].

The Village moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(1) and (b)(6). JA 44-427 [Motion to Dismiss]; SPA 1 [Opinion and Order p. 1]. Proposed Defendants-Intervenors Congregation Birchas Yitzchok, Congregation Dexter Park, Congregation Torah U'tfilla, the Orthodox Jewish Coalition of Chestnut Ridge, and Agudath Israel of America Inc. (collectively, "Proposed Intervenors") moved to intervene in the action. SPA 1 [Opinion and Order

p. 1].[2] On September 30, 2022, the District Court granted the motion to dismiss but denied intervention in a detailed Opinion and Order. SPA 1-20 [Opinion & Order]. The District Court dismissed Plaintiffs' complaint, without prejudice, for failure to plead Article III standing. SPA 21 [Judgment]. The Proposed Intervenors' motion was denied as moot. *Id.*

A. Plaintiffs' Challenges to the New Zoning Law.

This is one of three actions commenced by two of the three Individual Plaintiffs, Hilda Kogut and Robert Asselbergs,[3] challenging the New Zoning Law. JA 129-273 [Marzolla Decl. Exs. D-M]. In this particular action, Plaintiffs requested a declaration that "acts of [the Village] violated the First Amendment of the Constitution," specifically the Establishment Clause, and a "Preliminary and Permanent" injunction against the Village "enjoining enforcement of the Village's Zoning Laws as they pertain to houses of worship." JA 41 [Compl. ¶¶ B-C]. However, to obtain the relief Plaintiffs seek in this case, Article III requires that

[2] The proposed Defendants-Intervenors included those congregations and the Orthodox Jewish Coalition, which first petitioned the Village for a change of the Village's Zoning Law because the law was allegedly unconstitutional insofar as its zoning requirements blocked houses of worship from being built and opened, left approval up to the discretion of municipal officials, and treated houses of worship differently, and more harshly, than other entities and organizations, including civic associations, among other purported defects. *See* 19cv443(KMK) at ECF Docket No. 29.

[3] Two state court actions were commenced in the Supreme Court of the State of New York, County of Rockland, under Index Numbers 036311/2019 and 031506/2019 respectively (the "State Court Actions"). JA 129-273 [State Court Pleadings]. Plaintiffs Hilda Kogut and Robert Asselbergs are common to all three cases, while plaintiff Carole Goodman is not a party to the two state court actions. *Id.* Magali Dupuy is the third plaintiff in the State Court Actions. CUPON is not a party to the State Court Actions. *Id.*

Plaintiffs establish their standing to sue. Plaintiffs failed to plead allegations sufficient to properly establish standing to invoke the jurisdiction of the District Court.

B. The Religious Land Use and Institutionalized Persons Act ("RLUIPA") and Chestnut Ridge's Special Permit Requirement.

The enactment of the New Zoning Law came against the backdrop of questions raised at municipal meetings and in lawsuits regarding the requirements placed on local government by the federal Religious Land Use and Institutional Persons Act ("RLUIPA") and the Village's special-permit requirements. *See* JA 17 [Compl. ¶ 3]; *see generally* Compl. The Village of Chestnut Ridge is "largely a high-quality, low-density, single-family neighborhood of quiet wooded and suburban character." JA 21 [Compl. ¶ 23]. "Since 1986, when the Village was incorporated, it has been zoned primarily for single-family residences." *Id.*

The Village's original zoning law was enacted as a comprehensive zoning law when the Village was incorporated in 1986 (the "Old Zoning Law"). JA 21 [Compl. ¶ 22]. "At a June 28, 2018, public meeting, Johnathan Lockman, the Chestnut Ridge Village Planner, noted that under the [Old] Zoning Law[], all places of worship were in one category which permitted religious use by special permit approval and then site planning approval of the Planning Board." JA 22 [Compl. ¶ 28]. The Old Zoning Law required that, "absent a variance," "houses of worship be built and maintained on lots that were at least five acres." *Id.* at [Compl. ¶ 30]. No doubt, multiple houses

of worship were developed under the old zoning law, requiring necessary permissions, variances, and permits. *Id.* at [Compl. ¶ 29]. But they were built and opened at great time, effort, and expense. *See* JA 22-23, 33, 34 [Compl. ¶¶ 32, 79, 83]. And, under the Old Zoning Law, they were treated differently from non-religious entities and organizations seeking similar development and use approvals. *See* JA 22 [Compl. ¶ 28]. This disparate treatment is acknowledged in the Complaint. *See generally* Compl.

In 2015, long before the New Zoning Law was alleged to have been drafted, a representative of non-party applicant Congregation Ohr Mordechai argued that the Old Zoning Law was a burden on religious use and that RLUIPA prohibited putting such burdens on the applicant. JA 22-23 [Compl. ¶ 32]. The Complaint detailed the characteristics of that congregation's project, which was never built, describing a 29,000 square foot lot on which a 9,000 square foot synagogue was proposed, with 3,500 square feet to be used for residential purposes, and 6,400 square feet, plus the basement, to be used for religious purposes. JA 22-23 [Compl. ¶¶ 32-33, 35]. In what the Complaint appeared to characterize as a "concession," the Village's Board of Trustees granted "preliminary approval for a Special Permit," but only after the Zoning Board of Appeals worked with Congregation Ohr Mordechai on the site plans and granted various variances. JA 23 [Compl. ¶ 34].

The Complaint also characterized a series of events in or around 2016 involving the issuance of a building permit to another religious corporation, Kedishas Aharon D'hadas ("Kedishas"), as a "debacle", without appreciation of the burden the Old Zoning Law imposed or the impact of RLUIPA's prohibition on imposing burdens. JA 23 [Compl. ¶ 36]. After Kedishas' building was constructed and a Certificate of Occupancy issued, Plaintiff Kogut filed an appeal to the Chestnut Ridge Zoning Board of Appeals ("ZBA") to revoke the Certificate of Occupancy. JA 24 [Compl. ¶¶ 36-37]. Plaintiff Kogut argued that a special permit was required for the actual use of the structure, which she claimed was being used as a "house of worship." Plaintiff Kogut argued that Kedishas had proposed construction of a three-car garage without disclosing the intent to use the property for religious purposes. *Id.* at [Compl. ¶ 37].[4] Plaintiff Kogut prevailed before the ZBA. *Id.* at [Compl. ¶ 39]. The Complaint alleged that the then-Village Attorney issued a "new" certificate for the synagogue" a day after the official decision of the ZBA was filed. *Id.* at [Compl. ¶ 39].[5] No consideration was given to the import of the burden imposed by the Old Zoning Law if, as Plaintiff Kogut argued to the ZBA, the property was capable of

[4] The Complaint alleges that the applicant "never disclosed its intent was to construct a house of worship." *Id.* at [Compl. ¶ 38]. And the Complaint alleges that the "'3 car garage' which is actually a synagogue, dwarfs the size of the house." *Id.*

[5] Plaintiffs alleged that a "collusive lawsuit" was commenced against the ZBA challenging the ZBA decision in state court. Kedishas filed that lawsuit when the "new" certificate's force and effect was subject to challenge and discontinued after the time to challenge the "new" certificate expired without challenge. *Id.* at [Compl. ¶ 40]. The stipulation of discontinuance was so ordered by the presiding state court judge. See Rockland County Index No. 2019-00466."

being used as a house of worship only if a special permit was issued, or the impact of RLUIPA. *Id.* Nonetheless, in the Complaint, Plaintiffs acknowledged and alleged that the Mayor and Board of Trustees argued that Old Zoning Law was required to be changed – to the New Zoning Law - under RLUIPA. JA 17 [Compl. ¶ 3].

C. The Village is Sued Under RLUIPA.

Prior to the enactment of the New Zoning Law, on January 15, 2019, the Village was sued by Congregation Birchas Yitzchok, Congregation Dexter Park, Congregation Torah U'tfilla, several individuals, and the Orthodox Jewish Coalition ("OJC") (together the "2019 RLUIPA Action Plaintiffs") in the Southern District of New York under Case Number 7:19-cv-00443-KMK (the "2019 RLUIPA Action").[6] JA 37 [Compl. ¶ 98]. The lawsuit was filed on the day the Village closed the public hearing on the New Zoning Law, and weeks before the New Zoning Law was admittedly enacted. JA 35, 38 [Compl. ¶¶ 85, 103]. Plaintiffs alleged that the 2019 RLUIPA Action was collusive because the publicly filed document triggered the Mayor's and the rest of the Village Board's public expression of concerns over potential litigation as a reason to support passage of the New Zoning Law. JA 37 [Compl. ¶ 98]. Plaintiffs further alleged that the 2019 RLUIPA Action's complaint

[6] "A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Sanders v. Sanders*, 22-99, 2022 WL 16984681, at *1 (2d Cir. 2022) (citation omitted).

contained citations to the Village's Full Environmental Impact Statement that Plaintiffs assert was only uploaded to the Village's website and made public on the date of commencement, but without any allegation that the direct quotes could not have been obtained from that publication or elsewhere. *Id.* at [Compl. ¶ 99]. The Complaint even took issue with the Village's Attorney's decision to waive service of the 2019 RLUIPA Action's complaint, which waiver took place months later. *Id.* at 37-38 [Compl. ¶ 106].

On July 16, 2019, the Village filed a motion to dismiss the 2019 RLUIPA Action. *See* 7:19-cv-00443-KMK Dkt. Nos. 25-27. The very next day, the 2019 RLUIPA Action Plaintiffs amended their complaint. *Id.* at Dkt. No. 29. On April 17, 2020, the Village again moved to dismiss the 2019 RLUIPA Action. *Id.* at Dkt. Nos. 59-62. The Village's motion to dismiss was granted on March 31, 2021. *Id.* at Dkt. No. 80. Upon the 2019 RLUIPA Action Plaintiffs' motion for reconsideration, however, the Court reversed itself, holding that "The Congregations' and Individuals' Equal Protection and State Law claims may proceed." *Id.* at Dkt. No. 88. After spending a significant amount of time, effort, and money on defending the 2019 RLUIPA action, the amended complaint survived for some plaintiffs, and discovery, additional motions, and trial considerations drove settlement talks. *See generally* 2019 RLUIPA Action Dkt. On May 24, 2022, the 2019 RLUIPA Action was resolved by Consent Decree, whereby, among other things, the 2019 RLUIPA

Action Plaintiffs were permitted to file application(s) for "a building permit or other land use approval" under the New Zoning Law without any findings of fault or admissions of liability or money damages, including no award of attorney's fees. *Id.* at Dkt. No. 124. In essence, it was settled in a form that confirmed the viability of the New Zoning Law, at least for them.

D. The Development of the New Zoning Law.[7]

Plaintiffs alleged that the New Zoning Law "was initially drafted by OJC and its experts," subjected to minor changes that were the product of negotiations and excessive entanglement between the Mayor and the Village Board, on one hand, and the OJC along with its engineering firm, Brooker Engineering, on the other," and finalized after public hearings were held on the proposed law. JA 27, 31-35, 38 [Compl. ¶¶ 52, 70-86, 103].

Detailing the way in which the proposed legislation was processed, the Complaint alleged, that "starting in 2017, the Village, through Mayor Presti and Village Planners, exchanged emails, texts, and phone calls, and held meetings with the OJC, to discuss implementing the OJC Zoning Law." JA 25 [Compl. ¶ 43]. "OJC provided the draft law to the Village—and to no one else—in August 2017." *Id.* at [Compl. ¶ 44]. An invoice dated October 5, 2017 indicates that a firm hired by the

[7] Forebodingly, the resolution enacting the New Zoning Law attempted to address the allegations of conspiracy before they were used in this action to bring a lawsuit against the Village. *See* JA 126-127 n. 6.

Village for "planning services" reviewed a draft of the New Zoning Law and arranged a meeting with OJC. *Id.* That firm's employees billed time for contacting a "Senior Project Manager at Brooker Engineering, PLLC [], a civil engineering firm working on behalf of the OJC." *Id.* at [Compl. ¶ 45]. That firm also spoke to the Mayor about the draft law and its members met in September 2017 with individuals at Brooker Engineering, PLLC. JA 26 [Compl. ¶¶ 46-47]. Another invoice from the Village's Planners dated December 20, 2017, detailed review of the draft law and discussions held with the Mayor and the Brooker firm. *Id.* at [Compl. ¶ 48]. A final invoice showed similar entries. *Id.* at [Compl. ¶ 50]. The foregoing was allegedly confirmed when a member of the Village's Planning Board questioned one of the Village planners about whether members of OJC were present and participated in draft meetings. *Id.* at [Compl. ¶ 49].

Nonetheless, Plaintiffs alleged that "discussions, negotiations and drafting sections were done in secret and intentionally excluded other churches, mosques, planners, and Village residents." JA 27 [Compl. ¶ 52]. Plaintiffs alleged that, aside from the invoices, "there were no records of the meetings and no way to know whether those meetings complied with New York's Open Meetings Law." *Id.* at [Compl. ¶ 53]. Plaintiffs allege that they "submitted a FOIL request for 'correspondence, emails or any meeting minutes…' related to the drafting of the New Zoning Law in "secret," against which the Village Clerk responded that the

requested records "do not exist." JA 29 [Compl. ¶ 61]. Of course, New York's Open Meetings Law relates to municipal boards, not their village planners. *See* POL §§102-03; 2 N.Y. Jur. 2d Admin. Law § 81.

The Complaint alleged that the New Zoning Law was first published at a Village Board meeting held on February 22, 2018, 364 days before it was enacted on February 21, 2019. *Id.* at [Compl. ¶ 54], JA 38 [Compl. ¶ 103]. The proffered justification for the legislation was "to remove impediments to the free practice of religion, such as allowing for smaller-scale places of worship customary to Orthodox Congregations which are precluded from driving on Holy Days." JA 28 [Compl. ¶57]. According to the Complaint, the Mayor opened the meeting by stating, "There is a statutory provision for us to accommodate the establishment of Houses of Worship in Residential Zoning Districts, both Federal and State law; end of story." *Id.* at [Compl. ¶ 59]. The Mayor added that variances and other impediments with respect to establishing a house of worship may violate Federal and State law. *Id.* Thus, the Complaint identified a legitimate governmental purpose for the New Zoning Law, no matter what form it eventually took.

E. The Planning Board Expressed Opposition to the New Zoning Law.

The Village Planning Board expressed its opposition to the New Zoning Law by releasing a memorandum recognizing the need to change the Old Zoning Law, but disagreeing with the Board of Trustees proposed method and focusing on impacts to the community. JA 29-30 [Compl. ¶ 64]. The Complaint alleges that the Village Planning Board recommended that the Village first adopt a comprehensive master plan before considering the New Zoning Law. JA 30 [Compl. ¶ 65]. The Planning Board questioned why only the input of OJC was considered during the drafting of the proposed law, stating that it appeared the proposed law "is designed to favor one religious institution over another" and suggesting that the proposed law may be an Establishment Clause violation. *Id.* at [Compl. ¶ 66]. According to Plaintiff "the majority of the Planning Board's comments and recommendations were ignored by the Village and were not incorporated in any revisions to the OJC Zoning Law." JA 31 [Compl. ¶ 69].

F. Public Hearings Are Held in Relation to the New Zoning Law.

Even though the Complaint alleged that "the Village Board held several meetings in 2018 about the proposed law," Plaintiffs alleged that the adoption of the New Zoning Law "was done for the sole purposed of specifically advancing the religious interests of the OJC." JA 29 [Compl. ¶ 63]. Plaintiffs alleged that the "secret meetings" and "agreed-upon arrangements" between the Village and OJC were never disclosed to

the public or Plaintiffs themselves. *Id.* And, Plaintiffs alleged that Village residents and attorneys warned the Board of Trustees of the possibility that the adoption of the proposed law "could open the Mayor, the Trustees, and the Village up to a lawsuit under the Establishment Clause," obviously, from the Plaintiffs here. *Id.*

At that time, instead of passing the New Zoning Law, "CUPON" advocated that the Village conduct a comprehensive plan process and then amend its zoning laws in conformance with such a comprehensive plan, taking into consideration the needs of all residents and landowners of the Village–including (but not limited to) the OJC." JA 18 [Compl. ¶ 5].[8] CUPON appeared to share the Planning Board's view of things. CUPON "urged. . . that any such zoning amendments not favor one religious organization over another and not favor religious use over secular use". *Id.*

Plaintiffs alleged that at the first public hearing, an attorney representing OJC stated that the proposed law would "g[o] a long way to bringing the Village into compliance with the law" and announced that OJC would assist the Village in defending the law. JA 31-32 [Compl. ¶ 72]. CUPON's professional planner responded and "stated that the OJC Zoning Law has the potential to fundamentally change the nature of the community, but also to have significant environmental

[8] In a fourth lawsuit (the "Fourth State Action"), plaintiffs Asselbergs and Kogut are seeking to annul the comprehensive plan adopted by the Village based upon, among other things, alleged SEQRA violations. The Fourth State Court Action was commenced on or about November 19, 2022, under Index No. 034914/2022. The "Document List" and links to the pleadings are available at: https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=ltXjmtj/fCReeMeKPD0axg==&display=all&courtType=Rockland%20County%20Supreme%20Court&resultsPageNum=1.

impacts. JA 32 [Compl. ¶ 73]. Obviously, there was a stark difference in opinion. At this public hearing, Mayor Presti explained the legislative process to those present:

> What happens is someone needs to either advise or consult with us to say this is something that you should be thinking about, then what happens is as a Board of Trustees at a workshop, we say okay, why don't you draft something for us to consider, then what happens is-what happened is the planner drafted the first draft of what's before us this evening…

Id. at [Compl. ¶ 75].

At the second public hearing, Mayor Presti is alleged to have said that "doing nothing is not an option." *Id.* at [Compl. ¶ 77]. The Village believed that there was perceived infirmity with the Old Zoning Law. Mayor Presti explained that requiring for religious use applications to go through various boards is what defines a substantial burden. JA 33 [Compl. ¶ 79]. At the third public hearing, a Village resident asked, "why it was only one organization that represented one particular group that was included in the drafting and discussion with regards to the OJC Zoning Law." *Id.* at [Compl. ¶ 80]. Mayor Presti again explained the legislative process and confirmed that laws "have to start somewhere." *Id.* Plaintiffs take this to mean that, "a religious group asked the Village to consider Zoning Laws in advocacy for their particular religious uses and their particular community, allowing for the Defendant to become excessively entangled with a particular religious group and viewpoint." *Id.* However, a proposed law starts oftentimes at the insistence of a party that believes it is somehow aggrieved and Mayor Presti articulated and

explained his view of the evolution of the law regarding assemblies in homes from prayer groups to organized religions and why the proposed law was needed to address the issue. *Id.* at [Compl. ¶¶ 83-84].

The final public hearing was held on January 15, 2019. JA 35 [Compl. ¶ 86]. At that final hearing, Mayor Presti pointed out that the Village Planners' Memorandum with text of the New Zoning Law amendment bore an alleged typographical error, which Plaintiffs allege was not error, but more proof of conspiracy. *Id.* at [Compl. ¶ 90], JA 32 [Compl. ¶ 75]. Plaintiffs alleged that OJC, the Mayor on behalf of the Village, and Booker Engineering were "colluding to establish the [New] Zoning Law since at least August 2017, while the text of the resolution states a petition was received on November 2017. JA 38 [Compl. ¶ 105]. Plaintiffs alleged that only "cosmetic changes" were made to the draft of the law from its first iteration. JA 35 [Compl. ¶ 91]. As support, Plaintiffs alleged that a revision released on December 27, 2018 "contains substantially the same text." JA 36 [Compl. ¶ 92]. Plaintiffs alleged that the public comments did not result in their preferred and desired "changes to the [New] Zoning Law." *Id.*

Plaintiffs alleged that additional proof of conspiracy can be culled from the Village's Approving Resolution, which allegedly accuses Village citizens of 'outright animus' and 'discriminatory bias,' naming citizens and publishing their public comments in the body of the resolution. JA 38 [Compl. ¶ 106]. Plaintiffs also

claimed that OJC "circulated a flyer supporting candidates who voted to enact the [New] Zoning Law." JA 39 [Compl. ¶ 108]. Rather than seeing the issues politically, Plaintiffs view them cynically and conspiratorially.

G. The Zoning Law is Enacted by Resolution.

On February 19, 2019, the New Zoning Law was passed unanimously by the Village's five-member Board of Trustees. JA 20 [Compl. ¶ 18], JA 38 [Compl. ¶ 103].[9] Plaintiffs alleged that the enactment was improper because the Village was never properly petitioned by anyone for the change. JA 35 [Compl. ¶ 89]. Plaintiffs alleged that the New Zoning Law, favors "a specific religious organization" over other religious organizations and "favor[s] religious land use over secular land use." *Id.* at [Compl. ¶ 21]. Plaintiffs claimed that the law was "an end run around the permitting process in violation of the constitutional prohibition of advancing, endorsing or promoting religion." JA 27 [Compl. ¶ 51]. The Complaint alleged that, "[a]ny secular proposal of similar size and impact would not receive the special treatment accorded to the OJC by the Village. No other religious entity has ever asked for or received similar Village assistance in exceeding established land use laws, ordinances, and regulation in the history of the Village." JA 28 [Compl. ¶ 60]. Nonetheless, the Complaint acknowledged that the New Zoning Law creates three

[9] Plaintiffs' distinction between a "Village Board" and Board of Trustees" is inaccurate. Like most municipalities governed by a board of trustees, the Mayor of Chestnut Ridge is a member of the Board of Trustees, not a separate board. *See* JA 20 [Compl. ¶ 18].

categories of use: "residential gathering place, neighborhood places of worship, and community places of worship." JA 36 [Compl. ¶ 92].[10] The Complaint does not address the significance of the categories under the Establishment Clause or RLUIPA.

H. Two State Court Actions Are Commenced Challenging the New Zoning Law.

On or about March 21, 2019, Plaintiffs Asselbergs and Kogut, along with non-party Magali Dupuy commenced an CPLR Article 78 proceeding in the Supreme Court State of New York, County of Rockland, under Index Number 031506/2019.[11] JA 133-197 [March 21, 2019 Petition and Supporting Exhibits]. Such a proceeding is a vehicle by which to challenge a Village decision and is subject to a short statute of limitations. *See* CPLR 217; *Walton v. N.Y. State Dep't of Corr. Servs.*, 8 N.Y. 3d 186, 194 (2007). After the defendants in that action filed a motion to dismiss, three causes of action were dismissed and three remained. JA 199-214 [State Court May 22, 2019 Decision and Order]. A state court appeal of the ruling is currently pending. JA 216-221 [State Court October 11, 2019 Notice of Appeal].

A Second State Court Action was filed on or about November 6, 2019 by the same plaintiffs as the initial state court action. The second state court action seeks to

[10] The text of the New Zoning Law is available at JA 77-104.

[11] The NYSCEF Document List and links to the pleadings are available at https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=bHMohLt93PTf_PLUS_QHJxhqV3g==&display=all.

annul the New Zoning Law based upon failure to comply with New York Municipal Law, failure to comply with Village Law, and for "reliance upon a municipal resolution that contained materially false and derogatory information." JA 232-254 [November 6, 2019 State Court Verified Complaint]. Defendants' motion to dismiss that action was denied. JA 256-260 [State Court January 8, 2020 Decision and Order]. A state court appeal of the ruling is currently pending. JA 262-267 [State Court March 13, 2020 Notice of Appeal].

I. This Establishment Clause Case is Commenced Challenging the New Zoning Law.

Plaintiffs continue to assert their general grievance that the New Zoning Law, "completely changes the character of Chestnut Ridge" and that the Village failed to listen to CUPON's advice to adopt a new comprehensive plan. JA 17 [Compl. ¶ 2], JA 22 [Compl. ¶ 27] ("a law that radically transmogrifies the character of the Village"), JA 21-22 [Compl. ¶¶ 25-27]. Plaintiffs seek a declaration that "acts of [the Village] violated the First Amendment of the Constitution", specifically, the Establishment Clause, and an injunction against the Village "enjoining enforcement of the Village's Zoning Laws as they pertain to houses of worship". JA 41 [Compl. ¶¶ B-C]. On September 30, 2022, the District Court granted the Village's motion to dismiss holding that Plaintiffs did not establish their standing to sue, as required by Article III and well-established standing doctrines.

SUMMARY OF THE ARGUMENT

Article III of the Constitution limits the extent of judicial power of federal courts to "cases" or "controversies." U.S. Const. art. III, § 2. Generalized grievances fall outside the Article III case-or-controversy requirement because they can be neither particularized, nor concrete. To allow for the litigation of generalized grievances would throw open the doors of the federal courts to challenges to each act of each representative body nationwide. The case-or-controversy requirement was put in place to limit judicial review of representative body action to cases where the plaintiff is a proper party to raise a merits question, and avoid judicial overreach.

Here, the Individual Plaintiffs do not adequately allege their standing, despite alleging three separate grounds: taxpayer standing, direct exposure standing, and denial of benefit standing. None of the theories presented by the Individual Plaintiffs are sufficient to meet their burden to establish an injury-in-fact.

The Individual Plaintiff's municipal taxpayer theory relies solely upon three invoices from a firm hired as a Village Planner without allegations of an expenditure directly related to an Establishment Clause injury, let alone a measurable expenditure. No specific expenditure or tax is pled. No injury related to an expenditure or loss in revenue is alleged. The Individual Plaintiffs' direct exposure fails as none of the allegations amount to a particularized, concrete, non-conjectural, non-hypothetical Establishment Clause Injury. The case law cited by the Individual

Plaintiffs is inapposite. Finally, Individual Plaintiffs never alleged a denial of benefits, and their efforts to point to an alleged benefit received by a third party cannot afford them standing. As explained below, the District Court correctly held that the Individual Plaintiffs have not identified any injury which they have individually suffered, failing to meet requirements for a concrete, particularized injury, and properly entered judgment against the Individual Plaintiffs, because they have no right to sue in Federal Court.

The theories of associational and organizational standing alleged by the Association Plaintiff are equally lacking. As none of the members of CUPON have standing individually, the Association Plaintiff is unable to meet the requirements for organizational standing. The Association Plaintiff failed to allege that it suffered any injury, let alone an injury to its organization's activities or that it was forced to divert resources as a result of the legislation from its other activities and therefore is also unable to establish associational standing.

Accordingly, as each and every Plaintiff lacks standing, the District Court properly dismissed the Complaint without prejudice.

STANDARD OF REVIEW

A decision dismissing a complaint for lack of standing is reviewed *de novo*. *See Rajamin v. Deutsche Bank Nat. Tr. Co.*, 757 F.3d 79, 84–85 (2d Cir. 2014). Prior to addressing the merits of a plaintiff's complaint, federal courts have an obligation to assure that the merits question is presented in a "proper Article III 'case' or 'controversy.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 332 (2006) (citing *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560 (2012)); *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (holding that the case-or-controversy requirement is a "bedrock requirement").[12] "The law of Article III standing ... serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 408 (2013). A plaintiff seeking to invoke federal jurisdiction has the burden of establishing the elements of standing: injury-in-fact, causation, and redressability. *See Lujan*, 504 U.S. at 561. The elements of standing are not mere pleading requirements, but "an indispensable part of the plaintiff's case." *Id.* More particularly, a plaintiff invoking federal jurisdiction has the burden of establishing that: (1) he or she "suffered an 'injury-in-fact' – an invasion of a

[12] Appellants go to great lengths to fault the District Court for delay in rendering a decision on Appellants' standing. However, standing can never be waived and can even be raised *sua sponte* on appeal. *U.S. v. Hays*, 515 U.S. 737, 742 (1995). The importance of Article III Standing in this Court's jurisprudence and the fact that it is not subject to waiver makes obvious that a right to litigate a claim cannot accrue from delay alone. *See e.g., Id.* Additionally, the profound and lasting impacts of the COVID-19 pandemic upon court calendars cannot be overlooked either.

legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjured', or 'hypothetical' (2) "a causal connection between the injury and conduct complained of", and (3) "it must be 'likely', as opposed to merely 'speculative', that the injury will be 'redressed by a favorable decision'." *See Id.* at 560.

To establish a "particularized" injury, a plaintiff must prove that the injury is personal to plaintiff and that plaintiff was injured in a distinct, individual, manner, not in a collective or undifferentiated manner. S*pokeo, Inc. v. Robins,* 578 U.S. 330-340 (2016) (collecting cases). To establish a "concrete" injury, a plaintiff must establish that the injury is a real or actual injury, not "abstract." *Id.* at 340. In other words, the law is clear that a generalized grievance is insufficient to establish standing. *See Lujan*, 504 U.S. at 575 ("a suit rested upon an impermissible 'generalized grievance; and was inconsistent with the framework of Article III because the impact on [plaintiff] is plainly undifferentiated and common to all members of the public'") (quoting *U.S. v. Richardson*, 418 U.S. 166, 171 (1974)).

Furthermore, consistent with well-established prudential standing doctrines, a plaintiff asserting an Establishment Clause claim can establish standing under three possible theories: (1) under extremely limited circumstances, as a taxpayer, (2) direct harm, and (3) denial of benefits. *See Montesa v. Schwartz*, 836 F.3d 176, 195 (2d Cir. 2016); *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) ("we have consistently

adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing…"). "Prudential standing encompasses the rule against the adjudication of generalized grievances, the rule prohibiting plaintiffs from asserting the rights of third parties, and the rule barring claims that fall outside 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge*, 454 U.S. at 474–75 (internal quotation omitted).

A civic association can establish standing under two possible theories: (1) associational standing; and (2) organizational standing. To establish associational standing, a plaintiff must show that (a) its members would have standing to sue in their own right; (b) the interests it seeks to protect relate to the organization's purpose; and (c) neither the asserted claim nor the requested relief require the participation of individual members in the lawsuit. *Hunt v. Washington, State Apple Advert Comm'n,* 432 U.S. 333, 343 (1977).

Here, Plaintiffs claim them all. However, none of the theories of standing, nor those applicable to Establishment Clause cases, are sufficient to bring Plaintiffs' Complaint across the finish line. The Complaint falls short of alleging a particularized and concrete injury-in-fact. As the Plaintiffs" failed to meet their burden to establish an injury-in-fact, the dismissal of the Complaint should be affirmed.

ARGUMENT

I. The Individual Plaintiffs' Lack Standing as They Failed to Plead Municipal Spending or Loss of Revenue Attributable to an Alleged Establishment Clause Injury.

The general rule is that an individual's status as a taxpayer is insufficient to establish Article III standing. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. at 343. However, this Circuit has held that it is bound by the Supreme Court's "ringing endorsement" of municipal taxpayer standing expressed in *dicta* of the federal taxpayer case *Frothingham v. Mellon*. 262 U.S. 447 (1923) ("*Frothingham*"); *U.S. v. City of New York*, 972 F.2d 464, 470 (2d Cir. 1992) (municipal taxpayers had standing to challenge allegedly unlawful municipal expenditure). But *Frothingham* is not the end of the standing inquiry when a municipal taxpayer asserts an Establishment Clause claim based upon their status as a taxpayer.

Frothingham places municipal taxpayers on a different footing from state and federal taxpayers by automatically applying, in each municipal taxpayer case, the rule that "the interest of a taxpayer of a municipality in the application of its moneys is direct and immediate" when "su[uing] to enjoin an illegal use of the moneys of a municipal corporation." *Frothingham v. Mellon*. 262 U.S. at 447. Thus, *Frothingham* is clear, to be afforded standing, the municipal taxpayer must sue to enjoin an illegal use of the moneys of the municipal corporation. Accordingly, to properly allege taxpayer standing under *Frothingham*, a complaint must allege that:

[1] taxpayer moneys were spent by the municipality illegally, i.e., related to the challenged activity, [2] the municipal spending was not incidental to the challenged activity i.e., it was a measurable appropriation, and [3] the relief sought must be to enjoin the expenditures themselves. *See e.g., Altman v. Bedford Cent. Sch. Dist.,* 245 F.3d 49, 74 (2d Cir. 2001) ("*Altman*") (holding that payment of a "modest stipend" to a minister whose school activities were unrelated to religion was insufficient to afford the plaintiff standing); *Am. Civ. Liberties Union of Illinois v. City of St. Charles*, 794 F.2d 265, 267 (7th Cir. 1986) (holding that municipal taxpayers lacked standing where the challenged activity was not funded by taxpayer revenue), *cert. denied,* 479 U.S. 961, 107 S.Ct. 458, 93 L.Ed.2d 403 (1986); *Dash v. Mitchell,* 356 F.Supp. 1292, 1298 (D.D.C. 1972) (three-judge court) (municipal taxpayers lack standing where the expenditures to support administration of the statute are "'incidental'"), *aff'd sub nom. Briscoe v. Kleindienst,* 409 U.S. 808 (1972).

Additionally, it is the Individual Plaintiffs' burden to establish their standing to sue. *See Lujan*, 504 U.S. at 561. Thus, taxpayer standing requires more of a plaintiff than the allegation of the existence of invoices and a request for inferences that the invoices establish a good-faith pocketbook action. While such inferences would not rescue the Complaint regardless, the requested inferences are not available to cure a failure to properly plead standing, as the Supreme Court has acknowledged,

Article III does not permit the relief that the Plaintiffs seek in their argument based on:

> [T]he long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather 'must affirmatively appear in the record, and that it is the burden of the party who seeks the exercise of jurisdiction in his favor, clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.

Spencer v. Kemna, 523 U.S. 1, 10–11 (1998) (quoting *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 231 (1990) (citations and quotation marks omitted)).

A. The Individual Plaintiffs' Fail to Allege Illegal Expenditure of Municipal Taxpayer Funds Attributable to an Establishment Clause Injury, nor Do They Seek to Enjoin an Expenditure.

Both *Frothingham* and *Doremus v. Bd. of Ed. of Borough of Hawthorne* make clear that pleading a good-faith pocketbook injury is required to assert municipal taxpayer standing. *See also Miller v. California Commission on the Status of Women,* 469 U.S. 806 (1984). While *Doremus* was a challenge to a state statute, it involved a taxpayer of the Borough of Hawthorne, a municipality in the state of New Jersey, who alleged his municipality **"**has a high school supported by public funds." 342 U.S. 429, 433 (1952). The Third Circuit has expressed the limiting principals of *Doremus* as follows: "[t]hough a municipal taxpayer may, in some cases, challenge municipal expenditures, her right to do so is not unlimited, and [courts] have applied the 'good-faith pocketbook' requirements, articulated by the Supreme Court in *Doremus*, to municipal taxpayer standing." *Nichols v. City of Rehoboth Beach*, 836

F.3d 275, 280-81 (3d Cir. 2016); *see Doremus v. Board of Educ. of Boro. Of Hawthorne*, 342 U.S. 429 (1952).

To establish such a challenge, the *Doremus* taxpayer had to demonstrate that the "activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school." *Id.* at 433, 72 S.Ct. 394. The *Doremus* taxpayer could not satisfy that requirement, because it was " 'neither conceded nor proved that the brief interruption in the day's schooling caused by compliance with the statute adds cost to the school expenses or varies by more than an incomputable scintilla the economy of the day's work.' " *Id.* at 431, 72 S.Ct. 394 (quoting the New Jersey Supreme Court decision under review in *Doremus*).

Instead, it was "apparent" that the taxpayer sought to litigate not a "direct dollars-and-cents injury but ... a religious difference," which is insufficient to support taxpayer standing. *Id.* at 434, 72 S.Ct. 394. The *Doremus* taxpayer had to demonstrate that the government spends "a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of." *Id.* at 434, 72 S.Ct. 394; *see also* Taxpayers' Suits, A Survey and Summary, 69 Yale L.J. 895, 922 (1960) (*Doremus* "stands for the proposition that a state or municipal taxpayer does not have a direct enough interest for his suit to constitute

an [A]rticle III case or controversy unless the activity challenged involves an expenditure of public funds which would not otherwise be made").

As such, Pursuant to *Doremus*, a municipal taxpayer must show: (1) that she pays taxes to the municipal entity, (2) "that the municipality has actually expended funds on the allegedly illegal elements of the disputed practice", and (3) that more than a *de minimus* amount of tax revenue has been expended on the challenged practice itself. *Nichols v. City of Rehoboth Beath*, 836 F.3d 275, 282 (3d Cir. 2016); *see also Altman*, 245 F.3d 49, 74 (2d Cir. 2001). Failure to meet these requirements is fatal to a Plaintiffs' standing. *See Doremus v. Board of Education*, 342 U.S. at 433.

Based upon the foregoing, because Plaintiffs failed to allege the challenged activity was supported by any particular tax or was paid from any particular appropriation or that there was "a measurable appropriation or loss of revenue attributable to the challenged activities" (*Altman v. Bedford Cent. Sch.Dist.*, 245 F.3d at 74), the Complaint was deficient.

Here, Plaintiffs cannot sufficiently allege municipal taxpayer standing because the payment to a Village Planner associated with reviewing a proposed law is not attributable to the challenged activities, i.e., Plaintiffs are not suing to enjoin the use of municipal taxpayer monies, but rather seeking a declaration that the passage of the New Zoning Law violates the First Amendment to the Constitution

of the United States and injunctive relief against the Village enjoining enforcement of the New Zoning Law as they pertain to houses of worship, neither aspect of which challenges the expenditure of any funds for the Village Planner's services. The Individual Plaintiffs do not identify a resolution where their taxpayer funds were disbursed in a manner that relates to the municipal action they seek to enjoin. Put simply, the existence of invoices is an insufficient basis to establish an injury-in-fact to invoke the jurisdiction of the District Court.

In this regard, the Complaint points to three invoices from "Nelson Pope & Voorhis, LLC ("NPV"), a firm hired by the Village for planning services…" (JA 25-26 [Compl. ¶¶ 44, 48, 50]), without alleging any specific amount of appropriation. The Complaint alleges essentially four activities within the invoices which it identifies as coming from NPV, not the Village. First, it alleges that a NPV employee reviewed a draft of what would, after "minor changes" and public hearings, become the New Zoning Law. *See* JA 25 [Compl. ¶ 44]. Second, it alleges the NPV employee met with the drafting organization, which happened to be a religious organization, OJC. *See id*. Third, it alleges that NPV contacted an engineering firm working on behalf of the drafting organization. *See* JA 45-46 [Compl. ¶¶ 45, 47, 50]. Finally, it alleges that NPV was in contact with the Mayor regarding the draft law, and on one occasion included an employee from the drafting organization's engineering firm. *See* JA 46 [Compl. ¶ 46]. The only other mention of the invoices

is in paragraph 105 which contains an illogical conclusion that the Mayor on behalf of the Village was colluding with OJC based upon the fact that the Village resolution adopting the New Zoning Law provides that a "written petition" was received on November 1, 2017 and the invoices indicate that the draft law was received at least in August 2017. *See* JA 38. The only allegation that contains any alleged government activity whatsoever is the discussion of a draft law between the employee of the Village Planner and the Mayor.

These allegations are insufficient. There is no allegation of a measurable appropriation by the municipality spent on the alleged illegal elements of the disputed practice whatsoever. Nothing within the Complaint alleges that the Individual Plaintiffs are out-of-pocket as a result of any Establishment Clause injury since the Individual Plaintiffs are not challenging the invoices, the payment of the invoices, or law that was reviewed. Rather, they are seeking to enjoin application of the New Zoning Law, which they admit was changed after the review of the law by NPV, in some minor regard. They do not allege that payment of the invoices constitutes an illegal act either. There is no "measurable appropriation or loss of revenue attributable to the challenged activities..." that in any direct and immediate way is related to the invoices. Thus, the Individual Plaintiffs fail to plead a good-faith pocketbook injury and lack standing under Supreme Court precedent.

The insufficiency of the factual detail in the Complaint is analogous to *Doremus*, where the Supreme Court held:

> [t]here is no allegation that this activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school. No information is given as to what kind of taxes are paid by appellants and there is no averment that the Bible reading increases any tax they do pay or that as taxpayers they are, will, or possibly can be out of pocket because of it.

342 U.S. at 434. The *Doremus* Court compared *Everson v. Bd. of Ed. of Ewing Tp.*, where a different result was reached because, unlike here, the Everson plaintiff identified how the municipal action complained of was directly applied to himself as a taxpayer: "[t]he resolution which authorizes disbursement of this taxpayer's money limits reimbursement to those who attend public schools and Catholic schools. That is the way the Act is applied to this taxpayer." 330 U.S. 1, 20 (1947).

As the *Doremus* Court held, the party seeking to invoke the Court's jurisdiction must possess "the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct." 342 U.S. at 435. There is no allegation that the Individual Plaintiffs will be out-of-pocket based upon expenditures tied to alleged illegal municipal action taken by the Village, let alone action tied to the New Zoning Law. Accordingly, the District Court's taxpayer standing holding should be affirmed.

B. Invoices from a Firm Hired for Village Planning Services Are Insufficient to Allege a Measurable Appropriation.

To establish "a measurable appropriation or loss of revenue attributable to the challenged activities...", a plaintiff must allege more than an expenditure incidental to the challenged activity. *See Altman,* 245 F.3d at 74 (holding that payment unrelated to challenged activity is an insufficient basis for taxpayer standing). The logic of *Altman*, 245 F.3d at 74, that the application of standing to any government action of a taxpayer funded employee would allow any government action to be challenged at any time, equally applies, if not more, to firms hired by municipalities to fulfil traditional government employee roles, like village planning or village attorneys:

> Nearly all governmental activities are conducted or overseen by employees whose salaries are funded by tax dollars. To confer taxpayer standing on such a basis would allow any municipal taxpayer to challenge virtually any governmental action at any time. Article III, as interpreted by the Supreme Court, requires a good deal more.

This holding follows the logic of *Doremus*, which requires, a plaintiff seeking to assert municipal taxpayer standing to point to a specific municipal action, in the disbursing of funds that was "occasioned solely by the activities complained of." *See* 342 U.S. at 434 (quoting *Massachusetts v. Mellon,* 262 U.S. 447).

Nearly every law is reviewed by village attorneys and nearly every land use project is reviewed by village planners, to allow their invoices to confer taxpayer standing would, as this Court held in *Altman*, "allow any municipal taxpayer to

challenge virtually any governmental action at any time." *See Id.* By way of example, Feerick Nugent MacCartney PLLC ("FNM"), counsel for the Village, acts as the Village's attorneys in addition to litigation counsel. Thus, FNM drafts laws and also sends invoices to the Village, under Plaintiffs' theory of municipal taxpayer standing, this firm's invoices could potentially give standing to any municipal taxpayer who seeks to constitutionally challenge any law at any time.

Moreover, here, the invoices were entirely incidental to the enactment of the New Zoning Law. The Village Planners would have been paid to review the law whether or not it was enacted by the Board of Trustees. Moreover, there is no allegation regarding the appropriation which paid the Village Planners. It is not enough to allege a program is funded out of the general budget. *See, e.g.*, *Novesky*, 120 Fed. Appx. 384, 385, 2005 WL 78769, at *2 (2d Cir. 2005) (unpublished) (holding no measurable appropriation exists for programs funded out of a general budget). Payment to Village Planners is the type of general disbursement rejected in *Novesky*. Plaintiffs point to invoices alone. They do not allege how much was paid and by whom or to what extent a tax was used for. Rather, as the *Altman* Court held, the injury must be real and measurable and not abstract. There is no specific tax alleged, and no allegation that the invoices were funded from anywhere other than a general disbursement. Thus, the Individual Plaintiffs' have attempted to establish

municipal taxpayer standing by pointing to invoices paid to without detailing any measurable appropriation related to the challenged activities.

The Individual Plaintiffs concede, "the Complaint did not include specific expenditure," but argue, "[Plaintiffs] clearly alleged that multiple expenditures were made based on the invoices…" to support the contention that the District Court should have inferred that the Village paid the invoices. Appellants' Brief p. 24. Likewise, the Individual Plaintiffs' ask for an inference regarding a loss of revenue from a lack of special permit applications from religious organizations, but that is not alleged in the complaint, nor could it be as the complaint does not discuss the building of a single house of worship under the New Zoning Law. *See generally* Compl. The requests for inferences are improper and there is no basis for them in the allegations in the complaint.

Finally, of note, the Complaint itself is essentially a rehash of the allegations made by the plaintiffs in *Gagliardi v. City of Boca Raton*, 16-CV-80195-KAM, 2017 WL 5239570 (S.D. Fla. Mar. 28, 2017) ("*Gagliardi*"), *aff'd sub nom. Gagliardi v. TJCV Land Tr.*, 889 F.3d 728, (11th Cir. 2018), many of the allegations are identical or nearly so. *See* JA 274-342 [*Gagliardi* Complaint and Amended Complaint]. There the District Court held that the general grievances and allegations of a conspiracy asserted by the plaintiffs were insufficient to afford them taxpayer standing: "[p]laintiffs fail to identify an allegedly illegal use of taxpayer money." *Id.* at *9. As

discussed above, the same result applies here. Accordingly, as the Complaint fails to sufficiently allege taxpayer standing, the District Court's holding should be affirmed.

II. The Individual Plaintiffs Lack Direct Exposure Standing Because They Failed to Allege an Injury Resulting from Direct Exposure to the "Laws and Practices Against Which Their complaints are Directed."

A plaintiff seeking to establish direct exposure standing must allege that they are "directly affected by the laws and practices against which their complaints are directed." *Montesa v. Schwartz*, 836 F.3d 176, 196 (2d Cir. 2016) ("Montesa") (quoting *Sch. Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 224 n.9 (1963)).[13] The *Montesa* Court, acknowledging that direct exposure can be by either direct effect or indirect effect of the challenged government act, set forth the two types of cases in which direct exposure tends to occur: "1) the plaintiff is exposed to and affected by a law that on its face establishes religion (religious law cases) or 2) the plaintiff is exposed to and affected by a religious expression or message sponsored or promoted by the government (expression cases)." *Montesa*, 836 F.3d at 196.

The District Court, citing *Montesa*, correctly held that, "Plaintiffs have not alleged any economic injuries from the New Zoning Law to establish standing under

[13] Plaintiffs' reliance on *Catholic League for Relig. and Civ. Rights v. City and County of San Francisco*, 624 F.3d 1043, 1053 (9th Cir. 2010), in a footnote, for its summary of direct exposure standing is entirely unwarranted as this Court explained its direct exposure standing jurisprudence far more recently in *Montesa*.

the 'religion law' cases.'" SPA 16. Citing same, the District Court also held, "Plaintiffs have not alleged they 'c[ame] into contact with, or [were] exposed to, a government-promoted expression of religion." *Id.* (alterations in original). The Individual Plaintiffs appear to have conceded these points, instead arguing that this case falls into a third category not identified by the *Montesa* Court. Appellants' Brief p. 31.

But, analogous to the *Montesa* plaintiffs, the Individual Plaintiffs do not allege direct exposure to an unconstitutional municipal action, but instead allege that their injury arises from the development and enactment of the New Zoning Law in the Village which they reside. *See Montesa v. Schwartz*, 836 F.3d 176, 199 (2d Cir. 2016) (holding that the students' injury arises of being in an underfunded school system, not from direct exposure to an alleged unconstitutional state action). In sum, Plaintiffs allege that their injury arises from living in the Village of Chestnut Ridge, which alleged injury is neither concrete nor particularized, and does not arise from direct exposure to any unconstitutional state action. This law has never been applied to, nor threatened against any Plaintiff.

Here, the Individual Plaintiffs contend that they established direct exposure standing by "demonstrating the direct exposure of [Individual Plaintiffs] both [1] to religious structures enabled by the New Zoning Law, [2] to the Village's statements evidencing the patently religious motivation behind the New Zoning Law," [3] direct

exposure to religious expression in a public area, and [4] that the New Zoning Law stigmatizes the Plaintiffs. Appellants' Brief pp. 25, 29, 32.

The Individual Plaintiffs' first argument is based on a theory of direct exposure to "religious structures," which Plaintiffs' claim is in contrast to the indirect exposure in *Montesa*. However, all of the claimed "direct exposure" precedes enactment of the New Zoning Law. The New Zoning Law was enacted on February 21, 2019. JA 38 [Compl. ¶ 103]. Yet, the Individual Plaintiffs argue "the Individual Appellants here were directly exposed to the religious symbolism established by the New Zoning Law, which has already begun to change the character of the Village and in the Individual Appellants' own backyards through the construction of massive religious gathering places on single-family properties, automatically, and without limit." Appellants' Brief p. 27. The glaring problem with this argument is that the citation is to a paragraph which claims that a building permit issued on September 20, 2017, just over a year and five months before the New Zoning Law was enacted. A past event cannot present direct exposure to a subsequent unconstitutional municipal action. JA 24 [Compl. ¶ 36].

In fact, every event in the section cited to by the Individual Plaintiffs for support for direct exposure standing predates the enactment of the New Zoning Law. *Id.* [Compl. ¶¶ 36-41]. This could be passed off as a mistake, but for the same citation being used later to argue: "construction of these massive religious gathering places

had already begun in Appellant Kogut's neighborhood." Appellants' Brief pp. 28-29. And then Plaintiffs compare the Individual Plaintiffs to the plaintiff in *Sullivan v. Syracuse Hous. Auth,* stating: "This is precisely the direct harm that conferred standing in *Sullivan.*" Appellants' Brief p. 29; *Cf.* 962 F.2d 1101, 1108 (2d Cir. 1992) ("a religion has been established in a place functionally analogous to Sullivan's own home"). The Individual Plaintiffs present no facts supporting the contention that they had direct exposure "to the religious object of the challenged government action that gives rise to the injury" except by way of interaction or exposure to a "religious object" that predates the government action, which is not causally connected to the New Zoning Law. *Montesa*, 836 F.3d at 197. The assertion that construction of a "massive religious gathering place" which predates the challenged government action constitutes direct exposure has no basis in fact or law, and may best be directed at the Old Zoning Law, if anything.

While Appellants' Brief argues that direct exposure has already occurred, it has not, and the District Court correctly held that the alleged direct exposure to "massive religious gathering place[s]" is "hypothetical." SPA 16. Plaintiffs' reliance on cases involving "physical placement of religious expression in public area" is also misplaced. SPA 17. Plaintiffs claim that this case is analogous to an "eruv" representing religious expression in a public area or religious display in a post office. Appellants' Brief pp. 29-30. Such cases do not involve hypothetical direct exposure.

Those cases involve actual, imminent, non-conjectural and non-speculative impacts of the alleged Establishment Clause violation. *Cf.* Appellants' Brief pp. 30-31 (arguing [1] hypothetical "special permit[s] would automatically be approved under the [New Zoning Law]," [2] the New Zoning Law *will* "negatively impact homeowners by allowing for large structures to be built in single family zones," and [3] "as a result of the [New Zoning Law], massive structures with significant automatic variances *would* be established…"). (emphasis supplied).

The Individual Plaintiffs' second theory of direct exposure standing asserts that their grievances with the development of the law and the law itself affords them standing. *See* Appellants' Brief pp. 30-34. The Individual Plaintiffs argue that their injury falls into the category of a spiritual, psychological injury resulting from alleged preference shown towards a particular religion. Appellants' Brief p. 33. The Individual Plaintiffs claim that the law was developed "to the exclusion of any other member of the Village, through the final Village resolution adopting the Law" Appellants' Brief p. 27. However, Plaintiffs' pleading acknowledged that several public hearings were held before the law was enacted and that Plaintiffs as well as their professional planner were heard at the hearings. JA 31-35 [Compl. ¶¶ 70-86]. Despite the numerous hearings, Plaintiffs argue that the fact that a religious organization requested the new law, presented the initial draft of the new law, and met with Village Planners and possibly the Mayor, somehow shows "the entire

history of the drafting of the [New Zoning Law] … through the final Village Resolution adopting the [New Zoning Law], has been imbued with promotion of religious beliefs and religious practices of certain religion, and religion generally, over non-religion." Appellants' Brief p. 27. This is illogical, uncommon, and not worthy of additional comment about how legislation is brought to life in this country, state, county, or Village.

While Establishment Clause injury can be spiritual in nature, "it must be particularized to the individuals who sue." *In re U.S. Catholic Conf. (USCC)*, 885 F.2d 1020, 1024 (2d Cir. 1989). Plaintiffs' distress is "not cognizable unless plaintiffs could 'identify any personal injury suffered by them *as a consequence* of the alleged constitutional error....'" *In re U.S. Catholic Conf. (USCC)*, 885 F.2d 1020, 1025 (2d Cir. 1989) (quoting *Valley Forge*, at 485). Pointing to "an assertedly illegal benefit flowing to a third party that happened to be a religious entity" is not enough. *Id.* at 1025. An abstract stigmatic injury is likewise insufficient to afford a plaintiff standing. *See Allen v. Wright*, 468 U.S. 737, 755–56 (1984), *abrogated on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) (requiring plaintiffs to be personally subject to the challenged discrimination: "if the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the government was alleged to be discriminating in").

Plaintiffs' alleged psychological injury resulting from their grievances with the development and enactment of the law is insufficient to confer Article III standing. "They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982) (emphasis in original). Plaintiffs' may disagree with the fact that a law was drafted by a religious organization, but their disagreement does not result in an injury. Plaintiffs' may disagree with holding meetings with the organization which drafted the law, but this is a general grievance that is insufficient to confer standing.

Plaintiffs do not allege a constitutional injury. Plaintiffs were heard or at minimum, had the opportunity to be heard, at each public hearing before the law was enacted. The process of enactment of the law did not exclude them., it included them. JA 31-35 [Compl. ¶¶ 70-86]. Plaintiffs' expert was heard with an alternative plan. JA 32 [Compl. ¶ 73]. Plaintiffs disagree with the Village Board of Trustee's decision not to adopt their plan and instead enact the New Zoning Law. The primary injury alleged by Plaintiffs is their discomfort with the New Zoning Law having been initially requested by, and drafted by, a religious organization.

In support of their argument that their general grievances amount to a constitutional injury, Plaintiffs claim their case is analogous to *Sullivan*, rather than *Montesa*. *Cf.* 962 F.2d at 1108 (explaining Sullivan's "direct and personal stake" in the controversy):

> Sullivan has a direct and personal stake in this controversy, and has alleged injuries sufficiently distinct, palpable and concrete to constitute the "actual injury" required to confer standing. Sullivan is not a simple bystander, using the courts to vindicate abstract value interests, or a mere citizen complaining of the nonobservance by others of the Constitution.

Unlike here, the *Sullivan* plaintiff lived in the public housing facility in which he claimed an Establishment Clause violation occurred in facilities he was entitled to enjoy. The *Sullivan* Court relied upon the allegations that Sullivan was "depriv[ed] of Sullivan's entitlement to use and enjoy "public housing facilities" because of the "religious policy" of the SHA and the Residents Association." *Id.* Plaintiffs claim direct exposure psychological injury like *Sullivan's,* but as discussed above, Plaintiffs only allege that direct exposure to massive religious gathering places" based on structures built before the enactment of the New Zoning Law and a hypothetical fear of more to come in the future. JA 24 [Compl. ¶ 36]. There is no comparison to *Sullivan.* There is no nexus between a "backyard" injury and the Plaintiffs' complaints regarding the process of enacting the New Zoning Law. Accordingly, as Plaintiffs' general grievances do not allege an Establishment Clause injury, the District Court should be affirmed.

To the extent that Individual Plaintiffs argue that the New Zoning Law stigmatizes them, as non-adherent or irreligious individuals, assuming for the sake of argument, that the complaint actually alleges the same, the alleged abstract stigmatization injury is insufficient to afford standing to the Plaintiffs. Plaintiffs point to alleged statements, but do not allege how they were injured by the statements, let alone how the statements constitute an Establishment Clause violation. Appellants' Brief pp. 33-34. Moreover, the Statements of third parties without a nexus to an Establishment Clause injury cannot afford standing to the Plaintiffs.

Plaintiffs cite 9th Circuit caselaw, specifically *Catholic League*, to argue that Plaintiff Carole Goodman has standing, based upon the use of the "outright animus" phrase to describe statements made at a public hearing, where the reference was made using her statement as an example. JA 121. Ms. Goodman's statements statement speaks for itself, it does not bear repeating, and needs no label. *Id.* Notwithstanding, Plaintiffs reliance on *Catholic League* is misplaced, as that case involved a resolution which directly denounced tenets of a religion. 624 F.3d 1043, 1052 (9th Cir. 2010) (holding that plaintiffs' alleged injury was not speculative because it was "the resolution itself"). Plaintiffs have not alleged that they were targeted as religious or not by the New Zoning Law. The resolution enacted the New Zoning Law into law; it did not denounce the tenets of any religious. Plus Plaintiffs

have not alleged that the grouping of Ms. Goodman's statements with others under a characterization of the statements caused her to suffer an Establishment Clause injury. The allegations are insufficient to afford her standing.

Finally, *Gagliardi* is again telling, there the Plaintiffs' general grievances were also rejected under an noneconomic direct exposure theory, the District Court held: [1] the plaintiffs concrete and particularized constitutional injury in fact, "Plaintiffs have simply reasserted, again and again, a list of conjectural injuries to the whole of the area surrounding the proposed Chabad site, and potentially beyond" [2] the broad general grievances are "not an adequate foundation for standing," [3] even if the injuries were sufficiently particularized, they are "the type of injuries alleged are wholly conjectural," hypothetical, and *de minimus* at best. 16-CV-80195-KAM, 2017 WL 5239570, at *6 (S.D. Fla. Mar. 28, 2017). The same applies here, Plaintiffs' general grievances are both conjectural and hypothetical, thus insufficient to afford them standing.

III. The Individual Plaintiffs Lack Denial of Benefits Standing Because They Fail to Allege that the New Zoning Law Sets Preference for Any Religion.

A plaintiff may demonstrate denial of benefit standing "on the ground that they have incurred a cost or been denied a benefit on account of their religion."

Arizona Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 130, (2011) (citing tax code discrimination as an example of a denial of benefits which affords standing).[14]

Here, the District Court correctly held that the Individual Plaintiffs have not alleged a denial of benefits. SPA 17. Plaintiffs do not appear to argue otherwise, but go in an entirely different direction, arguing that the New Zoning Law confers a benefit "to religious organizations." Appellants' Brief p. 35. This is the very argument rejected as a basis for standing in *In re U.S. Catholic Conf. (USCC)* and *Valley Forge*. The Individual Plaintiffs cannot point to a benefit flowing to a third party to allege an Establishment Clause injury. The injury must be personal to the Individual Plaintiffs, not anyone else.

To support their position, Plaintiffs point to *Texas Mthly., Inc. v. Bullock*, 489 U.S. 1, (1989), but *Texas Mthly.* is a tax law case, not a standing case. Indeed, standing is not mentioned a single time in *Texas Monthly*. *See id.* Moreover, the *Texas Mthly.* plaintiff's alleged injury resulted from the statute itself. *See*, 489 U.S. at 5. And the plaintiff, Texas Monthly, was a magazine publisher who paid sales tax "under protest" while certain religious publications were exempt under the challenged law. *See, Id.* at 5-6.

[14] As an initial matter, Plaintiffs allegation of a blanket special permit exemption is incorrect, the special permit requirement remains in place for the "larger scale" "Community Place of Worship" projects. JA 126 n. 3; JA 84. Further, the New Zoning Law does not exempt the applicant seeking to build under the New Zoning Law from the entire land use process. JA 126 n. 3.

Here, Plaintiffs allege that religious organizations are "allow[ed] … to waive the administrative cost of seeking a special permit, while non-religious groups incur the cost of abiding by the special permit procedure. Appellants' Brief 35. There is no allegation that the law itself exempts religious organizations from such costs. More importantly, the Individual Plaintiffs, unlike the *Texas Monthly* plaintiff, do not allege that they have suffered an injury as a result of the challenged law, like this alleged exemption. They do not point to a single case where a religious group was exempted and contrast it with a particularized instance where the Individual Plaintiffs were somehow treated differently under the New Zoning Law.

IV. CUPON Lacks Associational Standing Because its Members Lack Standing to Sue in Their Own Right.

To establish associational standing, a plaintiff must show: "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members." *Hunt v. Washington State Apple Advert. Commn.*, 432 U.S. 333, 333 (1977).

The District Court correctly held that CUPON did not satisfy its burden to prove associational standing. CUPON has not alleged that any of its members - albeit the Individual Plaintiffs or any others have standing. Because none of the Individual Plaintiffs have standing (SPA 18) an no other allegations of proof were offered, the

District Court should be affirmed as to its holding regarding CUPON's lack of associational standing.

V. CUPON Failed to Raise or Preserve the Issue of Organizational, the Issue is not Before the Court, Regardless, CUPON Failed to Sufficiently Plead the Same.[15]

The District Court correctly held that the "complaint contains no allegations of any injuries to CUPON as an organization." SPA18. In the Association Plaintiff's footnote argument, CUPON argues that "CUPON has suffered an injury-in-fact, and the Complaint makes clear that this requirement is satisfied," because "the Village's Establishment Clause Violations made it more difficult for CUPON to engage its advocacy for a comprehensive zoning plan." That claimed difficulty is alleged nowhere in the Complaint. *See generally* JA 16-41 [Compl.]. The Complaint does nothing to establish CUPON's injury-in-fact burden. CUPON alleges no financial injury. There is no allegation that its resources were taken away from advocating from a comprehensive plan. Nor could there be because the Complaint alleges the opposite. JA 18 ("CUPON advocated that the Village conduct a comprehensive plan process"), JA 21 ("a professional planner hired by CUPON, spoke at the Village

[15] As discussed above, this argument is neither properly raised or preserved for appellate review, but the Village will address it briefly in an abundance of caution.

meeting and, after noting that the Village of Chestnut Ridge did not have a comprehensive plan, strongly recommended that the Village develop one").

Organizational injury requires much more. SPA 19; Appellant's Brief p. 42. A "concrete and demonstrable injury to organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). No specific drain on organizational resources is alleged in the Complaint. Like the Individual Plaintiffs, the alleged injury is not defined and lacking. Accordingly, even if the Court considers CUPON's footnote argument, CUPON has failed to sufficiently allege organizational standing and the District Court should be affirmed.

CONCLUSION

Based on the foregoing, the District Court's Opinion and Order should be affirmed in its entirety because Plaintiffs have failed to meet their burden to establish Article III standing.

Dated: South Nyack, New York
January 16, 2022

Respectfully Submitted by:

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