22-2710-cv

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Appellants,

– v. –

VILLAGE OF CHESTNUT RIDGE, NEW YORK,

Defendant-Appellee.

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

The Village's[1] Opposition brief distorts the governing case law, ignores the allegations in Appellants' Complaint (which, at this juncture, must be taken as true with all inferences drawn in Appellants' favor), and improperly seeks to argue the merits of this action. The Village's arguments are simply nonresponsive to the questions before this Court—whether Appellants have alleged facts that, if true, would establish Appellants' standing. None of the Village's arguments undermine a finding that Appellants have alleged standing—on multiple theories—to seek recourse in federal court for the Village's Establishment Clause violations.

First, the Individual Appellants have alleged municipal taxpayer standing because they have alleged measurable government expenditures through specific invoices that are tied to the unconstitutional process associated with and the enactment of the New Zoning Law. The Village's challenge to this theory of standing relies on outdated and irrelevant case law, as well as proposed (though unsupported) limitations on what types of allegations of expenditures can qualify as "measurable appropriations." These challenges must therefore be rejected.

Second, the Individual Appellants can separately sue under a theory of direct exposure standing because the New Zoning Law creates the imminent risk of

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[1] The defined terms herein have the same meaning ascribed to them in Appellants' Opening Brief.

limitless and preferentially-treated new religious structures throughout Chestnut Ridge—in the Individual Appellants' own backyards. The Village's response is essentially that this harm is "speculative"—but this argument requires the Court to suspend reality in presuming (contrary to all of Appellants' allegations) that the OJC spent time and money for years to pass, enact, and protect the privileges of the New Zoning Law (including by negotiating a consent decree with the Village to grandfather in any structures built under the New Zoning Law) only to abandon these investments and decline to pursue any construction. The more plausible read of Appellants' allegations, particularly in light of Second Circuit case law, supports direct exposure standing.

Third, the Individual Appellants can independently bring their claims pursuant to denial of benefit standing. Appellants properly allege denial of benefit standing based on the Village's simultaneous (1) conferral of benefits (a blanket variance from various zoning requirements) to property owners who commit to using their property for religious worship and uses and (2) denial of those same benefits to all other property owners, including the Individual Appellants. The Village's attempt to focus narrowly only on the benefits that the New Zoning Law confers on religious property owners—while ignoring that those same benefits are denied to the non-religious property owners—is a transparent attempt to evade judicial review of its actions.

Lastly, CUPON has both associational standing and organizational standing. The Village concedes that CUPON has associational standing if any of the Individual Appellants have standing. And the Village does little to attempt to rebut Appellants' organizational standing other than a specious argument that Appellants somehow failed to preserve this argument, despite raising the issue in multiple sections of its opening brief *in addition* to a lengthy and conspicuous footnote.

ARGUMENT

As a threshold matter, the Village urges an incorrect standard for reviewing standing allegations, arguing that Appellants are not entitled to inferences as the non-moving party on a motion to dismiss. (Appellee's Br. ("Opp.") at 26, 25.) But this is wrong. In *Warth v. Seldin*, 422 U.S. 490 (1975), the Supreme Court made clear that "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Id.* at 501 (citations omitted).

This Court has followed this approach and requires only that the plaintiff "allege facts that affirmatively and plausibly suggest that it has standing to sue." *Conn. Parents Union v. Russell-Tucker*, 8 F.4th 167, 172 (2d Cir. 2021) (quoting *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145-46 (2d Cir. 2011)); *accord Puglisi v. Underhill Park Taxpayer Assoc.*, 947 F. Supp. 673, 681 (S.D.N.Y.

1996) ("[P]laintiff must allege facts *from which it may be reasonably inferred* that he was or could have been injured in fact by the conduct, if the allegations were proved at trial." (emphasis added)).

A. APPELLANTS HAVE MUNICIPAL TAXPAYER STANDING

The Village's challenge to municipal taxpayer standing rests on a misconception of what qualifies as a "measurable" appropriation sufficient for a plaintiff to allege standing for an Establishment Clause claim. The Village argues—without authority—that a plaintiff is required to allege that "the municipal spending was *not incidental* to the challenged activity" and must allege that the expenditure is "more than a '*de minimis* amount.'" (Opp. at 26, 29 (emphasis added).) But neither this Court nor the Supreme Court has ever required this.[2] To the contrary—in *Altman v. Bedford Central School District*, 245 F.3d 49, (2d Cir. 2001), this Court made clear that it will "*presume* a municipal taxpayer's relationship to the municipality is 'direct and immediate' such that the taxpayer suffers concrete injury whenever the challenged activity involves a *measurable* appropriation or loss of revenue." *Altman*, 245 F.3d at 73 (emphasis added) (quoting *United States v. City of New York*, 972 F.2d 464, 466 (2d Cir. 1992)) (citing *Bd. of Educ. v. N.Y. State Tchrs. Ret. Sys.*, 60 F.3d 106, 110-11 (2d Cir. 1995) (municipal taxpayer standing

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[2] The out-of-circuit cases similarly do not impose a "not incidental" requirement on municipal taxpayer standing and are, in any event, inapposite.

requires ability to identify a "measurable appropriation or loss of revenue" attributable to the challenged activities)); *see also City of New York*¸ 972 F.2d at 471 (citing other courts of appeal that have "uniformly concluded that municipal taxpayers have standing to challenge allegedly unlawful municipal expenditures").

The Village's proposed definition of "measurable"—*i.e.*, its suggestion that there has to be a minimum amount of expenditure—is not borne out by the case law. Indeed, even in recent times, where there are "municipalities with multi-billion dollar budgets," *City of New York*, 972 F.2d at 470-71, this Court has observed that alleging expenditures based on "crayons, clay, or construction paper," would be sufficient for purposes of municipal taxpayer standing. *Altman*, 245 F.3d at 74; *accord Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223, 238-39 (S.D.N.Y. 2005) (finding "measurable appropriation" where the plaintiffs alleged that ten percent of government contracts to City Social Services were devoted to the Salvation Army, which was 95% funded by government sources and were going to perform religiously oriented services). In fact, this Court has explicitly rejected the Village's argument that Appellants must establish "that more than a de minimis amount of tax revenue has been expended on the challenged practice itself." *Compare* (Opp. at 29[3]), *with Altman*, 245 F.3d at 74 (finding expenditure on art supplies for challenged

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[3] The Village relies in part on *Nichols v. City of Rehoboth Beach*, 836 F.3d 275, 282 (3d Cir. 2016). Although *Nichols* reiterates the long-established distinction between

activities sufficient). A plaintiff need only allege any actual *measurable* expenditure—and Appellants have clearly done so.

Moreover, the Village seeks to require a more direct connection between Appellants' injury and this measurable appropriation than precedent warrants. This Court has observed that where a taxpayer plaintiff can demonstrate that an appropriation was made for the purpose of the challenged activity, even if presumably deriving from a general budget, the *Frothingham*[4] presumption of injury applies. *See, e.g.*, *Altman*, 245 F.3d at 74 (finding a measurable appropriation where challenged activity involved purchase of art supplies). The nexus that the Appellants have to demonstrate is not the direct relationship that the Village argues in its Opposition. Critically, this Court has observed that, whereas ***state*** taxpayers may face more significant challenges in demonstrating the connection between the challenged activity and the measurable appropriation or loss of revenue when funds are derived from a general budget (and activities are enacted by salaried employees), ***municipal*** taxpayer standing "stands on different footing" due to the different

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municipal taxpayers and their state and federal counterparts, it addresses standing under the Fourteenth Amendment, not the Establishment Clause. *See* 836 F.3d at 277-79. The Third Circuit cited *ACLU-NJ v. Township of Wall*, 246 F.3d 258 (3d Cir. 2001) for its holding that a municipal taxpayer cannot establish standing based on "a de minimis amount of tax revenue" expended on the challenged practice by municipal paid employees—*after a full litigation on the merits. Id.* at 262 (citing *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952)).

[4] *Massachusetts v. Mellon*, 262 U.S. 447 (1923) ("*Frothingham*").

relationship that exists between a municipality and its taxpayers. *Compare City of New York*, 972 F.2d at 466-68, 471 (municipal taxpayer case), *with Novesky v. Goord*, 120 F. App'x 384, 385-86 (2d Cir. 2005) (holding no *state* taxpayer standing where plaintiff failed to establish measurable appropriation "occasioned solely by the activities" at issue and instead challenged "discrete elements of two rehabilitation programs funded out of [the state's] general budget," elements that were "administered by government employees whose salaries are funded by tax dollars"). Contrary to the Village's *ipse dixit*, there is no requirement under the *municipal* taxpayer theory of standing that the taxpayer plaintiffs demonstrate that they are "out-of-pocket based upon the expenditures tied to the allegedly illegal municipal action." (Opp. at 32.) Such a holding would contradict this Court's holding in *Altman* that, when reviewing "a municipal taxpayer's standing to challenge municipal activities . . . standing *does not depend* on the plaintiff's ability to show a 'likelihood that resulting savings will inure to the benefit of the taxpayer.'" 245 F.3d at 73 (emphasis added) (citations omitted).

Setting aside the Village's unsupported attempt at imposing a higher burden for standing, it is clear that Appellants satisfy the standard imposed by this Court for municipal taxpayer standing. Appellants allege that specific expenditures were made to a private land planning services firm, NPV—not a municipal employee. (A25 ¶44.) The allegations regarding these invoices also include that NPV—a

private actor hired by the Village—worked with another private entity, Brooker, a civil engineering firm hired by the OJC, to review, revise, and enact the New Zoning Law. (A25-26 ¶¶45, 47, 50.) NPV and Brooker also met with and reported directly to Mayor Presti. (A26 ¶¶46, 48.) Together these allegations fall far outside of *Altman*'s warning that plaintiffs cannot rely "simply" on activities conducted by paid governmental employees. 245 F.3d at 74. Instead, Appellants' allegations show measurable appropriations spent solely for the purpose of drafting and enacting the New Zoning Law. (A18-19, A25-27 ¶¶7-10, 42, 44-48, 50-52.)

Additionally, Appellants alleged that the New Zoning Law creates a continuing loss of revenue by allowing religious organizations and individuals to forego the permit and approval process that is required of all other property owners in Chestnut Village. (A18-19, A25-27, A32-34 ¶¶7-10, 42, 44-48, 50-52, 78-79, 84.) These allegations must be accepted as true at this stage and construed in Appellants' favor. *Warth*, 422 U.S. at 501-02; *Russell-Tucker*, 8 F.4th at 172.

Individual Appellants have therefore identified *measurable* appropriations or loss of revenue associated with the New Zoning Law—and under the *Frothingham* presumption, this Court should "presume [the plaintiff] municipal taxpayer's relationship to the municipality is 'direct and immediate,'" sufficient for demonstrating a concrete injury. *Altman*, 245 F.3d at 73 (citations omitted).

The Village devotes much of its Opposition to entirely inapposite cases—*i.e.*, cases that address federal and state taxpayer standing, or cases that predate the modern line of municipal taxpayer standing cases. For example, the Village relies extensively on *Doremus v. Board of Education*, 342 U.S. 429 (1952)—but that case does not elaborate on the meaning of a measurable appropriation because the plaintiff in that case did not allege any appropriation *at all*. In any event, it is a *state* taxpayer standing case, not a *municipal* taxpayer standing case. *Id.* at 434.[5]

The Village's references to *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), and *Spencer v. Kemna*, 523 U.S. 1 (1998), are similarly inapt. The Court in *DaimlerChrysler* merely set forth the uncontroversial principle of *federal* taxpayer standing that a taxpayer plaintiff cannot bring an action merely to object to "expenditure of federal funds *simply because they are taxpayers*." 547 U.S. at 343 (emphasis added). The reasoning was specific to the nature of a federal taxpayer, whose "interest in the moneys of the Treasury . . . [which] is shared with millions of others . . . [is] so remote, fluctuating and uncertain" that it justifies a heightened burden for *federal* taxpayer standing. *Id.* (quoting *Frothingham*, 262 U.S. at 486-

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[5] If *Doremus* was decided today, it would not be a taxpayer standing case at all. The plaintiff's allegations of direct exposure to prayers in public schools would easily satisfy direct exposure standing, a theory that did not exist when *Doremus* was decided. This shows how far removed *Doremus* is from the modern theories of Establishment Clause standing.

87). And the *Spencer* case neither mentions nor alludes to taxpayer standing—in any respect (federal, state, or municipal)—but rather considered the collateral consequences of conviction as a basis for avoiding mootness. 523 U.S. at 8-11 (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990) (addressing standing of plaintiffs to challenge a municipal ordinance—not as taxpayers—that "prohibits the issuance of a license to an applicant" for certain individuals including those that had former convictions as none of the plaintiffs were within the scope of the statute and had a viable claim), *overruled in part on other grounds by City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774 (2004)).

Finally, the Village resorts to arguing that Appellants are somehow asking this Court to alter long-standing municipal taxpayer standing principles to "allow [any] invoice[] to confer taxpayer standing" when reviewed by non-state actors "fulfill[ing] traditional government roles." (Opp. at 33-34.) That is not so. Stripping away the hyperbole, the Village's parade of horribles is really no parade at all. First, Appellants are only asking the Court to apply its long-standing approach that a municipal taxpayer has standing where a "challenged activity involves a measurable appropriation or loss of revenue." *Altman*, 245 F.3d at 73. It is the Village that is seeking to deviate from this precedent and apply a more stringent standing test because it does not like the result. Moreover, Appellants are not arguing—as the Village suggests—that they may rely ***exclusively*** on invoices to establish standing.

Appellants' allegations clearly tie the expenditures to the alleged unconstitutional activities. (A25-26 ¶¶45-50.) Together these allegations clearly give rise to Appellants' municipal taxpayer standing. (*See* A28-30, A36-37 ¶¶60, 67, 94-97.)

B. THE INDIVIDUAL APPELLANTS ALSO PROPERLY ALLEGED DIRECT EXPOSURE STANDING

The Village urges a self-serving, narrow construction of direct exposure standing that is not in line with this Court's Establishment Clause precedent.[6] As an initial matter, the Village's suggestion that the Individual Appellants somehow "conceded" that they did not allege direct contact with or exposure to a government-promoted expression of religion is just plain wrong. (Opp. at 37.) The Individual Appellants alleged the *imminent risk* of limitless and preferentially-treated new religious structures throughout Chestnut Ridge, *i.e.* in their own backyards. (A27-33, A36-37, ¶¶56, 60, 64, 67, 71, 74, 78, 94-97.) And these allegations of imminent risk are sufficient to confer direct exposure standing. The Individual Appellants seek injunctive relief, and therefore the *imminent* risk of harm is sufficient to satisfy standing requirements. *See Dorce v. City of New York*, 2 F.4th 82, 95 (2d Cir. 2021)

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[6] The Village's reliance on standing cases that do not involve Establishment Clause claims is inapt, as both the Supreme Court and this Court have reaffirmed the unique nature of the injuries suffered by plaintiffs in Establishment Clause cases. *Montesa v. Schwartz*, 836 F.3d 176, 195-96 (2d Cir. 2016) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982)); (Opp. at 41 (citing *Allen v. Wright*, 468 U.S. 737 (1984)).)

(holding allegations of future injury are sufficient "if 'the threatened injury is certainly impending, or there is a substantial risk that the harm will occur'")[7]; *Conn. Citizens Def. League, Inc. v. Lamont*, 6 F.4th 439, 448 (2d Cir. 2021) ("A plaintiff seeking injunctive . . . relief cannot rely on past injury . . . but must show a likelihood that [it] will be injured in the future.") (alterations in original) (quoting *Deshawn E. ex rel. Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998)).

The Village's argument that the harm the Individual Appellants allege is purely hypothetical is simply implausible given the facts: that the OJC spent years drafting the New Zoning Law, lobbying for its passage, and suing the Village to ensure that the OJC could enjoy the New Zoning Law's benefits. (A25-33, A37-39 ¶¶42-69, 72, 74-75, 80-81, 98-108.) It is also belied by the fact that the Village itself pushed this law claiming that its passage was imperative. (A17, A26, A28, A33-34, A38 ¶¶3, 51, 59, 79, 83-84, 104.) And while the Village now muses that perhaps no

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[7] The consent decree appears to acknowledge that "substantial expenditures" on houses of worship had already taken place prior to the entry of the consent decree. *See* Consent Decree, *Orthodox Jewish Coal. of Chestnut Ridge v. Vill. of Chestnut Ridge,* No. 19-cv-443(KMK) (S.D.N.Y. Dec. 28, 2021), Dkt. #124 ¶5 ("'Substantial Investment' means . . . *substantial expenditures prior to the effective date of this Agreement*" (emphasis added)). On that basis alone, the Village should be judicially estopped from taking the contrary position here. *See New Hampshire v. Maine*, 532 U.S. 742, 749, 756 (2001) (concluding that judicial estoppel applied to prevent New Hampshire from re-litigating its boundary with Maine, where New Hampshire would have taken a position inconsistent with the consent decree it entered into decades before).

one will take advantage of the law's benefits,[8] this Court should disregard this perfidious argument, especially given that inferences should be drawn in the Appellants' favor at this stage of litigation.[9] Moreover, the Village's argument about hypothetical imminent harm is especially illogical in light of the Village's recent consent decree with the OJC that purports to grandfather in any structures built under the New Zoning Law—even if the New Zoning Law is later held to be unconstitutional![10] *See* Consent Decree, *Orthodox Jewish Coal. of Chestnut Ridge v. Vill. of Chestnut Ridge,* No. 19-cv-443(KMK) (S.D.N.Y. Dec. 28, 2021), Dkt. #124.

The Village's direct exposure standing argument also misconstrues this Court's assessment of standing in *Montesa v. Schwartz*, 836 F.3d 176 (2d. Cir. 2016). There, this Court described two types of cases in which a plaintiff will have direct exposure standing: first where the plaintiff is affected by a law that establishes

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[8] To the extent the Village argues that its entanglement with the OJC in passing a law for the explicit purpose of benefitting religion—and a sole religion at that—does not violate the Establishment Clause or is an accepted practice, this is completely irrelevant to the issue of standing.

[9] Prior to this year, not only the uncertainty of this litigation (which was resolved by the consent decree) but also the COVID-19 pandemic had temporarily impeded construction. As these obstacles have now been removed or alleviated, the imminent risk of harm has never been greater.

[10] The propriety of such a consent decree is—at best—questionable. *Robertson v. Nat'l Basketball Ass'n*, 556 F.2d 682, 686 (2d Cir. 1977) ("[A] settlement that authorizes the continuation of clearly illegal conduct cannot be approved").

religion on its face (religious law cases); and second where the plaintiff is affected by government-promoted religious expression (expression cases). *Id.* at 196. But the Court acknowledged that these categories were ***nonexclusive***. *Id.* at 197. Here, the Individual Appellants have already distinguished themselves from the *Montesa* plaintiffs by alleging they were directly exposed to the unconstitutional New Zoning Law—the drafting, enactment, and impact of which endorses religion over irreligion and one religion over all others. (A24-29, 40, ¶¶37, 42-63, 116, 119-20.) This is in sharp contrast to the facts of *Montesa*, where the plaintiffs could allege only indirect effects rather than direct exposure. *See* 836 F.3d at 198. And the Individual Appellants have further distinguished themselves by alleging imminent exposure to religious expression that has been enabled and promoted through the New Zoning Law.

The Village's reliance on the holding in *In re United States Catholic Conference ("USCC")*, 885 F.2d 1020 (2d Cir. 1989), is misplaced. In that case, this Court held that the clergy plaintiffs, who objected to the federal government's policy of selective nonenforcement of certain lobbying prohibitions, did not have standing because they were no more than "offended bystander[s]," because the federal government allegedly failed to enforce the law against a *third party*. *Id.* at 1026. The alleged harm in *USCC* was not alleged to be taking place in those

plaintiffs' own backyard—a dispositive distinction from the harm alleged by the Individual Appellants here.

The Village's citation to *USCC* is particularly inappropriate in light of this Court's holding in *Southside Fair Housing Committee v. New York*, 928 F.2d 1336 (2d Cir. 1991). *Southside* involved individuals who resided in the South Williamsburg neighborhood of Brooklyn (and an organization made up of those individuals and groups whose purpose was to promote a racially and religiously integrated community). 928 F.2d at 1138. The plaintiffs objected to the City's sale of neighborhood property to a Hasidic organization for development of a yeshiva and synagogue on the grounds that it constituted establishment of the area as a Hasidic enclave. *Id.* This Court found that the individual plaintiffs alleged standing to bring an Establishment Clause claim because they "have focused their concerns on their own backyards," reiterating the principle that standing may be "premised on a plaintiff's 'direct personal contact with offensive municipal conduct.'" *Id.* at 1342 (quoting *Foremaster v. City of St. George*, 882 F.2d 1485, 1491 (10th Cir. 1989)); *see also Sullivan v. Syracuse Hous. Auth.*, 962 F.2d 1101, 1107 (2d Cir. 1992) (finding standing where plaintiff alleged Establishment Clause violation in his proverbial "backyard"). Critically, this Court found it to be sufficient for standing purposes that plaintiffs alleged that they lived in the very neighborhood where the disputed land sales, which would be used "exclusively for religious purposes and

exclusively by members of the . . . Hasidic community," took place. *Southside*, 928 F.2d at 1343. The particular sale at issue in that case was the "straw that broke the camel's back," and this Court allowed the individuals to pursue relief via a broad prohibition on policies that would continue the trend. *Id.*

Finally, the Village argues in its Opposition that the existence of public hearings in advance of the New Zoning Law somehow militates against finding standing. (Opp. at 13-17.) As a preliminary matter, the Village ignores (or mischaracterizes) the allegations in the Complaint that the *original drafting process* was open only to the OJC, leading the Village's own Planning Board to question the lack of input from any other group or religion aside from the OJC at that important stage. (A25-27, A30 ¶¶ 42-53, 66.) The Village also ignores the clear allegations that the New Zoning Law was *admittedly* developed and crafted with the OJC alone in mind. (A28-30, A32-35, A38 ¶¶57, 60, 64, 66-67, 74, 80-81, 91, 104.)

In any event, the Village makes this argument with absolutely no legal support that such hearings are somehow relevant to direct exposure standing. They are not. For instance, the Court in *Southside* held that plaintiffs had standing even though at least one public hearing was held before the alleged Establishment Clause violation. 928 F.2d at 1340. No number of public hearings can cure a law that violates the Establishment Clause, nor deprive a plaintiff of standing when the law produces an imminent risk of direct exposure to government-endorsed religious expression.

C. THE INDIVIDUAL APPELLANTS HAVE DENIAL OF BENEFIT STANDING AS THEY ARE DENIED THE BENEFITS CONFERRED ON RELIGIOUS PROPERTY OWNERS

The Village mischaracterizes Appellants' arguments regarding denial of benefit standing. Appellants do not argue that they have denial of benefit standing purely because a benefit (primarily the blanket variance offered to those who will make use of their residential property for religious uses) has been conferred on religious individuals through the New Zoning Law.[11] Instead, the Individual Appellants have denial of benefit standing because the New Zoning Law

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[11] Briefly, the Village attempts to raise the merits of Appellants' claim in a footnote, but the merits have nothing to do with the issue of standing. (Opp. at 46 n.14.) In any event, the Village mischaracterizes the Appellants' allegations concerning the effect of the New Zoning Law.

Appellants do not allege that the New Zoning Law provides blanket variances from the "entire land use process." (*Id.*) Rather, Appellants allege two things. First, residential gathering places and neighborhood places of worship require only a conditional use permit rather than a special use permit (as under the previous zoning law). (A31 ¶71; A84-85, A97-104.) Second, and more importantly, the New Zoning Law provides an automatic blanket variance from certain zoning requirements, such as maximum development coverage, by automatically allowing, for example, neighborhood places of worship to occupy 10% more of the parcel of land than comparable structures used for non-religious purposes in the same zone. (A36-37 ¶¶94-97.)

Notwithstanding the Village's hyperbolic characterization, Appellants' position is that the New Zoning Law creates one, significantly more advantageous process and set of requirements for religious uses of land, and another, less advantageous process and set of requirements for non-religious uses of land. The Individual Appellants are denied the benefits that come with access to the process established exclusively for those who will engage in religious worship on their property.

simultaneously provides these benefits to landowners using their properties for religious purposes while ***denying those same benefits*** to the Individual Appellants and others who are not using their properties for religious purposes. In other words, the New Zoning Law places restrictions on the manner in which Individual Appellants use their property while at the same time exempting religious uses from those same restrictions. That is, by definition, a denial of benefit.

The Village makes the illogical argument that, because the New Zoning Law changed the application of the Village's zoning laws only to those using their property for religious purposes (*i.e.*, it conferred a benefit on one party) but did not take away a benefit from the Individual Appellants, there is no denial of benefit standing. The Village is wrong.

Not only is this an overly technical read of "denial of benefit," but it is not supported by the relevant case law. Indeed, the Supreme Court has repeatedly held that individuals subject to a law adversely affecting them have standing to challenge an allegedly unconstitutional exemption to that law—even if the exemption does not apply to them. For instance, in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989),[12]

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[12] Oddly, the Village argues that *Bullock* is inapposite because it is not a case that concerns standing. This too is wrong. Not only does *Bullock* directly discuss standing, 489 U.S. at 7-8, but the Supreme Court has itself cited to *Bullock* on the issue of denial of benefit standing. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 130 (2011).

the Supreme Court rejected the argument that the plaintiff lacked standing to challenge a tax exemption for religious publications because, under state law, a successful challenge would result in the exemption being struck down rather than a tax refund to the plaintiff. 489 U.S. at 8. The Supreme Court reasoned that, if it accepted such an argument, "it would effectively insulate underinclusive statutes from constitutional challenge." *Id.* Similarly, in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), the Supreme Court found plaintiff had standing to challenge an exemption from a state sales tax system that exempted "newspapers and religious, professional, trade, and sports journals," but not the magazine published by the plaintiff. 481 U.S. at 223-24. The Supreme Court held that standing is satisfied for "claims that others similarly situated were exempt from the operation of a state law adversely affecting the claimant." *Id.* at 227; *see also Orr v. Orr*, 440 U.S. 268, 272 (1979) ("We have on several occasions considered this inherent problem of challenges to underinclusive statutes and have not denied a plaintiff standing on this ground." (internal citation omitted)).

Here, the Village has rendered an otherwise constitutional zoning scheme unconstitutional by introducing new, significantly advantageous zoning categories solely for religious uses in violation of the Establishment Clause. Following the Village's narrow denial-of-benefit standing logic, it appears that the only parties that *would* have standing to challenge this blanket variance are those who are *receiving*

its benefits (*e.g.*, religious organizations and property owners who are using their property for religious purposes). This obviously cannot be the law, and this is exactly the absurd result repeatedly rejected by the Supreme Court as "effectively insulat[ing] underinclusive statutes from constitutional challenge." *Bullock*, 489 U.S. at 8 (quoting *Ragland*, 481 U.S. at 227).

Finally, the Village's attempt to analogize the Individual Appellants' grievances to the allegations that were rejected by this Court in *USCC* is unavailing. In *USCC*, this Court found insufficient, for denial of benefits purposes, allegations that amounted to the airing of generalized grievances or "roam[ing] the country in search of governmental wrongdoing." 885 F.2d at 1026. But that is not the situation here; the New Zoning Law directly applies to the Individual Appellants and their land as they are all landowners within the Village. Individual Appellants are challenging an unconstitutional exemption from a restriction that directly affects them as property owners and currently restricts the manner in which they can use their property. The Individual Appellants therefore have denial of benefit standing.

D. THE VILLAGE CONCEDES THAT CUPON HAS ASSOCIATIONAL STANDING IF THE INDIVIDUAL APPELLANTS HAVE STANDING

The Village concedes that, if any of CUPON's members (including the Individual Appellants) have standing, then CUPON has associational standing. The Village makes no attempt to dispute the remaining requirements to establish

associational standing under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). Therefore, because the Individual Appellants have standing under all of the three theories discussed *infra* (but, at a minimum, one of them), CUPON has associational standing.

E. APPELLANTS HAVE PROPERLY PRESERVED THE ISSUE OF ORGANIZATIONAL STANDING ON APPEAL AND CUPON HAS ORGANIZATIONAL STANDING

The Village's challenge to CUPON's organizational standing consists solely of conclusory statements that amount to the claim that, because CUPON expended some resources on advocating for a comprehensive plan, it cannot claim injury from diverting resources away from fully pursuing a comprehensive zoning plan, as alleged in the Complaint. (Opp. at 48.) That argument makes no sense; the diversion of any amount of resources qualifies as an injury. Additionally, the Village completely fails to address its complete exclusion of CUPON from the initial negotiating and drafting process—another source of injury CUPON alleges. (A27, A29-30, A33, ¶¶52, 61, 66, 80.) Given these obvious deficiencies, the Village's brief substantive argument warrants no further response.

Clearly aware of the infirmities of its substantive argument, the Village suggests that Appellants have not adequately preserved the issue of organizational standing for appeal because it was raised in a footnote—and this argument is based entirely on a single, out-of-context quote from *United States v. Restrepo*, 986 F.2d

1462, 1463 (2d Cir. 1993). In *Restrepo*, on a motion for reargument, this Court held that an issue raised only in a *minor footnote* of a party's brief and *not raised at oral argument* was waived. *Id.* Not only is this factual scenario distinct from the facts in this case, but subsequent cases have emphasized that *Restrepo* is restricted to cases in which an argument is raised without legal support in a footnote. The more recent iteration of this rule is that "[a] contention is not sufficiently presented for appeal if it is *conclusorily* asserted only in a footnote." *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) (emphasis added); *see also United States v. Brickhouse*, 75 F. App'x 39, 41 (2d Cir. 2003) (applying the rule only because the argument was raised in a footnote "without citing any legal authority").

Here, Appellants' argument about organizational standing was anything but conclusory; it spanned three paragraphs over the better part of two pages and cited to five federal appellate cases. (Appellants' Br. at 41-42.) It could not possibly be missed. Further, unlike in *Restrepo*, Appellants' argument was *not* limited only to a footnote. It was included both in the Statement of the Issues and the Summary of Argument. (*Id.* at 5, 17-18.) And there is no reason to think that the issue will not be addressed at oral argument. *Restrepo* plainly does not apply to arguments

referenced throughout a brief, including outside of footnotes, and Appellants have adequately preserved this issue for appeal.[13]

CONCLUSION

For all the foregoing reasons, Appellants respectfully request that this Court reverse the District Court's dismissal and remand for further proceedings.

Dated: January 31, 2023

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[13] Ironically, the Village exclusively raises this issue in largely conclusory footnotes and in a single heading of the Argument section, without any argument of it in the main text.

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