IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 71-1325

PAUL J. TRAFFICANTE, et al.,

Plaintiffs-Appellants,

v.

METROPOLITAN LIFE INSURANCE COMPANY, et al.,

Defendants-Appellees,

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the District Court correctly dismissed the complaint on the grounds that a landlord's black and white tenants lack standing to complain of his discriminatory rental practices.

INTEREST OF THE UNITED STATES

This case presents fundamental questions relating to the enforcement of the Civil Rights Acts of 1968 and 1866, both of

which prohibit racial discrimination in housing. Section 801 of the Civil Rights Act of 1968, */ 42 U.S.C. 3601 declares that "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." Decades of housing discrimination have confronted the people of this nation, white as well as black, with grave and pressing problems. See e.g., Report of the National Advisory Commission on Civil Disorders, Chs. VI, VIII, XVII (1968).

In our view, the decision of the District Court, holding that incumbent tenants have no standing to complain of their landlord's discriminatory housing practices, fails to recognize the real, concrete and legally cognizable injury to their right of voluntary interracial association resulting from their alleged confinement by defendants to a "white ghetto." In addition, by holding in effect that only the Attorney General has standing to contest "patterns or practices" of discrimination, the District Court has in our view seriously and unwarrantedly limited the resources with which the nation can combat discrimination in housing based on race, color, religion or national origin.

*/ Also sometimes referred to as the Fair Housing Act of 1968.

Since the elimination of such discrimination is a matter of the highest national priority, the issues here presented are of great importance to the United States.

PROCEEDINGS BELOW AND STATEMENT OF FACTS

The United States has made no independent investigation of the evidentiary facts in this case. Since the decision now on appeal granted defendants' motion to dismiss, the allegations of the Complaint and of the Complaint in Intervention are admitted for purposes of that motion and of this appeal.

The pleadings and other facts of record are fully described in Appellants' brief, and we advert here only to those we think most important. According to their pleadings, the plaintiffs */ are white and black residents of Parkmerced, a 3,500 unit complex in San Francisco composed of residential apartments and town houses. Parkmerced is alleged to be more than 99% white. The plaintiffs assert in essence that these statistics are not fortuitous, but, on the contrary, result from a variety of discriminatory housing practices by the defendants. They further allege that these practices have artificially and unlawfully deprived them of the benefits of residing in the kind of integrated community in which they would now be living if defendants

*/ Use of the term "plaintiffs" in this brief includes both the original and the intervening plaintiffs.

had obeyed the law. Specifically, plaintiffs allege that defendants have denied them social, business, and professional contacts with members of minority groups, thus impairing their opportunity for interracial association. In support of their allegations of injury, plaintiffs have filed an affidavit by the Associate Dean of the Harvard University School of Medicine describing the stigmatization, loss of self-esteem, reinforcement of racial prejudice and psychological and other harm which, according to the affiant, may be suffered by both black and white residents who have been confined to a "white ghetto" by the discriminatory practices of their landlord.

On February 10, 1971, the District Court dismissed the action on the pleadings, holding that plaintiffs have no "generalized standing" to enforce the policies of the Fair Housing Act. */ While the Court did not address itself to the plaintiffs' claim of specific and substantial injury to their pecuniary and other interests, the effect of the decision is that no matter how much a landlord may discriminate against nonwhite applicants for housing, and no matter what evidence may be presented by his tenants (whether black or white) that such discriminatory practices

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*/ And, by implication, of 42 U.S.C. 1982. The decision below is reported at 322 F. Supp. 352.

adversely affect their interests, these tenants have no recourse under the civil rights laws.

SUMMARY OF ARGUMENT

It is the basic premise of our submission that the Civil Rights Acts of 1866 and 1968 confer on citizens, both white and black, the right to be free of arbitrary and unlawful restrictions on their freedom of interracial association and on their opportunity to live in an environment as desegregated as full compliance with the law would create. The national policy of "fair housing throughout the United States" is designed to promote the interests of all citizens, regardless of race. Where a violation of the fair housing laws adversely affects any person, whether white or black, by placing him in an artificially segregated environment, he is to be accorded a legal remedy. We believe that the foregoing view is fully consistent with the statutory language and legislative history of the Fair Housing Act and with the construction of the law by those charged with its administration. We also believe that the decision below is at odds with analogous judicial precedent under the several civil rights laws, and with controlling decisions relating to the law of standing.

We think that the District Court also erred in predicating

its holding on what it thought to be the exclusive character of the Attorney General's authority to bring a "pattern or practice" type of suit under 42 U.S.C. 3613. Suits by the Attorney General were designed to be but one of several public and private resources created under the Fair Housing Act to carry out its purposes, and the courts have long recognized that individual plaintiffs under statutes of this kind carry out an important public policy and are, in that sense, "private attorneys general." That the Attorney General of the United States also has authority to bring suits seeking comparable relief does not impair the plaintiffs' right to do so.

ARGUMENT

I.

THE PLAINTIFFS HAVE STANDING TO ASSERT THAT DEFENDANTS' UNLAWFUL CONDUCT INJURED THEIR LEGALLY COGNIZABLE INTEREST IN INTERRACIAL ASSOCIATION

A. The Language, Administrative Construction and History of the Pertinent Statutes

The question of plaintiffs' standing to bring this action must be considered, first, in relation to the language of the

statutes */ under which they sue. A careful examination of the pertinent provisions discloses no language controlling the result. The words of the statute are, however, consistent with the position we take, in that broad rather than restrictive terms are used.

The original plaintiffs herein complained initially to the Department of Housing and Urban Development (HUD) under 42 U.S.C. 3610. **/ That section authorizes complaints by any "person aggrieved", defined as:

> any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur . . .

On its face, the statute recognizes a right to complain by anyone colorably injured by a defendant's unlawful conduct. There are no

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*/ While we limit ourselves primarily to a discussion of the Fair Housing Act of 1968, under which the Attorney General has specific responsibilities, see 42 U.S.C. 3613, we think that much of our discussion is also applicable to the Civil Rights Act of 1866, 42 U.S.C. 1982, under which plaintiffs also sue.

**/ The intervening plaintiffs proceeded directly under 42 U.S.C. 3612, without initially complaining to HUD. Section 3612 contains no separate definition of who may complain but should be read in pari materia with § 3610.

limitations on the kind of injury contemplated, and Congress significantly did not specify that complainants must be persons who had been denied sale or rental, or who had otherwise been the most direct victims of alleged discriminatory practices.

Other provisions of the Act provide that the discrimination of which a plaintiff complains must be on account of race, color, religion or national origin, but need not necessarily refer to his own race. Sub-sections (a), (b) and (d) of 42 U.S.C. 3604 respectively prohibit refusal to sell or rent, discrimination in terms and conditions of sale or rental, and misrepresentations as to the availability of a dwelling, and each contains the phrase "because of race, color, religion, or national origin." The Congressional language is markedly different from that used in the analogous fair employment statute, 42 U.S.C. 2000e-2(a), which twice prohibits discrimination in employment against an individual "because of such individual's race, color, religion, sex or national origin." Accordingly, the fact that several of the plaintiffs are white does not preclude them from complaining of discrimination against blacks, provided that they are able to demonstrate injury to their legal interests.*/ If

*/ See also Walker v. Pointer, 304 F. Supp. 56 (N.D. Tex. 1969), reaching the same result with less specific language under 42 U.S.C. 1982.

the District Court's decision is construed to hold that only rejected nonwhite applicants have standing to complain, that view cannot be squared with what Congress wrote. The most reasonable construction of the phrase "person who claims to have been injured" is that anybody who can demonstrate adverse consequences to him as a result of the defendant's discrimination may complain, and that Congress has left it to HUD and to the Courts to determine the sufficiency of his interest and injury.

The administrative construction of the statute is inconsistent with the decision below. The administration of complaints under Title VIII is vested in the Secretary of Housing and Urban Development, and HUD has expressly assumed jurisdiction of complaints of this kind. In fact, a letter from HUD's Regional Administrator dated November 5, 1970, and written in relation to this specific case, explicitly states that the complainants "are aggrieved persons and as such are within the jurisdiction of Title VIII of the 1968 Civil Rights Act." See Attachment to Plaintiffs' Exhibit "J" on this appeal. Since the Fair Housing Act is a relatively young statute and the issue on appeal is one of first impression, we believe that HUD's view should receive serious consideration. As the Supreme Court said in Udall v. Tallman, 380 U.S. 1, 16 (1965):

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Unemployment Commission v. Aragon, 329 U.S. 143. 153. See also, e.g., Gray v. Powell, 314 U.S. 402; Universal Battery Co. v. United States, 281 U.S. 580, 583. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'." Power Reactor Co. v. Electricians, 367 U.S. 396, 408.

HUD's interpretation of the statute is also consistent with its legislative history. While we have been able to find no explicit discussion in Congress delineating who may bring actions under the Act, the debates suggest a recognition of the harm which segregated housing inflicts on all members of the public, white as well as black and on the need for action on many fronts to combat it. Algernon D. Black of the American Civil Liberties Union, speaking for the proposed legislation before the appropriate Senate subcommittee, put it this way:

> The damage of racial injustice and segregation in housing is greatest on the colored people but it is placing a heavy burden on white Americans, all Americans too. (Emphasis added)
>
> The money cost is high; the financial cost of extra services for health, education, welfare, and police. We damage people and then we have to pay a burden which the larger community must bear. Meanwhile, in the very cities where these costs are greater the tax base in property and the ability to pay income taxes is undermined by the very ills brought by the discriminatory practices. If colored people pay heavily in health, family life, waste of talent, and psychological ways, the majority white population pays heavily too. It pays a tremendous bill in taxes. It also pays by living in a deteriorating situation in which the security of persons and property is endangered. (p. 180). */

The testimony of the proponents of fair housing legislation also includes references to the relationship between segregated housing and segregated schools. **/ The President of the Synagogue

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*/ Hearings on S. 1358 before the Senate Sub-Committee on Housing and Urban Affairs of the Committee on Ranking and Currency, 90th Cong., 1st Session (hereinafter Senate Hearings), at page 180.

**/ E.g., Senate Hearings, pp. 161-62, 236, 303, 359, 384, 434.

Council of America told a Congressional committee, for example, that

> This Nation can no longer afford to allow its efforts to provide the best education possible to all its people to be thwarted by actions of private persons -- actions which are at least antisocial and immoral -- and ultimately amount to a contravention of our public policy which calls for equal educational opportunity. The Fair Housing Act of 1967 is therefore more than a housing bill. It is part of an educational bill of rights for all our citizens (emphasis added).*/

The testimony of former Secretary Robert Weaver and others referred on several occasions to the economic burdens and restrictions which discrimination in housing placed on business men of all races and on the free enterprise system as a whole.**/ Former Attorney General Clark aptly summarized the views of the proponents of fair housing laws when he remarked that:

> We need them because they are right, and we need them because we will all suffer if we don't.***/

In spite of the lack of explicit reference in the debates

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*/ Senate Hearings, p. 359. See also Richard and Diane Margolis, The Ghetto and the Master Builder (1967) reprinted at Senate Hearings, p. 303: "The ghetto is self-perpetuating, for by separating the white child from the Negro child we hand on to both our own delusions of race."

**/ Senate Hearings, pp. 37, 40, 412.

***/ Senate Hearings, p. 29.

to who may sue, we believe that the foregoing discussion illustrates recognition by important proponents of fair housing legislation that discrimination in housing may inflict educational, economic, environmental and psychological injury on many citizens, black and white, who need not necessarily be identical to those to whom a landlord refused to rent an apartment. If the Congressional language, as elaborated by the views of proponents of the Act, does not actually negate the District Court's construction of the Act -- and we think it arguable that it does -- these indices seem to us, at least, more consistent with a broader view of standing, which would provide redress for those suffering the kinds of injury to which, as we have noted, many supporters of the legislation referred. This is particularly true since it is now well established that civil rights laws are to be liberally construed and broadly read so as to eliminate racial discrimination once and for all. See, e.g., Jones v. Mayer Co., 392 U.S. 409 (1968); Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969); Hamm v. Rock Hill, 379 U.S. 306 (1964); Miller v. Amusement Enterprises, 394 F. 2d 342, 349-50, 353 (5th Cir. 1968) (en banc).

B. Judicial Recognition of the Right of Voluntary Interracial Association

The essence of the statutory and judicial prohibitions against discrimination and segregation based on race is a recognition of the right to the free, interracial association of willing individuals. As the first Mr. Justice Harlan put it in his dissent in Plessy v. Ferguson, 163 U.S. 537, 557 (1896):

> If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the liberty of each.

In the seventy-five years which have passed since Plessy, the dissenting opinion has, for all practical purposes, become the law of the land,*/ and the proscriptions against interference with the rights in question have been held to apply to the conduct of private developers as well as of state officials. **/ Accordingly, denial of and interference with this right have consistently been held to inflict a legally cognizable injury on

*/ Brown v. Board of Education, 347 U.S. 483 (1954); Gayle v. Browder, 352 U.S. 903 (1956).

**/ Jones v. Mayer Co., 392 U.S. 409 (1968).

all those, white as well as black, who are seeking to exercise it.

The most direct form of interference with free interracial association is, of course, its open and direct denial. In Loving v. Virginia, 388 U.S. 1 (1967), for example, the Supreme Court struck down a state statute prohibiting intermarriage between whites and Negroes. In Buchanan v. Warley, 245 U.S. 60 (1917), decided long before state enforced segregation was held invalid, the Court struck down as an infringement on the seller's liberty a zoning ordinance which purported to restrict the right of a white man to sell a house in a white area to a Negro buyer.*/ State-imposed barriers to the exercise of this right have been invalid for more than half a century.

The more recent decisions upholding a right of action for interference with the opportunity for free association have not been limited to situations involving express prohibitions against interracial transactions. In Lee v. Nyquist, 318 F. Supp. 710 (W.D. N.Y. 1970) (three judge court)**/, parents of white and black

*/ See also Shelley v. Kraemer, 334 U.S. 1 (1948) and Barrows v. Jackson, 346 U.S. 249 (1953), holding that courts may not enforce racially restrictive covenants. In Barrows, a white seller who violated such a covenant was held to have standing to assert the rights of prospective Negroes as a defense to a suit for damages.

**/ This decision was affirmed by the Supreme Court on May 3, 1971. (No. 1354, ___ U.S. ___).

children brought suit, on constitutional grounds, to enjoin enforcement of a New York statute purporting to prohibit involuntary "busing" to reduce racial imbalance in the public schools. One black plaintiff's child was in a school which was 99.7% black, while one white plaintiff's child was in a school which was 95.6% white. The defendants challenged plaintiffs' standing to institute the action, claiming that they had demonstrated no injury. The court held otherwise:

> . . . it is by now well documented and widely recognized by educational authorities that the elimination of racial isolation in the schools promotes the attainment of equal educational opportunity and is beneficial to all students, both black and white. The Regents of the University of the State of New York in their 1969 Restatement of Policy on Integration and the Schools said at p. 3:
>
> > [T]he elimination of racial segregation in the schools can enhance the academic achievement of non-white children while maintaining achievement of white children and can effect positive changes in interracial understanding for all children. The latter consideration is paramount. If children of different races and economic and social groups have no opportunity to know each other and to live together in school, they cannot be expected to gain the understanding and mutual respect necessary for the cohesion of our

> society. The stability of our social order depends, in large measure, on the understanding and respect which is derived from a common educational experience among diverse racial, social, and economic groups -- integrated education. The attainment of integrated education is dependent upon the elimination of racial segregation in the schools. 318 F. Supp. at 714.

Similarly, in Hobson v. Hansen, 269 F. Supp. 401, 406, 419 (D. D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969), a suit to desegregate the schools of the District of Columbia, the Court found that "racially and socially homogeneous schools damage the minds and spirit of all children who attend them -- the Negro, the white, the poor and the affluent -- and block the attainment of the broader goals of democratic education, whether the segregation occurs by law or by fact." In later proceedings in the same case, the Court restated these principles verbatim in upholding a motion by nine white parents "who desperately want their children to have the value of an integrated education" to set aside a school board

decision as to zone boundaries which minimized desegregation. Hobson v. Hansen, 320 F. Supp. 720, 727 (D. D.C. 1970). */

In Shannon v. United States Department of Housing and Urban Development, 436 F. 2d 809, 818 (3rd Cir. 1970), white and black residents of an urban renewal area of Philadelphia brought suit against federal officials, complaining that the defendants' approval of the concentration of low-income housing near their homes and businesses tended to perpetuate racial segregation and adversely affected their living environment. Their interest was challenged by the defendants as too remote to give rise to standing to sue. The Court held that it was not:

> The test, for Article III purposes, is whether or not plaintiffs allege injury in fact. They do indeed. They allege that the concentration of lower income black residents in a 221(d)(3) rent supplement project in their neighborhood will adversely affect not only their investments in homes and businesses, but even the very quality of their daily lives.

If the destruction of an integrated environment by the concentration in it of too many blacks -- segregation by indirection - constitutes the infliction of a legally cognizable injury, we think that this must be even more true of the far more directly

*/ The Lee opinion and the first Hobson decision both contain additional useful discussion, both in text and footnotes, relating to the nature of the injury to both blacks and whites stemming from a segregated environment. See also The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement, 37 Minn. L. Rev. 427, 429-35 (1953).

discriminatory policy of almost total exclusion of non-whites which is alleged by these plaintiffs.

Factually different from this case, but analogous in principle, are decisions conferring a right of action on white persons penalized on account of the race of their guests or associates. In Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969), the Supreme Court held that a white resident who had been expelled by the defendants from an all-white residential community association for attempting to assign his interest to a black man and for protesting segregation had a right of action for damages under 42 U.S.C. 1982, the court reasoning that the white owner is often the "only effective adversary" of segregation and that to deny him standing would "give impetus to the perpetuation of racial restrictions on property." Similarly, in Walker v. Pointer, 304 F. Supp. 56 (N.D. Tex. 1969), the Court sustained the right of white tenants to recover damages under 42 U.S.C. 1982 after their landlord evicted them on account of the race of their guests. In both of these cases the defendants' discriminatory policy gave the white plaintiffs the choice, as a practical matter, of either living in a racially segregated environment or moving elsewhere. That is the very choice to which plaintiffs

claim to have been restricted here. Even though the present case involves no expulsions or evictions, we think the rationale of Sullivan and Walker applies, for the right of interracial association underlies each of these decisions, and it is with this right that the defendants here have allegedly interfered. */

The Equal Employment Opportunities Commission (EEOC) has also held, despite the more restrictive language of Title VII of the Civil Rights Act of 1964, **/ that white employees have standing to complain of the exclusion of Negroes from the work force of which they are members. See Dec. No. 70-09, CCH Emp. Prac. Guide ¶ 6026 (1969), cited at page 22 of Appellants' brief. The analogy is a close one. If, in the words of the EEOC, a white man has the "right to work in an atmosphere free of unlawful employment practices and their consequences," then he surely has

*/ See also Offner v. Shell's City, 376 F. 2d 574 (5th Cir. 1967), and Tolg v. Grimes, 355 F. 2d 92 (5th Cir. 1967), applying the prohibitions against racial discrimination in public accommodations in Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a et seq., to white persons seeking to dine in the company of Negroes; and Battle v. Mulholland, ____ F. 2d ____ (No. 29898, 5th Cir. March 23, 1971), holding that despite state's broad leeway as to who may have public employment, a black policeman may not be dismissed because white persons stayed at his home. See also Nesmith v. Alford, 318 F. 2d 110 (5th Cir. 1963). While the foregoing cases involve direct reprisal or refusal of service, that is not essential for standing. See, e.g., the Lee, Hobson, and Shannon cases, supra, and our general discussion of standing, infra.

**/ See p. 8, supra.

at least an equal right to live in an environment free of housing discrimination.

* * * * *

The benefits of integration which give rise to a cognizable legal interest therein for white tenants at Parkmerced apply with equal force to the few black residents. The black plaintiffs, if the allegations of the complaint are true, have been given the practical choice of being almost the only blacks in the community or of living somewhere else. Common experience teaches that a Negro can hardly be comfortable as the only member of his race in a strange environment where he feels the entire brunt of any adverse racial reactions on the part of his neighbors, from the cold shoulder, through unconcealed hostility, to racial violence. It was this factor, among others, that made freedom of choice fail as a vehicle for desegregation, for, when choice influencing factors are not eliminated, freedom of choice is an illusion. Coppedge v. Franklin County Board of Education, 273 F. Supp. 289, 299 (E.D. N.C. 1967), aff'd 394 F. 2d 410 (4th Cir. 1968); Lee v. Macon County Board of Education, 267 F. Supp. 458, 479 (M.D. Ala. 1967), aff'd sub nom. Wallace v. United States, 389 U.S. 215 (1967); Kier v. County School Board, 249 F. Supp.

239, 246-248 (W.D. Va. 1966). It is an injury to a Negro if, as a result of a landlord's discriminatory practices, he must severely restrict his opportunity to associate with members of his own race in order to enjoy his federal right to equal housing opportunity. Cf. Whitley v. Wilson City Board of Education, 427 F. 2d 179 (4th Cir. 1970).

* * * * *

We summarize. The courts, in a variety of circumstances, have recognized that unlawful conduct interfering with a person's right to voluntary interracial association, injures him in a legal sense. The language, administrative construction and history of the Fair Housing Act are consistent with the application of this principle to fair housing.

C. The Doctrine of Standing As Applied to Cases Involving Racial Discrimination

If, as we have argued, the plaintiffs' rights to and opportunity for interracial association are legally protected interests, they may maintain this action under conventional rules of standing, particularly those applicable to civil rights cases.

"In terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." Flast v. Cohen, 392 U.S. 83, 101 (1968); Lee v. Nyquist, supra, 318 F. Supp. at 713. There is no doubt that the parties to this action are genuine adversaries. Lee v. Nyquist, supra.

Aside from constitutional limitations, courts do impose requirements of standing as a matter of judicial self-restraint. Barrows v. Jackson, supra, 349 U.S. at 255. The requisite standing is present where

1. there is a logical nexus between the status plaintiffs assert and the claim sought to be adjudicated, and

> 2. plaintiffs are harmed in fact, economically or otherwise, by the conduct against which their complaint is directed.

Lee v. Nyquist, supra, 318 F. Supp. at 713, citing Flast v. Cohen, supra, and Data Processing Service v. Camp, 397 U.S. 150 (1970).

As the prospective neighbors and associates of the persons allegedly being excluded from Parkmerced, the plaintiffs' status has a logical nexus with the issue presented. Lee v. Nyquist, supra; Shannon v. United States Department of Housing and Urban Development, supra. The injury to plaintiffs' associational interest also satisfies the requirement of "harm in fact." As the Supreme Court noted in Data Processing Service v. Camp, supra, the litigant's injury need not be economic, but may be to aesthetic, conservational, recreational or even spiritual values. 397 U.S. at 154. An interest in "well organized residential neighborhoods of decent homes and suitable living environment," Shannon, supra, has been held sufficient to confer standing, as has an interest in the degree of integration in public schools. Lee v. Nyquist,

supra; Hobson v. Hansen, supra. The plaintiffs' status here is comparable.

The District Court, in holding against plaintiffs, relied on Sierra Club v. Hickel, 433 F. 2d 24 (9th Cir. 1970), certiorari granted ____ U.S.____ (Feb. 21, 1971). The Sierra Club was a conservationist organization which objected to the approval by federal officials of a commercial-recreational project in the Sequoia National Forest. The District Court entered a preliminary injunction prohibiting issuance of the necessary permits for development to proceed. This Court reversed, unanimously finding the evidence insufficient on the merits to sustain the entry of injunctive relief. On the issue of standing, the Court divided. The majority opinion, while noting that aesthetic, conservational and recreational interests are sufficient to sustain standing, Data Processing Service v. Camp, supra, held that there was no evidence that plaintiff had been injured in fact. The Court, Judge Hanley dissenting, found that "such club concern without a showing of more direct interest [cannot] constitute standing in the legal sense" sufficient to challenge the action of federal officials. 433 F. 2d at 30. Similarly, in Alameda Conservation Assn. v. State of California, 437 F. 2d 1087 (9th Cir. 197

this Court denied a conservationist corporation standing to complain of environmental damage by filling operations in the San Francisco Bay, while granting standing to individuals whose property would be injured at least from an esthetic standpoint.

We think the plaintiffs' injury in this case far more direct and tangible than in Sierra Club v. Hickel. In that case, except for their chosen interest in ecology, the members had no more stake in the outcome of the proceedings than any other citizen who might choose to visit Sequoia National Forest. Arguably, if the Sierra Club had standing, any group of citizens which claimed to be for or against ecology might sue. In the present case, however, it is the residents of Parkmerced who complain. Their opportunity to associate on a racially unrestricted basis, and indeed the racial environment in which they live, are at issue in this litigation. Their interest is surely at least as proximate as that of the affected residents in Alameda Conservation Assn. Sierra Club v. Hickel might apply if plaintiffs were an organization asserting a general interest in racial policy, but not where, as here, they constitute a unique and limited class of persons with a particular stake in the outcome. The cases are therefore in no sense analogous.

Moreover, we think that the question of standing is not to be determined without a consideration of the nature of this case. The opening sentence of the Fair Housing Act reflects the importance of the national policy in favor of equal opportunity which the Act reflects. Standing is, in large part, a doctrine of judicial self-restraint, see Data Processing Service v. Camp, supra, 397 U.S. at 154. The reason for such self-restraint is less where its exercise hinders the implementation of such a policy. In Barrows v. Jackson, supra, the Supreme Court made a conscious departure from the general proposition that the person asserting a constitutional right shall be a member of the class to whom the right is denied, noting that if that doctrine were rigidly followed, the enforcement of the equal protection clause would be seriously undermined. See also Sullivan v. Little Hunting Park, supra. Similarly, in school desegregation cases, pupils have been held to have standing to complain of discriminatory hiring and allocation of faculty members, even in the absence of a complaining teacher. Rogers v. Paul, 382 U.S. 198, 200 (1965); Lee v. Macon County Board of Education, 267 F. Supp. 458, 472 (M.D. Ala. 1967), aff'd, 389 U.S. 215 (1967). See also

Marable v. Alabama Mental Health Board, 297 F. Supp. 291, 297 (M.D. Ala. 1969) (three judge court) (doctrine of standing not to be used to defeat civil rights claims where plaintiffs' interest is genuinely adverse; inmates at state mental health facilities have standing to raise discrimination in pay rates of staff personnel at all facilities, including those in which they were not patients).

* * * *

The plaintiffs herein have sued not only for an injunction, but for compensatory and punitive damages. This prayer presents difficult problems of practical administration. If these tenants may recover damages if they prove their case, does that right inure to every tenant of a landlord who discriminates? If so, what showing must the tenant make, and what is the measure of damages? Cf. 42 U.S.C. 3612(c). It may be that, in fashioning rules on this issue, the courts will find it appropriate to impose practical limitations, so as to avoid the unreasonable multiplication of substantial damages.

We think, however, that the existence of this issue does not warrant a denial of standing where the complaint

alleges a legally cognizable injury and the plaintiffs stand ready to prove it. If, upon the trial, the plaintiffs prove their allegations, the Court will have before it, in concrete terms, the issue of relief, and the problem of fashioning a fair and workable remedy. We think that the possible difficulties in making a determination on damages should not be permitted to deny plaintiffs their day in court.

II.

THE ATTORNEY GENERAL'S AUTHORITY TO INSTITUTE "PATTERN OR PRACTICE" SUITS IS NOT EXCLUSIVE AND DOES NOT AFFECT PLAINTIFFS' RIGHT TO BRING THIS ACTION

The District Court's denial of standing to the plaintiffs appears, in part, to be bottomed on the proposition, stated at page 2 of the opinion, that

> The enforcement of the public interest in fair housing enunciated in Title VIII of the Act and the creation of integrated communities to the extent envisioned by Congress are entrusted to the Attorney General by 42 U.S.C. 3613, and not to private litigants such as those before the Court.

While the meaning of the above quoted passage is not entirely clear, its impact appears to be that private plaintiffs

(ordinarily, rejected non-white applicants) are generally limited to securing relief for themselves and, perhaps, for other individuals who are similarly situated, but that only the Attorney General may institute litigation to eradicate underlying discriminatory patterns and practices. We believe that so restrictive a reading is inconsistent with the purpose and structure of the statute. Moreover, such a construction would have the practical consequence of decimating the public and private resources available to eliminate patterns of segregation which prevail in so many areas of the United States.

The Civil Rights Acts of the past fifteen years have provided for enforcement not only by private individuals but also by the Attorney General.*/ Under the provisions of these statutes, individual and class litigants carry out an important public function in addition to protecting their own personal interests. Accordingly, they have been held to be entitled, upon proof of discrimination, to comprehensive

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*/ E.g., 42 U.S.C. 1971 (voting), 2000a et seq. (public accommodations), 2000b et seq. (public facilities), 2000c et seq. (education), 2000e et seq. (employment), 3601 et seq. (housing).

relief dismantling the entire segregated structure which denied them and others their right to equal treatment. See, e.g., Green v. County School Board of New Kent County, Virginia, 391 U.S. 430 (1968) (plaintiffs in school desegregation cases held entitled to complete disestablishment of dual system; admission of individual black pupils to white schools insufficient); Griggs v. Duke Power Company, ____ U.S. ____ (No. 124, March 8, 1971) (relief in employment discrimination cases includes elimination of testing, and revision of transfer and seniority procedures); Washington v. Lee, 263 F. Supp. 327 (N.D. Ala. 1966), aff'd per curiam 390 U.S. 333 (1967) (private litigation to desegregate Alabama penal system resulted in schedule for desegregation of all such institutions in the state). As the Supreme Court put it in Newman v. Piggie Park Enterprises, 390 U.S. 400, 401-402 (1968), a case under the public accommodations title of the Civil Rights Act of 1964, 42 U.S.C. 2000a et seq.:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under

> that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general" vindicating a policy that Congress considered of the highest priority.

There is nothing in the Fair Housing Act of 1968 which suggests that the scope of relief which may be secured through private suits under 42 U.S.C. 3610 or 3612 was designed to be narrower than under earlier Acts. In fact, Congress expressly provided in the statute that a court in such suits may order appropriate affirmative action by the defendant. 42 U.S.C. 3610(d). Such affirmative action, designed to correct the effects of past discrimination, is a conventional incident of relief in "pattern or practice" cases brought by the Attorney General. Louisiana v. United States, 380 U.S. 145, 154 (1965); and see the decree prescribed by the Court of Appeals for the Fifth Circuit in United States v. West Peachtree Tenth Corp., 437 F. 2d 221, 229-231 (5th Cir. 1971). A provision for affirmative steps has little meaning, however, unless the contemplated relief goes beyond securing housing or damages for the individual plaintiff.

We also think that the District Court's holding that the Attorney General's authority is exclusive threatens

severely to hamper enforcement of the Act. The tenants of an apartment complex have a unique opportunity to observe and recognize a landlord's discrimination, and may often be the most effective adversaries of unlawful practices. Cf. Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969); Barrows v. Jackson, 346 U.S. 249, 259 (1953).*/ The Courts are aware, on the other hand, that the Attorney General has a limited staff for civil rights litigation. See Allen v. State Board of Elections, 393 U.S. 544, 556 (1969); Perkins v. Matthews, 400 U.S. 379, 392, 396 (1971). Virtually all "pattern or practice" housing cases under 42 U.S.C. 3613 are handled by the Housing Section of the Civil Rights Division, which is presently composed of eighteen attorneys and is responsible for enforcement

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*/ For an account of how white tenants helped to secure such token desegregation as there has been at another of Metropolitan Life's previously all-white projects, see Arthur Simon, Stuyvesant Town, USA: Pattern for Two Americas, New York University Press (1970).

throughout the United States.*/ The legislative history of the Fair Housing Act is replete with references to the degree to which housing is segregated in all our cities.**/ Congress, having expressed its commitment to fair housing throughout the United States,***/ cannot reasonably be thought to have intended that only those patterns or practices be eliminated which a handful of lawyers at the Justice Department can reach. As former HUD Secretary Weaver put it during the Senate Hearings****/

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*/ In memoranda filed in the court below, defendants claimed that they must be in compliance with the law because the Attorney General had not sued them. We must disclaim this imputation of omniscience and ubiquity, for there are undoubtedly numerous patterns and practices which we have, as yet, been unable to reach. The Attorney General's limited staff cannot be aware of or eliminate every discriminatory pattern or practice in the country, and indeed, usually concentrates on cases in which no private action has been instituted, so that duplication of resources may be avoided.

**/ See, e.g., Senate Hearings, pp. 14-15, 36, 84, 98, 232 et seq. Edward Rutledge, Executive Director of the National Committee against Discrimination in Housing, testified that according to the leading sociological study "residential separation of Negroes and whites within central cities is nearly universal in American Life." Senate Hearings, p. 233.

***/ 42 U.S.C. 3601.

****/ Senate Hearings, p. 37.

> The urban crisis before this nation calls for action simultaneously on all fronts to alleviate poverty and to eliminate slums and racial ghettos. This country has an increasing awareness that the attack on our racial ghettos requires co-ordinated action by Federal, State, and local governments, private enterprise, management and labor, religious and other private groups.

The problem of inadequate resources and their impact on prompt remedial action has already been reflected in the history of this case. When the original plaintiffs complained to HUD, that agency, in accordance with 42 U.S.C. 3610, deferred to the California FEPC. The state body, understaffed, was unable to handle the case, and the plaintiffs had to sue. All of the litigation since the action was brought eight months ago has revolved around standing, ripeness, the substantial equivalency of state remedies, and other procedural issues not relating to the merits of the case. In spite of the industry and skill of the able advocates available to these plaintiffs, the District Court has yet to begin to hear the evidence as to whether defendants do or do not discriminate. Nor is it certain, or even likely, that a trial on the merits is around the corner, even if the decision below is reversed.

Procedural litigation is doubtless inevitable, and where, as here, the statute is still relatively in its infancy, issues such as those raised in this case must be authoritatively resolved if the machinery is to work. We submit, however, that if all litigation of this kind is left to the Attorney General, the Congressional policy in favor of swift elimination */ of the inequities caused by racial discrimination in housing will be severely hampered, to the injury of the United States and its citizens.

CONCLUSION

For the reasons stated, we respectfully request that the decision below be reversed and the cause remanded for expedited proceedings in the District Court.

Respectfully submitted,

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*/ See 42 U.S.C. 3614 (expedition of proceedings)

APPENDIX

Statutes Involved

The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 et seq., provides in pertinent part:

> 42 U.S.C. 3601: Policy
>
> It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.
>
> 42 U.S.C. 3604: Discrimination In the Sale
>
> Or Rental of Housing
>
> As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful--
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.
>
> * * *
>
> (d) To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.
>
> * * *

42 U.S.C. 3610: Enforcement

(a) Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary . . .

* * *

42 U.S.C. 3613: Enforcement by the Attorney General

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title, or that any group of persons has been denied any of the rights granted by this title and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this title.

CERTIFICATE OF SERVICE

I, ROBERT J. WIGGERS, hereby certify that on the day of May, 1971, I have served copies of the foregoing Brief for the United States as Amicus Curiae on the attorneys for the parties by placing copies in the United States mail, postage prepaid, addressed to them as follows:

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