Montesa v. Schwartz Doc. 205003073




REISS, *District Judge*, dissenting:

The majority holds that Student-Plaintiffs fail to allege standing to assert 42 U.S.C. § 1983 claims because they are only indirectly affected by Defendants' alleged Establishment Clause violations. I respectfully disagree, and would affirm in part the district court's decision.[1]

The majority cabins Student-Plaintiffs' Establishment Clause claims to a "direct exposure theory" and, for that reason, addresses "only whether the Student-Plaintiffs have sufficiently pleaded a basis demonstrating their direct exposure to the unconstitutional establishment of religion." Maj. Op. at 15–16 (footnote omitted). I believe Students-Plaintiffs' claims are broader than the majority's formulation, and that the Establishment Clause does not require "direct exposure" to the unconstitutional establishment of religion. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 221 (1963) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-

[1] I agree with the majority that Student-Plaintiffs cannot establish standing to challenge real estate transactions that were not consummated or the provision of a *de minimus* number of religious books.



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observing individuals or not."). At the pleadings stage, I would find that Student-Plaintiffs adequately allege they are "directly affected by the . . . practices against which their complaints are directed." *Id.* at 224 n.9.

Although Student-Plaintiffs bear the burden of establishing standing as a jurisdictional requirement, "standing allegations need not be crafted with precise detail, nor must the plaintiff prove his allegations of injury." *Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir. 2003). Indeed, "general factual allegations of injury resulting from the defendant's conduct may suffice[.]" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). In determining standing, we must "accept [] all well-pleaded allegations in the complaint as true [and] draw [] all reasonable inferences in the plaintiff's favor." *Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 191 (2d Cir. 2014) (alterations in original and internal quotation marks omitted) (reversing and remanding district court's dismissal of claims for lack of standing).

The majority concludes that Student-Plaintiffs fail to allege injuries that are sufficiently direct for prudential standing. The prudential standing doctrine is "in some tension with [the Supreme Court's] recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is

virtually unflagging." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (internal quotation marks omitted). At the pleadings stage, its requirements are neither stringent nor inflexible. *See Flast v. Cohen*, 392 U.S. 83, 99, 101 (1968) (observing that "[s]tanding has been called one of 'the most amorphous (concepts) in the entire domain of public law[]'" and that "the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy,' and whether the dispute touches upon 'the legal relations of parties having adverse legal interests[]'") (citation and footnote omitted). Prudential standing ensures that Student-Plaintiffs' claims "fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question[,]" a standard that, at least for pleading purposes, is satisfied here. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (internal quotation marks omitted).

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). "Primary among those evils" against which the Establishment Clause guards "have been sponsorship, financial support, and

active involvement of the sovereign in religious activity." *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973) (internal quotation marks omitted). "It is equally well established, however, that not every [practice] that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." *Id.* at 771. For this reason, Establishment Clause cases are fact sensitive,[2] often requiring courts to "sift[] through the details[,]" employ "careful judgment[,]" and draw "fine distinctions[.]" *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 847-48 (1995) (O'Connor, J., concurring).

In a close case like this one, we should hesitate to dismiss Student-Plaintiffs' constitutional claims based on the application of "[s]ynthesiz[ed]" rules that emphasize narrow categories of "direct exposure[.]" Maj. Op. at 19. Establishment Clause jurisprudence does not mandate that rigid approach. To the contrary, "[b]ecause standing in Establishment Clause cases can be shown in

[2] In *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), the Supreme Court, which was sharply divided as to the merits, nonetheless unanimously agreed that whether there is a violation of the Establishment Clause is a "fact-sensitive" inquiry. 134 S. Ct. at 1825 (plurality opinion); *id.* at 1838 (Breyer, J., dissenting) ("As we all recognize, this is a 'fact-sensitive' case."); *id.* at 1851 (Kagan, J., dissenting) ("The facts here matter to the constitutional issue; indeed, the majority itself acknowledges that the requisite inquiry [is] a 'fact-sensitive' one[.]").

various ways," *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145 (2011), "[i]f an establishment of religion is alleged to cause real injury to particular individuals, the federal courts may adjudicate the matter." *Id.* "Like other constitutional provisions, the Establishment Clause acquires substance and meaning when explained, elaborated, and enforced in the context of actual disputes." *Id.*

This court's decision in *Altman v. Bedford Central School District*, 245 F.3d 49 (2d Cir. 2001) imposes no greater burden. The *Altman* court explained that "direct exposure to the challenged activity" is only one basis for Establishment Clause standing, which, unlike the Free Exercise Clause, does not require "'proof that particular religious freedoms are infringed.'" *Altman*, 245 F.3d at 72 (quoting *Schempp*, 374 U.S. at 224 n.9). As an example of "direct exposure," the *Altman* court pointed to "students attending a public school, and their parents, hav[ing] standing to challenge a program of Bible reading in the school because they are 'directly affected by the laws and practices against which their complaints are directed[.]'" *Id.* (quoting *Schempp*, 374 U.S. at 224 n.9). In this dicta, the *Altman* court did not suggest that "direct exposure" required the students to actually be *exposed to* Bible reading. *Altman* thus reflects the

important distinction that "a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." *Schempp*, 374 U.S. at 223. For this same reason, a plaintiff's ability to avoid direct exposure is not a defense to an Establishment Clause violation. *See id.* at 224-25 ("[T]he fact that individual students may absent themselves [from Bible reading in school] upon parental request[] . . . furnishes no defense to a claim of unconstitutionality under the Establishment Clause.").

As the *Altman* court further recognized, the Establishment Clause does not require personal confrontation with, or constraint by, religious tenets, practices, or expressions; it requires only some "direct injury" as opposed to an "indefinite" injury indistinguishable from that suffered by the public at large: "[t]he party who invokes the power must be able to show, not only that the [practice] is invalid but that he has sustained or is immediately in danger of sustaining *some direct injury* as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Altman*, 245 F.3d at 72 (quoting *Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429, 434 (1952)) (emphasis supplied).

In this case, each Student-Plaintiff attends one of the District's public schools. Collectively, they challenge Defendants' alleged systematic diversion of state and local taxes, federal funds, and grant monies in order to finance special education at Yeshivas. They identify the educational programs and resources formerly provided at their schools which are now unfunded, explain how they are entitled to have the diverted funds spent on *their* educations,[3] and claim Defendants' alleged diversion of resources deprives them of their "right to a sound basic education by the laws and policies of the federal government and the State of New York." Joint App'x at 1072. Student-Plaintiffs allege they can demonstrate through budgetary records and academic test scores a direct causal link between Defendants' alleged diversion of District funds and the academic harm they suffer. Accepting these allegations as true and drawing all reasonable

[3] Although the majority correctly points out "there is no free-standing federal constitutional right to a public education that entitles the Student-Plaintiffs to a minimum level of educational services[,]" Maj. Op. at 25 n.15, the New York Constitution provides that the New York Legislature "shall provide for the maintenance and support of a system of free common schools, wherein all the children of [that] state may be educated." N.Y. Const. art. XI, § 1; *see also Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 369 (N.Y. 1982) (interpreting the New York Constitution to require provision of "a sound basic education"). In any event, an Establishment Clause claim does not require Student-Plaintiffs to establish that the violation deprived them of a free-standing federal constitutional right.

inferences in Student-Plaintiffs' favor, at the pleading stage, their causation allegations are not implausible. *See Plyler v. Doe*, 457 U.S. 202, 222 (1982) (recognizing that the deprivation of an education exerts an "inestimable toll . . . on the social economic, intellectual, and psychological well-being of the individual").

In characterizing Student-Plaintiffs' injuries as "too far removed, too attenuated, from the alleged unconstitutional component of the act of funneling public monies to support the advancement of Orthodox Hasidic Jewish schools[,]" Maj. Op. at 22–23, the majority ignores the fact that the Student-Plaintiffs' educational harm arises directly out of the allegedly unconstitutional acts, the general public, including taxpayers, are not suffering this same injury, and Student-Plaintiffs could not assert Establishment Clause claims if the District diverted the same funds for a secular purpose. As a result, Student-Plaintiffs' alleged injuries are not "similar to that of any other individual who is affected by the District's budget, regardless of whether that person is an employee, a student, a vendor, a taxpayer, or a citizen[,]" Maj. Op. at 25, and they do not allege a "generalized grievance[] . . . [that would be] most appropriately addressed in the representative branches." *Valley Forge*, 454 U.S. at 475 (internal

quotation marks omitted). Moreover, no other class of plaintiffs can assert this same claim or is better situated to assert a deprivation of this same interest. *See Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99-100 (1979) (noting that "under the prudential principles[,] . . . the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim").

Although the majority points out that the Student-Plaintiffs fail to cite precedent authorizing their Establishment Clause claim, it is equally true that there is no precedent prohibiting it. Accordingly, "[r]ather than attempting to define the outer limits" of the Establishment Clause "on the basis of the present record, the Court's opinion [should] wisely permit[ ] the parties . . . to create a factual record that will inform that decision." *United States v. Georgia*, 546 U.S. 151, 160 (2006) (Stevens, J., concurring) (footnote omitted); *see also Rosenberger*, 515 U.S. at 838-39 ("If there is to be assurance that the Establishment Clause retains its force in guarding against those governmental actions it was intended to prohibit, we must in each case inquire first into the purpose and object of the governmental action in question and then into the practical details of the

program's operation."). "Tenuous theories of liability are better assayed in the light of actual facts than in pleader's supposition." *Adato v. Kagan*, 599 F.2d 1111, 1117 (2d Cir. 1979); *see also Braden v. Univ. of Pittsburgh*, 477 F.2d 1, 4-5 (3d Cir. 1973) ("It would perhaps be possible for us to decide this last issue on the present record but we think we should not do so. Very important constitutional questions are presented and the Supreme Court has repeatedly informed us that such difficult issues should not be decided except upon a full record and after adequate hearing.") (collecting Supreme Court cases).

For the reasons set forth above, I would affirm in part the district court's conclusion that Student-Plaintiffs have adequately alleged standing at the pleadings stage, and I would defer a determination of qualified immunity.[4]

[4] *See Johnson v. Jones*, 515 U.S. 304, 317 (1995) (observing that "an interlocutory appeal concerning [the factual basis for qualified immunity] in a sense makes unwise use of appellate courts' time, by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision" and concluding that "we are persuaded that [i]mmunity appeals . . . interfere less with the final judgment rule if they [are] limited to cases presenting neat abstract issues of law") (internal quotation marks omitted).