RECENT CASES

ESTABLISHMENT CLAUSE — STANDING — D.C. CIRCUIT HOLDS THAT PROTESTANT NAVY CHAPLAINS LACK STANDING TO CHALLENGE NAVY RETIREMENT SYSTEM'S ALLEGED CATHOLIC FAVORITISM. — *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008).

The Supreme Court has held that the mere belief that government conduct violates the Establishment Clause is insufficient to confer standing to challenge that conduct in federal court.[1] Rather, a would-be plaintiff must identify a "personal injury" suffered as a result of the alleged constitutional violation.[2] Recently, in *In re Navy Chaplaincy*,[3] the D.C. Circuit held that a group of Protestant Navy chaplains lacked standing to sue the Navy for allegedly favoring Catholic chaplains in its retirement system, where the plaintiff chaplains "d[id] not claim that the Navy [had] actually discriminated against any of them."[4] The court rejected the plaintiffs' claim that the alleged "'message' of religious preference" the favoritism conveyed was sufficient to establish injury-in-fact for standing purposes, reasoning that the plaintiffs' theory would radically expand standing under the Establishment Clause.[5] Responding to the court's concern, the dissent sought to ground standing on the plaintiffs' membership in the specific "community" — the Navy Chaplain Corps — in which the alleged religious favoritism was occurring.[6] In this way, the dissent attempted to offer a middle ground between denying standing altogether and opening the floodgates to future Establishment Clause claims. Although initially attractive, the dissent's position lacks a principled foundation, as it rests on an artificial distinction that runs contrary to precedent and looks for support in a flawed analogy to religious display and school prayer cases.

The Navy groups its Chaplain Corps "into four categories: Catholic, liturgical Protestant, non-liturgical Protestant, and Special Worship."[7] By statute, chaplains who have not achieved or been recom-

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[1] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485–86 (1982).

[2] *Id.* at 485.

[3] 534 F.3d 756 (D.C. Cir. 2008).

[4] *Id.* at 758.

[5] *Id.* at 763–65.

[6] *See id.* at 771–72 (Rogers, J., dissenting).

[7] *Id.* at 759 (majority opinion). "Liturgical Protestant" refers to denominations that use an "established liturgy in worship services," such as Methodism, Lutheranism, Episcopalianism, and Presbyterianism. *Id.* "Non-liturgical Protestant" refers to denominations that have no formal liturgy, including Baptist, Evangelicalism, and Pentecostalism. *Id.* "Special Worship" is a catch-all category for other faiths, including Judaism, Mormonism, Buddhism, Hinduism, and Islam. *Id.*

mended for promotion to the rank of rear admiral (lower half) by age sixty-two are to be either discharged or transferred to retired status.[8] During the course of earlier litigation, a group of non-liturgical Protestant Navy chaplains learned that the Navy had retained fifteen Catholic reserve chaplains in active service beyond the age of sixty-two.[9] Alleging that the Navy had retained the Catholic chaplains in active service "for the purpose of enabling their pensions to vest,"[10] the Protestant chaplains sued to enjoin the Navy's "denominational preference policy" as a violation of the Establishment Clause.[11]

Denying the plaintiffs' motion for a preliminary injunction, the United States District Court for the District of Columbia found that the chaplains lacked standing.[12] In the district court's view, because none of the plaintiffs claimed to have been denied the opportunity to continue in active service beyond the statutory retirement age or showed that he might be denied such opportunity in the future, the plaintiffs failed to show the type of "particular and concrete injury" required for standing.[13]

The D.C. Circuit affirmed.[14] Writing for the panel, Judge Kavanaugh[15] emphasized the limiting nature of standing requirements: "the law of Art[icle] III standing is built on a single basic idea — the idea of separation of powers,"[16] and is "founded in concern about the proper — and properly limited — role of the courts in a democratic society."[17] Judge Kavanaugh also emphasized that the Protestant chaplains had conceded that the Navy had not discriminated against them personally on account of their religion.[18] Instead, the chaplains claimed standing based on their exposure to a "'message' of [govern-

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[8] *See* 10 U.S.C. § 1251(a) (2006) (commissioned officers); *id.* §§ 14509, 14515 (reserve officers). The Secretary of the Navy, however, may retain a chaplain in active status through age sixty-seven. *Id.* § 1251(c)–(d) (commissioned officers); *id.* § 14703(a)(2)–(b) (reserve officers).

[9] *See* Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 295 (D.C. Cir. 2006).

[10] *In re* Navy Chaplaincy, 516 F. Supp. 2d 119, 121 (D.D.C. 2007).

[11] *Id.* at 122. Apart from the fifteen Catholic chaplains, "[t]he Navy identified no other denomination with reserve chaplains on active duty over age [sixty]." Appellant's Opening Brief at 11, *Chaplaincy of Full Gospel Churches*, 454 F.3d 290 (No. 05-5143), 2005 WL 2844809.

[12] *Navy Chaplaincy*, 516 F. Supp. 2d at 123.

[13] *Id.* at 125–26. The district court also found that the plaintiffs lacked standing as federal taxpayers, because taxpayer standing for Establishment Clause violations can only be asserted when challenging congressional action under the Taxing and Spending Clause, U.S. CONST. art. I, § 8, cl. 1, whereas the plaintiffs were challenging action by the Executive Branch. *Navy Chaplaincy*, 516 F. Supp. 2d at 126–27 (citing Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2567 (2007) (plurality opinion)).

[14] *Navy Chaplaincy*, 534 F.3d at 758.

[15] Judge Kavanaugh was joined by Judge Silberman.

[16] *Navy Chaplaincy*, 534 F.3d at 760 (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)) (internal quotation marks omitted).

[17] *Id.* (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)) (internal quotation marks omitted).

[18] *Id.*

mental] religious preference as a result of the Navy's running a retirement system that favors Catholic chaplains."[19]

Rejecting the chaplains' claim of standing,[20] Judge Kavanaugh distinguished cases in which courts have found or assumed standing where a government religious display or school prayer conveyed a message favoring religion,[21] because unlike the states and counties in those cases the Navy in this case was "not communicating a religious message through religious words or religious symbols."[22] Further, under the plaintiffs' theory "every government *action* that allegedly violates the Establishment Clause could be re-characterized as a governmental *message* promoting religion. And therefore everyone who becomes aware of the 'message' would have standing to sue."[23] In Judge Kavanaugh's view, standing requirements are "not so manipulable."[24] Rather, "[w]hen plaintiffs are not themselves affected by a government *action* except through their abstract offense at the *message* allegedly conveyed by that action, they have not shown injury-in-fact to bring an Establishment Clause claim, at least outside the distinct context of the religious display and prayer cases."[25]

In dissent, Judge Rogers argued that the plaintiffs had indeed "suffered particularized Article III injury" because, as Navy chaplains, they were not "strangers" to the chaplain retirement program.[26] She stated that "[t]heir membership within the Chaplain Corps and their resulting receipt of a message of denominational preference ma[d]e them comparable to a citizen who has 'personal contact with the alleged establishment of religion,'" as in the religious display and school prayer cases.[27] Thus, just as the plaintiffs in the religious display and

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[19] *Id.* As in the district court below, the chaplains also asserted standing as federal taxpayers. *Id.*

[20] Judge Kavanaugh also dismissed the chaplains' asserted standing as federal taxpayers, *id.* at 761–62, reiterating that the limited taxpayer standing exception for Establishment Clause cases established in *Flast v. Cohen*, 392 U.S. 83, 105–06 (1968), applies "only when [taxpayers] challenge legislation passed pursuant to the Taxing and Spending Clause." *Navy Chaplaincy*, 534 F.3d at 761 (citing *Flast*, 392 U.S. at 102–03).

[21] *See id.* at 763 (citing, inter alia, McCreary County v. ACLU of Ky., 545 U.S. 844 (2005) (Ten Commandments displays in county courthouses); Lee v. Weisman, 505 U.S. 577 (1992) (prayer at public school graduation); County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (crèche display in county courthouse)).

[22] *Id.*

[23] *Id.* Judge Kavanaugh noted that the chaplains' counsel had acknowledged at oral argument that under the chaplains' theory, "any recipient of the Navy's 'message' in this case, including the judges on th[e] panel, would have standing to bring suit challenging the allegedly discriminatory Chaplain Corps." *Id.* (citing Transcript of Oral Argument at 6–7, *Navy Chaplaincy*, 534 F.3d 756 (No. 07–5359)).

[24] *Id.*

[25] *Id.* at 764–65.

[26] *Id.* at 767 (Rogers, J., dissenting).

[27] *Id.* (quoting Suhre v. Haywood County, 131 F.3d 1083, 1086 (4th Cir. 1997)).

school prayer cases had standing to challenge government messages endorsing religion, so too did the plaintiff chaplains in this case.[28] As Navy chaplains, they had been directly exposed to the Navy retirement program's "preference for Catholics, . . . [which] convey[ed] to them the 'message . . . that [as nonadherents of the favored denomination] they [were] outsiders, not full members of the . . . community.'"[29] This message in turn "cause[d] them psychological harm . . . that is cognizable under the Establishment Clause."[30]

Judge Rogers met Judge Kavanaugh's concern that granting the chaplains standing would "wedge open the courthouse doors"[31] to virtually any plaintiff alleging an Establishment Clause violation by arguing that the chaplains' claim was "based on an injury distinct to their status within the Chaplain Corps."[32] She reasoned that "appellants' membership in a narrowly defined community — the Navy Chaplain Corps — directly affected by the [chaplain retirement] program, and the message this program communicates to them as chaplains particularizes their injury-in-fact."[33] This is so because "[t]he practices of [one's] own community may create a larger psychological wound than someplace [one is] just passing through."[34] Thus, according to Judge Rogers, the plaintiffs' membership in the Navy Chaplain Corps not only provided them standing to challenge the chaplain retirement program's alleged religious favoritism, but also offered a basis for the court to grant standing in this particular case without opening the floodgates to future Establishment Clause claims.

Judge Rogers's effort to sidestep Judge Kavanaugh's concern that granting standing to the chaplains would radically expand standing under the Establishment Clause suggests a recognition on her part that conferring standing solely on the basis of a plaintiff's awareness of alleged government religious favoritism would have unwelcome consequences.[35] Yet, although her resulting approach seems to offer an at-

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[28] *See id.* at 767–68.

[29] *Id.* at 771–72 (third alteration and second and third omissions in original) (quoting McCreary County v. ACLU of Ky., 545 U.S. 844, 860 (2005)).

[30] *Id.* at 772.

[31] *Id.* at 765 (majority opinion).

[32] *Id.* at 768 (Rogers, J., dissenting).

[33] *Id.* at 772.

[34] *Id.* at 772 (alterations in original) (quoting Washegesic v. Bloomingdale Pub. Sch., 33 F.3d 679, 683 (6th Cir. 1994)) (internal quotation marks omitted).

[35] This concern is well founded. Weakening the injury-in-fact requirement in this way would strike at the core purposes of the standing doctrine that Judge Kavanaugh identified: safeguarding the separation of powers and keeping the judicial power within proper bounds by limiting the circumstances under which courts may hear cases. *See id.* at 760 (majority opinion); *see also, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992) ("[Standing doctrine] 'serv[es] to identify those disputes which are appropriately resolved through the judicial process.'" (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990))); Valley Forge Christian Coll. v. Ams. United for

tractive middle ground between denying standing altogether and wedging open the courthouse doors for future plaintiffs,[36] it lacks a principled foundation. Rather, her position rests on an artificial distinction between the plaintiff chaplains in this case and other potential plaintiffs outside the Navy Chaplaincy that runs contrary to precedent and seeks support in a flawed analogy to religious display and school prayer cases.

To begin with, contrary to Judge Rogers's position, it is not clear that the plaintiffs' injury was in fact "distinct" to their status as members of the Navy Chaplain Corps. The plaintiffs claimed that the chaplain retirement program's Catholic favoritism "ma[de] them feel like second-class citizens within the Navy Chaplaincy."[37] Obviously, a non-Catholic outside the Navy Chaplaincy who learns of the chaplain retirement program's Catholic preference will not feel like a second-class citizen *within the chaplaincy*. Yet, one wonders why membership in the Navy Chaplain Corps is the appropriate dividing line for standing purposes. A non-Catholic Army chaplain who learns of the Navy Chaplaincy's Catholic preference, for instance, may still very much feel like a "second-class citizen," as may a non-Catholic Navy officer who is not a chaplain, but Judge Rogers's position would deny standing to both. True, the "community" of which the non-Catholic Army chaplain or Navy officer feels like a second-class citizen will be

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Separation of Church & State, Inc., 454 U.S. 464, 473–74 (1982) (grounding standing doctrine in part on the constitutional separation of powers). If mere awareness of alleged government conduct favoring a particular denomination were a sufficient basis for standing, virtually any plaintiff who could identify a government policy advantaging a religion would be able to bring suit. The Establishment Clause would become a "special license" for parties "to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Id.* at 487.

[36] A brief survey of recent case law reveals similar efforts by other plaintiffs to substantially broaden standing under the Establishment Clause. Some of these efforts have been successful. *See, e.g.*, Barnes-Wallace v. City of San Diego, 530 F.3d 776, 784–86 (9th Cir.) (granting standing to lesbian and agnostic parents and their children challenging city park lease to local Boy Scout council because the Boy Scouts' "publicly expressed disapproval" of lesbians and agnostics deterred the plaintiffs from using the park, which contained "symbols of the Boy Scouts' belief system," *id.* at 784), *reh'g en banc denied*, 551 F.3d 891 (9th Cir. 2008). Others have not. *See, e.g.*, Caldwell v. Caldwell, 545 F.3d 1126, 1133 (9th Cir. 2008) (denying standing to parent of public schoolchildren who asserted standing based on her exposure to a state university website claiming that evolution does not conflict with Christian religious beliefs). Recent scholarship also suggests sympathy on the part of some academics toward efforts to expand Establishment Clause standing. *See, e.g.*, Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 130 (2009) ("[B]road standing is necessary to curb 'official action that undermines the integrity of religion.' . . . [C]itizens should have broad rights to enforce the fundamental principle that church and state should be maintained within their own separate jurisdictions." (quoting Carl H. Esbeck, *The Establishment Clause As a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 40 (1998))); *see also* Dana S. Treister, Note, *Standing To Sue the Government: Are Separation of Powers Principles Really Being Served?*, 67 S. CAL. L. REV. 689, 712 (1994).

[37] *Navy Chaplaincy*, 534 F.3d at 763.

different from, and larger than, the Navy Chaplaincy. It is unclear, however, why the size of the community of which an individual feels like a second-class citizen should determine her standing to bring an Establishment Clause challenge. Thus, although membership in the Navy Chaplain Corps may be a convenient dividing line for standing purposes, it is also an artificial one. Indeed, one has to wonder how a different judge confronted by a future plaintiff only slightly more removed from alleged governmental religious favoritism than the chaplains in this case would apply Judge Rogers's distinction. Judge Rogers offers no guidance on how large or small a "community" must be in order for her test to apply, and the term "community" is itself sufficiently plastic to be of little help on the matter.[38]

Not only is Judge Rogers's distinction artificial, but it also runs contrary to precedent. Judge Rogers relied heavily on *McCreary County v. ACLU of Kentucky*,[39] in which the Supreme Court struck down a Ten Commandments display that conveyed to the plaintiffs "the message . . . 'that they are outsiders, not full members of the *political community*.'"[40] However, when Judge Rogers quoted this language from *McCreary*, she omitted a key word: "political."[41] The relevant community, in other words, in determining whether an alleged establishment of religion has made an individual feel like a second-class citizen is the *political* community. Obviously, the Navy Chaplaincy is not "the" political community.[42] As used in Establishment Clause standing jurisprudence, the term "the political community" means the body politic, the coming together of various constituencies

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[38] Existing Supreme Court precedent reflects the highly flexible nature of the term "community." *Compare, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (interpreting the constitutional term "the people" as applying "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"), *with* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 690 (1994) (describing a village of Satmar Hasidic Jews in Orange County, New York as a "distinct community"). As these examples indicate, the term "community" may be applied to groups as large as the entire nation or as small as a local village.

[39] 545 U.S. 844 (2005).

[40] *Id.* at 860 (emphasis added) (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000)).

[41] *Compare Navy Chaplaincy*, 534 F.3d at 771–72 (Rogers, J., dissenting) (quoting *McCreary*, 545 U.S. at 860), *with McCreary*, 545 U.S. at 860 (quoting *Santa Fe*, 530 U.S. at 309–10). The argument that government conduct violates the Establishment Clause when it "sends a message to [religious] nonadherents that they are outsiders, not full members of the political community" comes originally from Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

[42] Significantly, *McCreary* speaks in terms of "the" political community, not "a" political community. That the Navy Chaplaincy arguably may be "a" political community is beside the point. The relevant inquiry, instead, is whether the Navy Chaplaincy constitutes "the" — that is, the one, the only — political community. Clearly, the Navy Chaplaincy does not constitute the entire political community.

in the process of self-government, not some narrowly defined employee group.[43] Further, it is doubtful that any principled ground can be advanced for why a non-Catholic Navy chaplain who learns of the Navy Chaplaincy's alleged Catholic favoritism may thereby feel like a second-class citizen of the political community, while a non-Catholic outside the Navy Chaplaincy who learns of the preference may not.

Judge Rogers's attempted analogy to religious display and school prayer cases does not save her distinction.[44] Judge Rogers argued that the plaintiffs, as Navy chaplains, had "personal," "direct" contact with the government's alleged message of denominational preference, just like the plaintiffs with standing to challenge government religious displays and school prayers.[45] Yet, although this argument has some initial appeal,[46] it fails to recognize an important difference between the nature of the "messages" conveyed in religious display and school prayer cases, and the nature of the alleged message in this case. In religious display and school prayer cases, the religious messages conveyed have a spatial component: one must be physically present to see or hear the message.[47] Thus, in such cases, a would-be plaintiff's proximity to an allegedly unconstitutional message is directly relevant to her standing to sue,[48] and courts have refused to grant standing to plaintiffs who could not prove sufficient closeness to allegedly offensive displays or prayers.[49] With the Navy chaplain retirement pro-

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[43] *See Lynch*, 465 U.S. at 687–88 (O'Connor, J., concurring) ("The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." *Id.* at 687.); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 697 (2002) (interpreting Justice O'Connor's formulation as intending to ensure "equal political participation by minority and majority alike"). Later cases buttress this interpretation of Justice O'Connor's phrase. *See, e.g.*, *McCreary*, 545 U.S. at 860; County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 593–94 (1989).

[44] As has widely been recognized, courts tend to apply looser standing requirements in religious display and school prayer cases than in other contexts. *See, e.g.*, Esbeck, *supra* note 36, at 37 & n.144; Marc Rohr, *Tilting at Crosses: Nontaxpayer Standing To Sue Under the Establishment Clause*, 11 GA. ST. U. L. REV. 495, 506–07 (1995). Courts should be wary of extending these looser requirements to other types of cases, lest by so doing they undercut the standing doctrine's important check on judicial power. *See supra* note 35.

[45] *Navy Chaplaincy*, 534 F.3d at 767–68 (Rogers, J., dissenting).

[46] Judge Kavanaugh acknowledged that this analogy "has some surface logic." *Id.* at 765 (majority opinion).

[47] Judge Kavanaugh adverts to this distinction, *see id.* at 764, but does not unpack its import.

[48] *See, e.g.*, Foremaster v. City of St. George, 882 F.2d 1485, 1490–91 (10th Cir. 1989) (holding that plaintiff had standing to challenge city logo depicting local Mormon temple because of his "direct, personal contact" with the logo); Saladin v. City of Milledgeville, 812 F.2d 687, 692–93 (11th Cir. 1987) (holding that plaintiffs had standing to challenge city seal bearing the word "Christianity" as a violation of the Establishment Clause because several of them "regularly receive[d] correspondence on city stationery bearing the seal," *id.* at 692).

[49] *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 486–87 (1982) (stressing plaintiffs' geographical distance from challenged property

gram's alleged message of denominational preference, however, one can "hear" the message anywhere. If the program does indeed convey a message of religious preference, then any person, in any place, who learns of the program's preferential treatment of Catholics will have "heard" that message. Consequently, whereas a religious-display plaintiff's closeness to a purportedly offensive display may be relevant to her standing to sue, and thus constitute a potential limitation on standing in such cases, the plaintiff chaplains' proximity to the government conduct in this case has no real relation to whether they should have standing to challenge the conduct. Whether or not the plaintiffs belong to the "community" the favoritism directly impacts, they can still "hear" the message and feel like "second-class citizens." Hence, Judge Rogers's effort to import proximity analysis from religious display and school prayer cases into this case as a way of granting standing without opening the floodgates does not withstand scrutiny.

Thus, the problems with Judge Rogers's position run deep. Yet, not only is Judge Rogers's distinction unsound, but it is also unnecessary. Judge Rogers's position is initially attractive because it appears to offer a middle ground between denying standing altogether and wedging open the courthouse doors to future plaintiffs. That the plaintiffs in this particular case lack standing, however, does not mean that the Navy Chaplaincy's alleged Catholic favoritism is immune from challenge. If the Navy is indeed discriminating in favor of Catholic chaplains, then surely there exists a non-Catholic chaplain somewhere who can seek an active status extension beyond the statutory cutoff age, be denied the extension, and bring an Establishment Clause action based on her own individuated discriminatory denial. That person is the proper party to bring suit, not a group whose relation to the alleged harm is so attenuated that the only injury the group can point to rests entirely on its members' mere awareness of the alleged misconduct. Permitting such groups to bring suit would import too much maneuvering room into a doctrine that exists, first and foremost, to ensure a "properly limited . . . role" for courts in our democratic society.[50]

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transfer to religious school in Pennsylvania when denying standing); Suhre v. Haywood County, 131 F.3d 1083, 1086 (4th Cir. 1997) ("[A] citizen of Omaha, Nebraska who finds a religious symbol in [a North Carolina] [c]ourthouse to be offensive in the abstract would not have standing to challenge it."); Freedom from Religion Found., Inc. v. Zielke, 845 F.2d 1463, 1469 (7th Cir. 1988) (holding that plaintiff challenging Ten Commandments display "cannot establish Article III standing simply on the basis of her alleged but unproven proximity to the offending conduct").

[50] Warth v. Seldin, 422 U.S. 490, 498 (1975) (citing Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208, 221–27 (1974); United States v. Richardson, 418 U.S. 166, 188–97 (1974) (Powell, J., concurring)).