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In The

Supreme Court of the United States

October Term, 1974

No. 73-2024

ROBERT WARTH, Individually and on behalf of all other persons similarly situated, LYNN REICHERT, Individually and on behalf of all other persons similarly situated, VICTOR VINKEY, Individually and on behalf of all other persons similarly situated, ANDELINO ORTIZ, Individually and on behalf of all other persons similarly situated, CLARA BROADNAX, Individually and on behalf of all other persons similarly situated, ANGELEA REYES, Individually and on behalf of all other persons similarly situated, ROSA SINKLER, Individually and on behalf of all other persons similarly situated, METRO-ACT OF ROCHESTER, INC., HOUSING COUNCIL IN THE MONROE COUNTY AREA, INC., ROCHESTER HOME BUILDERS ASSOCIATION, INC.,

Petitioners,

vs.

IRA SELDIN, Chairman, JAMES O. HORNE, MALCOLM M. NULTON, ALBERT WOLF, JOHN BETLEM, as members of the Zoning Board of the Town of Penfield; GEORGE SHAW, Chairman, JAMES HARTMAN, JOHN D. WILLIAMS, RICHARD C. ADE, TIMOTHY WESTBROOK, as members of the Planning Board of the Town of Penfield; IRENE GOSSIN, Supervisor, FRANCIS J. PALLISCHECK, DR. DONALD HARE, LINDSEY EMBREY, WALTER W. PETER, as members of the Town Board of the Town of Penfield, and the TOWN OF PENFIELD, NEW YORK,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents, Ira Seldin, Chairman, James O. Horne, Malcolm M. Nulton, Albert Wolf, John Betlem, as members of the Zoning Board of the Town of Penfield; George Shaw, Chairman, James Hartman, John D. Williams, Richard C. Ade, Timothy Westbrook, as members of the Planning Board of the Town of Penfield; Irene Gossin, Supervisor, Francis J. Pallischeck, Dr. Donald Hare, Lindsey Embrey, Walter W. Peter, as members of the Town Board of the Town of Penfield, and the Town of Penfield, New York, submit this brief in opposition to the Petition of Robert Warth, Lynn Reichert, Victor Vinkey, Katherine Harris, Andelino Ortiz, Clara Broadnax, Angelea Reyes, Rosa Sinkler, individually and on behalf of all other persons similarly situated, Metro-Act of Rochester, Inc., Housing Council in the Monroe County Area, Inc., and Rochester Home Builders Associations, Inc., that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this matter on April 18, 1974.

Opinions Below

The judgment of the United States Court of Appeals for the Second Circuit, entered on April 18, 1974, and reported at 495 F.2d 1187 (1974), affirmed the dismissal of the complaint and denial of the motion to intervene of the Rochester Home Builders Association and the motion by such petitioners as were originally plaintiffs to join the Housing Council in the Monroe County Area, Inc. by the United States District Court for the Western District of New York, dated December 27, 1972. The opinion of the United States Court of Appeals for the Second Circuit is attached to the Petition for a Writ of Certiorari as Appendix A; the unreported opinion of the District Court for the Western District of New York is attached to the Petition as Appendix B.

Jurisdiction

Respondents do not question the jurisdiction as set forth in the Petition.

Constitutional and Statutory Provisions Involved

Respondents do not question that the Constitutional and statutory provisions named in the Petition have been invoked by the petitioners.

Question Presented

The overriding question raised by the Petition is whether the various individual and corporate petitioners have standing to challenge, on various Constitutional and statutory theories, the zoning ordinance of the Town of Penfield, New York, and fifteen years' administration of that ordinance.

Statement

Although there are ten named plaintiffs in this case, their claims to standing fall into one or another of three categories.

(1) *As taxpayers.* The petitioners Vinkey, Reichert, Warth and Harris have sued as "property owners and taxpayers of the City of Rochester." The remarkable thing about them is that they are not suing the municipality in which they own property and to which they pay real property taxes, but another municipality. They pay taxes to the City of Rochester, and they pay none to the Town of Penfield; but it is the Town of Penfield, and its officials, whom these "taxpayer-plaintiffs" have sued.

Their theory as stated in the complaint is that they

> are aggrieved in that they are paying a greater proportionate share of real estate taxes to the City of Rochester than are other residents of the Rochester

> metropolitan area to their respective towns because the City of Rochester has and must continue to permit more than its fair share of tax abated housing projects within its territorial limits to meet the low and moderate income housing requirements of the metropolitan Rochester area by reason of the exclusionary practices of defendants.

The City of Rochester and the Town of Penfield are separate municipalities, each with its own taxing powers, spending powers and zoning powers. The "taxpayer-plaintiffs" in this case have not challenged either taxing or spending legislation of the Town of Penfield, but rather its zoning ordinance.

There is no petitioner who claims standing as a taxpayer of the Town of Penfield.

(2) *As persons of low income and members of racial minorities.* Plaintiffs Broadnax, Sinkler and Reyes are Blacks and Puerto Ricans who reside in Rochester. Each claims to have sought to obtain housing in Penfield without success. In the nearly five hundred pages which Petitioners contributed to the record below, none of these three, either in the complaint or in her affidavit, mentions any occasion on which she went into the Town of Penfield or communicated with any person who was in the Town of Penfield or had any dealing with respect to any property there for any purpose. None of the three says anything about any housing project or planned construction or attempted construction that she has had anything to do with. None has had any dealing at all with any of the respondents or any other official of the Town of Penfield; none has ever applied for anything from any official or official body there, let alone having been refused anything. No effort made by any of them or frustration suffered by any of them has been mentioned anywhere in the record.

Of the petitioner Ortiz, the complaint says that he is a resident of Wayland, New York, and the owner of real property

in the City of Rochester, New York; that he is of Spanish/-Puerto Rican extraction; that he is employed in the Town of Penfield; and that he has been "excluded from living near his employment *as he would desire* by virtue of" the zoning practices of the Town of Penfield. (Emphasis added) The complaint does not illuminate his grievance beyond this. In his affidavit submitted in opposition to the original motion to dismiss, Mr. Ortiz said that as of that time, he was no longer employed in the Town of Penfield; and that is the present state of the record. He used to work there, but he has not worked there since the motion was made which generated this appeal.

(3) *As organizations:* Three organizations seek standing, although only one of them, Metro-Act of Rochester, Inc., is one of the original plaintiffs in the action. The Rochester Home Builders Association, Inc., moved under F.R.C.P. 24(b) to intervene in the action at the same time as the original motion to dismiss. The Housing Council in the Monroe County Area, Inc. was sought by the plaintiffs, presumably under F.R.C.P. 19(a), to be joined involuntarily at that same time; the organization did not struggle against joinder, however, but appeared in favor of the motion by its own counsel. Neither the District Court nor the Court of Appeals regarded any of the three as having standing.

All three of these organizations and their relation to the case are thoroughly and accurately described in the Court of Appeals' decision below (see pp. A-12 through A-16 of the Appendix to the Petition for Certiorari), and those descriptions need not be elaborated further here.

ARGUMENT

POINT I

No Conflict Among the Circuits Exists On Issues Of Standing Involved Here.

The United States Court of Appeals for the Second Circuit held below that none of the petitioners in this case has standing to sue. This is the state of affairs of which the petitioners seek review, partly on the ground of conflict among the circuits.

It is one thing, however, to say that Court of Appeals for various circuits have recognized the standing of certain plaintiffs to challenge municipal zoning ordinances under the Fourteenth Amendment and federal civil rights statutes. It is another to say that the decision of the Second Circuit in this case is in conflict with decisions of the other circuits. The first thing can be true without the second thing being true. What we have here is not different doctrines of standing developing in the different circuits, but plaintiffs in some cases who really do have standing and plaintiffs in another case, this one, who do not.

In every one of the cases which the petitioners have cited to this Court to show a conflict among the circuits, the plaintiffs had a personal stake in a concrete and particular conflict with local authority which existed before the litigation and then gave rise to it. In this case there was no contact, so far as the pleadings reveal, between the plaintiffs and the Town of Penfield before the lawsuit. In each of the cases cited by petitioners, the plaintiffs had something specifically to gain or lose from the judgment in their case; they were not looking just for the holding of the court on a subject in which they had a political or philosophical interest.

Park View Heights Corporation v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972) is the first of the cases cited. Here the plaintiffs attacked the validity of a zoning ordinance on the

ground that it "effectively prohibits the construction of multi-racial, federally subsidized, moderate and low income housing in the City of Black Jack, Missouri."

Two of the plaintiffs were nonprofit corporations. One was incorporated for the purpose of owning and operating the specific housing development in question; it had been formed by the original sponsors of the project, which was known as the Park View Heights apartments. It had title to the land which was the proposed site. Its incorporators had obtained a "feasibility letter" from H.U.D. which reserved federal funds for the project and which was tantamount to a contractual commitment. Architectural plans had been completed and approved. A mortgage had been secured, and legal and organizational planning of the project had been completed.

The other plaintiff was a nonprofit organization whose corporate purpose was to use the St. Louis religious community's resources to alleviate urban problems. It had participated in the original land purchase and in the planning of the project and had advanced "seed money" for the project which had not been repaid.

The eight individual plaintiffs were persons who desired to live in the Park View apartments, and each of whom qualified for residence there.

Not only were the plaintiffs in the *Park View* case involved with a specific project, but they were also confronted with specific adverse, ad hoc governmental action. Indeed, the incorporation of the City of Black Jack itself, a municipality which had not theretofor existed, was the local response to the Park View Heights project; and, upon incorporation, Black Jack's newly formed Zoning Commission promptly called hearings on a zoning ordinance which would effectively prevent the construction of any new multi-family dwelling units within the City of Black Jack.

There is no conflict between the law of the *Park View Heights* case and the prevailing law of the Second Circuit. Just the contrary, the Eighth Circuit, in reaching its decision, invoked the authority of the Second Circuit in *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2nd Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

But there is nothing like any of this in the present case — no purchase, no mortgage, no architects, no loans, no feasibility letters, no identified agency action — nothing but generalized political disgruntlement with a zoning ordinance which never once gets down to cases.

The other cases cited by petitioners are distinguishable in the same way.

Daily v. City of Lawton, Oklahoma, 425 F.2d 1037 (10th Cir. 1970), grew out of hostile local reaction to a particular low-income housing project with which the plaintiffs were closely involved. The litigation was triggered by final agency action. Indeed standing does not appear to have been an issue on this appeal taken after trial.

Crow v. Brown, 457 F.2d 788 (5th Cir. 1972), was brought by the owners of property whose plans to build low-income housing had been frustrated by local agency action. They were joined by plaintiffs who were on the waiting list of the Atlanta Housing Authority.

United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974), arose from the City's refusal to permit a proposed housing project to tie into its water and sewer systems. The action was brought by the organization which was attempting to build the project and by certain individual farm workers whom it represented.

Shannon v. United States Department of Housing and Urban Development, 436 F.2d 809 (3rd Cir. 1970). Plaintiffs here

were "white and black residents (some homeowners and some tenants), businessmen in, and representatives of private civic organizations in the East Poplar Urban Renewal Area of Philadelphia," suing to enjoin specific H.U.D. action directly affecting the area and particularly challenging the procedures by which H.U.D. acted. The issues in the case were real and practical, not academic. The plaintiffs focused on specific agency action which focused on and would adversely affect their neighborhood and therefore the plaintiffs themselves.

Finally, the petitioners invoke *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205 (1972). The Court of Appeals distinguished the case in light of the peculiarities of the legislation involved there, section 810(a) of the Civil Rights Action of 1968, and the evident congressional intent to confer standing on persons in plaintiffs' position. It is important also that the majority opinion in *Trafficante* stressed the fact that the issue raised by the complaint was not academic: "The dispute tendered by this complaint is presented in an adversary context. [citation omitted] Injury is alleged with particularity, so there is not present the abstract question raising problems under Art. III of the Constitution." *Id.* at 211. Even here, where the Court obviously had some reservations about its recognition of standing, the case involved tenants of an apartment complex who sued *their* landlord with respect to the way it was operating *that* complex, specifically in a racially discriminatory manner made illegal by the act. While *Trafficante* may represent the outer limits of standing, it still had a fabric to it, of place and time and action, of connection between the parties, that this lawsuit against the Town of Penfield wholly lacks.

POINT II

The Decision Below Is Not In Conflict With The Law Of Standing As Embodied By This Court's Decision In United States v. Students Challenging Regulatory Agency Procedures.

In their argument that the decision of the Second Circuit in this case is in conflict with applicable law of the Supreme Court of the United States, the petitioners have relied wholly on *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973). They argue that the injury allegedly suffered by the plaintiffs in this case "is no more remote or speculative than that suffered by the parties in *SCRAP*."

Unless *SCRAP* renders all the pre-existing law of standing obsolete, however, the petitioners' arguments must be unavailing. *SCRAP* is distinguishable from this case in myriad ways.

In the first place, *SCRAP* dealt with specific agency action, orders of the Interstate Commerce Commission allowing the collection by substantially all the Nation's railroads of a 2.5% surcharge on most freight rates.

Secondly, the plaintiffs there "alleged a specific and perceptible harm" that resulted to them from this agency action and which the Court said should not be ignored simply "because many people suffer the same injury." *Id.* at 687

Thirdly, there was a logical relationship between the nature of the alleged wrong — a major federal action affecting the environment taken without the preparation of an environmental impact statement as required by federal statutory law — and the status asserted by the plaintiffs. For they were persons who, as they alleged, specifically used and enjoyed the environment, so that harm to the environment would result in harm to them "that distinguished them from other citizens who had not used

the natural resources that were claimed to be affected." *Id.* at 689. Indeed these were persons who *organized* to enhance the environment. They were adversely affected, if their allegations were to be accepted as true, in that very interest which the federal statute in question, the National Environmental Protection Act, with its requirement of an impact statement, was meant to protect.

On every score the non-taxpayer plaintiffs here have failed to make adequate allegations or to flesh them out in their voluminous affidavits and exhibits.

They have not focused on any single action or any coordinated actions of any body or officer of the Town of Penfield, or on any specific provisions of the zoning ordinance of the Town. So, while this Court in *SCRAP* allowed as how an "attenuated line of causation" (*Id.* at 688) may sometimes be properly traced to the injury inflicted, there has not in this case been any first cause identified in the complaint or supporting papers; without that initial action from which a chain of events follows, the line of causation itself cannot be ascertained.

Nor will the process work in reverse. There is no injury in fact alleged whose origins can be traced back to conduct of the respondents. There are plaintiff/petitioners here who allege that they are ill-housed and desire to be better-housed; but beyond that allegation the record is devoid of events. The frustration alleged by the Petitioners here is not explained even in terms of any efforts made by any of them to take up residence in Penfield, let alone any official action or provision law which thwarted such efforts.

Even if the relief sought in the complaint (which has been omitted from the petitioners' Appendix, notwithstanding that this case comes to the Court from an affirmed order of dismissal of the complaint) were granted and the whole zoning ordinance of the Town of Penfield were ruled unconstitutional, nothing

would change for any of the petitioners. They would have a holding, but they would not have a house or a variance or a permit, or a rental project preserved or an investment protected. They would have a ruling of law only.

In relying on *SCRAP*, therefore, they have overlooked language in the majority opinion which makes it clear that well-established principles of standing have not been scrapped:

> In *Sierra Club*, though, we went on to stress the importance of demonstrating that the party seeking review be himself among the injured, for it is this requirement that gives a litigant a direct stake in the controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders. *Id.* at 687

And again:

> Of course, pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action. *Id.* at 688-689

Here is precisely where the difference between the two cases lies. Nothing in particular precipitated the lawsuit, nothing done by the respondents or suffered by the petitioners. They are generally, academically or politically disgruntled. That is all, and that is not enough.

POINT III

With Respect To The Petitioners Who Assert Standing As Taxpayers Of An Adjacent Municipality And Those Who Assert Organizational Standing, Respondents Adopt And Urge The Reasoning Of The Court Of Appeals Below, Which Appears At A-7 And A-8 Of The Appendix To The Petition For Writ Of Certiorari, Regarding Taxpayers, And At A-12 Through A-16 Of The Appendix To The Petition, Regarding Organizational Petitioners.

CONCLUSION

For the reasons set forth in this brief and in the opinions below, it is respectfully submitted that, under the law which prevails not only in the United States Court of Appeals for the Second Circuit but in this Court and the United States Courts of Appeals for other Circuits, these petitioners lack standing to challenge the Constitutional and statutory legality of the zoning ordinance of the Town of Penfield.

Respectfully submitted,

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DATED: August 28, 1974