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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Eisner 'Levy, Steel & Bellman, P.C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

CITY OF HARTFORD, on behalf of itself and its inhabitants, Miriam Jordan and Fannie Mauldin,

Petitioners,

vs.

The TOWNS OF GLASTONBURY, WEST HARTFORD and EAST HARTFORD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners pray that a writ of *certiorari* issue to review the ruling of the United States Court of Appeals for the Second Circuit, *en banc,* which reversed the decision of the District Court and dismissed this action.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, on rehearing *en banc,* which reversed the decision of the District Court and dismissed petitioners' action, is appended at A 1. The opinion of the three judge panel of

the Court of Appeals for the Second Circuit, is appended at A 26. The opinion of the United States District Court for the District of Connecticut, reported at 408 F. Supp. 889, is appended at A 61.

Jurisdiction

The decision of the United States Court of Appeals for the Second Circuit, on rehearing *en banc,* was rendered on August 15, 1977. This petition is filed within 90 days of that date. Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. § 1254(1).

Questions Presented

1. Whether the Court of Appeals in ruling that petitioners lacked standing to sue properly interpreted the requirements of *Warth* v. *Seldin* and *Simon* v. *Eastern Kentucky Welfare Rights Organization.*

2. Whether *Warth* and *Simon* require or allow a lower court to question the appropriateness of a congressionally mandated remedy for purposes of determining standing.

Statutes Involved

The Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301, *et seq.,* and the Administrative Procedure Act, 5 U.S.C. § 702.

Statement of the Case

This case comes before this Court from a sharply divided Court of Appeals for the Second Circuit, sitting *en banc,* which held in a six to four ruling that the petitioners lack standing to maintain this action. The dis-

agreement below turned on the proper interpretation of recent decisions by this Court on standing to sue. More particularly, the majority below read *Warth* v. *Seldin,* 422 U.S. 490 (1975), and *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976) to require the complainants to show a virtual certainty of substantial and specific benefits flowing to them from undertaking this litigation. The dissenters maintain that the majority's interpretation of *Warth* and *Simon* establishes a burden impossible of satisfaction, and gives "the Executive a silent veto [over congressional actions] not provided in the Constitution" (A 25). The conflict below followed on the heels of a similar confrontation in the Second Circuit where the Court also split six to four in an *en banc* ruling involving the issue of standing to contest an alleged Department of Housing and Urban Development (HUD) violation of Federal Civil Rights laws. *Evans* v. *Lynn,* 537 F.2d 571 (2nd Cir. 1976), *cert. den.* —— U.S. —— (1977).

This action was commenced on August 11, 1975. The petitioners challenged a decision by HUD approving federal community development grants to seven Hartford suburbs. The petitioners' primary claim was that there had been a lack of compliance with the requirements of the Housing and Community Development Act of 1974, 42 U.S.C. § 5301, *et seq.,* in that the suburban communities had presented inadequate commitments for lower cost housing in their applications for funding.

A major goal of the 1974 Act was to expand housing opportunities for lower income persons in metropolitan areas. To accomplish this purpose, recipients of community development funds under Title I of the legislation are required to include as part of their funding application a housing assistance plan (HAP). The HAP is to contain an accurate survey of the condition of the housing stock in the applicant community and an assessment of the housing assistance needs of lower income persons,

including those "residing in or expected to reside in the community." The expected-to-reside (ETR) figure refers to lower income persons and families not currently living in the community but who would wish to do so because of employment or other opportunities. Nonetheless, six of seven challenged applications submitted by the defendant suburbs contained zero ETR figures.

The filing of applications with zero ETR figures occurred as a result of a May 21, 1975 memorandum issued by Assistant Secretary Meeker of HUD's Office of Planning and Development. The Meeker Memorandum advised that applicant communities would be given the option during the first program year of not completing the ETR table of the HAP. Only East Hartford, which had filed its application with HUD prior to the Meeker Memorandum, completed its ETR table. The East Hartford ETR figure was ultimately found to be wholly inadequate by the trial court.

When the complaint was initially filed, only HUD was named as a defendant. On August 26, 1975, however, the District Court granted motions by HUD and the seven towns to join the towns as defendants.

Simultaneously with the filing of the complaint, petitioners moved for a preliminary injunction restraining HUD from disbursing any monies under the challenged grants. A consolidated preliminary injunction hearing and trial on the merits was held, and on September 20, 1975 the District Court granted the preliminary injunction. On January 28, 1976, the District Court rendered its final decision making permanent the injunction.

The District Court held that HUD violated the 1974 Act with respect to six of the seven towns by approving grants notwithstanding the fact that the applications failed "to make any assessment whatsoever of the housing needs of low and moderate income persons who might be 'ex-

pected to reside' within their borders" (A 84). The Court held that the assessment of the expected-to-reside figure was a required and non-waivable aspect of the HAP portion of the application for community development funds (A 84). With respect to East Hartford's application, the lower court found that the submitted ETR figure was legally deficient, having been based exclusively on the town's waiting list for public housing units. The District Court stated that HUD was duty bound to do more than accept any ETR figure proposed by East Hartford, "however inadequate its size or derivation. The administrative record discloses that it did not live up to that duty" (A 94).

The injunction entered barred the suburban towns from drawing funds from the Treasury under the challenged grants. The District Court provided, however, that the communities could resubmit their grant applications to HUD and that the injunction would be lifted for any town which filed an acceptable revised HAP (A 95).

Three of the suburban towns, East Hartford, West Hartford and Glastonbury, filed appeals. HUD elected not to appeal, but did file a brief *amicus curiae* with the Court of Appeals.

Shortly after the District Court ruling, HUD amended its regulations for post-1975 community development grants by establishing detailed requirements for completion of the ETR table. 24 CFR § 570.303(c)(2)(i), and (ii)(1976). In its brief to the Second Circuit, HUD stated, "The Secretary has not appealed in this case because the *result* reached by the district court is not inconsistent with the present practices adopted by HUD subsequent to the administrative determinations challenged in this litigation and because the court's opinion can be read in a manner consistent with the Department's interpretation of its duties under the Act." HUD Brief, *Amicus Curiae,* July 1976, p. 3.

On December 23, 1976, a panel of the Second Circuit affirmed the District Court ruling. The majority of that panel held that the petitioners had standing to maintain the action and, on the substantive issue, that the District Court had correctly interpreted the terms and requirements of the 1974 law. Judge Meskill filed a dissenting opinion. On February 8, 1977, the Court of Appeals granted the respondents' petitions for rehearing *en banc.*

On August 15, 1977, the full court issued its opinion. The majority of the Court disagreed with the panel's holding and reversed the District Court decision exclusively on the issue of standing to sue. Judge Meskill wrote the plurality opinion, and Chief Judge Kaufman wrote a separate concurring decision. Four members of the Court dissented with Judge Oakes writing the dissenting opinion.

The majority of the Court of Appeals concluded that the lack of compliance with the Act did not affect petitioners as it was speculative whether the injunction entered would redress their alleged injury (A 8). Judge Meskill contended that the petitioners were not harmed by the absence of an ETR figure in the community development applications, asserting that the figure represented merely "an educated guess at the number of people who are going to move into the community" (A 4). In addition, Judge Meskill argued that since fiscal 1975 housing subsidies were already being fully utilized, the lack of expected to reside figures could not affect the interest of the plaintiffs (A 8).

The majority also rejected the petitioners' claim to a financial interest in the outcome of the litigation. The District Court, had held that Hartford had a financial interest in the outcome of this case, noting that under HUD regulations if the suburban towns refused to comply with the provisions of the Act and the terms of the injunction, their grant monies would be reallocated with first priority

going to the Hartford metropolitan area. The trial court emphasized that Hartford would have a strong statutory preference to such funds. However, Judge Meskill termed this financial interest claim inadequate to support standing in the absence of proof of a "substantial probability" that the towns would in fact elect to forfeit their grants rather than modify their applications (A 9).

Judge Oakes in his dissenting opinion took strong exception to the manner in which the majority analyzed the petitioners' interest in this case. He stated that the, "Majority fails to examine the suit's principal purpose, and, as a result, misunderstands the nature of the plaintiffs' interest" (A 15). Judge Oakes noted that the petitioners' objective was not to halt the flow of community development funds to the seven suburban defendants, but rather to secure compliance by HUD with the terms and provisions of the congressional statute which HUD "was charged with enforcing for the benefit of cities like Hartford" (A 16).

Judge Oakes emphasized that HUD had, in fact, deviated, as the District Court had found, from the requirements of the 1974 statute and pointed to the fact that HUD had revised its ETR regulations for post-1975 grants in accordance with the District Court ruling. Judge Oakes stated:

> In short, I believe that Hartford stood to benefit from this suit both by forcing a change in overall HUD policy—a benefit that has been realized—and by forcing its suburbs to assist with the HCDA's spacial deconcentration objective in return for the receipt of community development funds—a benefit that, to the extent ETRs had been revised upward in the resubmitted applications, also has been realized (A 21-22).

Finally, the dissenters disagreed with the majority's contention that because the injunction permitted the respond-

ent communities to obtain their community development monies upon submission of revised applications, Hartford's claim to a financial stake in the case was negated (A 23-24).

On October 5, 1977, the Second Circuit, *en banc,* granted the petitioners' motion pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure and stayed issuance of its mandate to the District Court pending the filing of this petition.

Reasons for Granting the Writ

I. The decision below indicates that there are sharply divided views among the federal judges as to the proper criteria to be applied in determining standing to sue. Review should be granted in order to clarify the standards for ascertaining standing to sue and in order to give necessary guidance to the lower courts.

The Second Circuit in holding the petitioners lacked standing to sue interpreted *Warth* and *Simon* as requiring a conclusive showing by petitioners that the remedy they sought would provide them specific and tangible benefits. The majority then asserted it was speculative whether the relief requested and obtained would in fact redress the petitioners' alleged injury, as compliance with the District Court injunction would not insure construction of new subsidized housing units in conformance with the revised HAP figures. Furthermore, the majority found that petitioners' financial interest claim was too speculative to permit standing since, by the terms of the injunction, the respondent communities could revise their applications and obtain their grants. As a result, there was no certainty that monies would be forfeited and available for redistribution within the Hartford metropolitan area.

In response, the dissenting judges argued that *Warth* and *Simon* did not mandate an inflexible rule of certainty

of benefit and that the majority had "read into the law of standing a test far more restrictive than any devised by the Supreme Court, a test that could threaten the viability of all litigation aimed at illegal agency action" (A 14). According to the dissenters, under this Court's recent decision in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 50 L.Ed.2d 450 (1977) the injury to a plaintiff may be indirect as long as it is traceable to the acts or omissions of the defendants and uncertainties can remain as to whether the relief afforded will in fact redress the alleged injury.

The dissenting opinion notes that the division of the court below resulted primarily from the conflicting views among the judges with respect to how to characterize the nature of the petitioners' claim. As Judge Oakes pointed out, petitioners did not seek to block the respondent towns from receiving grants under the 1974 Act, but to halt HUD from violating the provisions of the Act. Thus, Judge Oakes concluded,

> Had the plaintiffs not filed suit, all indications are that 1975 grants would have been disbursed illegally to the towns; moreover, HUD might well have continued its 1975 policy for a period stretching into the indefinite future (A 17).

By contrast, the majority of the Court did not consider the HUD violation of the 1974 law by itself to be critical, but instead questioned whether securing HUD compliance with the legislative requirements could be considered meaningful relief. Thus the majority undertook to determine the likelihood that housing units would in fact be constructed as a result of revision of the respondents' HAPs.* In the view of the dissenters, however, the peti-

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* This pursuit led the majority to emphasize testimony by HUD officials that Title II (providing for housing subsidy funds)

(footnote continued on following page)

tioners were entitled to secure the congressionally intended remedy—promotion of housing deconcentration—even if there was no assurance that deconcentrated units would be built during the 1975 fiscal year.

The responses to Hartford's financial interest claim further illustrate the disagreement below as to the degree of certainty that must be established. It is clear that Hartford had a statutory claim to any reallocated funds resulting from disapproval of grants to any of the seven suburbs.* The majority, citing *Warth,* imposed a standard which appears to require near certainty that monies will be forfeited and reallocated to Hartford. Thus, in the majority's view, Hartford, at the *outset* of the litigation, would have been required to prove that if it prevailed and secured an injunction halting the grants to its suburbs, these communities would refuse to revise their applications thereby assuring a pool of funds for redistribution (A 9).** The dissenting judges responded that, "There is scarcely any lawsuit that involves a certainty of recovery, from ad-

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(footnote continued from preceding page)

had been exhausted for fiscal year 1975. Focusing on this testimony was misdirected, however, since it is clear that the HAP is to set goals for *all* low cost housing, federally subsidized or otherwise, and to establish housing goals beyond the particular year in question. Thus, an applicant must spell out its housing needs, on both short and long term bases, and the application must include three years' goals. See 24 CFR § 570.303(a)(c) (1976). See also discussion at A. 21, n. 4.

* HUD regulations provide that reallocation of Title I monies be carried out on a priority basis with such monies going first to the same metropolitan area where the funds were initially designated. 24 CFR § 570.409(d)(1).

** In fact, one of the original defendants, Windsor Locks, refused to revise its application and forfeited its 1975 grant. East Hartford still refuses to revise its application and has not indicated whether it would do so should plaintiffs ultimately prevail. HUD itself has rejected East Hartford's 1976 and 1977 requests for Title I money on the basis of inadequate applications. See affidavits submitted to Second Circuit with respect to petitioners' motion for a stay of mandate.

ministrative law to zoning. Such a standard has no support in *Warth* or *Simon,* much less in the more recent *Arlington Heights;* its adoption here significantly raises the barriers a litigant must cross in attempting to challenge illegal government action" (A 24-25).

This divergence of opinion as to the meaning of the *Warth-Simon-Arlington Heights* line of cases has resulted in the expenditure of an inordinate amount of time and energy among the lower courts. As noted, the *en banc* ruling below in the instant matter followed the similar turmoil in the Second Circuit on the scope and meaning of *Warth* in the *Evans* v. *Lynn, supra,* matter. In both this case and in *Evans* the Court, en banc, reversed a three judge panel determination. Given the sharp split in the Second Circuit on the proper standard to be applied in ruling on standing issues, there is every reason to suppose that other federal courts will experience similar difficulties. Beyond doubt, the persisting controversy on the issue of standing to sue confirms the need for further clarification and guidance by this Court.

II. There was substantial disagreement in the court below as to whether enforcement of the congressionally mandated remedy would in fact benefit petitioners. Review should be granted in order that this Court provide direction on the extent to which the lower courts may question legislative findings and remedies for purposes of determining standing.

Inherent in the lower court's ruling is a questioning of the effectiveness of the remedy Congress deemed appropriate to relieve the problems confronted by inner cities and their residents. When the majority below concluded that the revision of the HAPs would not benefit the petitioners sufficiently to warrant standing, it in effect substituted its judgment for that of the Congress as to what constitutes meaningful remedial action.

In passing the 1974 Act, Congress emphasized that its primary objective was "the development of viable urban communities by providing decent housing and suitable environment and expanding economic opportunities, principally for persons of low and moderate income." 42 U.S.C. § 5301(c). Congress noted that a major problem in achieving that objective was the concentration of lower income persons in inner cities [42 U.S.C. § 5301(a)(1)] and therefore called for "the reduction of the isolation of income groups within communities and geographical areas . . . through the spatial deconcentration of housing opportunities for persons of lower income." *Id.*, at § 5301(c). This spatial deconcentration goal was to be accomplished by requiring applicants for Title I community development funds to include the expected to reside goal in the HAP section of their applications. Indeed, the ETR table constitutes the only link in the legislation between promoting and achieving housing deconcentration in metropolitan areas.

The petitioners argued, and the District Court so found, that when HUD approved Title I applications without requiring completion of the ETR table, Hartford's suburbs were relieved of their obligation to recognize the housing need for persons residing outside their jurisdictions. Thus the operative means for accomplishing a spatial deconcentration goal and for lessening the onerous burden on the cities was administratively negated. The majority below, rather than supporting the Congressional policy, challenged the importance of the ETR provision, characterizing the requirement as only an "educated guess" at the number of persons expected to move into a community.

Although one can argue that the ETR requirement in the application is not the most perfect mechanism for achieving housing deconcentration, this was the method Congress saw fit to adopt. If the petitioners—the intended beneficiaries of Congress' spatial deconcentration efforts—lack

sufficient interest to contest HUD's non enforcement of the provision, then certainly no one has standing to raise the issue and all federal judicial review in this area is effectively foreclosed. Petitioners do not believe, however, that it was the intent of the *Warth* or *Simon* rulings to immunize an agency's disregard for the law. This Court in *Warth* was careful to note that it did not intend to impinge upon Congress' prerogatives. Justice Powell stated in *Warth* that, "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of the statute." 422 U.S. at 513-514. See also, *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n. 3 (1973); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 212 (1973). Thus, this Court has instructed that the deprivation of the right to the legislative remedy itself constitutes injury in fact. See e.g., *Warth, supra,* 422 U.S. at 501.

Furthermore, it is clear that this Court, notwithstanding the imposition of additional barriers to establishing standing, adheres to the view that, "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of 'aggrieved persons' is symptomatic of that trend." *Association of Data Processing, Inc.* v. *Camp,* 397 U.S. 150, 154 (1970). See also, *United States* v. *SCRAP,* 412 U.S. 669 (1973); *Simon* v. *Eastern Kentucky Welfare Rights Organization, supra; Arlington Heights* v. *Metropolitan Housing Development Corp., supra.*

Petitioners respectfully urge that this Court review this case in order that the lower federal courts be given guidance as to the appropriate standards to be applied in determining whether a complainant has standing to sue, particularly in a context in which Congress has mandated benefits for a class and where an agency of the Executive Branch fails to carry out the legislative mandate.

CONCLUSION

For the foregoing reasons, petitioners respectfully urge this Court to grant this writ of certiorari.

Respectfully submitted,

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