The Burger Court Opinion Writing Database

Warth v. Seldin

422 U.S. 490 (1975)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 5, 1975

PERSONAL

Re: No. 73-2024 - Warth v. Seldin

Dear Lewis:

I am in general agreement with you in this sticky area of standing. However, having in mind how garbled some of our standing cases read when we come to use them, e.g., Flast, I have difficulty with some of the wording in your June 4 draft.

On page 9 the sentence commencing "But so long . . ." is an important one which I fear could be read much more broadly than you intend. The reference to a statutory right of action granted "either expressly or by clear implication" is a fair reading of the cases, but I wonder whether this may not be read as inviting persons to "imply" the existence of a statutory right for standing purposes? More important, I question whether we should or need say one can "seek relief on the basis of the legal rights . . . of the public generally." Even though that generalization has many exceptions it may be read as a holding. It seems to me that a person who has been granted statutory standing by Congress must seek relief solely for the "distinct and palpable injury to himself." In my view the cases indicate only that such a person may support the particularized relief sought with the public interest factor. The notion that a person within a class to which Congress has granted standing may allege a minor injury and then seek relief on the basis of the rights of "the public generally" is not one I could embrace.

In Part V, B commencing on page 23 the lack of standing of petitioner Home Builders is discussed. I agree that associations should be allowed standing in behalf of their members only in limited instances; however, I am unsure of the relevance of some of the comments on page 24. In the first full paragraph it states "the claims are not common to the entire membership, nor shared by all in equal degree." This could be read to constitute a requirement in association standing cases,

and its basis is not readily apparent. The key point is the requirement of individualized proof and that requirement would exist, I would imagine, even if all members of an association suffered the same injury in equal degree. Finally, at the end of that paragraph the builders are referred to as "indispensable parties." I am unclear on whether you mean that in the sense of Rule 19 of the Federal Rules of Civil Procedure, or whether you intend it to apply to standing alone.

I have hesitated to raise these questions but you will recall the difficulties presented by the general statements and discussion in Flast and other standing cases created great difficulties in the two standing cases I wrote last year.

Regards,

WEB

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1975

Re: No. 73-2024 - Warth v. Seldin

Dear Lewis:

I join you.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 19, 1975

Re: No. 73-2024 - Warth v. Seldin

Dear Lewis:

I will circulate tomorrow a short separate dissent.

Sincerely,

William O. Douglas

Mr. Justice Powell

cc: The Conference

Wm. Douglas
OCT 74

No. 73-2024

Mr. J... White
Mr. ... Marshall
Mr. ... Brennan

Robert Warth, etc., et al.,)
Petitioners,)
)
v.)
)
Ira Seldin et al.)

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

From: Doug.

Circulate: 6/21/75

Recirculate: _____

[June __, 1975]

MR. JUSTICE DOUGLAS, dissenting.

With all respect, I think that the Court reads the complaint and the record with antagonistic eyes. There are in the background of this case continuing strong tides of opinion touching on very sensitive matters, some of which involve race, some class distinctions based on wealth.

A clean, safe, and well-heated home is not enough for some people. Some want to live where the neighbors are congenial and have social and political outlooks similar to their own. This problem of sharing an area of the community is closely akin to that when one wants to control the kind of person who shares his own abode. Metro-Act of Rochester, Inc. and the Housing Council in the Monroe County Area, Inc.—two of the associations which bring this suit—do in my opinion represent the communal feeling of the actual residents and have standing.

The associations here are in a position not unlike that confronted by the Court in NAACP v. Alabama, 357 U.S. 449 (1958). Their protest against the creation of this

Wm. Douglas 0479

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-2024

Robert Warth, etc., et al., Petitioners, *v.* Ira Seldin et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1975]

MR. JUSTICE DOUGLAS, dissenting.

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The associations here are in a position not unlike that confronted by the Court in *NAACP* v. *Alabama,* 357 U. S. 449 (1958). Their protest against the creation of this segregated community expresses the desire of their members to live in a desegregated community—a desire which gives standing to sue under the Civil Rights Act of 1968 as we held in *Trafficante* v. *Metropolitan Life Insurance Co.,* 409 U. S. 205 (1972). The voices here

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 30, 1975

RE: No. 73-2024 Warth v. Seldin

Dear Lewis:

I shall circulate a dissent in the above.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

No. 73-2024

Robert Warth, etc., et al., Petitioners, v. Ira Seldin, et al.

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

[June ____, 1975]

MR. JUSTICE BRENNAN, dissenting.

In this case, a wide range of plaintiffs, alleging various kinds of injuries, claimed to have been affected by the Penfield zoning ordinance, on its face and as applied, and by other practices of the defendant officials of Penfield. Alleging that as a result of these laws and practices low and moderate income and minority people have been excluded from Penfield, and that this exclusion is unconstitutional, plaintiffs sought injunctive, declaratory, and monetary relief. The Court today, in an opinion that purports to be a "standing" opinion but that actually, I believe, has overtones of outmoded notions of pleading and of justiciability, refuses to find that any of the variously situated

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-2024

Robert Warth, etc., et al., Petitioners, *v.* Ira Seldin et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1975]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

In this case, a wide range of plaintiffs, alleging various kinds of injuries, claimed to have been affected by the Penfield zoning ordinance, on its face and as applied, and by other practices of the defendant officials of Penfield. Alleging that as a result of these laws and practices low- and moderate-income and minority people have been excluded from Penfield, and that this exclusion is unconstitutional, plaintiffs sought injunctive, declaratory, and monetary relief. The Court today, in an opinion that purports to be a "standing" opinion but that actually, I believe, has overtones of outmoded notions of pleading and of justiciability, refuses to find that any of the variously situated plaintiffs can clear numerous hurdles, some constructed here for the first time, necessary to establish "standing." While the Court gives lip-service to the principle, oft-repeated in recent years,[1] that "standing in no way depends on the plaintiff's contention that particular conduct is illegal," *ante,* at 8, in fact the opinion, which tosses out of court

[1] *Flast* v. *Cohen,* 392 U. S. 83, 99 (1963); *Association of Data Processing Services, Inc.* v. *Camp,* 397 U. S. 150, 153, 158 (1970); *Schlesinger* v. *Reservists to Stop the War,* 418 U. S. 208, 225 n. 15 (1974). See *Barlow* v. *Collins,* 397 U. S. 159, 176 (1970) (BRENNAN, J., concurring).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 3, 1975

No. 73-2024, Warth v. Seldin

Dear Lewis,

If, as I understand, you are willing to make the two minor changes we discussed on the telephone, I shall be glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 5, 1975

No. 73-2024 - Warth v. Seldin

Dear Lewis,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

To Ros - Lets re-circulate.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 9, 1975

2024
No. 73-2040, Warth v. Seldin

Dear Lewis,

The changes you propose in this opinion in response to the Chief's suggestions are wholly satisfactory to me.

Sincerely yours,

P.S.

Mr. Justice Powell

Copy to Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 3, 1975

Re: No. 73-2024 - Warth v. Seldin

Dear Lewis:

I shall await Bill Brennan's dissent.

Sincerely,

Mr. Justice Powell

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 12, 1975

Re: No. 73-2024 - Warth v. Seldin

Dear Bill:

Please join me.

Sincerely,

Byron

Mr. Justice Brennan

Copies to Conference

Whether or not WJB's dissent

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 3, 1975

Re: No. 73-2024 -- Robert Warth v. Ira Seldin

Dear Lewis:

I shall await the circulation of the dissent.

Sincerely,

T. M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 12, 1975

Re: No. 73-2024 - Warth v. Seldin

Dear Bill:

Please join me in your dissent.

Sincerely,

T. M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 12, 1975

Re: No. 73-2024 - Warth v. Seldin

Dear Lewis:

Please join me.

Sincerely,

H.A.B.

Mr. Justice Powell

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: MAY 29 1975

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-2024

Robert Warth, etc., et al., Petitioners, *v.* Ira Seldin et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

Petitioners, various organizations and individuals resident in the Rochester, New York, metropolitan area, brought this action in the District Court for the Western District of New York against the Town of Penfield, an unincorporated municipality adjacent to Rochester, and against members of Penfield's Zoning, Planning, and Town Boards. Petitioners claimed that the town's zoning ordinance, by its terms and as enforced by the defendant board members, respondents here, effectively excluded persons of low and moderate income from living in the town, in contravention of petitioners' First, Ninth, and Fourteenth Amendment rights and in violation of 42 U. S. C. §§ 1981, 1982, and 1983. The District Court dismissed the complaint and denied a motion by petitioner Rochester Home Builders Association, Inc., for leave to intervene as party-plaintiff. The Court of Appeals for the Second Circuit affirmed, holding that none of the plaintiffs, nor Home Builders Association, had standing to prosecute the action. 495 F. 2d 1187 (1974). We granted the petition for certiorari. 419 U. S. 823

3, 8-9, 16, 18-19, 20, 26

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: _____

Recirculated: [illegible] 3 1975

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-2024

Robert Warth, etc., et al., Petitioners, *v.* Ira Seldin et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

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7, 23

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: _____

Recirculated: JUN 4 1975

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-2024

Robert Warth, etc., et al., Petitioners, v. Ira Seldin et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1975]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 6, 1975

No. 73-2024 Warth v. Seldin

Dear Chief:

Thank you for your comments on my draft opinion.

That a statutory right of action may, in certain circumstances, properly be implied seems to me clear from the Court's cases which I cited. The principle is also reaffirmed in Justice Brennan's recent opinion in Cort v. Ash, slip opinion at 11. The Court, on occasion, has recognized standing in certain plaintiffs to seek relief from injury to themselves on the basis of the legal rights and interests of others, even when no statute expressly allows such standing. My purpose in the paragraph on page 9 (to which you referred) was to move away from the "zone of interests" test applied to prudential standing problems in Association of Data Processing Service Organizations. That test seems to me too broad and too loose to describe accurately the occasions in which third-party standing should be recognized.

By stating the problem as whether the statutory provision in question should be deemed to grant a right of action to persons in the plaintiffs' position, I think that several desirable results are achieved. First, the third-party standing question is anchored to the statutory language and the congressional purpose. Second, as application of the principle in the remainder of the opinion makes clear (see Parts IV and V-A), a right of action to assert the rights of third parties as the basis for a claim to relief cannot lightly be implied. Special circumstances must prevail; in particular, a right of action in the plaintiff must normally be necessary to the protection of third parties'

rights. While these principles are susceptible to abuse, they are less so than alternatives. In any event, I think they accurately reflect the Court's decisions in the third-party standing area.

I agree that a plaintiff must, in all cases, allege and establish "a distinct and palpable injury to himself." The opinion so states (p. 9). Moreover, the plaintiff can secure relief only for that injury. But if such injury is alleged, the question is whether the plaintiff may assert the rights and interests of third parties as the basis for his claim to relief? The opinion says that if Congress has granted a right of action to a person in the plaintiff's position, he also may assert the rights and interests of others, some of which may pertain "to the public generally". This refers, for example, to the public interest in the environment, as in SCRAP, 412 U.S. 669.

Nonetheless, there may be some ambiguity in some of the language I have employed, and the language you suggest may be a more precise reflection of the cases cited. I propose, therefore, to change the last full sentence on page 9 to read as follows:

> "But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim."

I do not understand your point as to the Home Builders associational standing problem. The statement that "the claims are not common to the entire membership, nor shared by all in equal degree" was not meant to erect a requirement applicable to all associational standing questions. Indeed, the preceding paragraph makes clear that with respect to prospective relief associations may have standing to represent one or more of their members: i.e., not all of the members need have suffered injury. The statement to which you refer comes in a paragraph discussing the peculiar problems presented when an association seeks damages on behalf of its members. It means only that if all members of the association had suffered the same injury and in equal degree, individualized proof might not be required, and the association could

presumably distribute any award to all of its members equally. In those circumstances, perhaps, an association might be deemed the proper representative of its members. This is in contrast to the circumstances here. Each member will have been injured, if at all, in varying degree; hence there must be individualized proof and individualized awards.

I am inclined to leave the statement substantially as it is. But to help eliminate any danger that it will be taken out of context to apply to anything other than the damages problem, I propose to change the statement to read as follows:

> "Moreover, in the circumstances of this case, the damages claims are not common to the entire membership, nor shared by all in equal degree."

Finally, I think your point about the use of the term "indispensable parties" is well-taken. I intended only that, to obtain damages, the members must themselves be parties to the suit. I propose to change the final sentence in the full paragraph on page 24 to read as follows:

> "Thus, to obtain relief in damages, each member who claims injury as a result of respondents' practices must be a party to the suit, and Home Builders has no standing to claim damages on his behalf."

I hardly need say (see my concurrence in Richardson) that I am no devotee of Flast. Indeed, I suggested in Richardson that we limit Flast to its peculiar facts. In writing this case, I tried carefully to avoid past pitfalls of over-generalization. Although I followed our precedents, I also tried to harmonize and clarify them. My clerks all think I have narrowed the law of standing (and so do some of our Brothers), although in truth I tried simply to restate the principles as precisely as possible, and apply them to the facts of this case.

Sincerely,

Lewis

The Chief Justice

lfp/ss

If these changes are satisfactory to you, I will have to clear them with Potter & Bill Rehnquist who have joined me.

June 9, 1975

No. 73-2040 Warth v. Seldin

Dear Potter and Bill:

As you may have noticed, the Chief joined us today in the above case.

He had raised certain questions with me, and in the interest of clarification I agreed to make certain changes - subject to your respective approval.

I enclose for each of you (i) copy of my letter of June 6, to the Chief, and (ii) a marked copy of the 3rd Draft of my opinion, reflecting in red the changes I propose to make.

If they meet with your approval, I will recirculate.

Sincerely,

Mr. Justice Stewart
Mr. Justice Rehnquist

lfp/ss
Enc.

9.24

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: _____

Recirculated: JUN 11 1975

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-2024

Robert Warth, etc., et al., Petitioners, *v.* Ira Seldin et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

July 18, 1975

MEMORANDUM TO THE CONFERENCE:

Case Held for No. 73-2024, WARTH v. SELDIN

No. 74-970, City of Parma, Ohio v. Cornelius

In late 1971, Forest City Enterprises sought a building permit to construct high-rise, federally-subsidized housing for elderly persons in the City of Parma. Shortly thereafter, citizens of the Town passed by referendum ordinances restricting the height of residential housing and requiring referendum approval of federal aid for housing and rent supplements. Perhaps pursuant to these ordinances (the facts are disputed on this point), the building permit was denied and the company abandoned the project.

Eighteen months later, suit was filed against petitioners by (i) 5 low and moderate income Negros who alleged that they wanted to live in Parma but were prevented from doing so by the City's discriminatory policies; (ii) 2 white Parma residents, claiming deprivation of the benefits of an integrated community; (iii) the Cleveland NAACP; and (iv) the Ozone Construction Company. These plaintiffs claimed that petitioners' zoning practices violated 42 U.S.C. §§ 1981-1983 and the 1968 Fair Housing Act. The suits were consolidated. The District Court (N.D. Ohio, Battisti), in a pretrial ruling, held that the action under the Fair Housing Act was untimely under 42 U.S.C. § 3612, that the NAACP and the construction company lacked standing, and that the white Parma residents lacked standing under 42 U.S.C. § 1982.

Wm. Doyle

Oct 7th

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 30, 1975

Re: No. 73-2024 - Warth v. Seldin

Dear Lewis:

Please join me.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 10, 1975

Re: No. 73-2024 - Warth v. Seldin

Dear Lewis:

The changes in the draft opinion are fine with me.

Sincerely,

Mr. Justice Powell

Copy to: Mr. Justice Stewart