

The Burger Court Opinion Writing Database

Simon v. Eastern Kentucky Welfare Rights Organization

426 U.S. 26 (1976)

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

May 14, 1976

Re: 74-1124) - Simon v. E. Kentucky Welfare Rights Org.
74-1110) - E. Kentucky Welfare Rights Org. v. Simon

Dear Lewis:

I join your proposed opinion dated May 12, 1976.

Regards,

WJ

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 24, 1976

RE: Nos. 74-1110 and 74-1124 Eastern Kentucky Welfare
Rights Organization, et al v. William E. Simon, etc.

Dear Lewis:

I shall shortly prepare and circulate a separate
opinion in the above.

Sincerely,



Mr. Justice Powell

cc: The Conference

To: The Chief Justice
 Mr. Justice
 Mr. Justice
 ✓ Mr. Justice
 Mr. Justice
 Mr. Justice
 Mr. Justice
 Mr. Justice

1st DRAFT

From: Mr.

SUPREME COURT OF THE UNITED STATES

Circulation 5-5-76

Nos. 74-1124 AND 74-1110

Recirculation

William E. Simon, Secretary of the Treasury,
 et al., Petitioners,
 74-1124 v.

Eastern Kentucky Welfare Rights Organization
 et al.

Eastern Kentucky Welfare Rights Organization
 et al., Petitioners,
 74-1110 v.

William E. Simon, Secretary of the Treasury,
 et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit,

[May —, 1976]

MR. JUSTICE BRENNAN, concurring in the judgment and dissenting.

I agree that in this litigation as it is presently postured, respondents have not met their burden of establishing a concrete and reviewable controversy between themselves and the government with respect to the disputed Revenue Ruling. That is, however, the full extent of my agreement with the Court in this case. I emphatically dissent from the Court's reasoning on the standing issue, reasoning that is unjustifiable under any proper theory of standing and clearly contrary to the relevant precedents. The Court's further obfuscation of the law of standing is particularly unnecessary when there are obvious and reasonable alternative grounds upon which to decide this case.

To: The Chief Justice
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____
 Recirculated: 5/24/76

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-1124 AND 74-1110

William E. Simon, Secretary of the Treasury,
 et al., Petitioners,
 74-1124 v.

Eastern Kentucky Welfare Rights Organization
 et al.

Eastern Kentucky Welfare Rights Organization
 et al., Petitioners,
 74-1110 v.

William E. Simon, Secretary of the Treasury,
 et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May —, 1976]

MR. JUSTICE BRENNAN, concurring in the judgment and dissenting.

I agree that in this litigation as it is presently postured, respondents have not met their burden of establishing a concrete and reviewable controversy between themselves and the government with respect to the disputed Revenue Ruling. That is, however, the full extent of my agreement with the Court in this case. I must dissent from the Court's reasoning on the standing issue, reasoning that is unjustifiable under any proper theory of standing and clearly contrary to the relevant precedents. The Court's further obfuscation of the law of standing is particularly unnecessary when there are obvious and reasonable alternative grounds upon which to decide this case.

STYLISTIC CHANGES

+ p.p. 6, 9-12, 17-22

WLB

Planned

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: MAR 13 1976

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-1110 AND 74-1124

Eastern Kentucky Welfare
Rights Organization
et al., Petitioners,

74-1110 v.

William E. Simon, Secre-
tary of the Treasury,
et al.

William E. Simon, Secre-
tary of the Treasury,
et al., Petitioners,

74-1124 v.

Eastern Kentucky Welfare
Rights Organization
et al.

On Writs of Certiorari to the
United States Court of
Appeals for the District of
Columbia Circuit,

[March —, 1976]

MR. JUSTICE STEWART, concurring,

I join the opinion of the Court holding that the plain-
tiffs in this case did not have standing to sue. I add
only that I cannot now imagine a case, at least outside
the First Amendment area, where a person whose own
tax liability was not affected ever could have standing to
litigate the federal tax liability of someone else.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 24, 1976

Re: Nos. 74-1110 & 74-1124 - Eastern Kentucky
Welfare Rights Organization v. Simon

Dear Lewis:

I agree.

Sincerely,



Mr. Justice Powell

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 25, 1976

Re: Nos. 74-1124 and 74-1110 -- William F. Simon v.
Eastern Ky. Welfare Rights Organization, et al., etc.

Dear Bill:

Please join me.

Sincerely,



T. M.

Mr. Justice Brennan

cc: The Conference

74-1110

January 27, 1976

Reproduced from the Collections of the Manuscript Division, Library of Congress

Dear Lewis:

Our daughter Sally, as you may recall, is in her last year at Emory Law School. She sent me a copy of the Emory Law Journal, just published, which contains an article she wrote.

I am not bothering you about Sally's article. but just prior to it, at 24 Emory L. J. 1191, is a comment on the D. C. Circuit decision in Eastern Kentucky Welfare Rights. Whether this will be of any assistance in the preparation of the opinion in that case, I do not know. I merely call it to your attention.

Sincerely,

HAG

Mr. Justice Powell

Phil - later removed to HABS

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



CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 12, 1976

Re: No. 74-1110 - Eastern Kentucky Welfare Rights
Organization v. Simon
No. 74-1124 - Simon v. Eastern Kentucky Welfare
Rights Organization

Dear Lewis:

As I have told you, I am waiting for Bill Brennan's circulation in this case. I shall undoubtedly join you, but I thought it best to wait.

The slight suggestion I had in mind was that the bulk of footnote 2 (that part after the citation of 1956-1 Cum. Bull. 202) be omitted. Perhaps I overreact to it, but it struck me, on reading, as though it said that the practice of issuing rulings was begun only in 1953. This is true as to the formal "Revenue" rulings, but as you know there was a complicated structure of rulings going back many years prior to 1953. These ran over the entire spectrum from the T.D. to the lower forms of ruling life such as Misc. What happened in 1953 was a revision of this rather complicated system. Tax lawyers all know this, and I fear that they might be amused by the inference (at least to me) that rulings were begun only in 1953. There is a mild reference to this in footnote 8 on page 31 of the Secretary's brief.

Sincerely,

Mr. Justice Powell

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 13, 1976

Re: No. 74-1110 - Eastern Kentucky Welfare Rights
Organization v. Simon
No. 74-1124 - Simon v. Eastern Kentucky Welfare
Rights Organization

Dear Lewis:

Please join me in your recirculation of May 12.

Sincerely,



Mr. Justice Powell

cc: The Conference

✓

✓

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

From: Mr. Justice Powell

Circulated: FEB 20 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-1110 AND 74-1124

Eastern Kentucky Welfare
 Rights Organization
 et al., Petitioners,

74-1110 v.

William E. Simon, Secre-
 tary of the Treasury,
 et al.

William E. Simon, Secre-
 tary of the Treasury,
 et al., Petitioners,

74-1124 v.

Eastern Kentucky Welfare
 Rights Organization
 et al.

On Writs of Certiorari to the
 United States Court of
 Appeals for the District of
 Columbia Circuit.

[February —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

Several indigents and organizations composed of indigents brought this suit against the Secretary of the Treasury and the Commissioner of Internal Revenue. They asserted that the Internal Revenue Service (IRS) violated the Internal Revenue Code (the Code) and the Administrative Procedure Act (APA) by issuing a Revenue Ruling allowing favorable tax treatment to a non-profit hospital that offered only emergency room services to indigents. We conclude that these plaintiffs lack standing to bring this suit.

✓ —
19

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

From: Mr. Justice Powell

Circulated: _____

Recirculated: ~~FEB 24 1976~~ _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-1110 AND 74-1124

Eastern Kentucky Welfare
 Rights Organization
 et al., Petitioners,
 74-1110 v.

William E. Simon, Secre-
 tary of the Treasury,
 et al.

William E. Simon, Secre-
 tary of the Treasury,
 et al., Petitioners,
 74-1124 v.

Eastern Kentucky Welfare
 Rights Organization
 et al.

*Wait for
w/2*

On Writs of Certiorari to the
 United States Court of
 Appeals for the District of
 Columbia Circuit.

[February —, 1976]

MR. JUSTICE POWELL delivered the opinion of the
 Court.

Several indigents and organizations composed of indi-
 gents brought this suit against the Secretary of the
 Treasury and the Commissioner of Internal Revenue.
 They asserted that the Internal Revenue Service (IRS)
 violated the Internal Revenue Code (the Code) and the
 Administrative Procedure Act (APA) by issuing a Reve-
 nue Ruling allowing favorable tax treatment to a non-
 profit hospital that offered only emergency room serv-
 ices to indigents. We conclude that these plaintiffs
 lack standing to bring this suit.

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 26, 1976

No. 74-1110 Eastern Kentucky Welfare
Rights v. Simon

Dear Potter:

I have reread SCRAP in light of our recent conversation. This reaffirmed, at least to my satisfaction, that what you wrote in SCRAP is entirely consistent with my circulation in the above case.

Perhaps my footnote 25 does not draw clearly enough the distinction between the two cases. In SCRAP, 412 U.S., at 687-689, you emphasized that the appellees had alleged "injury in fact":

"Here, by contrast [with Sierra Club], the appellees claimed that the specific and allegedly illegal action of the Commission would directly harm them in their use of the natural resources of the Washington Metropolitan Area.

* * * *

". . . 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 action. . . . [W]e deal here simply with the pleadings in which the appellees alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected."

Although I must say that I think the allegations in SCRAP were marginal and unlikely ever to be supported by facts, you were justified in accepting them at the pleading stage on a motion to dismiss.

In this case, on the other hand, plaintiffs did not specifically allege a chain of causation between the defendants' change of policy and their own failure to receive hospital services. All they alleged was that defendants' action had "encouraged" hospitals in general to refuse service to indigents, and that the particular hospitals that denied them service received "substantial" contributions. That a hospital receives "substantial" contributions does not say that it is dependent upon them; and it certainly tells us nothing about how any particular hospital, faced with the decision of admitting indigents or losing its tax benefits, would balance the economic benefits of favorable tax treatment against the economic disadvantages of giving uncompensated services. In this situation, unlike SCRAP, a court is left to speculate on whether defendants' action caused the hospitals' refusal to serve rather than simply "encouraging" it. In short, plaintiffs alleged no connection between actions of defendants and the alleged injury to their interest in receiving hospital services.

This case would be like SCRAP if one of the plaintiffs had alleged that a particular hospital, which had denied service, was so dependent upon contributions that it would be compelled to admit him if the IRS changed its policy. In that event, the necessary connection would have been drawn, and the burden would have been upon defendants to move for summary judgment to force the plaintiff to prove the allegation about the hospital.

As you know more about standing than I ever will, I hesitate to impose this letter upon you. I do so only to emphasize that I was not unaware of arguable tension between SCRAP and other decisions, including this one. But I had thought that Warth v. Seldin, following Linda S., had sharpened somewhat the focus of our standing analysis.

I could still decide this case on other grounds. I agree with your view that a third party should not have standing to challenge an IRS regulation, and yet I have found no judicial authority supporting this view. If we reach the merits, I would conclude without the slightest difficulty that the decision of the Court of Appeals is correct. The vote at the Conference was 7 to 1 against petitioners, although views diverged as to how the case should be written. For example, Thurgood thought there was

standing, but would affirm on the merits. My notes indicated there was more sentiment - though less than a majority - for the Warth v. Seldin analysis than for any other viewpoint.

Sincerely,

Levin

Mr. Justice Stewart

lfp/ss

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

From: Mr. Justice Powell

Circulated: _____

Recirculated: **MAR 12 1976**

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-1110 AND 74-1124

Eastern Kentucky Welfare
Rights Organization
et al., Petitioners,
74-1110 v.

William E. Simon, Secre-
tary of the Treasury,
et al.

William E. Simon, Secre-
tary of the Treasury,
et al., Petitioners,
74-1124 v.

Eastern Kentucky Welfare
Rights Organization
et al.

On Writs of Certiorari to the
United States Court of
Appeals for the District of
Columbia Circuit.

[February —, 1976]

MR. JUSTICE POWELL delivered the opinion of the
Court.

Several indigents and organizations composed of indi-
gents brought this suit against the Secretary of the
Treasury and the Commissioner of Internal Revenue.
They asserted that the Internal Revenue Service (IRS)
violated the Internal Revenue Code (the Code) and the
Administrative Procedure Act (APA) by issuing a Reve-
nue Ruling allowing favorable tax treatment to a non-
profit hospital that offered only emergency room serv-
ices to indigents. We conclude that these plaintiffs
lack standing to bring this suit.

p. 2

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

From: Mr. Justice Powell

Circulated: _____

Revised: APR 11 1976

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-1124 AND 74-1110

William E. Simon, Secretary of the Treasury,
 et al., Petitioners,
 74-1124 v.
 Eastern Kentucky Welfare Rights Organization
 et al.
 Eastern Kentucky Welfare Rights Organization
 et al., Petitioners,
 74-1110 v.
 William E. Simon, Secretary of the Treasury,
 et al.

On Writs of Certiorari to the
 United States Court of
 Appeals for the District of
 Columbia Circuit.

[April —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

Several indigents and organizations composed of indigents brought this suit against the Secretary of the Treasury and the Commissioner of Internal Revenue. They asserted that the Internal Revenue Service (IRS) violated the Internal Revenue Code (the Code) and the Administrative Procedure Act (APA) by issuing a Revenue Ruling allowing favorable tax treatment to a non-profit hospital that offered only emergency room services to indigents. We conclude that these plaintiffs lack standing to bring this suit.

pp 10, 12, 15-18

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

From: Mr. Justice Powell

Circulated: _____

Revised: MAY 12 1976

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-1124 AND 74-1110

William E. Simon, Secretary of the Treasury,
et al., Petitioners,
74-1124 v.

Eastern Kentucky Welfare Rights Organization
et al.

Eastern Kentucky Welfare Rights Organization
et al., Petitioners,
74-1110 v.

William E. Simon, Secretary of the Treasury,
et al.

On Writs of Certiorari to the
United States Court of
Appeals for the District of
Columbia Circuit.

[May —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

Several indigents and organizations composed of indigents brought this suit against the Secretary of the Treasury and the Commissioner of Internal Revenue. They asserted that the Internal Revenue Service (IRS) violated the Internal Revenue Code (the Code) and the Administrative Procedure Act (APA) by issuing a Revenue Ruling allowing favorable tax treatment to a non-profit hospital that offered only emergency room services to indigents. We conclude that these plaintiffs lack standing to bring this suit.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 11, 1976

Re: No. 74-1110 - Eastern Kentucky Welfare Rights
Organization v. Simon

Dear Lewis:

Please join me.

Sincerely,
L. R.

Mr. Justice Powell

Copies to the Conference