No. 09-930

MAY 25 2010

IN THE

Supreme Court of the United States

KENYON B. FITZGERALD, *ET AL.*,

Petitioners,

v.

WADE F.B. THOMPSON, *ET AL.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

When an armory building in New York City fell into disrepair, the New York Legislature enacted a statute authorizing the building to be leased to a non-profit organization. Petitioners are veterans who claim that the statute effected a taking and unlawfully denied them building access. The district court dismissed petitioners' claims for lack of standing, and the Second Circuit affirmed. The questions presented are:

1. Whether petitioners have standing to assert a taking when petitioners have no ownership interest in the armory.

2. Whether petitioners' claimed denial-of-access injury satisfies the requirement that, to be a proper predicate for standing, injury must be "actual or imminent, not conjectural or hypothetical" when the challenged statute requires the organization managing the building to grant reasonable access to veterans on request, and when petitioners concededly failed to request access.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, the undersigned private-party respondents (the Seventh Regiment Armory Conservancy, Inc., and certain of its officers, directors, and employees: Elihu Rose, Stephen Lash, Arie L. Kopelman, Edward Klein, Rebecca Robertson, Kirsten Reoch, and Wade F.B. Thompson[1]) state as follows:

Respondent the Seventh Regiment Armory Conservancy, Inc., a not-for-profit organization, has no parent corporation and no publicly-held corporation owns 10 percent or more of its stock.

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[1] Although Mr. Thompson was a party to the proceedings below, he has since passed away. We believe that, because Mr. Thompson was sued solely in his capacity as a board member of the Conservancy, he is no longer a party.

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STATEMENT OF THE CASE

Petitioners challenge a state statute that authorized an armory to be leased to a non-profit organization. The Second Circuit, affirming the district court, correctly concluded that petitioners lack standing to press their challenge because they neither own the armory nor requested access to it. Those holdings do not conflict with precedent of any other court. Because this case involves only fact-bound application of unchallenged and correctly stated legal principles, it presents no issue warranting review by this Court.

1. On Manhattan's Upper East Side, at Park Avenue and 67th Street, stands the Seventh Regiment Armory. Pet. App. 3a. Built between 1877 and 1881, the Armory includes a vast drill hall that was an engineering marvel when it was built, as well as a number of meeting rooms that were ornately decorated by some of the finest artists and craftsmen of the day. The building is included in federal, state, and local landmark registers. Pet. 9; Pet. App. 9a, 26a.

Since its construction, the Armory has always been publicly owned and controlled. Pet. App. 31a-32a. The land under the Armory was and is owned by the City of New York. Pet. App. 9a, 17a, 28a. The land was leased to the Seventh Regiment, a National Guard unit that has always been an arm of the State of New York. Pet. App. 9a, 17a.

The Armory continues to be used as an administrative center and staging ground for the National Guard. Pet. 10. Over the years, the State also permitted other public uses. For some time, part of the building has been used as a homeless shelter. Pet.

App. 27a. In addition, the drill hall has long been used for exhibits and artistic performances. Pet. 10, 11; Pet. App. 26a-27a.

In recent decades, however, the building fell into a regrettable state of disrepair. Pet. App. 10a, 27a. The State estimated that necessary rehabilitation would cost millions of dollars. Pet. App. 27a. Given budgetary constraints, the State was unable to provide public funding and ultimately concluded that funding should be sought instead from private sources. Pet. App. 27a-29a. Accordingly, the State invited private proposals to rehabilitate the building while maintaining its traditional uses. Pet. App. 10a, 27a. In response, the Seventh Regiment Armory Conservancy, Inc. ("Conservancy"), a nonprofit organization, submitted a proposal to rehabilitate the building and expand its function as a center for the performing and visual arts. The State decided to accept the Conservancy's proposal. Pet. App. 11a.

The State implemented the proposal by enacting a statute authorizing lease of the building to the Conservancy. 2004 N.Y. Laws Ch. 482 (reprinted at Pet. App. 26a-36a). The statute allowed the Conservancy to use the building for cultural purposes, on the condition that any proceeds must be devoted to the building's rehabilitation. Pet. App. 34a-35a. The statute further provided that the Conservancy must allow the building to be used for its traditional purposes. Pet. App. 33a-35a. And the statute provides: "On application of [veterans' associations], the lessee . . . shall provide a proper and convenient room or rooms or other appropriate space in the armory where such [association] may hold regular and special meetings and organizational social events of

a private nature, without the payment of any charge or expenses therefor, provided that such use does not interfere with the use by the lessee . . . ." Pet. App. 33a.

2. Almost three years after the statute's enactment, petitioners (three individual veterans and one veterans' organization) challenged the statute in federal district court. Pet. App. 11a. The complaint named as defendants various state officials as well as the undersigned private-party respondents (the Conservancy and certain of its officials). The complaint requested a declaration that the statute violated petitioners' constitutional rights and an injunction against the statute's implementation.

The complaint alleged that the statute violated the Takings Clause and interfered with petitioners' access to the Armory in violation of petitioners' First Amendment, due process, and equal protection rights. The complaint also asserted that the Armory should be used to establish a museum dedicated to the Seventh Regiment, and that the failure to establish such a museum (at public expense) likewise violated petitioners' rights under the First Amendment.

Respondents moved to dismiss the complaint on numerous grounds. *See* Pet. App. 13a. With respect to the claim that the statute took property from the Seventh Regiment, respondents argued (among other things) that the Seventh Regiment is an arm of the State of New York, and as such is not a private entity that is capable of suffering a taking — much less at its own hand. Even if the Seventh Regiment could assert any kind of takings claim, respondents argued, that claim could not be asserted

by petitioners, who are not officers of the Seventh Regiment or otherwise authorized to act on the Regiment's behalf.

As for the claim about petitioners' own access to the Armory, respondents argued (among other things) that nothing in the challenged statute denies veterans access to the Armory — to the contrary, the statute specifically provides that, "[o]n application of [veterans' associations]," the Conservancy "shall" make available "a proper and convenient room or rooms or other appropriate space in the armory." Pet. App. 33a. And, respondents argued, the complaint does not (because it cannot) allege that petitioners sought access from the Conservancy, much less that such access was denied. Thus, respondents argued, any claim about possible denial of access was speculative.

The district court granted the motion to dismiss. With respect to the takings claim, the district court noted that the Armory has historically been owned and controlled by the Seventh Regiment. Pet. App. 16a-17a. Petitioners, it found, "are *not* representatives of the Regiment and thus have no property interest in the Armory." Pet. App. 17a (emphasis in original). "Because only those with cognizable property interests have standing to bring takings claims," the district court concluded, petitioners "lack standing." Pet. App. 22a.

With respect to the denial-of-access claim, the district court noted that, "by the express terms of [the statute], veterans' groups may have access to the Armory on application to the Conservancy." Pet. App. 15a. As the district court explained, the statute amended prior law only in that it "shifted the

responsibility of granting access to the Armory from the officer in charge of the Armory to the lessee of the Armory, the Conservancy." Pet. App. 15a-16a. And, the court noted, "[t]he Complaint does not allege that the Conservancy has taken any steps affirmatively to restrict applications by veterans groups"; nor does it allege that petitioners "have made any such application to access the Armory." Pet. App. 16a. Accordingly, the district court ruled, petitioners "are unable to demonstrate more than an injury that is merely speculative," which is not sufficient to support standing. Pet. App. 16a.

The Second Circuit affirmed by unpublished summary order. With respect to the takings claim, the court stated that "'[o]nly the owner of an interest in property at the time of the alleged taking has standing to assert that a taking has occurred.'" Pet. App. 4a (quoting *United States Olympic Committee v. Intelicense Corp.*, 737 F.2d 263, 268 (2d Cir. 1984)). The court noted that petitioners "allege no official connection between [petitioners] and the Seventh Regiment of the National Guard." Pet. App. 5a. "Therefore," the court concluded, petitioners "have no standing to bring a takings claim." *Id.*

As for the claim about petitioners' own access to the Armory, the court of appeals noted that petitioners did not argue that the statute violates their rights "on its face," and likewise did not allege that the statute "has been applied to violate" their rights. Pet. App. 5a. As the court noted, the statute "changes the access procedure to the Armory only in that appellants must now submit their application for access to a different person," and "Appellants did not allege that they have applied for and been denied access." Pet. App. 5a. "At present," the court

accordingly concluded, "any injury is hypothetical." Pet. App. 6a.[2]

The undersigned private-party respondents initially waived a response to the petition. On March 30, 2010, this Court requested a response. The Court later extended the time for filing a response to and including May 28, 2010.

REASONS TO DENY THE WRIT

I. THE PETITION PRESENTS NO TAKINGS ISSUE THAT WARRANTS REVIEW.

In affirming the dismissal of petitioners' takings claim, the Second Circuit was entirely correct. As the court of appeals noted, "[o]nly the owner of an interest in property . . . has standing to assert that a taking has occurred." Pet. App. 4a (internal quotation marks omitted). That view is consistent with the precedent of this Court and other courts that have considered the issue. *See, e.g.*, *Andrus v. Allard*, 444 U.S. 51, 64 n.21 (1979) ("[T]here is no standing to assert a takings claim by those who are merely employed in selling artifacts owned by others."); *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1219 (Fed. Cir. 2005) ("Air Pegasus appears to assert a claim based on a perceived taking of property owned by other parties. The Fifth Amendment does not provide a remedy for such a derivative claim."); *United States Olympic Committee v. Intelicense Corp.*, 737 F.2d 263, 268 (2d Cir. 1984) ("Only the owner of an interest in property at

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[2] The court of appeals also rejected petitioners' museum-related claim on the merits, determining that petitioners "have not shown any right to install a museum in the Armory." Pet. App. 6a.

the time of the alleged taking has standing to assert that a taking has occurred."); *Heirs of Burat v. Board of Levee Commr's of the Orleans Levee Dist.*, 496 F.2d 1336, 1341 (5th Cir. 1974) ("The Burats do not have standing to contest the expropriation of United States owned land, nor do they have standing to contest the taking of privately owned land from other owners."); *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1298 (N.D. Okla. 2007) ("The Court is not aware of any Takings Clause case in which a court invalidated a law based on its impact on property owners that were not parties to the litigation."), *rev'd on other grounds*, *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009).

The court of appeals was further correct in ruling that, as a factual matter, the complaint did not allege that petitioners either are the Seventh Regiment or are authorized to act on the Seventh Regiment's behalf. Nor do petitioners dispute this characterization of the facts in their petition. Rather, without citation to the record, petitioners make an "offer of proof" that two of the petitioners were officers and members of various organizations that used the Armory *other* than the Seventh Regiment itself, including the Seventh Regiment Rifle Club and the Veterans of the Seventh Regiment. Pet. 17. These are new allegations, which are not in the complaint and thus not properly before this Court. In addition, they simply confirm that petitioners have no right to act on the Seventh Regiment's behalf.

Petitioners do not contend that the Second Circuit's decision conflicts with the decision of any other court of appeals. Petitioners also do not contend that the petition should be held pending the

decision in any other case on this Court's plenary docket.[3] Rather, petitioners for the most part simply repeat their merits arguments that the Armory constitutes private property, that the statute effected a taking, and that the taking was for a private rather than a public use. Petitioners fail, however, to take meaningful issue with the ground on which the court of appeals rested its ruling: that petitioners are not the Armory's owner and are not authorized to act on the owner's behalf. In light of that holding, petitioners' merits arguments are beside the point.

The closest petitioners come to challenging the court of appeals' threshold ruling is when they argue that the court of appeals took an overly narrow view of ownership. Pet. 26-30. According to petitioners, "retired members" of the Seventh Regiment as well as "those who contribute 'sweat equity' into the Armory" have a sufficient ownership stake to be entitled to assert takings claims on the Seventh Regiment's behalf. Pet. 26. But petitioners correctly acknowledge that their claim is "novel," Pet. 13: they cite no support for it, and we know of none. Nor does petitioners' view have common sense to commend it: it would vastly expand the universe of parties who must be compensated when government exercises its power of eminent domain and it would greatly complicate governmental efforts to renovate or dispose of government property.

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[3] There is no cause to hold the petition pending a decision in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, No. 08-1151 (filed Mar. 13, 2009). The issue in that case is whether a taking can be effected by a judicial decision. Here, there is no claim of any taking by judicial decision.

II. THE PETITION PRESENTS NO DENIAL-OF-ACCESS ISSUE THAT WARRANTS REVIEW.

Just as the court of appeals was correct in holding that petitioners lack standing to assert a takings claim, so the court of appeals was correct in holding that petitioners lack standing to complain of a denial of access. To have standing, a plaintiff must point to an invasion of a legally protected interest that is "actual or imminent, not conjectural or hypothetical." *Bennett v. Spear*, 520 U.S. 154, 167 (1997). As a result, a plaintiff lacks standing to challenge denial of a benefit unless he shows either that he applied for the benefit or that application would have been futile. *See, e.g., Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 167 (1972) ("appellee was not injured by Moose Lodge's membership policy since he never sought to become a member"); *Schutz v. Thorne*, 415 F.3d 1128, 1134-35 (10th Cir. 2005) ("[Plaintiff] had not yet applied for [hunting] licenses and established that the [challenged statute] in fact limited his hunting options. Standing is not conferred by 'conjecture' or 'speculation' about future hunts."); *Madsen v. Boise State Univ.*, 976 F.2d 1219, 1220 (9th Cir. 1992) (*per curiam*) ("There is a long line of cases . . . that hold that a plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit."); *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 55 (D.C. Cir. 1991) (association complaining of agency's "failure to apply . . . hiring preference" lacked standing because it "failed to assert that any of its members actually applied for or otherwise sought to fill vacant . . . positions"); *ICC v. Appleyard*, 513 F.2d 575, 577 (4th Cir. 1979) ("Until

[plaintiff] has shown that he cannot obtain a permit under the existing regulations, he has suffered no legally cognizable injury from this injunction.").

As the court of appeals correctly ruled, petitioners do not and cannot argue that the challenged statute violates their rights "on its face," Pet. App. 6a: the statute by its terms requires the Conservancy to provide veterans' groups "proper and convenient" access upon request, Pet. App. 33a. The court of appeals also correctly determined that petitioners' complaint did not "allege that [petitioners] have applied for and been denied access." Pet. App. 6a. On these facts, the court of appeals correctly held that petitioners' "injury is hypothetical," and that their access claim therefore is not justiciable. Pet. App. 6a.

Petitioners again do not (because they cannot) argue that this ruling conflicts with the ruling of any other court of appeals. Nor do petitioners argue that the court of appeals' ruling implicates a question presented in any other case on this Court's plenary docket. Rather, petitioners again devote the bulk of their petition to arguing that they have statutory and constitutional rights to assemble in the Armory, including a right to establish a museum there at public expense.[4] Those assertions are baseless: although petitioners unquestionably have a First Amendment right to speak about their experi-

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[4] *See, e.g.*, Pet. 33 ("The obvious source of funding for planning, installing and operating a first-class museum on America's citizen-soldiers in the Seventh Regiment Armory is out of the rental income the Armory receives from the annual antique art and antiquarian book shows held in the Armory's Drill Hall.").

ences and to establish a museum memorializing them, they have no right to occupy property that has been leased to others, much less at public expense.

More importantly, petitioners do not meaningfully challenge the court of appeals' threshold determination that, absent any allegation that access has been requested and denied, any denial-of-access injury is hypothetical. The petition states that the statute "closed the Armory to veterans," Pet. 24, that petitioners have been "*de facto* denied access," Pet. 37, and that they have been "effectively excluded," Pet. 39. But petitioners nowhere take issue with the court of appeals' determination that petitioners' complaint failed to "allege that [petitioners] have applied for and been denied access." Pet. App. 6a. Petitioners cannot pursue a claim for denial of access they have not sought.

Petitioners appear to argue that they can have standing even without requesting access. Citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (1999), petitioners argue that they are being denied "enjoyment of the Armory's aesthetic and recreational resources," which they say is "not unlike the aesthetic and recreational rights of bird-watchers and animal welfare activists in environmental cases." Pet. 30; *see* Pet. 13, 39 (same).

But even in environmental cases (which implicate considerations quite different from those at issue here), plaintiffs cannot establish standing merely by claiming to care about the environment — they must assert that they have a present intent to avail themselves of environmental enjoyment in a particular location affected by a measure sought to be

blocked. *See, e.g., Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1150 (2009) (requiring a "firm intention to visit . . . locations" affected by challenged measure); *Friends of the Earth*, 528 U.S. at 181-82 (plaintiffs had established standing by asserting that they sought to visit a particular location but had been rebuffed by the pollution that they sought to remedy); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (plaintiffs could not establish standing by asserting that they intended to return "some day" to affected area without asserting "concrete plans").

To be sure, plaintiffs in environmental cases generally need not allege that they filed an application for access to a particular park or forest. But that is so only because most parks and forests are open to the general public without the need for any prior application. *Friends of the Earth* and other environmental cases recognize, however, that a plaintiff complaining of environmental harm to a particular location must assert concrete intentions to visit that location. That recognition only lends support to the proposition that a plaintiff seeking access to a location that provides desired access on application must assert that access has been requested and denied.

* * *

For their military service to the Nation, petitioners deserve respect. But petitioners have no right to override the decision of elected representatives of the People of the State of New York to implement an effective and efficient plan to save a priceless State resource while preserving its military character. That legislative judgment also deserves respect in

federal court. And, as the Second Circuit correctly determined, petitioners' legal challenges to that judgment founder on settled principles of justiciability. That determination does not give rise to issues that deserve this Court's further attention.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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