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Justiciability

Brian Caulfield

JUSTICIABILITY

U.S. Const. art. III, § 2, cl. 1:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

COURT OF APPEALS

Rudder v. Pataki[1]
(decided May 6, 1999)

One month before the termination of the Office of Regulatory and Management Assistance, Governor George E. Pataki created the position of Director of Regulatory Reform (hereinafter "Director") with Executive Order No. 20.[2] The Director is charged with overseeing the Governor's Office of Regulatory Reform (hereinafter "GORR"), the office authorized to evaluate rule proposals offered by the Executive branch administrative agencies.[3] Plaintiffs commenced an action following the Director's refusal of a proposed

[1] 93 N.Y.2d 273, 711 N.E.2d 978, 689 N.Y.S.2d 701 (1999).

[2] *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 5.20 (1998).

[3] *Rudder II*, 93 N.Y.2d at 277, 711 N.E.2d at 979, 689 N.Y.S.2d at 703. More succinctly, the GORR may authorize publication of the rule, require specified changes before publication, or prohibit publication entirely, effectively blocking the proposed rule from promulgation. *Id.*

amendment to the rules of the Department of Health,[4] "seeking a declaratory judgment that Executive Order No. 20 was unconstitutional."[5] Summary judgment was granted in favor of the Governor and the Supreme Court dismissed the complaint entirely.[6] The Appellate Division reversed, holding plaintiffs lacked standing to raise their constitutional claims.[7] On appeal, plaintiffs claimed standing was satisfied based on three theories: organizational, citizen taxpayer and voter standing.[8] The Court of Appeals, in affirming the Appellate Division, focused its reasoning on organizational standing. The Court concluded plaintiffs did not have standing as they failed to meet the first two prongs of the organizational standing test. Further,

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[4] *See* N.Y. COMP. CODES R. & REGS. tit. 10, § 405.28(d) (1990). Section 405.28(d) reads in pertinent part "[a]ll hospitals . . . shall have an organized social work department, which shall be directed by a qualified social worker." The proposed amendment, negated by the GORR, would have required the director of the social work department to hold a "Master's degree in social work from an accepted educational program." Rudder v. Pataki, 246 A.D.2d 183, 185, 675 N.Y.S.2d 653, 655 (3d Dep't 1998).

[5] *Rudder II*, 93 N.Y.2d at 278, 711 N.E.2d at 980, 689 N.Y.S.2d at 703.

[6] *Rudder I*, 246 A.D.2d at 185, 675 N.Y.S.2d at 655 (Mercure, J., dissenting). Justice Mecure and Justice Spain concurred in dissent "agree[ing] with plaintiffs that the executive order violates the doctrine of separation of powers . . .." *Id.* The dissent indicated the "Governor has the power to oversee but not necessarily to direct." *Id.* at 190, 675 N.Y.S.2d at 658-59 (Mercure, J., dissenting) (citing *Rapp v. Carey*, 44 N.Y.2d 157, 162, 375 N.E.2d 745, 748, 404 N.Y.S.2d 565, 567 (1978)). In the view of the dissent, "the executive order's grant of absolute veto power over proposed rulemaking provides an enforcement mechanism far exceeding that employed in any present or former legislative enactment." *Rudder I*, 246 A.D.2d at 191, 675 N.Y.S.2d at 659 (Mercure, J., dissenting). However, the Appellate Division never reached this issue as they reversed the Supreme Court holding that plaintiffs lacked standing to bring their constitutional claims. *Id.* at 187, 675 N.Y.S.2d at 656.

[7] *Id.* at 187, 675 N.Y.S.2d at 656.

[8] *Rudder II*, 93 N.Y.2d at 278, 711 N.E.2d at 980, 689 N.Y.S.2d at 703. The following are some of the organizational plaintiffs who brought suit along with individual plaintiff Cynthia Rudder: Nursing Home Coalition of New York State, Inc.; Friends and Relatives of the Institutionalized Aged, Inc.; Disabled in Action of Metropolitan New York. Ltd.; New York Statewide Senior Action Council, Inc.; Center for Medical Consumers and Healthcare Information, Inc.; and the Coalition of Institutionalized Aged and Disabled, Inc. *Id.* at 280, 711 N.E.2d at 981, 689 N.Y.S.2d at 705 (FN *).

the Court did not attempt to reach any other issues and affirmed the Appellate Division's ruling that plaintiffs did not have standing.[9]

The GORR's disapproved an amendment to 10 NYCRR 405.28(d), the minimum standards of hospitals. This rule states "[a]ll hospitals . . . shall have an organized social work department, which shall be directed by a qualified social worker."[10] The proposed changes to the rule would require the director of the department of social work to have a Master's degree in social work from an accredited school.[11] Subsequently, the Director of the Nursing Home Community Coalition of New York State, Cynthia Rudder[12] and various other organizations representing the interest of social workers, such as the New York City Chapter of the National Association of Social Workers and 1199 National Health and Human Services Employees Union,[13] commenced action in the Supreme Court claiming the unconstitutionality of GORR.[14] Plaintiffs' Supreme Court claim rested on the notion that the creation of the GORR, via Executive Order No. 20,[15] allowed the Governor's office to circumvent the legislative authority vested in the agency heads and assume authority naturally vested in the legislative branch, thus violating the doctrine of separation of powers.[16] On summary judgment motions from both sides, the Supreme Court held that plaintiffs had standing, but "Executive Order No. 20 did not run afoul of the separation of powers doctrine . . . ."[17]

On appeal, the Appellate Division, Third Department, considered the issue of whether plaintiffs had standing to bring their cause of action. In a rather short majority opinion, the court began its discussion of the case by noting that an initial determination as to standing had to be made because it was the key for plaintiffs to

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[9] *Id.* at 278, 711 N.E.2d at 980, 689 N.Y.S.2d at 703.

[10] *See* N.Y. COMP. CODES R. & REGS. tit. 10, § 405.28(d) (1990).

[11] *Rudder I*, 246 A.D.2d at 185, 675 N.Y.S.2d at 655.

[12] *Id.* at 186, 675 N.Y.S.2d at 656.

[13] *Id.* at 188, 675 N.Y.S.2d at 657.

[14] *Id.* at 185, 675 N.Y.S.2d at 655.

[15] *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 5.20 (1998).

[16] *Rudder II*, 93 N.Y.2d at 277, 711 N.E.2d at 980, 689 N.Y.S.2d at 703.

[17] *Id.*

unlock the gateway to judicial review.[18] The court understood current legislation regulating qualified social workers works against them in that they would have to be replaced by individuals who held Masters degrees in social work.[19] Nevertheless, the court still found that the plaintiff organizations lacked specific harm, and held that they "failed to sustain their burden of establishing standing in this matter."[20]

The Court of Appeals considered the issue of whether plaintiffs had standing to challenge Executive Order No. 20.[21] The Court

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[18] *Rudder I*, 246 A.D.2d at 185, 675 N.Y.S.2d at 655 (citing The Soc'y of the Plastics Indus., Inc. v. County of Suffolk, 77 N.Y.2d 761, 655 N.E.2d 1034, 570 N.Y.S.2d 778 (1991)).

[19] *Id.* at 186, 675 N.Y.S.2d at 656.

[20] *Id.* The three page majority opinion focused on whether plaintiffs had standing to bring the cause of action and, by establishing that no standing could be conferred, did not reach the issue of whether the GORR is unconstitutional based on the doctrine of separation of powers. While the Supreme Court found the GORR unconstitutional, the Appellate Division failed to reach this issue, dismissing the cause of action on the basis that plaintiffs failed to have standing.

The seven page dissenting opinion, however, found that at least one of the organizational plaintiffs met the standing requirements as set forth in *The Soc'y of the Plastics Indus., Inc.* and noted the executive order establishing the GORR violated the doctrine of the separation of powers. *Id.* at 190, 675 N.Y.S.2d at 658 (Mercure, J., dissenting). Justice Mecure, with whom Justice Spain concurred, noted the "State Constitution provides for a distribution of powers among the three branches of government, an arrangement that serves to prevent an excessive concentration of power in any one branch or in any one person." *Id.* "As related to the various entities within the executive branch . . . the Governor has the power to oversee but not necessarily to direct." *Id.* (citing Rapp, 44 N.Y.2d at 162, 375 N.E.2d at 748, 404 N.Y.S.2d at 567). The dissent added that in their "view, the executive order's grant of absolute veto power over proposed rulemaking provides an enforcement mechanism far exceeding that employed in present or former legislative enactment." *Id.* at 191, 675 N.Y.S.2d at 659 (Mercure, J., dissenting). "Employing 'absolute rules and proscriptions' instead of guidelines, that aspect of the executive order lacks any cognizable legal basis." *Id.* The grant of absolute power the dissent notes is found within the Director's ability to stop the rulemaking process by denying proposed rule amendments rather than authorizing publication or requiring specified changes be made prior to publication. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 5.20 (1998).

[21] *Rudder II*, 93 N.Y.2d at 278, 711 N.E.2d at 980, 689 N.Y.S.2d at 703. The Court of Appeals elaborated on the organizational standing and touched briefly on both taxpayer and voter standing. Nonetheless, the Court found that the

chose to analyze the theory of organizational standing to a greater extent than it did taxpayer or voter standing.[22] Taxpayer and voter standing primarily concerned individual plaintiff Cynthia Rudder while organizational standing affected the various organization, group and union plaintiffs.

The Court of Appeals began its analysis of organizational standing with its citation to, and reliance on, *The Soc'y of the Plastics Indus., Inc., v. County of Suffolk*.[23] In *Society*, the Court of Appeals identified applicable principles of organizational standing are embodied in the following three requirements:[24]

> First, if an association or organization is the petitioner, the determination to be made is whether one or more of its members would have standing to sue; standing cannot be achieved merely by multiplying the persons a group purports to represent. Second, an association must demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests. Third, it must be evident that neither the asserted claim nor the appropriate relief requires the participation of the individual members.[25]

The Court of Appeals in *Rudder* asserted that the first two prongs of organizational standing were at issue by noting that plaintiffs claimed to represent those who had been harmed by the Director's actions, and that they were due to have specific interests furthered by the regulations.[26]

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plaintiffs, organizations and individual, lacked standing to challenge Executive Order No. 20 and failed to reach the issue of whether the order violated the doctrine of the separation of powers as noted in the Appellate Division's dissent.

[22] *Id.*

[23] 77 N.Y.2d 761, 573 N.E.2d 1034, 1041, 570 N.Y.S.2d 778, 786 (1991).

[24] *Id.* at 775, 573 N.E.2d at 1042, 570 N.Y.S.2d at 786.

[25] *Id.*

[26] *Rudder II,* 93 N.Y.2d at 278, 711 N.E.2d at 980, 689 N.Y.S.2d at 704. The Court of Appeals paraphrased the first prong by stating "an organization plaintiff must demonstrate a harmful effect on at least one of its members." *Id.*

Judge Ciparick stated in *Rudder* that "[t]he two main groups of organizational plaintiffs here — those that represent social workers and those that represent patients who receive social work services — fail to allege any cognizable harm to their members."[27] Cognizable harm is another way of saying plaintiffs fail to meet the former "legal interests" test, now known as the "injury in fact" test. Rooted in the common law, a "court has no inherent power to right a wrong unless . . . the civil, property or personal rights of the plaintiff in the action or the petitioner in the proceeding are effected."[28] The court quoted *Society* that the "core requirement that a court can act only when the rights of the party requesting relief are effected, has been variously refashioned over the years."[29] "Once a 'legal interests' test requiring a litigant to allege injury to a legal interest derived from common or statutory law, 'injury in fact' has become the touchstone during recent decades."[30] The 'injury in fact' test is a tool for the court to use in determining whether a plaintiff has "an actual legal stake in the matter being adjudicated" and a "concrete interest in prosecuting the action."[31]

In *Rudder*, the organizational plaintiffs alleged that if the GORR promulgated the proposed rule there would have been an increase in potential employment for those individuals who held a Master's in Social Work (MSW) degree from an accredited educational program. On the contrary, the "de facto veto of the rule (would have) the effect of depriving them of that pecuniary and professional advantage."[32] In essence, the Appellate Division, Third Department, determined that since no one individual member of organizational plaintiffs met the legal interests test that the group failed as a whole, thus concluding organizational plaintiffs failed to meet the first prong of their test for standing. The Court of Appeals acknowledged some members of organizational plaintiffs with a Master's degree would have the

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[27] *Id.*

[28] Schieffelin v. Komfort, 212 N.Y. 520, 530, 106 N.E.2d 675, 677 (1914).

[29] *The Soc'y of the Plastics Indus., Inc.*, 77 N.Y.2d at 772, 573 N.E.2d at 1040, 570 N.Y.S.2d at 784.

[30] *Id. See, e.g.,* Association of Data Processing Serv. Orgs. Inc. v. Camp, 397 U.S. 150 (1970); Matter of Dairylea Coop. v. Walkley, 38 N.Y.2d 6, 339 N.E.2d 865, 377 N.Y.S.2d 451 (1975).

[31] *Id.*

[32] *Rudder I*, 246 A.D.2d at 188, 675 N.Y.S.2d at 657 (Mecure, J. dissenting).

advantage of increased employment opportunities, but found that this "d[id] not mean that any one individual member with an MSW ha[d] been injured."[33]

Turning to the second prong of organizational standing, the *Rudder* court again relied on the *Society* decision which noted an "association must demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests."[34] This prong has become known as the "zone of interests" test: that is, "a party must show that the in-fact injury of which it complains . . . falls within the 'zone of interests,' or concerns sought to be promoted or protected by the statutory provision under which the agency has acted."[35] This means that "a group . . .whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes."[36]

In *Rudder*, the Court of Appeals determined that the organizational plaintiffs failed to meet this test because they "failed to identify any statutory or constitutional provision intended to prevent economic injury resulting from decreased employment opportunities."[37] The court's reasoning for this was the representation of the organizational plaintiffs. Identifying the representation of a few organizational plaintiffs as being diverse, that is, not exclusively representing individuals who hold an MSW degree, the court stated that since

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[33] *Rudder II*, 93 N.Y.2d at 279, 711 N.E.2d at 981, 689 N.Y.S.2d at 704. The court reasoned that "the organizations' members who hold MSW's are not prohibited from seeking a certain portion of available jobs, nor deprived of monies to which they may be statutorily entitled. Rather, they are merely not given preference over those who do not hold an MSW degree." *Id.*

[34] *The Soc'y of the Plastics Indus., Inc.*, 77 N.Y.2d at 775, 573 N.E.2d at 1042, 570 N.Y.S.2d at 786.

[35] *Id.* at 773, 573 N.E.2d at 1041, 570 N.Y.S.2d at 785. *See, e.g.*, Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990); *see also* Matter of Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 76 N.Y.2d 428, 559 N.E.2d 641, 559 N.Y.S.2d 947 (1990).

[36] Transactive Corp. v. New York State Dep't of Soc. Servs., 92 N.Y.2d 579, 587, 706 N.E.2d 1180, 1183, 684 N.Y.S.2d 156, 159 (1998) (citing The Soc'y of the Plastics Indus. Inc., 77 N.Y.2d at 774, 573 N.E.2d at 1041, 570 N.Y.S.2d at 785).

[37] *Rudder II*, 93 N.Y.2d at 279, 711 N.E.2d at 981, 689 N.Y.S.2d at 704.

representation covers both individuals with MSW degrees and individuals without "it cannot be said that the interests of the organizations dovetail with [the] claims they put forth."[38] The court explicitly shattered the organizational plaintiffs premise, stating that "[b]y seeking to enhance job opportunities of only some of their members — those holding MSW's — *these groups implicitly seek to diminish job opportunities* for other of their members — those otherwise qualified social workers who do not hold MSW's."[39] The diverse interests sought by the organizational plaintiffs for representation is precisely the entity which brought the court to conclude there was no standing upon which the organizational plaintiffs could bring this cause of action.[40]

While there is no provision in the State Constitution concerning standing, case law and statutes have developed New York's requirement on standing. [41] Standing finds its roots in the common law. The common law requirement is for a plaintiff to have "an actual legal stake in the matter being adjudicated," further "ensur[ing] that the party seeking review has some concrete interest in prosecuting the action . . . ."[42] This is also considered the injury-in-fact test. New York has defined this requirement by saying "[t]he party seeking relief must demonstrate that it will suffer direct harm

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[38] *Id.*

[39] *Id.* (Italics added).

[40] *Id.* at 280, 711 N.E.2d at 981, 689 N.Y.S.2d at 705. The court did not reach the third prong of organizational standing, rather it ended its analysis of organizational standing by concluding the organizational plaintiffs failed to meet the first two prongs set forth in *Society*. The court dismissed the cause of action in *Rudder* for lack of standing. They were cautious to do so, noting in *dicta* that it was not "a case where to deny standing to. . . plaintiffs would insulate (any) government[al] action from judicial scrutiny." *Id.* The court expanded this notion saying "this [case] does not mean that a future plaintiff could not allege requisite injury based on GORR's decision not to pursue the proposed rule." *Id.* "We conclude only that no organizational plaintiff has done so here." *Id.* at 280, 711 N.E.2d at 982, 689 N.Y.S.2d at 705.

[41] The Soc'y of the Plastics Indus., Inc. v. County of Suffolk, 77 N.Y.2d at 772, 573 N.E.2d at 1040, 570 N.Y.S.2d at 783. "The standing requirement in Federal actions has been grounded in the Federal constitutional requirement of a case or controversy, a requirement that has no analogue in the State Constitution." (citing U.S. Const. art. III, § 2, cl. 1; *see, e.g.,* Allen v. Wright, 468 U.S. 737, *reh. denied*, 468 U.S. 1250 (1984)).

[42] *Id.* (citing Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974)).

or injury that is different in some way from that of the public at large."[43]

The doctrine of standing has been modified over the years in order to limit its coverage. Such limitations are clearly set forth in the Supreme Court's decision in *Allen v. Wright*.[44] *Allen* notes that the "judicially self-imposed limits on the exercise of federal jurisdiction" include a general "prohibition on a litigant's raising another person's legal rights . . . and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked."[45] It is the zone of interests test that has been "adopted at both State and Federal levels, [and] has evolved into the crucial test for standing in the administrative context . . .."[46] A party's injury-in-fact must fall with in the zone of interests that is protected by the by the law which they seek redress.

> The requirement that the injury suffered be within the zone of interests sought to be protected by the statute serves to filter our cases in which a person's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that [the drafters] intended to permit the suit.[47]

In *Society*, the court notes that the State law requirement on zone of interests is analogous to the Federal requirement. That is, if the plaintiff's injury is only marginally related to, or consistent with, the purposes the statute seeks to advance, the plaintiff "cannot use the

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[43] *Rudder I*, 246 A.D.2d at 185, 675 N.Y.S.2d at 655. *See,* Matter of Lee v. New York City Dept. of Hous. Preservation and Dev., 212 A.D.2d 453, 622 N.Y.S.2d 944 (1st Dep't 1995) *appeal dismissed in part, lv. denied in part,* 85 N.Y.2d 1029, 655 N.E.2d 398, 631 N.Y.S.2d 284 (1995); Matter of Houston v. New York State Dept. of Health, 203 A.D.2d 826, 611 N.Y.S.2d 61, *lv. denied,* 84 N.Y.2d 803, 641 N.E.2d 158, 617 N.Y.S.2d 137 (1994).

[44] 468 U.S. 737 (1984).

[45] *Id.* at 751.

[46] *The Soc'y of the Plastics Indus., Inc.*, 77 N.Y.2d at 773, 573 N.E.2d at 1041, 570 N.Y.S.2d at 785; *see,* Matter of Dairylea Coop., 38 N.Y.2d 6, 339 N.E.2d 865, 377 N.Y.S.2d 451; *see also,* Clarke v. Securities Indus. Assn., 479 U.S. 388 (1987); *c.f.* Greer v. Illinois Hous. Dev. Auth., 122 Ill.2d 462, 524 N.E.2d 561, 120 Ill.Dec. 531 (1988) (Illinois not accepting the zone of interests test).

[47] *Id.* at 773-74, 573 N.E.2d at 1041, 570 N.Y.S.2d at 785 (citing Clarke, 479 U.S. 388 (1987)).

courts to further their own purposes at the expense of the statutory purpose."[48] Therefore, for the zone of interests test to be satisfied by a plaintiff, organizational or otherwise, the plaintiff must show that its alleged injury is sufficiently related to the conditions the Legislature set forth that it would not be unreasonable for a cause of action to arise from it.

Rudder has developed what is now a definitive test for the determination of organizational standing in New York. While there is no constitutional provision in New York which establishes standing for organizations, the fundamental requirements developed from the common law have been incorporated by New York. These fundamental requirements are also deeply rooted in the Federal Constitution and have evolved through the years to refine what plaintiffs must establish in order to satisfy standing. The development of the injury-in-fact test and zone-of-interests test are essential to plaintiffs examining whether they have a cause of action. It is vital that plaintiffs have an actual legal stake in the matter being adjudicated and that the matter fall within the zone of interests sought to be protected by the legislation.

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[48] *Id.* at 774, 573 N.E.2d at 1041, 570 N.Y.S.2d at 785. The court notes this in the context of a group asserting its own purposes. However, the zone of interests test goes beyond just organizational plaintiff and is a requirement necessary for plaintiff's standing.