C1

In the

Supreme Court of the United States

PAUL J. TRAFFICANTE, et al.,

Petitioners,

v

METROPOLITAN LIFE INSURANCE COMPANY, et al.,

Respondents.

No. 71-708

Washington, D. C.

November 7, 1972

Pages 1 thru 50

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

PAUL J. TRAFFICANTE, et al.,

Petitioners,

v. No. 71-708

METROPOLITAN LIFE INSURANCE COMPANY, et al.,

Respondents.

Washington, D. C.,

Tuesday, November 7, 1972.

The above-entitled matter came on for argument at 1:42 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

STEPHEN V. BOMSE, ESQ., San Francisco, California: for the Petitioners.

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.: as amicus curiae, supporting Petitioners.

RICHARD J. KILMARTIN, ESQ., San Francisco, California: for the Respondents.

ROBERT M. SHEA, ESQ., San Francisco, California: for the Respondents.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-708, Trafficante against Metropolitan Life and others.

[Disturbance in courtroom.]

All right, Mr. Bomse, you may proceed.

ORAL ARGUMENT OF STEPHEN V. BOMSE, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BOMSE: Mr. Chief Justice, and may it please the Court:

The issue which we confront here today is whether tenants at a large, privately owned apartment complex have standing to challenge practices of racial discrimination by their landlord, under either the 1968 Civil Rights Act, Title 8 thereof, or 42 USC, Section 1982, a statute principally interpreted by this Court in its 1968 decision in Jones v. Myer.

The petitioners here are both Negro and white residents of Parkmerced, a 3500-unit apartment complex in San Francisco, California.

They filed a lawsuit under Title 8 and under 1982, alleging that Parkmerced was generally responsible for practices condemned by both of those statutes, in refusing occupancy there to members of the Negro race and other minority races. Their action was against the landlords

responsible for that discrimination. Motions to dismiss were made in the district court on a variety of grounds, and the court granted those motions, limited, however, to the question of standing, which is before this Court today.

The case then went to the Ninth Circuit Court of Appeals, where the decision of the district court was affirmed, again limited solely to the question of standing. We sought certiorari, and that was granted by this Court.

It is our submission today that the decision below should be reversed, and the petitioners held to have standing, in view of the language of the relevant statutes, the clear policies which they embody, and the national commitment which I think none of us would reasonably gainsay or minimize to eliminate racial discrimination from housing, not only because that of itself is a crucial problem to our nation today, but because it quite clearly infects our national life in a variety of other circumstances.

To recall only the most obvious one, the terribly divisive national controversy over busing as a means of eliminating segregation, separation of the races in the schools, in large part is a product of the fact that the races in this country live apart. That fact has been too well documented to really be disputed here. It's been documented by the United States Civil Rights Commission, in its notion that we are indeed moving towards two societies. They're not

speaking merely in a social or any intangible sense. We live apart.

So what is in issue here is whether the commitment which petitioners submitted, embodied in the laws in issue, Title 8 and 1982, is going to be broadly or narrowly upheld. We submit it should be the former.

We trust that any inquiry on the question of standing begins and, at least some members of this Court would suggest, ends with the question of whether there is injury in fact. That is a test which, at least as I read the cases, is the constitutional or Article III cases in controversy one.

But I don't think that there is a great dispute here over injury. This Court has noted in numerous recent cases, including most recently Sierra Club v. Morton, that there are interests beyond mere economic ones, which merit judicial protection. In Sierra Club, the Court referred to the environmental questions there in issue as an important ingredient of the quality of life in our society. It's language which was also used in a very well-reasoned opinion of the Third Circuit involving Title 8 in part, Shannon vs. HUD, in which the Third Circuit suggested that persons who are neither going to be displaced nor live in a federally low-funded housing area would, nonetheless, have standing to challenge what was obviously going to disintegrate the quality of their neighborhood because of the effect which

those practices had upon the quality of their daily life.

Here the petitioners submit that being compelled, as a result of defendant's practices, to continue to live in Parkmerced under unlawful conditions of segregation, constitutes a very real injury to the quality of their daily life, and an injury which, we submit, undeniably merits protection.

In an effort to flush out the rather bare-bones allegations of our complaint, which of course must be taken as true in the posture of this case, we submitted it in the district court, and it's part of the record here, an affidavit of Dr. Alvin Poussaint, associate dean of the Harvard Medical School.

Dr. Poussaint, whose clinical practice has been quite broad in this area, suggests indeed that persons living in an environment such as Parkmerced, or any environment that's artificially segregated, suffer real injuries, injuries which may or may not lead to clinical symptoms, injuries which may or may not result in personal damage, even economic damage. But injuries which, nonetheless, are very real.

QUESTION:Would you suggest, then, that a person living in northwest Arkansas, where there is present only one race, are suffering deprivation of the kind you have suggested?

MR. BOMSE: Well, I don't think I can answer that, Mr. Justice, in the abstract. We would suggest that there is no right under the Constitution, or at least none has yet

been recognized by this Court, per se, to live in an integrated environment. The only right we're asserting here is the right to live in an environment which is not artificially segregated as a result of practices affirmatively proscribed under Title 8 and 1982.

Now, if your question goes to the issue of whether or not a person in Arkansas might have standing to challenge practices of racial discrimination at Parkmerced, I would suggest, no, unless on some set of facts, which I can't hypothesize, he could allege the type of individualized grievance injury which the statutes in question were intended to protect.

QUESTION: Well, I read Dr. Poussaint's affidavit, and it seemed to me it would be equally applicable to the Eskimo who lives only among Eskimoes, or someone living in Africa, living only among Blacks.

MR. BOMSE: There are, of course, injuries which the Constitution and the laws are simply powerless to redress. Under our system some people are rich, some are poor, some are black, some are white; those are not things which are the province of the law, nor need they concern us here. The only question is if injuries result as the result of practices which are proscribed by federal law, shouldn't the persons who were injured have a forum in which to seek redress

for them?

And that's the only issue which is involved here. When --

QUESTION: What I meant when I interrupted you there. There is a companion case, is there not, involving those who allegedly have been denied entrance to Parkmerced?

MR. BOMSE: There is another case in which --

QUESTION: What is the status of that case?

MR. BOMSE: That case is now pending before the district court. It is in the discovery phase of the litigation.

QUESTION: They were not instituted simultaneously?

MR. BOMSE: No, they were not instituted simultaneously, at all. The plaintiffs' counsel in the two cases are the same, as has been pointed out.

The issue that goes beyond the mere question of injury is: Are these plaintiffs, these petitioners, proper parties to challenge, or to seek redress for the injuries that they suffered under Title 8? It may, indeed, be a concept, as we've noted, of zone of interest, if that test applies; of reviewability, if that test, which I understand to be a minority view on this Court at this point, applies. It may, indeed, if we're under the generalized language of Article III, in Flast vs. Cohen, be a question of nexus of some sort.

But, however one approaches that, it seems to us,

and we would submit to the Court, that these plaintiffs who have both privity of estate and privity of contract with their landlord, and whose terms and conditions of tenancy are unquestionably affected by their unlawful practices, are within the contemplation of Title 8, and within the contemplation of 1982, and accordingly have standing.

Recall the language of Title 8. It begins with the explicit declaration that it is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. In terms of standing, it defines a person aggrieved as anyone who claims to have been injured by a discriminatory housing practice.

There's a broad arsenal of remedies provided.

QUESTION: But isn't that something which must be read with the other sections, provisions of the statute, which, expressly the statutory scheme is to see that all citizens will have the same right to inherit, purchase, lease, sell, hold, and convey real and personal property.

Now, under which part of that statute do you say the petitioners here fall?

MR. BOMSE: Now, Mr. Chief Justice, I take it you're referring us now to 1982 as opposed to Title 8.

QUESTION: Right.

MR. BOMSE: Under 1982, again we must be aware that we have two classes of plaintiffs. Some are Negro tenants at

Parkmerced. Unquestionably they are being denied, at least on our view, the rights which are afforded to white citizens to lease and hold property. White citizens are not forced to live apart from other members of their race. Black citizens, Negro citizens are.

QUESTION: I'm speaking now of the petitioners who seek standing, under which part of that particular statute do you say they come? That is, are they being -- are the petitioners, not someone else, are the petitioners being denied the right to inherit, purchase, lease, sell, hold or convey?

MR. BOMSE: Mr. Chief Justice, I meant to respond. We do have two petitioners here, Mrs. Carr and Mr. Embrey, who are Negroes.

But as to the others, we suggest that in terms of a standing inquiry, the inquiry is whether or not, as a proximate result of practices proscribed by 1982, which you just read, they are directly injured. That was the thrust, as we read it, of the Court's holding in the Sullivan case. It's the thrust also of the district court's decision, which we've cited to the Court, in Walker v. Pointer.

White persons can be injured and can therefore have standing under Article III as a result of discrimination, as in Sullivan, as in Walker, as in the earlier case of Barrows v. Jackson, which are not directed against them. It's

the injury that they suffer, and the interest which they have in redressing that injury, which grants standing under 1982.

In terms of the companion statute, under which we are here, Title 8, the language is even more clear. We are seeking to redress injuries which the petitioners suffered, this is a case involving personalized allegation to injury, we claim to have been injured as a result of discriminatory housing practices proscribed by the Act.

Now, if we go beyond the language which both ourselves and the Office of the Solicitor General, who will be before the Court in a moment, think is quite clear in support of our standing, if we go beyond that to the legislative history we again find, I think, although no comment at all as to who should or should not have standing beyond the language of the Act, we find two principles, which I submit militate strongly in favor of petitioners' standing here.

The first is the continuing recognition of the fact that racial discrimination is a pernicious evil throughout our society. Senator Mondale, who was the principal author of the bill, noted that we must show that we do not intend to live separately in this country, but that we intend to live together.

That is what this measure is all about.

Now, the second thing that we derive from the legislative history is the fact that Title VIII was intended

to do something about that discrimination, not only at the behest of a Negro individual who is denied housing, is intelligent enough to perceive that he's been denied it because of his race and diligent enough to pursue it, but at the behest of a group of tenants as well, as long as they are personally injured by those practices.

That's what this statute is all about. It's about the right --

QUESTION: But that's the question, I believe, whether they suffered the kind of injury that's contemplated to give, to afford them standing.

MR. BOMSE: Yes, I would agree with the Court. I think that is exactly the question.

QUESTION: But is it -- that doesn't -- certainly the statute must mean something more than having their feelings hurt; something of substance, isn't it?

MR. BOMSE: Well, I think we've come in terms of the analysis of standing in this country to know that there are injuries beyond economic ones, which merit judicial protection: aesthetic values, environmental values, spiritual values; all have been held properly justiciable or proper as a basis for finding injury, to assert standing.

The question here is not some mere intangible dissatisfaction, but it is real damage to one's associational right, which we interpret to be injury to the quality of one's

very daily life. I can think of no injury, indeed, which is more substantial or more worthy of judicial protection. Unless we are willing to take the view that Title VIII says to the Negro and to other minorities: Housing discrimination is your problem, if you want to come in to our neighborhoods and live there, fine; but it isn't a problem which affects anybody else, nobody else can be injured by it.

I think that's a notion which we've discredited in this country, and I think it's a notion which this Court has regularly rejected, which other courts have regularly rejected.

This Court, ten years ago, in Bailey v. Patterson, noted the standing of passengers in a public transportation system to seek non-segregated treatment. Regularly, it has been held that white students as well as black have standing to contest practices of discrimination, practices which injure them, because they are deprived of non-segregated, non-separated education.

I think we have come, and I certainly think we should come to the point in terms of racial discrimination, to recognize the fact that there are real injuries and direct injuries, and cognizable injuries which are suffered at any point where a person is, as the result of unlawful practices, deprived of the right of non-segregated treatment.

QUESTION: Mr. Bomse, in a statutory case like this,

how much help do you think you can get from related adjudications as to standing under other statutes or perhaps on constitutional questions? It pretty much boils down to what Congress meant in this particular statute, doesn't it?

MR. BOMSE: Well, I think that that is of course true, but one must presume, I think, that Congress had in mind the interpretation that has been given to the term "persons aggrieved". The view that has been taken by enforcement agencies, such as the EEOC, under Title VII, interpreting the analogous term "persons aggrieved" there.

And I think when they chose to use that language in Title VIII in 1968, they presumably were well aware of what this Court had interpreted the term "persons aggrieved" to mean, and what other courts had interpreted the term "persons aggrieved" to mean.

So, in so far as we derive anything from that history, I think it certainly supports our standing.

We would finally submit to this Court that the standing of tenants should be recognized because they are going to be perhaps the most effective advocates of any racial discrimination in large apartment complexes. They are people with a real continuing interest in those problems. They live there. It's a continuing situation with them.

QUESTION: Well, those might be good reasons to urge upon Congress for specifically granting them standing,

but do you suggest that the utterances of some of the prime authors support that view? Didn't Senator Mondale himself indicate that, as an illustration in response to a question, that what this statute was about was that when a man wants to buy a particular piece of property or lease it, this statute is to help him get it, and --

MR. BOMSE: Yes, but the fact that that is one thing it is about does not, in my view, suggest that it is not about something else. Senator Mondale was not at that point discussing the question of who had standing. And I'll frankly admit to the Court, as I think the respondents would as well, there is no legislative history on the precise question of who has standing. All we must do is look to the language that is used, look to the intent of the statute, and look to what Congress was attempting to accomplish when it enacted it.

I think that all of those things point very strongly in this case to the fact that standing should be recognized.

QUESTION: But didn't Senator Hart's language address itself directly to this point when he said that: as these provisions now stand, they reveal a congressional intent, a clear congressional intent to permit and even encourage litigation by those who cannot afford to redress specific wrongs aimed at them because of the color of their skin.

Doesn't that indicate that, at least at that point,

he was talking about standing and said it's limited to the people who are themselves wronged by exclusion?

MR. BOMSE: I do not think so, Mr. Chief Justice. I think that in that case again he was talking about the fact there should be broad enforcement, should be enforcement by persons who are directly injured, or enforcement at their behest when they cannot afford it. But it was not suggesting in any way that petitioners here should not have standing.

QUESTION: Now, this related litigation that you mentioned in response to a question, will that litigation -- is that litigation such in its scope that all of the relief sought here could be accomplished there?

MR. BOMSE: We can't tell at this point. Certainly the relief which petitioners seek for their own personal injuries cannot be. For example, Mrs. Carr has been told that her child should have greater contact with minority persons, that he has been psychologically disadvantaged by the lack of that. Now, if that's an injury that's cognizable under the statute, she should be entitled to seek redress for that quite apart from any relief which would be granted in the Browbridge case.

It's the question of the right of any person who has been injured to seek redress for those injuries, quite apart from the right which other persons have.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

FOR THE UNITED STATES AS AMICUS CURIAE

MR. WALLACE: Mr. Chief Justice, and may it please the Court:

In the view of the United States, anticipated a little bit in Mr. Justice Rehnquist's question, this case presents a quite narrow question of statutory construction, and in answering that question we believe this Court can put aside more far-reaching problems of standing to litigate constitutional issues, or to enforce statutes that do not expressly provide for a right of private action and do not contain a provision conferring standing on a defined class of persons.

In the Fair Housing Act of 1968, Congress has specified two methods of private enforcement: one providing for recourse to the conciliation efforts of the Department of Housing and Urban Development before suit is brought; and the other authorizing direct action in the courts. And the Act's standing provision, which is reproduced on page 2 of our brief, is, in the words of the Court of Appeals, very broad.

Certainly the language is broad enough to cover the petitioners here. They are within the literal terms of the provision, and they have alleged economic injury to themselves, injury in their social relationships, and injury to

their reputation through the practices that the Act forbids, that they alleged have occurred here, whether their claims of injury can be substantiated remains to be tried, if this Court holds, as we believe it should, that they have a right to have these claims heard.

QUESTION: Mr. Wallace, the words to which you are referring are "Any person who claims to have been injured" on page 2 of your brief?

MR. WALLACE: That is correct. That is the standing provision.

QUESTION: "Any person who claims to have been injured".

MR. WALLACE: "-- by a discriminatory housing practice within the meaning of the" --

QUESTION: Right. I suppose if you read those words literally, as you suggest we should, anybody, that would give anybody standing; because any person could claim to have been injured.

MR. WALLACE: Well, we don't suggest, though, that the literal reading is the end of, but it certainly is the beginning of the interpretation.

QUESTION: Would you agree that literally those words would include anybody who claimed --

MR. WALLACE: They would confer standing on any one.

QUESTION: Anybody coming from a different city, and claimed to have been injured?

MR. WALLACE: He could make that claim; obviously there'd be great difficulty in substantiating that claim in those circumstances.

QUESTION: Well, --

MR. WALLACE: We do not take the position that any person can complain, nor has HUD in its administration of the statute applied the terms that literally. But HUD has consistently entertained and processed complaints by persons similar to those -- similarly situated to those here. Not only the complaints of petitioners Trafficante and Carr, but complaints by others. HUD officials estimated to me that a little more than ten percent of their initial complaints and inquiries, they would guess around 12 percent come either from -- come from whites who are either tenants in apartment complexes that they claim is discriminating, or who are customers of housing developers that they claim are discriminating.

QUESTION: To pursue that, Mr. Wallace, would it be necessary that they be even residents of the same State, let alone the same city? If they claimed the injury. We're talking about standing now, not talking about evidentiary now.

MR. WALLACE: Under the literal terms of the provision, it would not be necessary. As the statute has been administered, HUD has found concrete content for those literal terms in some of the practicalities that are inherent

in the subject matter with which Congress was dealing, and in the legislative history of the Act, which we believe corroborates the way the government has been applying the provision.

We have recounted in our brief that some of the difficulties encountered, both in our own experience in investigating and finding witnesses for our pattern-in-practice suits, and in the experience of the NAACP legal defense fund, recounted to you in an amicus brief in this case, which we commend to the Court's attention, in developing private litigation.

We have reviewed in our brief some of the difficulties experienced with those persons who have been turned away or rejected as applicants, who often are not in a position to know why they've been turned away, who have to satisfy their housing needs elsewhere without awaiting the outcome of litigation, and who often do not wish to force their way through litigation into a place where they've been made to feel unwelcome.

On the other hand, tenants' organizations have long been in the forefront of litigation on this subject, as is recounted in the book by Simon on Dorsey v. Stuyvesant Town, cited in the petitioners' brief.

And we believe this is because of the continuing nature of the injury that they suffer, and the fact that that

injury can often be more effectively redressed in the courts than the injury to a rejected applicant who has had to satisfy his housing needs elsewhere.

And, significantly, this injury to incumbent tenants was recognized and discussed in the Act's legislative history, as we recount in our brief, repeated references were made in the floor debates to the discrimination experienced by a black naval officer when he attempted to rent an apartment in a certain building, and to a letter from one of the building's tenants expressing his shame and outrage that this had occurred.

It is true that the predominant concern expressed in the legislative history was with the plight of those turned away. And the Court of Appeals mistakenly, in our view, relied on expressions of that concern to reach the conclusion that was not expressed in the legislative history, the Chief Justice has read some excerpts from it, that only those individuals, or the Attorney General with his limited resources, could sue.

There was a subsidiary but recurrent theme in the legislative history, which we have set forth in considerable detail in our brief, and that theme was that blacks and whites alike are harmed by being forced to live in racially segregated neighborhoods, and that the harm to both races would be alleviated by the Act.

QUESTION: Mr. Wallace, if the Court were to grant to these plaintiffs standing, plaintiffs who were deprived of the right to live in an integrated community, as I understand their language here, how can we define "community" in a way that will place some limits on the concept of standing?

MR. WALLACE: Well, of course, the only issue before the Court in this case involves complainants who themselves are living in a particular complex or development that they claim has been discriminating, and where they have that close identification with the particular development or community such that -- I think there's a reasonable expectation that their reputations could be injured, and the like; certainly if you posit the case of a man running for political office you could see instances where there would be very real injury to a man's reputation and economic interests.

When you get to the question of, What about the next-door neighbor, couldn't he perhaps be similarly injured? That's an issue that needn't been reached here. HUD itself has not had complaints of that kind. HUD has adopted regulations which, in their standing provision, practice the language of the statute.

QUESTION: Well, we would have great trouble, wouldn't we, in trying to decide this case and say it does include a tenant at Parkmerced under the standing clause, and try to give some principal reason for it, without saying that it

either does or does not include a man three blocks away?

MR. WALLACE: Well, I think the thrust of this aspect of the legislative history is that Congress believed that whites and blacks are injured by being forced to live in artificially segregated neighborhoods, and if someone comes forward and shows that injury, HUD officials have said to me that they believe that that would be within the terms of their regulations a person who has standing.

This question is not arising either in complaints to HUD or in the courts, and I don't see any reason to anticipate it. It's much more likely that someone living in the complex will be in a position to have the knowledge to complaint.

QUESTION: But let me follow through. You've used the words "particular complex". If standing were applicable to the particular complex, is it also applicable to the complex across the street?

MR. WALLACE: If the complex across the street is discriminating, within the meaning of the Act?

QUESTION: Yes. Would these plaintiffs have standing to complain about the complex across the street?

MR. WALLACE: Well, that question is not in this case. As I've been saying, there is reason to think that anyone in the neighborhood who is injured would have standing, considering the thrust of this aspect of the legislative history and the breadth of the language Congress used. But

this seems to be largely an academic question. HUD has been receiving 2500 complaints a year under this statute. None of the complainants are in this category. They're not likely to have the requisite information to make such a complaint. And it's much more likely that the real injury that would motivate a complaint would be felt by someone more directly associated with the complex where the discrimination was occurring, whether it's an apartment development or a development of tract homes.

QUESTION: Well, you can see I'm troubled as to the limitations of this; that would be the next case, probably.

QUESTION: Mr. Wallace, do you rely on Section 1982, on the standing issue, or do you address yourself only to Title VIII?

MR. WALLACE: In our brief we discussed only the question under Title VIII. We do have one footnote, which indicates that we think that the Negro petitioners seem to come within the terms of 1982, to the extent that they are complaining that they are victims of tokenism in living in this large development where their race is discriminated against.

QUESTION: So you think there's standing under both, both statutes?

MR. WALLACE: So they have standing at least on the same terms as white persons, in that sense. And we've

suggested that that seems to fit the language of 1982.

Of course, our principal concern is with our responsibilities for administering Title VIII, and with the complaints that HUD has been entertaining, and that the holding of the court below seems to imply HUD is not empowered to entertain or process.

MR. CHIEF JUSTICE BURGER: Mr. Kilmartin.

ORAL ARGUMENT OF RICHARD J. KILMARTIN, ESQ.,

ON BEHALF OF RESPONDENT METROPOLITAN LIFE INS.

MR. KILMARTIN: Mr. Chief Justice, and may it please the Court:

We have here under consideration today what I believe is an extremely practical problem rather than an emotional problem that has been presented. Neither of the defendants would deny that segregation or discrimination is a pervasive evil. But that is not the question presented.

As I indicate, we have nothing but a practical problem: Is this Court going to authorize tenants of an apartment complex, incumbent tenants, to sue their landlord for injuries which they allege arise out of the Civil Rights Act of 1968 and the Civil Rights Act of 1866?

This Court has never gone that far before. And, I submit, should not in this case.

I further submit that the decision of the Ninth Circuit was absolutely correct.

I believe, preliminarily, before considering the question of standing, we should put the interest of the United States in focus. The contentions of the United States track and parallel almost exactly that of the petitioners, but I believe that their motivation for joining with the petitioners is different; and I believe that's reflected in their briefs.

Their briefs assert that they have a very small Civil Rights staff, and an evan smaller housing staff; and, therefore, they need whatever help they can get from the private sector. And that is certainly understandable. If they do have, indeed, a small staff and are overworked, they should have assistance of the private sector.

However, we submit that denial of standing to these plaintiffs is not going to detract one whit from the enforcement, or from the assistance legitimately available to the United States in this type of case. There's a complete arsenal of federal authority provided by Title VIII, which is applicable to this kind of a situation. The implementation of national policy in providing fair housing will not be affected at all; as partial proof of this, I refer to the case that Mr. Justice Blackmun referred to, and that is Burbridge vs. Parkmerced Corporation.

While that case might not be a blood brother to this case, it's certainly a first cousin. It was filed just 15 days after the district court dismissed this case for lack of

standing. It was filed by the same attorneys as are representing the plaintiffs here. It has virtually identical allegations. Whenever we appear in the district court, the plaintiffs in this case are there to observe, and it would be folly to assume that they are not in fact related.

In each of those cases, in that case, rather, the plaintiffs are five Negroes, one married couple, and three other individuals, each of whom claims to have been the direct victim of discriminatory housing practices; that they applied for apartments and that, for some reason or other, they were refused.

QUESTION: Is there any question but that they have standing?

MR. KILMARTIN: None whatever, Your Honor. We did not challenge their standing in the lower court. We are proceeding with that case, discovery proceedings are pending, and, in fact, a trial date has been set. The trial date is April 29th, I believe it is. With certain pretrial dates in the interim. And so that case will be disposed of shortly.

In addition, it purports to be a class action. And while it has not qualified as such as yet, under Rule 23, it is proceeding in that context, and it is anticipated that, in due course, a motion to qualify it as a class action will be filed.

I'd like the Court to keep in mind what the

plaintiffs have asked this Court to do, and what they've asked the district court to do. In their prayer for relief, they asked the court to fashion a decree, an injunctive decree, which would be virtually binding on no one, except, perhaps, the defendant.

This distinct possibility occurs. Keep in mind that this action is not a class action; this is an action by individuals and individuals alone who sue in their own right, and in their own right alone.

And if I might state at this point, parenthetically, because I think it's important, in response to the petitioners' contention that somehow incumbent tenants are the ones that should assert the rights under this Act, I will advise the Court at this time that there were six plaintiffs. There were two plaintiffs that filed the suit, and there were four individual plaintiffs in intervention, together with an unidentified committee.

The four individual plaintiffs have since long departed Parkmerced,have moved their tenancy, demonstrating the inherent transiency of tenancies, and I can fail to see what stake they would have in the outcome of this controversy at this time.

While we haven't raised it, it might well be moot as to those four tenants, who no longer live there. One of them, as a matter of fact, has moved as far away as Rio de Janeiro.

They would lack the personal stake in the outcome of the controversy, which this Court has required in its decision in Baker vs. Carr.

If, however, getting to trial on a case such as this, the defendants won, that is, if the defendant landlord won the case, it certainly wouldn't be binding upon the next individual who would come along and assert his personal value preference -- a phrase used by this Court most recently in Sierra Club vs. Morton.

Whether his grievance would be real or imagined, he'd have the right to assert it, because there would be no res judicata effect to a decision such as this.

If, on the other hand, the plaintiffs were granted any measure of relief, it certainly wouldn't be binding upon the next group of plaintiffs who wanted to come in and assert what they thought was the proper racial mix of Parkmerced or any complex.

And it's with that background, Your Honors, that we proceed to the question of standing. We just do not feel that Congress ever envisioned that kind of profound disorder in creating certain rights and remedies in the housing field.

As we've indicated, and I think as both sides concede, the standing issue in this case is not at all complex, in fact it's quite simple. The length of the briefs and the plethora of cases that have been cited on the subject demon-

strate, in my judgment, one thing, and that is the futility of attempting to assign to a statute a task or a burden that it was never meant to carry. And I think that is the thrust of the petitioners' position here.

They are trying to derive from Title VIII standing, where none was ever intended, and the statute simply won't carry it. Stripped to its essentials, the issue is simply this: Did Congress intend that plaintiffs such as this, that is, incumbent tenants, have standing to complain of the policies of their landlord?

We submit that it clearly did not.

QUESTION: Mr. Kilmartin, --

MR. KILMARTIN: Yes, sir.

QUESTION: -- let me put this hypothetical to you. It's Mrs. Carr here who is a member of the minority race, isn't she?

MR. KILMARTIN: Yes, she is, sir.

QUESTION: Suppose that there were some vacant apartments and she had a dependent relative whom she would like to have come in to the complex, and the admission of that relative was refused; would this be beyond her rights under the statute?

MR. KILMARTIN: I would say, as the statute stands now, yes, it would. But certainly the dependent relative would have every right to assert his or her rights under this

statute so that if in fact a discriminatory practice was practiced against that person there would be a remedy for it. There would be a remedy under both federal and State law, as a matter of fact. California has a comprehensive public -- or fair housing statute of its own, as well as this.

QUESTION: But it it would withhold it from Mrs. Carr, even though this were her dependent and she could show it to be much more convenient, less expensive to have her at hand rather than across town?

MR. KILMARTIN: I would say, Your Honor, that the statute would not extend to that situation. But once again I believe it would be academic, because of the fact that the person himself or herself would have direct rights under the Act, and could obtain the apartment.

QUESTION: I suppose, if Mrs. Carr, in that illustration, were so disposed, again coming down to the practical matters you spoke of earlier, all that would need to be done to assure standing would be to join the dependent relative as a plaintiff; isn't that so?

MR. KILMARTIN: That's correct. That's correct.

QUESTION: And then, there being one plaintiff with standing, there probably wouldn't be much profit in people challenging standing of other plaintiffs?

MR. KILMARTIN: That's correct, Your Honor. Or Mrs. Carr could take her dependent relative down to the office of

HUD to initiate administrative proceedings under 810 of the Fair Housing Act.

And if that failed, then that relative could file an action either in federal or State court, under Section 812.

The Solicitor General has alluded to the fact that the only thing involved in this case is two or three tenants, and we do not go beyond that. But the problem has much greater dimension than that, it has a very significant effect upon landlords, and, as a practical matter, the decision of this Court is going to go far beyond, if it grants standing, far beyond these individual tenants.

I would like to give you just a thumbnail sketch of what Parkmerced is, because you probably -- maybe some of you have seen it, maybe not. It is a large, 3500-apartment complex of tower buildings and garden apartments, located on about 150 acres in the southwest portion of San Francisco. It's near Lake Merced.

Immediately adjacent to it, to the north, is San Francisco State College, and its campus, which has in the neighborhood of 20,000 students. About a half a mile to the north of that is another complex, totally -- an apartment complex totally unrelated to Parkmerced, called Stonestown.

Immediately to the south, within a mil, is another large complex of apartments, several thousand, called Westlake.

Immediately to the east of Parkmerced are hundreds

of single-family dwellings.

We submit that within a one-mile radius of Parkmerced, and we don't even have to go to Arkansas, but there would be nothing, if this Court granted standing to these tenants, to prvent the person in the house across the street from asserting his views, or the apartment dweller in the next complex, or, perhaps, even the State College student, who spends eight hours of his day each day immediately next to Parkmerced.

We submit that that would be a logical extension and a logical consequence of granting standing to this type of plaintiff in this case.

I would like the Court to keep in mind that the thrust of the plaintiffs' arguments are that they are denied inter-racial association. That is not one of the rights that is protected by the statute. They allege that their injuries are social and professional, in that they are deprived of the right to benefit from association with different races.

But the complaints are silent on these points. There's no allegation in any complaint that Parkmerced, Metropolitan Life or the present owner, Parkmerced Corporation, has a gate at the door and blocks any business or social visitor for these plaintiffs from entering his apartment, or coming to visit him, or from associating with him in any way.

The complaint is devoid of any such allegations,

and the challenge that they are denied interracial association simply fails. The streets of Parkmerced are public, although the development is private,and anybody that wants to come there can come at any time and visit any tenant in any apartment, as long as he is, of course, invited by the tenant himself.

So there is absolutely no interference with free interracial association, nor is there any allegation to that effect in the complaint.

In the case of Data Processing vs. Camp, Mr. Justice Douglas started out with the phrase that: generalizations about standings to sue are largely worthless as such. And I believe that is certainly true. And I think this case demonstrates it.

However, we start with, in every standing case, the Article III case or controversy test, the Article III case or controversy requirement.

I want the Court to understand clearly here and now that what the petitioners' counsel said and what the Attorney General implied is -- implies in their briefs, that is, that these people have suffered injury in fact and were therefore automatically over the hurdle of Article III, is simply not so. We do not admit that.

As this Court pointed out in Sierra Club, and as I read Sierra Club, the injury in fact that is necessary has to

be a cognizable injury in fact.

It is not, as the Chief Justice suggested, just a racial slur, an insult, a broken leg, or anything else, but it has to be a cognizable injury in fact, under the statutes that are being discussed.

That being --

QUESTION: You said Congress could have conferred standing here had it desired to do so?

MR. KILMARTIN: No. No, Your Honor, I don't suggest that at all. I suggest that all of the arguments that have been presented by the petitioners should be addressed to Congress, if they want to grant standing to people such as these. And I would assume the constitutionality of such, if it were passed, under this Court's holding in Jones v. Mayer.

QUESTION: Then, would you state again, or just very briefly, some of your case or controversy argument? I don't believe I fully apprehended what you meant by it.

MR. KILMARTIN: Yes. In Data Processing, as well as other case, but Data Processing zeroes in on it, as I understand it and as I read it, the first inquiry is: Is there a case or controversy? And to find that there is a case or controversy, you have to have an injury in fact to the person complaining. That's the first inquiry.

But, as this Court pointed out, in Sierra Club, it's not just an abstract injury in fact, it has to be an injury

cognizable under the statutes that are under discussion. And in this case those statutes are Title VIII and Section 1982.

And we submit that the injuries asserted here, the injuries in fact that are asserted by these petitioners, are not the injuries contemplated by Title VIII or 1982, that they --

QUESTION: But didn't I understand Mr. Wallace to suggest that the HUD entertains complaints of this kind of injury? Under this statute.

Am I wrong about that?

MR. KILMARTIN: HUD entertained these complaints?

QUESTION: Entertains complaints of this kind. Didn't he tell us that?

QUESTION: For administrative relief.

MR. KILMARTIN: Well, -- yes, he did say that, Your Honor.

QUESTION: Well, at least that agency, at least, thinks that this kind of complained-of injury is an injury that comes under that.

MR. KILMARTIN: Well, I think there is more committed to HUD under Title VIII than is committed to private plaintiffs, Your Honor. And I think that's the answer.

QUESTION: I see.

MR. KILMARTIN: They have great powers. They have

investigate powers, for example. I think that HUD is empowered to investigate just about any complaint that comes into its office. And they have subpoena power.

They don't have much enforcement power, but they do have a lot of powers to investigate for the purpose of recommending to Congress --

QUESTION: Well, one of their complaints, as I gathered it, is that Congress hasn't supplied HUD and the other establishments with enough manpower to do the job, and that's why they want the aid of private attorneys general, as it were.

MR. KILMARTIN: I think that's the thrust of their argument, Your Honor; and that's what I mentioned at the outset of my remarks. But they will not be denied the aid of the private sector, in my opinion, one whit by denying standing to these plaintiffs. Because, as demonstrated, the minute these plaintiffs fail, there is always the Burbridge type of plaintiffs who will be collected and will file a suit.

And, in those cases, the case such as Burbridge, you have issues that are real, that are live; not just abstract contentions such as the petitioners present here. But you have real, live issues.

For example, inthe Burbridge case, the complaints of discrimination are subject to rectification. They can sit down, these tenants can sit down with the landlord and they

can talk across the table and, as was the case in this situation, they were all offered apartments.

QUESTION: But supposing, Mr. Kilmartin, that the Burbridge plaintiffs sue to enjoin unlawful discrimination under the Act, and it turns out that in fact there was no unlawful discrimination against them. And yet these plaintiffs know of another refusal on the part of Parkmerced which was an unlawful discrimination?

Now, presumably, these plaintiffs could redress that unlawful discrimination, whereas the Burbridge plaintiffs didn't. Am I not right in that?

MR. KILMARTIN: By "these plaintiffs", you're referring to the Trafficante ones, Your Honor?

QUESTION: Right.

MR. KILMARTIN: I would say no, that their redress would be to go and collect the plaintiffs who had been discriminated against, and let them file an action on their own, in their own name.

QUESTION: But I mean if this type of lawsuit were allwed, some actual incidents of discrimination would be redress that might not be picked up under the Burbridge type suit.

Because not every guy who is discriminated against is necessarily going to sue.

MR. KILMARTIN: That's correct. That's correct.

We believe, Your Honor, to achieve that result you would have to have a standing statute far beyond what we have in this case. We think 1982 is clear on its face, and I believe that this Court, in its decision in Sierra Club, posited the meaning of that section quite clearly when it said: Hurd vs. Hodge -- that's an earlier decision of the Court -- squarely held therefore that a Negro citizen who is denied the opportunity to purchase the home he wants, solely because of his race and color, has suffered the kind of injury that 1982 was designed to prevent.

That is the person directly affected, and not the person who is on the other side of the legal coin, so to speak, attempting to assert the rights of somebody else.

And inTitle VIII, I believe it is even clearer, because when you track the sections of Title VIII and correlate them, it seems to me crystal-clear that the only ones, and as held by the Ninth Circuit and the district court, the only ones who were the intended beneficiaries of that Act were the persons who were directly discriminated against.

And I refer the Court specifically to those portions of the Act, 3610, 3602(f) and 3604 and 3612.

QUESTION: I notice that 810(a), which is the language we're talking about --

MR. KILMARTIN: Yes, Your Honor.

QUESTION:-- is talking about a person who may do

what? Who may file a complaint with the Secretary.

And it's only in the event that the Secretary is unable to do anything about it that, then, that person may commence a civil action.

MR. KILMARTIN: That's right.

QUESTION: Well, it does seem to me that we've got an administrative interpretation, if I correctly understand Mr. Wallace, on the part of HUD, that the very people that we're talking about here, who are plaintiffs, qualify to file complaints with the Secretary.

MR. KILMARTIN: Well, Your Honor, --

QUESTION: And if they are, then it seems, logically, the statute means that they also have standing to bring suit when those things happen, the Secretary has been unable to obtain, voluntary complaints, and so forth.

MR. KILMARTIN: Well, yes. I think, though, to put it in proper context, we would have to know exactly what HUD did with such complaints. And what they intended to do with them, or what they tried to do.

Their conciliation and persuasion powers are virtually unlimited in this area.

QUESTION: Well, that may be, but if you're right -- and the court of appeals below is right -- it would seem to me HUD ought to refuse to accept complaints under (a), of tenants like these petitioners.

MR. KILMARTIN: Well, I -- that's up to HUD, Your Honor.

QUESTION: Am I not right?

MR. KILMARTIN: I think --

QUESTION: That's what (a) talks about, filing complaints with the Secretary.

MR. KILMARTIN: That's right, but I think that HUD could accept -- to illustrate by exaggeration -- HUD could accept an employment contract.

QUESTION: Well, maybe they could, but they wouldn't have to, if the court of appeals is right, I suggest.

MR. KILMARTIN: That's correct. I suggest that also.

And I'd like to draw the Court's attention to the specific provisions of 3610 and 3612, which, when authorizing suit, state that the suit may be filed to enforce the rights granted or protected by this subchapter; and 3612, the rights granted by section 3604 may be enforced by civil actions. The rights granted, not just any old right, but the rights granted by 3604.

The rights granted by 3604, which are at issue in this case, are (a) the right to rent an apartment without being discriminated against because of race, (b) the right to have a landlord not make a misrepresentation to you that the apartment is or is not available, and (c) the right to rent

the apartment on the same basis as anybody else and receive the same services.

Those are the rights that this Act creates; those are the rights that this Act protects; those are the rights that are not involved in this action.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Shea.

ORAL ARGUMENT OF ROBERT M. SHEA, ESQ.,

ON BEHALF OF RESPONDENT PARKMERCED CORP.

MR. SHEA: Mr. Chief Justice, and may it please the Court:

My primary concern this afternoon will be to discuss the question of the liability of the Parkmerced Corporation as a successor in ownership of the Parkmerced apartment complex to Metropolitan.

However, I would initially like to make a remark concerning standing. Of course it is clear, and I don't believe it has been specifically adverted to as yet, that if this case goes forward at the behest of these petitioners, the very persons discriminated against themselves will not be bound or affected.

So, presumably, under a statute which has a relatively short statute of limitations, and which is cast in terms of specific discriminatory housing practices, in order to prevail, these plaintiffs, although their complaint contains

no specific allegation of specific wrongful conduct, will have to prove that Mr. A came to the premises, made an application and was wrongfully excluded; and B and C.

None of those people is present. Moreover, may I point out to the Court that, under Section 3604 of the statute, in describing a violation in refusal to rent, the statute specifically requires a finding as to the bona fide, the good faith, of the applicant for an apartment.

Well, it seems particularly inappropriate that plaintiffs who are not themselves in the excluded group should be permitted, or even called upon, to litigate the good faith of those not represented or bound by the action.

Indeed, the decision would, to that extent, lack finality.

There was a question from the Court as to --

QUESTION: Are you saying -- let me interrupt you there -- are you saying that these plaintiffs would not make out a case if they established a general pattern, they must prove specific cases?

MR. SHEA: Yes, sir. Mr. Chief Justice, the ability to sue in respect of a pattern or practice of discrimination is rested --

QUESTION: That's limited to the Attorney General, isn't it?

MR. SHEA: Indeed. And I am paraphrasing the

statutory language, if he reasonably believes that there has been a pattern or practice of resistance to the full enjoyment of rights.

Now, a private plaintiff who phrased a complaint in precisely those terms would necessarily not be entitled to proceed. The private action rights and remedies under the statute are limited to those brought within 180 days of the specific discriminatory housing practice complained of. And otherwise limited.

We do not contend, as our brief makes clear, that an appropriate private plaintiff, who complies with the requirements of Rule 23 of the Federal Rules of Civil Procedure, may not maintain a class action and represent broad -- and maintain broad relief. But that's not this case.

There was a question from the bench as to the power of Congress to enact legislation which might provide plaintiffs in petitioners' position standing. I believe that there is no question that that could be done, and call the Court's attention to the provisions of the 1964 Public Accommodations, Civil Rights Act, which, in its terms, provides that citizens are entitled to public accommodations which are free of segregation and discrimination.

There's no question that a plaintiff, any citizen who encounters a condition of segregation or discrimination,

can sue under that Act.

I might note that the Act also limits the remedy to injunctive relief without damages.

Now, in the 1968 Civil Rights Act here at issue there is no comparable language. And the remedies afforded to the private plaintiff include damages, penalty damages as well as the right to recover attorneys' fees in appropriate instances.

Turning to the main thrust of my talk today, Parkmerced Corporation purchased the properties after, some months after the complaints at issue here were filed. Parkmerced Corporation is a special-purpose corporation, created for the purposes of acquiring the property. It had no connection with the alleged acts of housing discrimination attributed to Metropolitan, and it was joined after the suit was commenced under Federal Rule 25 as a party defendant.

QUESTION: Mr. Shea, at that point, there's something in the record, perhaps in the pleadings, that in 1970, of some 6600 people in the complex, one-half of one percent were non-white.

MR. SHEA: I have no reason to question that statistic, sir.

QUESTION: Does the record show whether the situation is the same today? I suppose it doesn't show that, does it?

MR. SHEA: The record -- there is no record other

than the complaint and ancillary papers, Your Honor. I can assure the Court that while there may have been some changes, I do not think the Court is justified in assuming that there is a materially different complex of tenants within Parkmerced.

Now, as to the successor-in-interest position, I should point out that under familiar concepts of law, ordinarily, a private entity is not liable for the conduct of another unless it somehow has contributed to, conspired in, or otherwise become involved in the conduct itself which is a violation.

None of these factors applies to the case of Parkmerced Corporation.

As to the pleadings in the case, the pleadings simply assert that Parkmerced Corporation had notice of the charges at the time it bought; and, secondly, upon information and belief that Parkmerced Corporation, in the two weeks which has elapsed from December 21, 1970, when it purchased the property, to January 5, 1971, when an amended complaint stating a cause of action against Parkmerced Corporation was filed. In that two-week period, that they had not made substantial changes in the operations of Parkmerced.

Thirdly, upon information and belief, the assertion was made that Parkmerced intends to continue the employees in their real estate office and not to make changes in policies.

Now, the latter allegations, incidentally, are, by terms of the complaint itself, based upon public information type letters sent to tenants advising them of the transfer, which, in effect, said, we've been happy to have you and we will continue with operations as before.

In their briefs, the petitioners attempt to maintain the position that Metropolitan and Parkmerced Corporation, notwithstanding the complete separation of interests between them, which we have made explicit in our brief, are somehow involved in a joint venture. This is wholly inaccurate.

First of all, Metropolitan provided mortgage financing and has committed to provide additional mortgage financing. These obligations are represented in the mortgage in a side-letter agreement. Indeed, the letter agreement itself is so detailed as to belie any suggestion that the lender, Metropolitan, was in any way involved in the future operating decisions which would result in mortgage liability, additional lending by it.

Finally, there's an assertion that Metropolitan has -- in petitioners' brief, that Metropolitan has retained the power to appoint a property manager. This is simply not correct.

Metropolitan, as a mortgage lender and as lessor, under the ground lease, which is here at issue, has the power, for cause only, to require that Parkmerced give up the

management of the premises, and in such case upon, indeed, a failure of Parkmerced properly to manage the premises, Parkmerced would select from a list provided by Metropolitan the new manager.

It simply is not a reservation of control of Metropolitan.

QUESTION: Mr. Shea, isn't this a matter for the trial court and not this Court?

MR. SHEA: Sir, the essential question before the Court is the adequacy of the pleadings as against Parkmerced.

Now, of course, this Court will not reach the issue of the successor's liability if it decides the standing issue.

QUESTION: Well, what pleadings are before us, other than the complaint?

MR. SHEA: I beg your pardon, sir?

QUESTION: What pleadings do we have here?

MR. SHEA: You have the complaint --

QUESTION: -- that will allow us to pass on all of these factual points you are producing?

MR. SHEA: Your Honor, the --

QUESTION: Is there anything in the record that shows anything about Metropolitan appointing a property agent, one way or the other?

MR. SHEA: Yes, indeed.

QUESTION: How is that there?

MR. SHEA: The amended complaint against Parkmerced Corporation, filed at the time we were joined, contains allegations --

QUESTION: And aren't they accepted as true at this posture?

MR. SHEA: They are accepted as true. However, their substantiality, in light of the facts otherwise appearing of record, I think is appropriately measured by this Court. The documents comprising the relationship, the financial lease and other documents comprising the relationship have been submitted in the record of this case, which has been transmitted to this Court.

QUESTION: But, Mr. Shea, how do you get those in the record, if the case was dismissed on the basis of the insufficiency of the complaint?

MR. SHEA: Your Honor, the petitioners themselves secured the documents, and they were submitted to the trial court as pertinent to the motion for judgment, to dismiss the case, on the grounds of lack of standing.

QUESTION: So the trial court virtually treated this as a motion for summary judgment rather than a --

MR. SHEA: It could be so regarded. It wasn't adverted to as a problem by the trial court, and has been treated as if dismissal were solely upon the pleadings.

However, as you will note in the briefs of the parties, liberal reference has been made to these documents of lease and contract.

Now, I'd -- in compressing the remaining points of my argument, I'd like to point out to the Court that again practicalities must govern. If tenants in this position are permitted to maintain a suit containing general allegations, and then, in the fact of the general allegations, without specific reference to any facts, require that a successor, unconnected with the wrongs, be compelled to litigate in furtherance of the possible prospect of affirmative relief, you've provided the tenant group, be they in good faith or bad, with a tremendous weapon to use to impair transfers of property and to impose their will and their conditions upon the successor purchaser. Who, I remind the Court, has done absolutely no wrong.

He simply has notice of charges which the predecessor owner denies. And there are no specific allegations at issue, a nd there's nothing he can investigate and determine.

The mediation/conciliation process is frustrated by suits of this generality.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:51 o'clock, p.m., the case was submitted.]