FEDERAL COURTS — STANDING — THIRD CIRCUIT DENIES STANDING TO BRING CLAIM OF RACIAL DISCRIMINATION IN ZONING. — *Taliaferro v. Darby Township Zoning Board*, 458 F.3d 181 (3d Cir. 2006).

The land use policies of municipalities across the United States have contributed significantly to widespread racial segregation and inequality.[1] Two Supreme Court decisions from the 1970s regarding challenges to exclusionary zoning — one of the mechanisms by which localities maintain segregation — severely limited the situations in which federal courts will hear such claims.[2] The Court thus foreclosed the possibility of federal judicial relief for most victims of racial bias in zoning decisions. Recently, in *Taliaferro v. Darby Township Zoning Board*,[3] the Third Circuit held that plaintiffs alleging racial discrimination in the grant of a zoning variance lacked standing to bring that claim but could proceed with a suit based on the economic injury the variance would cause.[4] Had the court chosen to recognize that some land use decisions have effects analogous to those of redrawing legislative districts, it could have established a significant but manageable expansion of plaintiffs' abilities to bring challenges to racially exclusionary zoning and perhaps thereby discouraged such harmful policies.

In 1960, Darby Township, a small suburb of Philadelphia,[5] condemned a nine-acre tract of land in the African American section of town, displacing the area's residents.[6] The locality purported to be taking the property as part of a renewal plan that called for the construction of new residences on the property, but the land remained un-

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[1] *See* THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN 121, 141 (2004) (explaining that the value of homes in white neighborhoods is far greater than in black neighborhoods and that segregation — which persists in part because of "local zoning decisions" — contributes significantly to wealth disparities in the United States); THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS 245–46 (1998) (attributing the development of "suburban exclusiveness and homogeneity" in part to "strictly enforced zoning, including prohibiting the division of single-family houses into apartments, strictly limiting multiple-family housing, and stipulating lot size"); Anthony Downs, *Some Realities About Sprawl and Urban Decline*, 10 HOUSING POL'Y DEBATE 955, 959–61 (1999) (describing exclusionary zoning, with its economically protective and racially discriminatory purposes, as a cause of concentrated poverty).

[2] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Warth v. Seldin, 422 U.S. 490 (1975).

[3] 458 F.3d 181 (3d Cir. 2006).

[4] *See id.* at 185.

[5] The Township covers an area of 1.4 square miles; in 2000, its population was 9622. Darby Twp., Pa., Detailed Profile, http://www.city-data.com/city/Darby-Township-Pennsylvania.html (last visited Jan. 14, 2006).

[6] *See* Taliaferro v. Darby Twp. Zoning Bd., No. Civ.A. 03-3554, 2005 WL 696880, at *1 (E.D. Pa. Mar. 23, 2005). The Township is extremely segregated. *See* Amended Complaint at 3, *Taliaferro*, 458 F.3d 181 (No. 05-2253).

used.[7] The Township allegedly discouraged each of the successive owners of the plot from constructing residences in order to avoid accommodating an expansion of the African American community.[8] In May 2002, the current owner received from the Township's Zoning Board a variance to erect a commercial self-storage facility on the plot.[9] After an appeal and several additional hearings,[10] the Board voted again in May 2003 to allow the nonresidential use of the land.[11] A group of citizens whose homes stood adjacent to the property filed another unsuccessful appeal of the variance order in state court.[12] Following that ruling, two of the state court complainants, Lee Taliaferro and Samuel Alexander, and two former inhabitants of the property, Beatrice Moore and Bernice Williams, brought suit in federal court.[13]

The United States District Court for the Eastern District of Pennsylvania dismissed the complaint.[14] The plaintiffs alleged that the Zoning Board, as well as other individuals and entities,[15] had injured them by failing to develop the property for residential use with intent "to perpetuate the white majority in the Township."[16] They brought six claims, including violations of 42 U.S.C. § 1981, 42 U.S.C. § 1983, and the Fair Housing Act.[17] The court granted the defendants' motions to dismiss based primarily on its holding that the plaintiffs lacked standing.[18] Citing *Warth v. Seldin*,[19] the court articulated the constitutional requirements of standing: a concrete and actual or imminent injury, a causal connection between the relevant activity and the harm, and a likelihood that the remedy will redress the harm.[20] It then held that the plaintiffs failed to demonstrate "actual injury."[21]

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7 *See Taliaferro*, 2005 WL 696880, at *1.

8 *See id.* The Township was 62% white in 2000. Darby Twp. Profile, *supra* note 5.

9 *See Taliaferro*, 2005 WL 696880, at *1–2.

10 Taliaferro v. Darby Twp. Zoning Hearing Bd., 873 A.2d 807, 810 (Pa. Commw. Ct. 2005).

11 *Taliaferro*, 2005 WL 696880, at *2.

12 *See Taliaferro*, 873 A.2d 807.

13 *See Taliaferro*, 2005 WL 696880, at *1.

14 *Id.* at *12–13.

15 The other defendants included Darby Township, the Delaware County Redevelopment Authority, individual members of the Zoning Board, and the current owner of the property. *Id.* at *1.

16 *Id.* (internal quotation marks omitted).

17 *Id.* §§ 3601–3631 (2000). *See Taliaferro*, 2005 WL 696880, at *2 & n.10.

18 *See Taliaferro*, 2005 WL 696880, at *6. The court rejected the Fair Housing Act claim for failure to file within the two-year statute of limitations. *See id.* at *6 n.18. The court also indicated that even if the plaintiffs had had standing to bring the case, it would have dismissed the suit on alternative grounds: abstention under *Younger v. Harris*, 401 U.S. 37 (1971), and lack of jurisdiction according to the *Rooker-Feldman* doctrine. *See Taliaferro*, 2005 WL 696880, at *7, *9–10 & n.23.

19 422 U.S. 490 (1975).

20 *Taliaferro*, 2005 WL 696880, at *4 (citing *Warth*, 422 U.S. at 499).

21 *Id.* at *6.

Unlike in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[22] an exclusionary zoning case in which the Supreme Court found standing, the allegations of discrimination here were insufficiently specific to demonstrate personal harm.[23] The court also noted that "none of the Plaintiffs . . . demonstrated[] how any of them would benefit" from the requested relief.[24]

Writing for a unanimous panel of the Third Circuit, Judge Rodriguez[25] reversed in part and affirmed in part. The court first noted, relying on *Warth*, that a "plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him."[26] In this case, Taliaferro and Alexander's claim that the town "made land use decisions in order to limit the effect of the African American vote" alleged only a "generalized" injury, not a "concrete, particularized loss."[27] Those two appellants did have standing, however, to proceed with claims that the variance would decrease their property values, degrade the aesthetics of the neighborhood, and increase noise and traffic in the community.[28] Because Moore and Wilson, the displaced residents, did not assert "that they were ready, willing, and able to move back to the area at this time," they failed to allege an injury sufficient to confer standing.[29] The court also wrote that none of the plaintiffs met the standing requirements as representatives of the African American community because the remedy the court could provide, an injunction preventing nonresidential use of the land, would not redress the injury they alleged, that African Americans had suffered a loss of political and voting power.[30]

By treating the facts of this case as indistinguishable from the situations that led to the *Warth* and *Arlington Heights* opinions, the

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[22] 429 U.S. 252 (1977).

[23] *See Taliaferro*, 2005 WL 696880, at *6.

[24] *Id.*

[25] Judge Rodriguez, of the United States District Court for the District of New Jersey, was sitting by designation. Judges Aldisert and Roth joined his opinion.

[26] *Taliaferro*, 458 F.3d at 189 (quoting Warth v. Seldin, 422 U.S. 490, 508 (1975)) (internal quotation marks omitted). Citing precedent from its own court that closely tracked the facts of *Arlington Heights*, the panel noted that when "potential tenants of a low-income housing project" can show that the failure to build the project causes a "particular injury," those individuals have standing. *Id.* (citing Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 130 (3d Cir. 1977)).

[27] *Id.* at 190.

[28] *Id.* State court conflicts did not bar those claims, the court held: the opinion reversed the district court's determinations that *Younger* abstention was appropriate and that the *Rooker-Feldman* doctrine barred the federal claims. *Id.* at 192–93.

[29] *Id.* at 191. Because no developer was attempting to build residences into which Moore and Wilson could desire to move, the court might not have reached a different conclusion even had they expressed an interest in returning.

[30] *Id.* The court asserted that it could not order the implementation of the renewal plan. *Id.* at 192.

Taliaferro court squandered an opportunity to give plaintiffs a legal avenue for fighting racial discrimination. Although federal courts may be hesitant to involve themselves in local-level land use policy,[31] the need for intervention is great. Thirty years after *Warth*, exclusionary zoning persists[32] and segregation is still widespread.[33] The federal judiciary could reinsert itself into disputes of this nature and provide refuge to those who bear the burdens of racial discrimination. Federal courts do hear claims about, or issue injunctions against, racially motivated decisionmaking in other arenas, notably election law. The Third Circuit could have conferred standing on Taliaferro and Alexander had it acknowledged the connection between the effects of zoning and legislative districting.

The Supreme Court's strict standing requirements for exclusionary zoning cases have effectively prevented those claims from proceeding in federal court. In 1975, in *Warth*, plaintiffs challenged a town zoning ordinance that excluded low- and moderate-income housing and thus the African Americans and Hispanics who would inhabit it.[34] Finding that zoning was not the only barrier to the complainants' ability to live in the locality, the Court deemed their personal injury insufficient to confer standing.[35] Two years later, in *Arlington Heights*, the Court granted standing in an exclusionary zoning case that arose out of a Chicago suburb's denial of a rezoning request, but the opinion rested on a narrow set of facts: the plaintiffs had alleged sufficiently specific injury only because the town's decision prevented a developer from building a residential complex for which it had acquired a lease and prepared specific plans[36] and, consequently, prevented at least one mi-

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[31] Review of zoning decisions is more complicated for federal than state courts:

> [B]ecause of their lack of plenary jurisdiction over the content of local zoning policy, [federal courts] have only limited opportunities for formulating remedies to eliminate racial discrimination in zoning practices. This perception may have hastened the Supreme Court's retreat from more active supervision of municipal zoning in the *Arlington Heights* case.

Daniel R. Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on* Arlington Heights, 55 TEX. L. REV. 1217, 1247 (1977). Although the Third Circuit provided a way for the *Taliaferro* suit to continue, a victory for the plaintiffs based on economic harm would be relatively meaningless because it would not directly address the discrimination issue on which Taliaferro and Alexander placed "primary emphasis." *Taliaferro*, 458 F.3d at 191. Even if the variance resulted in an *increase* in neighboring property values, the alleged discrimination — and similar claims in future efforts to combat discrimination — would still deserve recognition.

[32] *See* Downs, *supra* note 1, at 959–61.

[33] For a discussion of current trends in segregation by race (among other factors, including class), see Claude S. Fischer et al., *Distinguishing the Geographic Levels and Social Dimensions of U.S. Metropolitan Segregation, 1960–2000*, 41 DEMOGRAPHY 37 (2004).

[34] Warth v. Seldin, 422 U.S. 490, 496 (1975).

[35] *See id.* at 502–04.

[36] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 256–57 (1977).

nority individual from obtaining housing there.[37] These holdings significantly limited the circumstances under which federal courts could reach the merits of exclusionary zoning claims.[38] In *Taliaferro*, for example, there was no thwarted residential project and thus no developer or potential residents with standing to challenge the variance on discrimination grounds.

The Third Circuit could have avoided applying this restrictive precedent by focusing on the similarity of the *Taliaferro* plaintiffs' allegations to those in cases challenging a related action: racially motivated legislative redistricting. Despite the obvious distinctions, districting and zoning are obviously distinct in many ways, their impacts on the composition of communities (at least where zoning decisions affect residences) are closely related. Professor Richard Ford notes the parallels between drawing legislative districts and locality borders, recognizing that in both instances, the government decides who is included within — and excluded from — the lines that allocate voting power.[39] In effectively the same way, a zoning decision that impacts where voters can live determines who is within the relevant predetermined boundary. Rather than gerrymander by changing the district's external borders, a local government can gerrymander by changing the district's internal composition.

Because of the related effects of redistricting and zoning, the harms governing bodies cause by making either type of decision with racially discriminatory motives are also similar. The Supreme Court established precedent for racial gerrymandering suits in *Shaw v. Reno*,[40] (*Shaw I*) a 1993 case that held that plaintiffs objecting to North Carolina's congressional districting plan on the ground that the legislature had drawn bizarrely shaped districts based on race had stated a cognizable claim.[41] Justice O'Connor described the injury the Court recognized in *Shaw I* by explaining that a district drawn for racial reasons "reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer

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[37] *See id.* at 263–64.

[38] A dissent in *Warth* noted this implication of the decision, and commentators have since agreed. *See Warth*, 422 U.S. at 520 (Brennan, J., dissenting) ("[The majority] tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional . . . ."); *see also* Lawrence Gene Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1375 (1978) ("In *Warth*, the Court interpreted the requirement of standing to bring exclusionary zoning challenges in a fashion quite likely to preclude the federal adjudication of most significant claims of exclusion.").

[39] *See* Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365 (1997).

[40] 509 U.S. 630 (1993).

[41] *See id.* at 642.

the same candidates at the polls."[42] Subsequent racial gerrymandering cases have echoed this view.[43] This "expressive" harm stems not from a loss of political power but instead from the message the government sends by drawing lines in a racially motivated way.[44] The Court's recognition of an expressive injury is "unusual";[45] in recent decades, the Court has been reluctant to grant standing in any expansive way that would allow many potential plaintiffs to bring complaints for the same harm.[46] But *Shaw* and its progeny are prominent exceptions, and given the limited scope of the expansion proposed here — to racially motivated zoning decisions that impact residential land use for the purpose of manipulating the political district — recognizing an expressive harm in *Taliaferro* would not have cleared a path for an overwhelming number of new claims.[47]

Making this connection to racially motivated redistricting would have allowed the Third Circuit to grant standing to Taliaferro and Alexander. As in *Shaw I*, the *Taliaferro* plaintiffs argued that those controlling the composition of the constituency assumed that racial groups will share interests and opinions and vote accordingly.[48] Cases

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[42] *Id.* at 647.

[43] *See, e.g.*, Bush v. Vera, 517 U.S. 952, 980, 984 (1996) (plurality opinion) (stating that "[s]ignificant deviations from traditional districting principles . . . cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial").

[44] *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506–07 (1993); *see also* Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2285–86 (1998).

[45] Pildes & Niemi, *supra* note 44, at 507.

[46] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992) ("We have consistently held that a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy."); Allen v. Wright, 468 U.S. 737, 755 (1984) ("[The plaintiffs lack] standing to litigate their claims based on the stigmatizing injury often caused by racial discrimination. . . . Our cases make clear . . . that such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." (citation omitted) (quoting Heckler v. Mathews, 465 U.S. 728, 739–40 (1984))).

[47] It is, of course, difficult to know how many new claims this suggested theory would generate, but the requirement that the decision be motivated by political concerns would prevent just any zoning decision from falling under it. In addition, the theory does not conflict with the observation in *Shaw I* that "[t]his Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances," *Shaw I*, 509 U.S. at 642; merely taking race into account as one of several factors relevant to a decision — as occurs in the drawing of many valid districting plans and the establishment of inclusionary zoning policies — would not be sufficient to generate a claim of this nature. Nonetheless, the facts underlying a viable claim, including the type of decision at issue (whether the claim centers on, for example, a denial or grant of a rezoning, a variance, or a special-use permit) and the existing racial balance of the locality in question, need not closely track those of the probably atypical *Taliaferro* case.

[48] It may seem problematic that the plaintiffs' argument appears to be based on the same assumption, but because the complainants are private actors, the Equal Protection Clause does not apply to them. Furthermore, they sought only to disallow the Township from granting the variance, not to require it to increase the black population within its borders.

since *Shaw I* have made clear that any residents of a challenged district — such as Taliaferro and Alexander[49] — have standing to bring such a claim: they are subject to the alleged expressive harm by virtue of where they live.[50] *Shaw I* did not address the remaining standing requirements of causation and redressability, presumably because when the challenged conduct itself constitutes the injury, then by definition that conduct has caused, and its invalidation eliminates, that injury.[51] Thus the Third Circuit's concern in *Taliaferro* about providing a remedy — that barring Darby Township from granting the variance would not guarantee an increase of the black population in the locality — is not relevant under the *Shaw I* framework. The remedy granted in successful challenges to redistricting is not a particular alternative set of redrawn lines, but simply the revocation of the racially based plan.[52] Here, nullifying the grant of the variance would redress the harm.

The ability to successfully assert standing does not mean, of course, that the *Taliaferro* plaintiffs or other complainants in cases of this nature would be victorious on the merits of their claims. The requisite showing of intentional discrimination[53] remains difficult to prove.[54] Regardless of whether they would have won their suit, however, they — and others in similar situations — deserve the opportunity to fully present their grievances in court. The tools exist to make federal courts a forum for combating at least some racist land use decisions; judges need only choose to use them.

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[49] Moore and Williams, who no longer live within the borders of Darby Township, would not have standing to bring a claim of this nature.

[50] *See, e.g.*, Shaw v. Hunt (*Shaw II*), 517 U.S. 899, 904 (1996) ("Two appellants . . . live in District 12 and thus have standing to challenge that part of [the districting plan] which defines District 12."); Miller v. Johnson, 515 U.S. 900, 909 (1995) ("As residents of the challenged Eleventh District, all appellees had standing."). The Court has given serious attention to standing questions in redistricting cases only when residents of districts adjacent to those designed based on race have attempted to bring suit. *See* Sinkfield v. Kelley, 531 U.S. 28 (2000) (denying standing to residents of an Alabama district adjacent to the majority-minority district that allegedly violated equal protection); United States v. Hays, 515 U.S. 737 (1995) (same, in Louisiana).

[51] Cases that followed *Shaw I* similarly implicitly assumed that standing hinged on injury and did not discuss causation or redressability. *See, e.g.*, *Shaw II*, 517 U.S. 899; *Miller*, 515 U.S. 900.

[52] *See, e.g.*, Johnson v. Miller, 922 F. Supp. 1552, 1556 (S.D. Ga. 1995).

[53] The Supreme Court reiterated in *Arlington Heights* that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). The burden is particularly high in districting cases: plaintiffs must show "that race was *the predominant factor* motivating the legislature's decision." *Miller*, 515 U.S. at 916 (emphasis added).

[54] The *Taliaferro* plaintiffs, for example, believed they had evidence sufficient to prove intent, including a decades-long pattern of zoning decisions that permitted nonresidential land uses only in the African American section of the highly segregated town. Telephone interview with Robert J. Sugarman, Sugarman and Assocs., P.C., counsel for plaintiffs-appellants (Oct. 19, 2006).