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A QUICK KNOCKOUT: SHERIFF JOE ARPAIO'S LAWSUIT AGAINST PRESIDENT OBAMA'S EXECUTIVE ACTION DISMISSED FOR LACK OF STANDING

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By David A. Isaacson

On November 20, 2013, the very same day that President Obama announced a series of executive actions aimed at "Fixing Our Broken Immigration System", a lawsuit against the newly announced executive actions and against the existing Deferred Action for Childhood Arrivals program (DACA) was filed by Maricopa County Sheriff Joe Arpaio. Sheriff Arpaio's name may be familiar to readers of this blog: among other lowlights of a long and controversial career, he has been found by the Justice Department to have engaged in "unconstitutional policing" targeting Latinos, and was similarly found by a federal judge in the private class-action lawsuit *Ortega Melendres v. Arpaio* to have engaged in unconstitutional racial profiling. Barely a month after Sheriff Arpaio's lawsuit was filed, on December 23, 2013, the *Arpaio v. Obama* lawsuit was dismissed by a Memorandum Opinion and Order issued by Judge Beryl A. Howell of the U.S. District Court for the District of Columbia.

In his lawsuit, Sheriff Arpaio sought to challenge DACA as originally implemented, DACA as revised by the November 20 announcement, and the new Deferred Action for Parental Accountability program that will provide deferred action similar to DACA to some parents of U.S. citizens and Lawful Permanent Residents. Judge Howell's Memorandum Opinion found that Sheriff Arpaio lacked standing to sue regarding any of these programs, for a number of reasons.

As Judge Howell explained in her Memorandum Opinion, the Supreme Court has held that the power of federal courts under Article III of the U.S. Constitution to hear "Cases" and "Controversies" is restricted to instances in which the plaintiff meets certain requirements of standing to sue.

> *The Supreme Court has explained, "the irreducible constitutional minimum of standing contains three elements." Defenders of Wildlife, 504 U.S. 560 . First, the plaintiff must have suffered an "injury in fact," i.e., "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Id. (citations and internal quotation marks omitted). Second, there must be "a causal connection between the injury and the conduct complained of," i.e., the injury alleged must be fairly traceable to the challenged action of the defendant. Id. Finally, it must be "likely" that the complained-of injury will be "redressed by a favorable decision" of the court. Id. at 561. In short, "he plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014).*

Arpaio v. Obama, No. 14-01966 (D.D.C. Dec. 23, 2014), slip op. at 15-16.

Sheriff Arpaio, Judge Howell found, failed to satisfy all three of these requirements. First of all, he had not properly alleged any injury in fact to him resulting from the challenged deferred action programs. To the extent that he sued in his personal capacity, and claimed only the interest of every citizen in governmental compliance with the law, Sheriff Arpaio was asserting a generalized grievance of the sort that the Supreme Court has consistently held not to confer standing. His assertion of past threats against him by undocumented immigrants was not a basis for standing because those threats, besides being in the past, were not traceable to the challenged deferred action programs and would not be redressed by any action the court might take against those programs. As for Sheriff Arpaio's claims in his official capacity as Sheriff of Maricopa County, the injuries he asserted there as well, having to do with alleged increases in workload, were generalized to the point of not being cognizable, and extremely speculative to boot: he alleged that the deferred action programs would attract new undocumented immigrants into Maricopa County, and yet the programs by their own terms applied only to those who had already been present in the United States prior to January 1, 2010.

Nor did Sheriff Arpaio's complaint demonstrate causation and redressability, the other key requirements of standing. As Judge Howell's Memorandum Opinion

explained, "it is the actions taken by undocumented immigrants—migrating to Maricopa County and committing crimes once there—that are purportedly the direct cause of the plaintiff's injury." *Arpaio v. Obama* slip op. at 22. But those actions would not be authorized by the challenged government programs. Indeed, by enabling federal authorities to focus their resources on actual criminals, the challenged deferred action programs might help rather than harm Maricopa County:

> *In the present case, the challenged agency action—the ability to exercise enforcement discretion to permit deferred action relating to certain undocumented immigrants—does not authorize the conduct about which the plaintiff complains. The challenged deferred action programs authorize immigration officials to exercise discretion on removal; they do not authorize new immigration into the United States (let alone Maricopa County); they do not authorize undocumented immigrants to commit crimes; and they do not provide permanent status to any undocumented immigrants eligible to apply for deferred action under any of the challenged programs. Contrary to the plaintiff's assertion that a consequence of the challenged programs will be an increase in illegal conduct by undocumented immigrants and an increase in costs to the Maricopa County Sheriff's office, these programs may have the opposite effect. The deferred action programs are designed to incorporate DHS's enforcement priorities and better focus federal enforcement on removing undocumented immigrants committing felonies and serious misdemeanor crimes. Since the undocumented immigrants engaging in criminal activity are the cause of the injuries complained about by the plaintiff, the more focused federal effort to remove these individuals may end up helping, rather than exacerbating the harm to, the plaintiff.*

Arpaio v. Obama slip op. at 24. Sheriff Arpaio, the court found, had "submitted no evidence showing that the challenged deferred action programs are, or will be, the cause of the crime harming the plaintiff or the increase in immigration, much less "substantial evidence."" *Id*. at 25.

Moreover, given the limited resources available to the executive branch for removal of noncitizens from the United States, Sheriff Arpaio also could not establish that his alleged injuries would be redressed by the relief he requested,

an injunction against the challenged deferred action programs. Such an injunction, after all,

> *w not grant additional resources to the executive branch allowing it to remove additional undocumented immigrants or to prevent undocumented immigrants from arriving. Thus, the plaintiff's complaint regarding the large number of undocumented immigrants and the limited number of removals w not change as a result of any order by the Court in this litigation.*

Arpaio v. Obama slip op. at 28.

Given Sheriff Arpaio's lack of standing to bring the suit, Judge Howell found herself compelled to dismiss the suit for lack of jurisdiction. She did, however, go on to detail, in the course of addressing Sheriff Arpaio's request for a preliminary injunction, some of the other obstacles that his lawsuit faced as well. Among those obstacles were the fact that "the challenged deferred action programs continue a longstanding practice of enforcement discretion regarding the Nation's immigration laws," that they "still retain provisions for meaningful case-by-case review," and that they "merely provide guidance to immigration officials in the exercise of their official duties." *Arpaio v. Obama slip op*. at 31-32. For all of these reasons, and given the absence of irreparable harm to Sheriff Arpaio and the public interest weighing against a preliminary injunction Judge, Judge Howell denied the motion for a preliminary injunction and dismissed the suit.

For any readers who may be disturbed that a case of this nature would be dismissed before entirely reaching the merits, it is worth noting that the requirements of standing have played an important role in other controversial areas of law as well. It was these requirements that led the Supreme Court to rule in *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013), that proponents of a California initiative prohibiting the marriage of same-sex couples did not have standing to appeal a decision striking down the statute enacted by that initiative where the governor and Attorney General of California did not appeal. It was also those same standing requirements that led the Supreme Court to order dismissal of a lawsuit by environmentalists seeking to overturn an administrative rule that limited application of the Endangered Species Act in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Whatever one thinks of modern standing doctrine, it has clearly gored the proverbial oxen of plaintiffs of all ideological persuasions, immunizing government actions across the political spectrum from judicial review

at the behest of bystanders without a sufficient concrete stake in a particular matter.

Sheriff Arpaio's lawsuit against the President's executive actions may not be the last to founder for lack of standing. As explained in a recent post on this blog by Gary Endelman and Cyrus D. Mehta, even the lawsuit filed in December 2013 by a group of states led by Texas to challenge President Obama's immigration initiatives is likely to fail for lack of standing. The United States' Memorandum in Opposition to the states' request for a preliminary injunction in that litigation also sets out in great detail why standing is lacking there. The states' lawsuit, like Sheriff Arpaio's, is also deeply problematic on the merits, for the reasons explained in that same blog post and in the United States' Memorandum in Opposition. For both reasons, the Texas lawsuit may soon meet the same fate as Sheriff Arpaio's.