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US IMMIGRATION & NATIONALITY LAW

# EQUATING IMMIGRANTS TO GREENHOUSE GASES: IS THIS A VALID BASIS FOR STANDING TO SUE THE FEDERAL GOVERNMENT?

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It has lately become fashionable for states that oppose President Obama's immigration executive actions to sue in federal court on grounds that they are unconstitutional. But in order to get heard in court, a state must demonstrate standing.

In the *Texas v. United States* litigation challenging President Obama's November 2014 Deferred Action for Parent Accountability Program (DAPA) and expanded Deferred Action for Childhood Arrival (DACA) programs, plaintiff states led by Texas successfully invoked standing by equating immigrants to noxious air pollutants that cause greenhouse gases. While greenhouse gases can only cause harm, immigrants, legal or not, are more likely to confer benefits than harm. Is it appropriate for a judge to give standing to a state opposing federal immigration policy based on the sort of harm that pollutants would cause it?

Parties seeking to resolve disputes in federal court must present actual "Cases" or "Controversies" under Article III of the US Constitution. Plaintiffs must demonstrate that they have standing in order to satisfy Article III. They must establish three elements set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) that there is 1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision.

In *Texas v. United States*, the states attempted to show harm through the influx of immigrants who will remain in the United States through deferrals of their removals and thus burden them. The basis for linking the harm caused by immigrants to noxious pollutants stems from the seminal Supreme Court

decision in *Massachusetts v. EPA* in which plaintiffs requested the Environmental Protection Agency to regulate greenhouse gas emissions from motor vehicles under section 202 of the Clean Air Act. After EPA refused to do so, plaintiffs, which included Massachusetts, sought review of the EPA's refusal in the Supreme Court to regulate greenhouse gases. Massachusetts successfully sought standing under *Lujan* by showing that global warming caused by greenhouse gas emissions was so widespread that the failure of the EPA to regulate them would cause the state environmental damage such as coastal flooding of its shores. Justice Steven delivered the opinion of the Court by beginning with this broad pronouncement on global warming:

*A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species—the most important species—of a "greenhouse gas."*

Later, in showing how Massachusetts as a landowner would suffer injury even though global warming was widespread, Justice Stevens stated:

*That these climate-change risks are "widely shared" does not minimize Massachusetts' interest in the outcome of this litigation. . According to petitioners' unchallenged affidavits, global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming. MacCracken Decl. 5(c), Stdg.App. 208. These rising seas have already begun to swallow Massachusetts' coastal land. Id., at 196 (declaration of Paul H. Kirshen 5), 216 (MacCracken Decl. 23). Because the Commonwealth "owns a substantial portion of the state's coastal property," id., at 171 (declaration of Karst R. Hoogeboom 4), it has alleged a particularized injury in its capacity as a landowner. The severity of that injury will only increase over the course of the next century: If sea levels continue to rise as predicted, one Massachusetts official believes that a significant fraction of coastal property will be "either permanently lost through inundation or temporarily lost through periodic storm surge and flooding events." Id., 6, at 172.. Remediation costs alone, petitioners allege, could run well into the hundreds of millions of dollars. Id., 7, at 172; see also Kirshen Decl. 12, at 198.*

While it is undeniable that greenhouse gases can cause only harm, should this case be applicable when a state uses it to invoke standing to challenge federal

immigration policy? Texas, the lead plaintiff in *Texas v. United States*, argued that the President's executive actions would cause a significant economic burden as deferring removal of certain classes of non-citizens would allow them to apply for drivers licenses, which in turn would cost the state several million dollars. Texas relied on this trifling economic burden as the injury that would give it standing, which Judge Hanen accepted among other standing legal theories. After providing standing, Judge Hanen temporarily blocked the executive actions, and a trenchant criticism of his reasoning in doing so can be found here. Judge Hanen elaborated at great length in equating the harm that Massachusetts would suffer through global warming with the harm that Texas would suffer as a result of "500,000 illegal aliens that enter the United States each year." Judge Hanen went on to further expound his views on the harms caused by illegal immigration, as follows:

*The federal government is unable or unwilling to police the border more thoroughly or apprehend those illegal aliens residing within the United States; thus it is unsurprising that, according to prevailing estimates, there are somewhere between 11,000,000 and 12,000,000 illegal aliens currently living in the country, many of whom burden the limited resources in each state to one extent or another. Indeed, in many instances, the Government intentionally allows known illegal aliens to enter and remain in the country.*

While emphasizing the alleged harms that undocumented immigration would cause to the states, Judge Hanen gave short shrift to the well-reasoned amicus brief of 12 states demonstrating the overwhelming benefits that DAPA and DACA would confer to the states. Amici argued that the recipients of a prior DACA program in 2012, which was not challenged in the litigation, caused 60% of the recipients to find new jobs and that wages increased by over 240%. Allowing immigrants to work legally and increase their wages substantially increases the state tax base. The granting of deferred action also provides many social benefits, amici argued, as it allows parents to support US citizen children, thus reducing the cost of state social service benefits and it also allows families to remain united. According to the amicus brief, "When fit parents are deported, it can be difficult for the State to find the parents and reunite them with their children. The existence of fit parents – even if they have been deported – can also prevent the State from seeking alternative placement options for a child, such as a guardianship or adoption by another family member or third party.. Deferred deportation allows families to remain

together, even if only temporarily."The government appealed Judge Hanen's preliminary injunction to the Fifth Circuit Court of Appeals. In a hearing before a panel in the Fifth Circuit to lift the block while the government's appeal was pending, *Massachusetts v. EPA* was again discussed, as presented in David Isaacson's summary:

*Continuing with the standing discussion, Judge Smith directed AAG Mizer to the Supreme Court's decision in Massachusetts v. EPA, 549 U.S. 497 (2007), which he considered to be a key case on the standing issue. Mizer responded, first, that there isn't a territorial effect in this case as in Massachusetts, where the state's territory was being affected (by rising sea levels resulting from global warming). Also, the specific statute in Massachusetts v. EPA gave a specific right to sue, while the INA, Mizer argued, "is not enacted to protect the states".*

The success of the legal challenges to President Obama's executive actions hinges on whether courts will give plaintiffs standing or not. In *Crane v. Johnson*, the Fifth Circuit upheld the lower court's finding that Mississippi, a plaintiff, did not have standing as its claim to fiscal injury arising out of deferral under the DACA 2012 program was speculative. More recently, a three judge panel in the D.C. Circuit was skeptical of Arizona sheriff Joe Arpaio's challenge against DAPA and expanded DACA based on standing. While they were skeptical that the deferred action programs will result in more immigrants being detained in Maricopa County jails, one George W. Bush appointee judge again cited Massachusetts' standing to sue to prevent environmental harm from greenhouse gases by asking why "at least at the state level, isn't concern about public safety and crime and that sort of things costs and crime should not be at least equal to the sovereignty concern to the sea level rise taking a few inches of shoreline."

Although the government has argued in its appeal brief that the Clean Air Act gave a state such as Massachusetts the right to sue while the INA does not in the context of deferred action and prosecutorial discretion, a broader and more compelling argument can be made against invoking *Massachusetts v. EPA*in immigration litigation. Analogizing the ability of certain classes of immigrants to temporarily remain in the United States to greenhouse gases is both specious and offensive. It is well recognized that greenhouse gases only cause harm, and thus a state impacted by them can readily demonstrate injury in order to seek standing to sue the federal government. Immigrants, unlike greenhouse gases, bring great benefits to the United States. Any manufactured

claim of harm by a state, like what Texas has claimed with the so called economic burden caused by issuing driver's license, is far outweighed by the benefits that immigrants bring to this country. Apart from all the benefits that were discussed by the states opposing the legal challenge, even a second grader can figure out that handing out licenses to people who otherwise could not get it before deferral ensures that many more will drive safely in the state of Texas.

One would also not use this analogy in other contexts as it is highly offensive to link human beings to greenhouse gases. Imagine if a state were to challenge a federal policy of providing federal benefits to same-sex married couples whose marriages are valid where celebrated but not in the state of their residence, on the basis that this policy led more same-sex married couples and their families to reside in that state and thus overburden its schools and public hospitals. If the state invoked *Massachusetts v. EPA*, it would be viewed as highly offensive and also not a very strong argument. Plaintiffs seem to be getting away for the time being in linking immigrants to noxious pollutants, and it is hoped that some judge will strike down this odious analogy so that it is no longer invoked in immigration litigation.