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Interest Groups' General Grievances with Deregulation Order Held Insufficient for Article III Standing

by Daniel E. Jones

Advocacy organizations on all sides of the political spectrum routinely file lawsuits in federal court challenging regulations or executive orders with which they disagree. Opening the federal courthouse doors requires more than disagreement with the challenged law or policy, however; a litigant must satisfy Article III's requirements for standing to sue in federal court. The U.S. District Court for the District of Columbia recently issued a welcome reminder of this bedrock constitutional principle, dismissing a lawsuit filed by Public Citizen and two other organizations challenging Executive Order 13771 and related guidance documents.[1] The Order requires, among other things, that agencies eliminate two regulations for every one that an agency proposes. The court did not comment on the wisdom of the Order or the guidance documents as a policy matter, and neither does this Legal Opinion Letter. But the court rightly reasoned that plaintiffs' policy grievances could not stand in for the requirements of Article III.

The U.S. Supreme Court has repeatedly admonished that "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)(quotation marks omitted). The "irreducible constitutional minimum of standing consists of three elements: ... The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). And the Supreme Court made it clear decades ago that "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy," because those are not "permissible substitute[s]" for the constitutionally-required showing of concrete harm caused by the challenged conduct of the defendant. *Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 (1982).

The plaintiffs in this case alleged both "associational standing," or that their members or those individuals that they purport to represent had been harmed by the challenged Order;[2] and "organizational standing," or that they satisfied the requirements for standing in their own right.

On associational standing, the plaintiffs failed to meet the requirement that they identify at least one member of the association that has standing to sue in her own right. The court carefully considered each of plaintiffs' theories and explained why they failed to satisfy the injury-in-fact standard. To begin with, for several of the putative regulatory actions plaintiffs identified, they "made no effort" to "identify at least one *specific* member who has suffered, or is likely to suffer, an injury in fact." Rather, plaintiffs' theory was that the consequences of the actions were so sweeping that it was likely that at least one of their (unidentified) members suffered an injury in fact. But, under D.C. Circuit precedent, this type of speculative assumption is not a permissible alternative to "'firmly establish[ing]'" the identity of the party that the plaintiff claims satisfies the requirements of Article III.

[1] *Public Citizen, Inc. v. Trump*, --- F. Supp. 3d ----, 2018 WL 1129663 (D.D.C. Feb. 26, 2018). The plaintiffs have since amended their complaint in an effort to cure the jurisdictional defects; this paper discusses only the allegations at the time of the court's opinion.
[2] *See generally Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)(setting forth test for associational standing).

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Similarly speculative was plaintiffs' assertion that their members would be harmed by agencies' decisions to forgo potential regulatory actions or repeal existing regulations. Plaintiffs' predictions about future regulatory developments were "too abstract and too speculative," and, in any event, plaintiffs had "abandoned their contention that their members will be injured by the repeal of beneficial regulations" by failing to defend that contention in their briefing.

Plaintiffs' main contention was that the Order had already delayed and will continue to delay the issuance of new regulatory actions, and they identified eight examples that they claimed had been or will be delayed due to the Order. But here too plaintiffs failed to satisfy Article III's injury-in-fact requirement. Plaintiffs acknowledged that their members had not yet suffered any concrete harm and were not certain to suffer harm in the future, but they alleged that their members were nonetheless placed at increased risk of future harm. While increased risks of harm can in some instances satisfy the injury-in-fact requirement, the standard is "not easily met." Rather, "[t]o satisfy this test, Plaintiffs must aver facts or proffer evidence sufficient to show both a "*substantially* increased risk of harm" and a "*substantial* probability of harm with that increase taken into account." And the test is especially hard to meet when the increased risk of harm "depend[s] on the government's regulation of someone else," given the extended causal chain required to connect the challenged governmental action with future injury to the plaintiff or its members.

Plaintiffs had plausibly alleged a delay in six of the eight regulatory actions they identified that was caused by the Order, but they "devote[d] scant attention to the core of the injury-in-fact requirement: actual or imminent harm." After explaining why plaintiffs' allegations surrounding each of those six regulatory actions were insufficient, the court summarized by noting the "ramifications" of accepting plaintiffs' overbroad approach to future harm—including that doing so "would drain the 'actual or imminent' requirement of meaning."

Having rejected each of plaintiffs' associational standing theories, the court shifted to plaintiffs' organizational standing allegations. Plaintiffs contended that the Order "caused them harm because it chills their advocacy activities," forcing them to choose between "'advocating for new regulations at the potential loss of other beneficial regulations, and refraining from advocating for necessary new public protections.'"

Plaintiffs' theory flunked both the first and second prongs of the Article III standard. Merely being "forced to consider" the Order "before engaging in advocacy does not constitute a cognizable injury in fact." The court noted but did not decide whether alleged impairment of an organization's issue advocacy can ever, without more, give rise to an Article III injury. (The better view is that it cannot, because an organization's internal advocacy decisions are a policy choice, not an economic loss or any other kind of concrete harm, and cannot be caused by the defendants' conduct.) Even assuming that it could, the problem for plaintiffs was that they had not actually alleged that "any of them have, in fact declined—or are imminently likely to decline—to advocate for a new rule out of fear" of the Order.

Finally, plaintiffs could not show causation either: the Supreme Court's decision in *Clapper v. Amnesty International USA* makes clear that plaintiffs cannot manufacture standing by "inflicting harm on themselves based on their fears of hypothetical future harm." 568 U.S. 398, 416 (2013). And plaintiffs' theory of causation "tracks the theory that the Supreme Court rejected in *Clapper*;" they claim that they had made internal advocacy decisions based on the "uncertain" possibility that the relevant agency would agree with the proposed regulatory action and then potentially repeal unspecified rules in response, thereby causing harm to the plaintiffs or their members.

In short, whatever the merits of plaintiffs' challenges to the Order, the court was appropriately vigilant in confronting plaintiffs' expansive theories of standing, which, if accepted, would have turned Article III's standing requirements into empty formalities rather than meaningful constitutional limitations on federal judicial power.

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