In a Threat to State Priorities, a Broadside Against Standing

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A PAIR of cases are pending in the Supreme Court that may stretch or upend standing and administrative law doctrine, with dramatic impacts on environmental protection. The cases were brought by states against the United States. Individually or in groups, states are regular litigants in cases challenging environmental policies at the national level, but in both of these the United States argues that the states do not have standing.

The traditional standing rule is that in order to bring a lawsuit, the plaintiff, including state plaintiffs, must show an "actual or imminent" injury that can be traced to the defendant's actions and which can be redressed by the court. Indirect injuries can satisfy this standard as long as they are concrete and particularized. The point is to make sure that there is a real case or controversy for the court to resolve.

First up is *United States v. Texas.* In their suit, Texas and Louisiana argue that a Biden administration immigration enforcement policy is illegal. The states claim they have standing to challenge the policy because it will lead them to spend more on criminal enforcement and other state services.

Is the federal government moving to a policy of "special hostility" to states?

In response, the United States argues that the states need to show that they are incurring a direct injury, and that an indirect or incidental effect on a state's "expenditures, revenues, and other activities" is not enough. The department explains in the brief that "almost every federal policy will indirectly affect the states themselves" and that a contrary standing rule will "inundate" federal courts—as demonstrated by the many Texas-led challenges that have been filed against Biden-era policies, and California- and Washington state-led challenges filed against Trump-era policies.

The federal government's argument elicited some surprise from the justices as the case was heard. When the United States conceded that its argument would limit states more than non-state plaintiffs, Justice Alito brought up the Court's decision in *Massachusetts v. EPA*. In that case, the Court held that the state had shown that the federal government's "steadfast refusal to regulate greenhouse gas emissions" presented an actual and imminent risk to the state, as "rising seas have already begun to swallow Massachusetts' coastal land." In addition, the state was entitled to "special solicitude" in the standing analysis because it has quasi-sovereign interests to protect. Rather than solicitude, Alito asked the federal government in the *Texas* case if it was proposing a rule of "special hostility" instead.

In the second case, *Biden v. Nebraska,* a coalition of states led by Nebraska challenges the federal government's decision to provide debt relief to student-loan borrowers who are continuing to suffer the effects of the COVID pandemic. The states argue that they have standing, among other reasons, because the timing of the loan discharge means that they will not be able to treat it as taxable income under state law. The United States again argues that the "incidental" effects of the federal policy cannot provide a basis for standing—and that if they did, then "every state would have standing to challenge almost any federal policy." The *Nebraska* case was set for argument in February.

Before these two cases, there had not been a major standing decision in some time—and there certainly have not been many pertaining to state standing. In December 2020, the Supreme Court decided *Trump v. New York,* holding that the coalition of state plaintiffs had not shown it had standing to challenge the Trump administration's plan to keep undocumented people out of the census. The Court found that the challenge was premature because there were too many contingencies with how the Trump administration would carry out its plan. But that case did not get anywhere near what the federal government now seems to want to do in *Texas* and *Nebraska*.

There is another lurking issue in the *Texas* case, which may also affect the many environmental cases that are brought under the Administrative Procedure Act. This statute states, "The reviewing court shall . . . hold unlawful and set aside" an agency action upon finding that the agency violated the APA. Courts have routinely understood that "set aside" language as authorizing them to vacate agency actions when those actions run afoul of the statute—and courts have vacated many environmental rules promulgated in recent years. But the United States in *Texas* is now arguing that the act only allows a court to decide whether a particular agency action or rule is legal as to the parties in the case—and that it could still enforce the rule against other people.

Even if the plaintiffs' arguments in *Texas* and *Nebraska* fail for other reasons, the United States' position in these cases is something to watch.