Sixth Circuit Confirms Doctors' Association Suit Cannot Survive Standing Ailments

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In early September, the Sixth Circuit issued a published opinion—*Association of American Physicians & Surgeons v. United States Food and Drug Administration*, 13 F.4th 531 (6th Cir. 2021)—that takes aim at the lurking issues related to associational standing and the propriety of nationwide injunctions in light of recent Supreme Court opinions that address those issues more broadly.

The Association challenged an FDA authorization curtailing the distribution of hydroxychloroquine from the federal stockpile, which limited prescribing the drug only to a specific subset of patients hospitalized with Covid-19. The Association argued the harm suffered was that the authorization (1) required it to consider cancelling a conference, (2) prevented its members from prescribing the drug, and (3) precluded its members' patients from receiving the benefits of taking the drug as a preemptive treatment for Covid-19.

Suffering a harm is one component of standing, a broad concept that must exist before a party has the ability to sue in federal court. This is because Article III of the U.S. Constitution limits a court's power to deciding only "Cases" or "Controversies" between litigants. To have a "case," a plaintiff must (1) have suffered an injury (2) that was likely caused by the defendant's conduct, and (3) for which relief can be fashioned to redress that injury.

That first component—injury—is what the court discussed first. Because the Association abandoned its argument that considering cancelling a conference was injury, it was left to argue the injury it suffered was not its own, but that of its members and its members' patients. The Association maintained that it could continue pursuing the lawsuit on those theories of injury based on two related concepts: associational standing and third-party standing.

Associational standing "sometimes permits an entity to sue over injuries suffered by its members" despite the organization itself alleging "no personal injury." To do so, an organization must show that: (1) its members would have standing to sue "in their own right," (2) the "interests that the suit seeks to protect are germane to the organizations purpose"; and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." The Sixth Circuit opined that because the Supreme Court has yet to "reconcile" this test for associational standing "with its more recent guidance" on standing more generally, associational standing is on shaky legal ground.

First, the court attempted to reconcile associational standing with the irreducible fact that the Supreme Court has not clearly authorized an organization that suffered no injury to sue on behalf of its members, some of whom may have an injury. Instead, the Sixth Circuit was skeptical that the progeny of the associational standing doctrine is truly rooted in any "historical practice," and that recent decision have overturned any notion that prior precedent permits suing in this way.

Second, the Sixth Circuit posited that a court's limited ability to provide redress to remedy a specific injury does not comport with associational standing. This is because "standing requires a plaintiff's requested relief to redress the plaintiff's injury." The court summarized that issue with a hypothetical in context: "How can any relief in this case satisfy this element if the Association has not been injured by the FDA's authorization and if its allegedly injured members are not parties?" One possibility where relief can satisfy this element, the Supreme Court has said, is where an organization requests an injunction.

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This strikes at the core of another issue percolating in the federal courts—the propriety of the nationwide injunction. Some courts, including some members of the Sixth Circuit, have been skeptical of nationwide injunctions, particularly because under Article III a "valid … remedy must operate with respect to specific parties, not with respect to a law or regulation in the abstract." This "creates an inherent mismatch between the plaintiff and the remedy" in the associational standing context. Put differently, an injunction that prohibits the FDA from enforcing the authorization against the Association "does not satisfy Article III because will not redress an injury" *because the Association itself suffered no injury*. Its members have. And those members were not plaintiffs.

Consider the alternative. The Association is able to get an injunction preventing enforcement of the authorization. This creates a host of other issues that the Sixth Circuit identified. To whom does the injunction apply? Just the Association's members who suffered an injury, or does it extend to all members wherever they may be, regardless of whether they were impacted or even aware of the authorization. Does it extend to members in the future, or just those who were members at the time of the suit? Issues abound.

Third, even setting these thorny concerns aside, the court also took aim at how to determine whether an organization's purpose could be "germane" enough to confer standing to sue. Thissecond prong of associational standing often requires courts to determine if the organization suing has the "adversarial vigor" to "litigate the legal issues well." The court theorized, "If Article III otherwise permits associations to seek redress for their members' injuries, what legal source gives a court the power to decline jurisdiction on the ground that an association lacks sufficient 'vigor'?" Likely, there is no such source.

Nevertheless, the Sixth Circuit noted it was required to "stick to" precedent, "even if the logic from other cases has called that precedent into doubt." To that end, the court undertook the associational standing analysis and determined the Association did not have standing because its members did not adequately allege standing in their own right. It was not plausible that any member had suffered an injury, the court said, because there was no allegation that any member suffered a direct harm because of the authorization. No member was sanctioned or disciplined for prescribing hydroxychloroquine. None received a threat of discipline from a state medical board. That is, the Association's members lacked standing because what they feared was that a mere "possibility" of injury might "arise in the future," which is insufficient under Article III.

Turning last to third-party standing—that the Association's members' patients suffered harm because they could not take hydroxychloroquine—the court disposed of that issue in short order. It stated that it "need not decide . . . whether we could have allowed this double 'stacking' of the standing exceptions" because the complaint failed to allege any of the Association's members "had Article III standing" on their own. The notion of, and implied disdain for, "double staking" of standing poses an additional set of problems that could have spanned many more pages.

While arguably dicta—as Judge Siler noted, and somewhat esoteric in terms of the legal issues of Article III, standing, and injury—the opinion is just one that calls into question some long-standing legal doctrines. Other recent examples that come to mind are the various property owner and landlord associations that sued to enjoin the CDC's eviction moratorium.

The Sixth Circuit's opinion hones in on several legal issues that the Supreme Court intimated it might soon face, including the propriety of nationwide injunctions. How these questions are ultimately resolved remains to be seen. The scope of what the justices take up may have wide-ranging results for standing doctrine more broadly and provide new alternatives for the government or private defendants to defend against suits from organizations that sue on behalf of their membership.