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U.S. COURT OF APPEALS

State of California v. Little Sisters of the Poor, No. 18-15144+

Kleinfeld, Senior Circuit Judge, dissenting:

I respectfully dissent. The plaintiff state governments lack standing, so the district court lacked jurisdiction. The reason they lack standing is that their injury is what the Supreme Court calls "self-inflicted," because it arises solely from their legislative decisions to pay these moneys. Under the Supreme Court's decision in Pennsylvania v. New Jersey,[1] we are compelled to reverse.

Pennsylvania sued New Jersey on the theory that a new New Jersey tax law caused the Pennsylvania fisc to collect less money.[2] Pennsylvania granted a tax credit for income taxes paid to other states, and New Jersey under its new tax law had begun taxing the New Jersey-derived income of nonresidents.[3] Maine, Massachusetts, and Vermont sued New Hampshire on similar grounds.[4] The concrete financial injury was plain in all these cases. Like the plaintiff states'

[1] 426 U.S. 660 (1976) (per curiam).

[2] Id. at 662.

[3] Id. at 663.

[4] Id.

injury in the case before us, the reason why was the plaintiff states' laws.[5]

The Court in Pennsylvania invoked the long established principle that under Massachusetts v. Missouri,[6] the injuries for which redress was sought had to be "directly caused" by the defendant states.[7] They were held not to be "directly caused" so in Pennsylvania because the monetary losses resulted from the plaintiff states' own laws.[8] Though it was undisputed that the defendant states' tax schemes had cost the plaintiff states money, the defendant states were held not to have "inflicted any injury,"[9] because the monetary harms were "self-inflicted:"[10]

> The injuries to the plaintiffs' fiscs were self-inflicted, resulting from decisions made by their respective state legislatures. Nothing required Maine, Massachusetts, and Vermont to extend a tax credit to their residents for income taxes paid to New Hampshire, and nothing prevents Pennsylvania from withdrawing that credit for taxes paid to New Jersey. No state can be heard to complain about damage

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[5] Id.

[6] 308 U.S. 1, 15 (1939).

[7] Pennsylvania, 426 U.S. at 664.

[8] Id.

[9] Id.

[10] Id.

inflicted by its own hand.[11]

California and the other plaintiff states in the case before us have pointed out that their legislative schemes were in place before the federal regulatory change that will cost them money. But Pennsylvania does not leave room for such a "first in time, first in right" argument. Vermont's law, for instance, long preceded New Hampshire's, but the court held that any "injury" was "self-inflicted" because Vermont need not have extended tax credits to its residents at all.[12] The states could also have prevented their financial injury by changing their laws.[13] As the concurring opinion put it, "[t]he appellants therefore, [we]re really complaining about their own statute[s]."[14]

Pennsylvania differs from the case before us because the dispute was between coequal sovereigns in Pennsylvania, heard under the Court's original jurisdiction, and here it is between state governments and the federal government.

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[11] Id.

[12] Id.; see 32 V.S.A. § 5825 (1966); N.H. R.S.A. § 77-B:2 (1970).

[13] Pennsylvania, 426 U.S. at 664.

[14] Id. at 667.

But Pennsylvania's rejection of "self-inflicted" injury has been applied outside the original jurisdiction context.[15] There is no conflict between the federal and state laws, so the sovereign rights of the plaintiff states cannot establish standing.[16] Though the plaintiff states may under their own laws spend additional money to provide benefits to some women that they would not have had to pay for before the federal change, they remain free to decide whether to do so.

As the majority acknowledges, the "irreducible minimum" for standing is that "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."[17] All three minima are perhaps debatable, but

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[15] See Clapper v. Amnesty Intern. USA, 568 U.S. 398, 416 (2013).

[16] Sturgeon v. Masica, 768 F.3d 1066, 1074 (9th Cir. 2014), vacated and remanded sub nom. Sturgeon v. Frost, 136 S. Ct. 1061 (2016) (rejecting "standing based simply on purported violations of a state's sovereign rights" and requiring "evidence of actual injury" where state failed to "identify any actual conflict between [federal agency regulations] and its own statutes and regulations"); Sturgeon v. Frost, 872 F.3d 927, 929 (9th Cir. 2017), cert. granted, 138 S. Ct. 2648 (2018) (explaining prior holding as to state standing was "unaffected by the Supreme Court's vacatur of [the] prior opinion"); Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253, 270 (4th Cir. 2011) (holding state lacked standing where it failed to identify enforcement of state statute that "conflict[ed]" with the individual mandate of the ACA).

[17] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016), as revised (May 24, 2016).

causation, that is, "traceability," is controlled by Pennsylvania. That case establishes that harm to the fisc of a plaintiff state because of its own statute is "self-inflicted," and therefore not "traceable to the challenged conduct of the defendant."[18] Traceability fails if the expense to the state results from its own law and without that state legislative choice, could be avoided. The federal regulatory change itself imposes no obligation on the states to provide money for contraception. The plaintiff states choose to provide some contraception benefits to employees of employers exempted by the federal insurance requirement, so the narrowing of the federal mandate may lead to the states spending more because some employers may spend less. Nor can the plaintiff states invoke the doctrine of parens patriae to gain standing.[19]

I recognize that the Fifth Circuit took a different view in different

[18] Pennsylvania, 426 U.S. at 664; Spokeo, 136 S. Ct. at 1547.

[19] See Massachusetts v. EPA, 549 U.S. 497, 520 n.17 (2007) (explaining that state actions against the federal government "to protect [its] residents from the operation of federal statutes" are precluded); Sierra Forest Legacy v. Sherman, 646 F.3d 1161, 1178 (9th Cir. 2011) ("California, like all states, 'does not have standing as parens patriae to bring an action against the Federal Government.'" (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 610 n.16 (1982))).

circumstances in Texas v. United States.[20] There, the Fifth Circuit held that states did indeed have standing to challenge a new federal program relating to immigration.[21] Texas was held to have standing because federal regulatory change on its administration of drivers' licenses – requiring it to issue drivers' licenses to illegal aliens – would cost it money.[22] The Fifth Circuit rejected application of the Pennsylvania "self-inflicted injury" rule, but stressed that its decision "is limited to these facts."[23] It is not plain that the Fifth Circuit would extend its view of standing to the quite different facts before us. The regulatory change regarding contraception poses no challenge to the sovereign authority of California to provide contraceptive benefits or not, but the regulatory change in Texas did limit the legislative choices Texas could make without "running afoul of preemption or the Equal Protection Clause."[24] Nor can we be sure that Texas is good law. The Supreme Court granted certiorari on the question whether "a State that voluntarily provides a subsidy" has standing to challenge a federal change that would expand

[20] 809 F.3d 134 (5th Cir. 2015), as revised (Nov. 25, 2015).

[21] Id. at 162.

[22] Id. at 155-57.

[23] Id. at 154.

[24] Id. at 153; see also Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) ("An amicus curiae generally cannot raise new arguments on appeal." (citations omitted)).

its subsidy, and other issues.[25] The Court was "equally divided," so the questions were not answered.[26]

The majority errs in treating Wyoming v. Oklahoma[27] as though it overruled Pennsylvania.[28] It does not say so. And the Court doubtlessly would have said so had that been its intent. Nor is the self-inflicted injury doctrine even relevant to Wyoming, which is doubtless why Wyoming does not discuss Pennsylvania. In Pennsylvania, the plaintiff states could have avoided any lost revenue by changing

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[25] United States v. Texas, 136 S. Ct. 906 (2016); Pet. for Writ of Cert. at I, United States v. Texas, No. 15-674 (U.S. Nov. 20, 2015).

[26] United States v. Texas, 136 S. Ct. 2271, 2272, reh'g denied, 137 S. Ct. 285 (2016).

[27] 502 U.S. 437 (1992).

[28] Of course, it does not matter when jurisdiction is raised, since we must raise it whenever its absence appears likely. See Interpipe Contracting, Inc. v. Becerra, 898 F.3d 879, 891 n.9 (9th Cir. 2018) ("Because Article III standing is jurisdictional, we must sua sponte assure ourselves."). And the majority errs in saying that the self-inflicted harm doctrine was not raised by the parties. **See Reply Br. of March for Life at 29, Dkt. No. 95**. Much of the briefing before us addresses standing, and the appellee states were also provided an opportunity to address self-inflicted injury at oral argument. And it does not matter that the self-inflicted injury doctrine arose in the context of a case taken under the Court's original jurisdiction, because it is a straightforward application of the generally applicable causation requirement for standing. See Clapper, 568 U.S. at 416 (applying Pennsylvania's "self-inflicted" doctrine outside the original jurisdiction context); Texas, 809 F.3d at 158-59 (same).

their own laws granting tax credits for taxes paid to the defendant states. By contrast, Wyoming could not prevent the expense to its fisc by changing its own law.[29] Wyoming lost severance tax revenue because the new Oklahoma law required major Oklahoma coal consumers to replace a substantial part of the Wyoming coal they burned with Oklahoma coal, so less coal was mined in Wyoming.[30] Since the Wyoming legislature could not change the Oklahoma law, the harm to Wyoming's fisc was not self-inflicted. The Oklahoma law, which expressly targeted Wyoming, caused the injury.[31] In our case, as in Pennsylvania, the plaintiff states elected to pay money in certain circumstances, and can avoid the harm to their fiscs by choosing not to pay the money.

I agree with the federal position that the plaintiff states lack standing to bring this case in federal court. Because such a conclusion would preclude us from reaching the other issues in the case, I do not speak to them in this dissent. Nor do I address additional reasons why the plaintiff states may lack standing, since the

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[29] Wyoming, 502 U.S. at 447; see also Texas, 809 F.3d at 158 ("Wyoming sought to tax the extraction of coal and had no way to avoid being affected by other states' laws that reduced demand for that coal." (emphasis added)).

[30] Id. at 443, 445-47.

[31] Id. at 443.

"self-inflicted injury" disposes of the question without them.