

No. 15-643

IN THE
Supreme Court of the United States

JOSEPH ARPAIO, SHERIFF, MARICOPA COUNTY,
ARIZONA,
Petitioner

v.

BARACK OBAMA, JEH JOHNSON,
LEON RODRIQUEZ, & ERIC HOLDER
Respondents

On Petition for Writ Of Certiorari
To The United States Court of Appeals for the
District of Columbia Circuit (Appeal No. 14-5325)

**PETITIONER'S MOTION TO RECONSIDER
AND PETITION FOR REHEARING ON
PETITION FOR WRIT OF CERTIORARI**

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January 20, 2016

**PETITIONER'S MOTION TO RECONSIDER
AND PETITION FOR REHEARING ON
PETITION FOR WRIT OF CERTIORARI**

The Plaintiff-Petitioner, Sheriff Joe Arpaio, by counsel, hereby respectfully moves the Court to reconsider its denial of his petition for writ of certiorari and/or petitions for rehearing thereon.

Having granted a writ of certiorari to hear an appeal of Case No. 15-674, *United States of America, et al. v. State of Texas, et al.*, from the U.S. Court of Appeals for the Fifth Circuit, this Court cannot be completely and thoroughly briefed and cannot properly consider that appeal without contrasting the treatment of the exact same government programs and legal issues between the Fifth Circuit in Case No. 15-674 and the U.S. Court of Appeals for the District of Columbia Circuit in Case No. 15-643.

Unfortunately, the granting of a writ of certiorari in Case No. 15-674 but not in this Case No. 15-643 – in conflict with this Court's well-established practice of relying upon conflicts among the circuits to better inform this Court's considerations -- creates the appearance that the Court is evaluating and passing judgment upon the parties rather than the legal issues which parties bring before the courts. Indeed, this has already been the message of public commentary. The Court gives the impression that it merely disfavors a party before the federal courts, the lawfully elected Sheriff of one of the nation's largest counties at 4 million residents, larger than 22 states, Sheriff Arpaio and/or his legal counsel.

In this case, *Arpaio v. Obama, et al.*, Case No. 15-643, the Petitioner Sheriff Arpaio was the first to file a legal challenge to the exact same new government programs (called "deferred action" by the Petitioners) on November 20, 2014.

Two weeks later, a number of states (the total grew over time to a total of twenty-six (26) states as co-plaintiffs), which largely copied the complaint filed by Sheriff Arpaio.

Both cases were at the same stage procedurally of a motion for preliminary injunction. (Sheriff Arpaio's motion for a preliminary injunction was

filed and made available to the Appellees in Case No. 15-674, the twenty-six plaintiff states, before they filed their Complaint in the U.S. District Court for the Southern District of Texas.) In this case, the portion of the Respondents' opposition addressing standing was treated as and converted to a motion to dismiss under Federal Rules of Civil Procedure Rule 12(b)(1) on the grounds of standing.

Sheriff Arpaio's case has consistently broken new ground on this topic and now briefs the Court on additional legal issues, concerns, and precedents which are lacking in the related Case No. 15-674. For example, Sheriff Arpaio challenges both the government's June 2012 Deferred Action for Childhood Arrivals ("DACA") program covering an estimated 1 to 1.5 million illegal aliens, as well as the government's November 20, 2014, expansion of deferred action covering an estimated 4.7 to 5 million additional illegal aliens. Because both arise from the same legal concepts, the Petitioner contends that logically and as a matter of substance any court needs to consider both to fully understand the legal analysis.

Similarly, the government Defendants-Respondents here (in Case No. 15-674 the Petitioners) have increasingly at every stage in these cases leaned more and more heavily on a central argument that Congress has not appropriated sufficient funding to deport all of the estimated 11.3 million illegal aliens believed to be present in the country. Respondents claim the authority to rewrite the laws enacted by Congress based on necessity, because they are forced to prioritize deportations. The Respondents blame the failure of Congress to appropriate sufficient funding as requiring the government to rewrite the law to fit their budget.

But only this case by Sheriff Arpaio has addressed this central argument. Sheriff Arpaio documented that the Respondents

- a) received more funding each year from Congress than they asked for over the last decade (and likely much further back than 2006),
- b) have never asked for more funding,
- c) are falsely assuming as deceptive sophistry that all illegal aliens must be deported in a single fiscal year,

- d) should be required to demonstrate that Congress denied additional funding (which it never did) before being allowed to make such a legal argument to the courts, and
- e) are in effect asking this Court to sit as a super-appropriations committee, to perform the function that hearings in Congressional committees perform to determine how much it actually costs to deport illegal aliens, whether there are more efficient methods, how much is enough, etc.

Overlooking this case will leave important questions about standing in this matter and in this area of the law that will not be addressed if the Court does not grant writs of certiorari to both cases and consider the contrasts between the treatment by the D.C. Circuit and the Fifth Circuit. Important issues on standing will remain unaddressed.

In this case, Sheriff Arpaio has a much stronger claim to standing including because the same government Defendants, Respondents here, stood on the pleadings in this Case No. 15-643 without producing any evidence or factual support, but engaged in an extensive factual contest in Case No. 15-674. This Case No. 15-643 provides a cleaner, clearer, more direct presentation of the issues of standing because standing was addressed and decided on the pleadings alone. In Case No. 15-674, the record includes hundreds of pages, probably in the vicinity of a thousand pages, of conflicting declarations, affidavits, factual exhibits, etc.

But ultimately this Court needs to address the same legal questions on standing as applied to the challenged programs at issue in these cases, either presented purely on the pleadings here in Case No. 15-643 or by wading through as many as a thousand pages of factual exhibits and affidavits in Case No., 15-674. In either case, the ultimate questions about how to analyze standing are the same.

The Court demonstrated its interest in hearing the ultimate constitutional concerns raised by expanding the scope of the briefing in Case No. 15-674: “In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: ‘Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, Sec.3.’”

Nevertheless, as this Court has repeatedly made clear, a federal court must address the question of its own jurisdiction, including under the judicially-created doctrine of standing.¹ *Henderson v. Shinseki*, 131 S.Ct. 1197, 179 L.Ed.2d 159 (U.S., 2011) (“Objections to subject-matter jurisdiction, however, may be raised at any time.”). Therefore, the contrasting treatment of standing concerning the exact same government programs between the D.C. Circuit and Fifth Circuit is an important topic which – under this Court’s precedents – cannot be avoided or overlooked.

Our Founding Father and second President John Adams declared just days before signing the Declaration of Independence in the undersigned’s native city of Philadelphia that we were to be a nation of laws and not men. Thus, Sheriff Arpaio’s case should respectfully be considered on the merits and certiorari granted in the interests of justice as set forth above, without regard to his very unfair vilification by certain politically motivated persons and press organizations in the media for his views and actions to combat illegal immigration.

CONCLUSION

Therefore, the Plaintiff-Petitioner respectfully petitions that this Court reconsider and rehear its view on granting a writ of certiorari in this Case No. 15-643 and grant certiorari in this case.

Respectfully submitted.
FREEDOM WATCH, INC.

/s/ Larry Klayman
LARRY KLAYMAN, ESQ.
Counsel of Record

¹ Contrary to analysis in precedents, Article III of the U.S. Constitution actually confers jurisdiction for the federal judiciary very broadly over any “cases” arising under a question of federal law or the Constitution. The narrower concept of “controversies” which has come to animate standing analysis is mentioned in Article III only in reference to diversity jurisdiction or original suits between states.

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STATEMENT OF SERVICE

The Petitioner, Joseph Arpaio, Sheriff of Maricopa County, Arizona, by counsel, hereby certifies that a copy of the foregoing Motion is being served this day, January 21, 2016, upon the attorney of record for the Respondents by first class U.S. mail, postage prepaid:

Donald B. Verrilli, Jr.
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In addition, in compliance with Rule 29 of the Rules of the Supreme Court, an electronic copy of this Motion has also been emailed on this day January 21, 2016, to all attorneys who have participated at any phase in the proceedings in the lower courts by electronic mail (email).

/s/ Larry Klayman
LARRY KLAYMAN, ESQ.