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Justice Alito's Questions in California v. Texas Explain The Likely Aftermath Of a Dismissal on Standing Grounds

Finding that the state plaintiffs and the private plaintiffs lack standing will not settle the constitutionality of the ACA.

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On Tuesday, the Supreme Court heard oral arguments in *California v. Texas*. I previously wrote about the merits question. Here, I will focus on the standing question. Specifically, what would happen if the Court held that neither the individual plaintiffs nor the state plaintiffs have standing? (I'll presume general familiarity with the case, which I discussed in the Amicus brief I filed for the Cato Institute.)

At first glance, this standing holding may seem like the easiest way to get rid of this case. The individual plaintiffs are not injured by a mandate without a penalty, and the state plaintiffs are not subject to the mandate at all. Easy, right? Not quite.

There are two general postures in which a statute can be challenged. The traditional posture is that a plaintiff seeks a declaration that a law is unconstitutional. Here, the Plaintiff must assert that the statute causes an Article III injury. Generally, the government must take some sort of enforcement action to cause that injury. There is a second, less common posture: the government tries to enforce a statute against a person, and she raises as a defense that statute is unconstitutional. For example, in *Bond v. United States*, the defendant argued that his prosecution was invalid because a chemical weapons treaty violated the principles of federalism. In this case, Article III standing was obvious because the government sought to prosecute Bond with the statute. I'll call the first path the *offensive* posture and the second path the *defensive* posture.

In *California v. Texas*, even if the Court holds that the plaintiffs lack standing to challenge the ACA in an offensive posture, a defendant in another case could challenge the ACA in the defensive posture. Justice Alito developed this point out in questions to three of the advocates.

First, consider Justice Alito's colloquy with California Solicitor General Michael Mongan. Texas and other states argued that they incurred certain costs because of the ACA's mandate. For example, the law requires Texas to "calculate Medicaid eligibility" using a new method. And this

new method "has greatly increased the number of persons on Medicaid in Texas . . . by about 100,000 persons." Was this cost enough for Article III standing, Alito asked? Mongan replied that these ancillary costs would not be enough. Texas would have to claim an "injury by the provision that they actually allege is unconstitutional." That is, the individual mandate. An injury stemming from the Medicaid provision, Mongan argued, would not provide standing to challenge the mandate.

Justice Alito seemed to disagree. He observed "there is logic to [Texas's] theory of standing." He asked, "why is it conceptually unsound?" Later, Alito asked what "consequences would follow" if Texas did not follow the ACA's method for calculating Medicaid eligibility. Mongan responded that "the federal government could bring some sort of enforcement proceeding against them."

Justice Alito posed another hypothetical. Texas argues that the ACA requires Texas to submit certain reports to the Internal Revenue Service. Assume Texas refused to do so. What are the consequences if the "IRS attempted to assess penalties on state employers for failing to comply with the reporting requirements"? In that situation, could Texas argue that it is not required to follow the reporting requirements, because those requirements "can't be severed from the individual mandate"? Mongan responded that "it's possible" this argument could be raised "as a defense in response" to an enforcement action. But the facts here were different. Texas cannot "establish an Article III injury" based on the individual mandate.

Second, consider Justice Alito's colloquy with Don Verrilli, the lawyer for the House of Representatives. (Verrilli had argued *NFIB v. Sebelius* as Solicitor General in 2012). Justice Alito asked about a "very simple statute." The law has "two provisions, (a) and (b)." The plaintiff is "hurt by (b)" but is "not hurt by (a)." And "(a) is unconstitutional." This statute has an inseverability clause that "says if (a) falls, (b) falls too." Justice Alito did not ask whether provision (b) would fall. He asked a different question. "Under those circumstances, would [the plaintiff] lack [Article III] standing to challenge (a)?" Verrilli acknowledged that the Plaintiff in this hypothetical would likely have standing. He said, "that hypothetical definitely tests the limits of our objection to standing through inseverability." Given a "statute like that," he said, "it would be hard to maintain [our] position." In other words, the Plaintiff would likely have standing to challenge (a) and (b).

This concession was significant. Verrilli seemed to suggest that in some cases, a plaintiff injured by (b) would still have standing to challenge (a) if there was a clear inseverability provision. Congress cannot create Article III standing by a statute. Either the Plaintiff suffers an injury in fact, or she does not. Regardless of whether statute has a clear inseverability clause, the Article III analysis would be the same.

Third, Acting Solicitor General Wall referred to Alito's question during a colloquy with Chief Justice Roberts. He asked the Chief to consider a statute that has a "clearly racially discriminatory provision and an express inseverability clause." Under California's theory, the "plaintiffs regulated by that statute couldn't challenge it." Wall said, "And that doesn't seem right to us. The plaintiffs here have an Article III injury." Wall posed a very similar response to Justice

Kagan. What if you had a statute "with an express inseverability provision and an obvious constitutional problem, like racial discrimination." This statute was an "obvious . . . legal nullity." But no one could challenge the statute until the government racially discriminated against a person. "As an Article III standing matter, that doesn't seem right."

Fourth, consider Justice Alito's colloquy with Texas Solicitor General Kyle Hawkins. (Hawkins clerked for Alito). Justice Alito asked Hawkins what would happen if Texas failed to "calculate eligibility based on modified adjusted income." Hawkins replied that "the federal government could bring some action against" Or Texas could be sued by a person who becomes ineligible for Medicaid under the ACA. Justice Alito asked whether "the Affordable Care Act set out any penalties for failing to" perform the correct calculations. Hawkins wasn't sure if the ACA provided any penalty for failing to perform calculations. But the IRS could enforce penalties for failing to comply with the reporting requirements. For example, Texas submitted the form, but did not complete it correctly.

Justice Alito shifted his questioning. He said the "failure to comply" with the reporting requirements "would [result in] a penalty under the Internal Revenue Code, which this Court has suggested is a tax for purposes of the Anti-Injunction Act." Alito asked how there would be standing in light of the Anti-Injunction Act. Hawkins maintained that the Article III injury does not flow from the penalty. Rather, the injury flows from having to prepare the reports. The ACA's "reporting requirement itself inflicts a pocketbook injury on the states. Those forms don't produce themselves." And that "pocketbook injury itself is enough to satisfy Article III." Those injuries, Hawkins continued, "flow from the individual mandate itself and are traceable back to the mandate."

Let's combine the questions Justice Alito posed to Mongan, Verrilli, and Hawkins, as well as Wall's response to the Chief Justice. In the future, Texas could shift from the offensive posture to the defensive posture. In the future, Texas simply fail to comply with the IRS reporting requirement. If the government takes some enforcement action, Texas would argue that (1) the individual mandate is unconstitutional, (2) the mandate cannot be severed from the remainder of the ACA, and therefore (3) the reporting requirements are also unconstitutional. In that case, there would be Article III standing.

And this argument would not be limited to Texas. If the government take an enforcement action against *anyone* for violating the ACA, the defendant could raise the same three defensive arguments: (1) the individual mandate is unconstitutional, (2) the mandate cannot be severed from the remainder of the ACA, and therefore (3) the particular provision of the ACA is also unconstitutional.

For example, imagine there is a False Claims Act case. The allegation is that someone violated some provision of the ACA. In response, the defendant raises the unconstitutionality of the ACA as a defense. At that point, the Court would have to adjudicate the constitutionality of the ACA. There would unquestionably be Article III standing.

If the Court dismisses the case for lack of standing, the controversy would linger. During that time, the fate of the ACA would remain in doubt. Dismissal does not provide an easy way out of this dispute.

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