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Reconsidering Redressability and Traceability in California v. Texas

The answer to questions from Justice Gorsuch and Barrett depends on how the Plaintiffs' injuries are characterized.

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On Tuesday, the Supreme Court heard oral arguments in *California v. Texas*. I previously wrote about the merits question, and what would happen if the Court found that Texas lacked standing. Here, I will focus on the standing of the individual plaintiffs. (I'll presume general familiarity with the case, which I discussed in the Amicus brief I filed for the Cato Institute.)

Lujan identified three factors to determine whether a plaintiff has established Article III standing. The plaintiff must "allege (1) an injury that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and that is (3) "likely to be redressed by the requested relief." Most discussions of standing in *California v. Texas* have focused on the first element. How can a mandate with a penalty inflict a concrete injury? The second and third factors have received far less attention.

In this case, traceability and redressability are closely linked. If the injury can be *traced* to the actions of *someone* in the federal government, then that person's actions can be enjoined to *redress* the plaintiff's injury. But if the injury cannot be traced to actions of *someone* in the federal government, then the plaintiffs may not be able to show their injury can be redressed. For *California v. Texas*, redressability and traceability rise together, or fall together. Justices Gorsuch and Barrett asked about these two elements.

Justice Gorsuch asked Kyle Hawkins, the Texas Solicitor General, what precise remedy the "individual Plaintiffs" are requesting. "I guess I'm a little unclear who exactly they want me to enjoin and what exactly do they want me to enjoin them from doing?" In other words, which defendant is injury traceable to, and how can that defendant be enjoined to redress the injury. Justice Gorsuch continued that courts usually "require some proof that we can remedy a plaintiff's injury more concretely than just [through] a mere declaratory judgment." Gorsuch said "you'd have to show that there would be an injunction that would be available." This case would "essentially [be] an anticipatory action" to halt some future enforcement action.

Later, Justice Barrett followed up on Justice Gorsuch's questions. She asked the Texas Solicitor General about whether the individual plaintiffs can establish traceability. She assumed for

purposes of her questions that the mandate makes "them feel a legal compulsion to purchase insurance, [which] has caused them a pocketbook injury." She asked, "why is that [injury] traceable to the defendants that the individuals have actually sued here." Justice Barrett said the injury could be "caused by or traceable to a mandate itself." But, she asked, how is that injury "traceable to the IRS or to HHS." Justice Barrett asked, "Why is it their action that's actually inflicting the injury?"

The answer to these questions about redressability and traceability turns on the *precise* nature of the injury being asserted. And there are two ways to frame the individual Plaintiffs's injuries. First, that the unconstitutional mandate, standing by itself, causes the injury. Second, that the unconstitutional mandate cannot be severed from other portions of the ACA, and the plaintiffs are injured by the mandate, as well as those other portions of the ACA.

Frame #1

First, the Plaintiffs can argue that the mandate, standing by itself, forces them to purchase unwanted health insurance. With this first frame, it is not clear that the Plaintiffs' (assumed) injury can be traced to anyone. Who enforces what is, in effect, a self-executing statute? It is not clear that any case would have ever addressed such a statute. During oral arguments, Justice Kavanaugh questioned if Congress had ever enacted a "true mandate with no penalties" "to do something" or "to purchase a good or service." In reply, Hawkins said that the mandate was an "unprecedented" statute. (I chuckled).

In the Amended Complaint, the Plaintiffs sued five defendants: (1) The United States of America, (2) the Department of Health and Human Services, (3) the Secretary of Health and Human Services, (4) the Internal Revenue Service, and (5) the Commissioner of Internal Revenue. Under the first frame, where the injury is premised solely on a self-executing mandate, Defendants 2-5 play no role in enforcing the mandate. Therefore, the plaintiffs' injuries cannot be traced to the those named defendants. And an injunction could not be issued against those four defendants. But the first Defendant is the United States of America. And the Plaintiffs contend that this defendant is broad enough to encompass the injury caused by the mandate for traceability purposes.

Justice Barrett pushed back on this theory. She said, "doesn't it really seem that Congress is the one who's injured the individual plaintiffs here." Congress has immunity to such suits. Barrett explained, "You can't sue Congress and say: 'Hey, you've put us under this mandate that's forcing us to buy insurance and that's harming us,' right?" Hawkins replied that the defendant was not Congress. Rather, "we've sued the United States." He added, "It is the United States' law that the individual plaintiffs have to acquire health insurance that the United States thinks is good for them." I think Hawkins was trying to convey that at bottom, suing the United States is a broad enough umbrella to encompass every fact of federal law, including the self-executing mandate. I'm not sure there is any precedent to support this proposition. But again, Congress does not usually enact self-executing statutes without an enforcement mechanism. At that point, Justice Barrett "switch[ed] gears" to talk about state standing. It is not clear whether Justice Barrett accepted Hawkins's response.

Suing the United States may address the traceability prong, but it creates problems for the redressability prong. Generally, a plaintiff cannot seek an injunction that runs against the United States. The doctrine of sovereign immunity bars that remedy.

The Plaintiffs had two responses. Hawkins explained the first answer to Justice Gorsuch. In the District Court, the United States "insisted that an injunction would not be necessary and that it would treat the declaration as an injunction." Texas took the government at "its word." Second, Count 4 of the Amended Complaint alleges a violation of the Administrative Procedure Act. Generally, the APA waives sovereign immunity against federal agencies. 5 U.S.C. 551 defines the term "agency" very broadly. Justice Barrett asked about Congress, but Congress is exempted. *Franklin v. Massachusetts* held that the President is not an "agency," even though his position is not expressly exempted. The United States is not expressly exempted, so it could be covered. I don't have a strong opinion on this question.

In short, if the injury is limited to the self-executing mandate, standing by itself, then Justice Barrett seems right: the traceability and redressability elements are much harder to satisfy. Acting Solicitor General seemed to agree with Barrett. He said that Justice Barrett "ask[ed] some very difficult questions about traceability with respect to the individual Respondents." The SG's brief stated "The individual plaintiffs can make this merits argument regardless of whether they would have Article III standing to challenge the individual mandate by itself."

The Plaintiffs have characterized their case with a second frame. Here, redressability and traceability can be more easily established.

Frame #2

The individual plaintiffs have framed their injury as resulting from the mandate, working in conjunction with the ACA's health reforms. They argue that that law's insurance reform regulations have increased the cost of policies. For example, Plaintiff Neill Hurley stated, "The ACA prevents me from obtaining care from my preferred health care providers and has greatly increased my health insurance costs."

But wait a minute!? If the Plaintiffs argue that the mandate is unconstitutional, and the mandate injures them, how can the Plaintiffs rely on *other* provisions of the ACA to establish standing? The answer turns on severability. In short, their theory of standing turns on the mandate being inseverable from other parts of the ACA. But wait!? Isn't severability a merits question that can only be decided after the court finds the Plaintiffs already have standing? Welcome to the ACA chicken-and-egg problem. If the mandate is inseverable from the remainder of the ACA, then the Plaintiffs have standing. If the plaintiffs lack standing, the the mandate is severable.

At several points, Justice Thomas asked questions about the sequencing of this case. He asked California Solicitor General Mongan to explain "why we would determine severability at the standing stage?" Mongan replied, "We don't think that that's a theory that's ever been endorsed by this Court." He added, "it seems like it would create some serious tension with this Court's Article III precedent." Mongan maintained that "typically, severability would be analyzed after a ruling on the legality of the provision."

Justice Thomas asked Texas Solicitor General Kyle Hawkins whether the Court should "determine inseverability" "at the standing stage." He suggested that severability is a matter of "statutory construction and something more suitable for the merits stage.

Justice Thomas posed the same question to Acting Solicitor General Wall (his former law clerk): "at what stage we should confront the inseverability issue." Texas argued that it should be confronted when the court considers standing. But, Thomas said, "it seems more like a statutory construction issue that you consider at the merits stage." The Solicitor General agreed with Justice Thomas. Texas, he said, "keep[s] referring to standing through inseverability." But "that's not right." Standing and inseverability, Wall said, "are distinct things."

The SG's brief stated that the "individual plaintiffs may advance, and this Court may consider, legal arguments that (1) the individual mandate is invalid and (2) all other ACA provisions, including the insurance-reform provisions that injure the individual plaintiffs, are **inseverable from it**." (p. 17). The key word is "inseverable." In effect, the SG brief suggested that the Court could *assume* the plaintiffs were correct about inseverability at the standing stage, even if the Court ultimately finds that the mandate is severable. *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("One further preliminary matter requires discussion. For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."). The SG later stated, "Here, the plaintiffs challenge the insurance-reform provisions that do injure them, and the basis for their challenge is that the insurance-reform provisions are **inseverable from the mandate**, which is invalid."

Once the Court assumes the Plaintiffs are correct on severability for purpose of the standing inquiry, the other two *Lujan* factors fall into place. The Secretary of HHS and the Commissioner of Internal Revenue enforce the insurance reform provisions, which cause the injuries. And the court can enjoin the enforcement of those provisions. The SG stated that "the individual plaintiffs have standing to obtain an *injunction* barring enforcement against them of the insurance reforms that injure them." And "the facts plaintiffs aver establish a cognizable injury *traceable* to the insurance-reform provisions." All three *Lujan* elements would be satisfied. And there are no *Poe v. Ullman* problems with the second framing of the injury.

Here, the Plaintiffs requested this second frame of relief. Count 5 of the Amended Complaint requested a "permanent injunction against Defendants from implementing, regulating, or otherwise enforcing any part of the ACA because its requirements are unlawful and not severable from the unconstitutional individual mandate." Here the Plaintiffs did not merely request an injunction against the mandate. The Plaintiffs requested an injunction against other parts of the statute that could not be severed from the unconstitutional mandate. The District Court did not resolve Count 5. Hawkins told the Court that County 5 was "still a live issue before the district court." And the individual plaintiffs "can pursue that remedy, if necessary."

There is some daylight between the SG and the individual plaintiffs. The SG would limit the standing inquiry to the insurance-reform provisions that injure the plaintiff; the individual plaintiffs would allow the *entire* ACA to be in play for standing analysis. The Cato Institute

brief, which we wrote before the SG filed, largely shares the SG's approach. We focused on the ACA's guaranteed issue and community rating provisions.

At bottom, the standing analysis is related to the severability analysis. If the Court assumes the material allegations from the Plaintiffs' brief that the mandate is inseverable, then the unseverable reform provisions are part of the standing analysis. And the Plaintiffs' asserted injuries are traceable to those provisions, and an injunction to halt those provisions would remedy the Plaintiffs' asserted injuries. Ultimately, the Court can find that the mandate is severable.

Even if the Court assumes the mandate is inseverable for the purposes of the standing analysis, the Court can later find that the mandate is severable for purposes of the merits analysis. This duality reminds me of the Solicitor General's argument in *NFIB v. Sebelius*: the exaction was a "penalty" for purposes of the jurisdictional Tax Anti-Injunction Act, but was a "tax" for purposes of the constitutional saving construction. Here, the Court would construe the mandate as inseverable for the constitutional jurisdictional analysis, but construe the mandate as severable for purposes of the statutory severability analysis.

Finally, the Solicitor General offered one other exit strategy in a colloquy with Justice Kagan. He said "the Court as a matter of avoidance can do severability before doing the merits." In other words, assume there is standing, assume the mandate is unconstitutional, and declare the mandate is severable from the rest of the act. Wall stressed that "we don't think [the Court] should [so] here." But he stressed that "normally a court would."

A crude prediction: Five Justices follow the SG's "avoidance" approach, and then four Justices write separately to find that the parties have standing, and that the mandate is unconstitutional. Ultimately, I suspect zero Justices will vote to invalidate the entire ACA. Justices Thomas and Gorsuch have formally rejected that model in *Barr v. AAPC.*

Query what would happen if three justices find that the individual plaintiffs have standing, three justices find the states have standing, and three justices find that no party has standing. I think at that point, there could not be a merits ruling, because six justices ruled against individual standing and six justices ruled against state standing. But the SG's avoidance punt could work. Following the ACA for a decade has taught me a valuable lesson: always prepare to be surprised.

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