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Standing to Challenge the Individual Mandate

Plaintiffs may have had standing in NFIB v. Sebelius, but they don't in California v. Texas.

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A threshold issue in *California v. Texas,* the Affordable Care Act case to be argued on Tuesday, is whether any of the plaintiffs have standing to challenge the so-called "individual mandate." This is a serious question because in 2017 Congress eliminated the financial penalty that had been used to enforce the mandate. As originally enacted in 2010, the ACA instructed Americans to obtain qualifying health insurance, and threatened to impose a tax penalty on those who failed to comply. Now, however, the instruction remains in the U.S. Code, but the financial penalty for noncompliance is gone.

Ordinarily, plaintiffs who seek to challenge a governmental action must allege that they will suffer a cognizable injury from the government imposition. So, for instance, an oil refinery challenging an environmental regulation would allege that they must spend money installing mandated pollution control equipment or face enforcement actions, backed by fines and other penalties. This injury requirement is rooted in Article III of the Constitution. As such, the Supreme Court has held, if a plaintiff cannot allege a sufficient injury, federal courts have no power to hear their case.

The lack of a penalty to enforce the individual mandate would seem to defeat any claim of standing on behalf of the plaintiffs. Yet the lower courts (and the Department of Justice) have acquiesced to their standing claims. For reasons I have explained in prior posts, I think these conclusions were in error.

In *NFIB v. Sebelius*, there was little question that the plaintiffs had standing to challenge the ACA. The Obama Justice Department accepted that plaintiffs had made the necessray showing, and the standing claim was sufficiently obvious that none of the Court's opinions in *NFIB* saw any need to address it.

In an amicus brief and SCOTUSBlog post, my co-blogger Josh Blackman and the Cato Institute's Ilya Shapiro claim that the individual plaintiffs in *California v. Texas* "assert an even greater injury" than the plaintiffs in *NFIB*. This is simply not so.

As Blackman and Shapiro tell it, the individual plaintiffs in *California v. Texas* have suffered a greater injury than the *NFIB* plaintiffs because they are already subject to the individual mandate, and have been required to purchase health insurance in order to comply with the law.

Tellingly, however, neither of the plaintiffs have alleged any consequence that would come from failing to comply with the mandate, let alone can they allege the reasonable prospect of enforcement that is usually required to claim Article III standing. Their only injuries from the mandate (as opposed to other provisions of the ACA) are their own decisions to purchase insurance.

Blackman and Shapiro argue that the injuries alleged by the *NFIB* plaintiffs, Mary Brown and Kaj Ahlburg, "rested *entirely* on the individual mandate" (emphasis in original), and not on any financial harm. This is simply not so. As their declarations make clear, both Brown and Ahlburg were faced with a choice: purchase insurance or suffer a financial penalty. Complying with the law would impose an injury, as would simply doing nothing, due to the penalty (which both reference in their declarations (see Ex. 25, paragraphs 8, 9 and 12; Ex. 26, paragraphs 6, 8, and 10).

Because self-inflicted harms are not sufficient to satisfy the requirements of Article III standing, this is the sort of showing the plaintiffs routinely make when challenging government requirements. They identify the costs of compliance (in this case, purchasing qualifying insurance) and the costs of noncompliance (in this case, a financial penalty). That the mandate had not taken effect yet is of no moment, as it would apply on a date certain, and the plaintiffs identified costly actions they would have to take at the time their suit was filed in order to avoid the costs of noncompliance.

By contrast, the plaintiffs in *California v. Texas* identify no consequence of failing to purchase qualifying health insurance (because there is none). Blackman and Shapiro object to pointing this out, claiming that "[t]his argument conflates the merits analysis . . . with the necessary threshold inquiry of standing." Yet it is the plaintiff's obligation to demonstrate the existence of standing by, at the very least, alleging facts that (if true) would satisfy the requirements of Article III, and the individual plaintiffs identify no legally cognizable harm that will result if they fail to purchase qualifying health insurance.

There is a serious argument that individuals should be allowed to peremptorily challenge any governmental action that purports to impose a legal obligation upon them, but this is not—and has never been—the way that Article III standing has worked. It is no accident the Blackman and Shapiro brief fails to cite any case in which plaintiffs were afforded Article III standing on nothing more than the costs of their own voluntarily compliance with the law, because there aren't any. There are, however, plenty of cases holding that absent a reasonable prospect of government enforcement, there is no standing for (as the Supreme Court cautioned in *Poe v. Ullman*), the courts lack jurisdiction to "umpire . . . debates concerning harmless empty shadows." As the Fifth Circuit should have recognized, there was a reason Texas' prohibition on same-sex intimacy could not be successfully challenged until the state sought to prosecute John Lawrence. The mere existence of a statutory prohibition on the books is not enough. For an individual to challenge a law, they have to show how they are injured, and that injury must be more than that costs of voluntary compliance undertaken just because one wants to be a law-abiding citizen.

The federal government, for its part, avoids some of these problems by claiming that the individual plaintiffs are injured by *other* parts of the ACA, and because these other provisions are inseverable from the individual mandate, that is enough for standing. But that's not how standing works either. Rather, plaintiffs must demonstrate standing for each provision of federal law they seek to challenge.

As the Supreme Court has repeatedly reaffirmed, standing is not dispensed in gross. A plaintiff "must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." The Justice Department cites this language, but seems to ignore its import: It's not enough that the individual plaintiffs (or, for that matter, the states) can identify other, indisputably constitutional, provisions of the ACA that cause them injury. In order to challenge the constitutionality of the penalty-less individual mandate, they have to allege how the mandate causes them an Article III injury. As the Justice Department itself acknowledges in another part of their brief, plaintiffs "have standing to challenge only those ACA provisions that injure them."

The states further allege standing on the grounds that even a non-enforceable mandate may induce some individuals to take action (such as enroll in Medicaid) that could impose costs on the states. Such an argument for standing would seem to be a stretch, but under *Massachusetts v. EPA* states are entitled to a "special solicitude" for their standing claims. The Chief Justice, however, is no fan of this invented doctrine, having written a powerful dissent contesting the point in *Massachusetts*. If *California v. Texas* comes down to standing—and state standing in particular—this could present the Chief with an opportunity to put the doctrine of "special solicitude" to bed.

Most of the focus in *California v. Texas* has been on the individual mandate and whether it is severable from the rest of the ACA. These are important questions, but so too is whether the plaintiffs have standing to have brought this case in the first place.

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