No. 19-841

IN THE

Supreme Court of the United States

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

v.

STATE OF TEXAS, ET AL.,
Respondents,

and

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The questions presented in the petition for certiorari indisputably warrant review by this Court. That review should occur now. The Fifth Circuit has rendered a final decision that respondents have standing and that Section 5000A of the Affordable Care Act (ACA) is unconstitutional. The only ostensibly non-final aspect of that ruling—the court's failure to address severability—presents a pure question of law that respondents acknowledge is straightforward, and is of a kind that this Court routinely addresses in the first instance when it invalidates an Act of Congress. There is thus no good reason to defer review. Indeed, the weakness of respondents' arguments against certiorari lays bare that what they are after is delay for delay's sake. But the multi-year delay they seek will inflict grave harms on the healthcare industry and on millions of Americans.

This Court should therefore grant review and resolve the merits of this case expeditiously.[1]

ARGUMENT

I. REVIEW IS WARRANTED NOW.

A. Delay will harm the nation's healthcare system.

Amici representing the healthcare system—associations composed of thousands of hospitals and healthcare providers, leading insurers, small businesses, patient advocates, and 56 bipartisan economists—have urged this Court in the strongest terms to grant review of the Fifth Circuit's decision now. They

[1] Petitioner renews its request that the Court adopt a briefing schedule that allows oral argument to be scheduled during the Court's current term.

have done so because they are experiencing first-hand the harms inflicted by the decision.

1. The Fifth Circuit's decision is destabilizing the insurance market. Organizations representing insurers covering more than 40 million Americans explain that without immediate review insurers "will be forced to make their 2021 marketplace decisions amid a path of unknowns," which could precipitate an exodus of insurers from many service areas. Alliance of Community Health Plans, et al. Br. 10. That would, in turn, create "significant disruption for consumers," who would be "'automatically disenrolled' from discontinued plans." *Id.* at 11 (citation omitted). All told, "delay is likely to lead to insurers operating in fewer markets and charging higher premiums, with the potential that 100,000 people or more will become uninsured during the pendency of proceedings in the lower courts." Bipartisan Economic Scholars Br. 3; see America's Health Insurance Plans Br. 4, 7.

The decision is also causing "serious, perhaps irreparable, consequences for hospitals and the patients they serve." National Hospital Associations Br. 23. The ACA's reforms have "made a substantial financial impact on hospitals" and "transformed the way care is delivered." 33 State Hospital Associations Br. 13-14. Continuing uncertainty about the ACA's validity "destabilize[s] hospitals' ability to make long-term investments," leaving them unable to "know how to operate services[] for which funding may no longer be available," and, in some cases, to predict "whether they will be able to keep their doors open at all." National Hospital Associations Br. 23-24. Uncertainty also causes "bond rating downgrades that adversely impact [hos-

pitals'] access to capital," sharply increasing their expenses and forcing them to curtail investments in patient care. 33 State Hospital Associations Br. 3, 13-14.

Most significantly, the Fifth Circuit's decision is harming Americans who are now enduring increased expenses and diminished care as insurers reduce coverage and hospitals struggle financially. As the American Cancer Society explains (Br. 12), prolonging this litigation subjects millions of Americans, many with life-threatening conditions, to agonizing "uncertainty about their access to insurance, their ability to pay, and ultimately their ability to obtain vital health services and medications." Uncertainty also "harms the small business owners and employees who cannot plan and budget for employer-sponsored coverage," as well as self-employed individuals who cannot count on the continuing availability of affordable coverage. Small Business Majority Foundation Br. 12. That "decision-paralysis" extends to "the economy as a whole," as "fewer people [will] creat[e] new small businesses and expand[] existing ones" because they cannot rely on the availability of ACA-guaranteed insurance. *Ibid.*

2. Respondents cavalierly dismiss those concerns (Texas Opp. 15), but make no effort to explain why the pervasive alarm of the healthcare industry is unfounded. Their willingness to tolerate so much damage to the vital healthcare sector—and to the nation's citizens—is impossible to justify given the concessions that this case presents straightforward questions of law the resolution of which would not be advanced by further proceedings on remand. See p. 5, *infra*.

B. There is no reason to delay review.

Despite those harms, respondents seek to defer review for years for a provision-by-provision severability

analysis of the ACA's 900 pages. This Court should not follow that course, which respondents acknowledge is unnecessary.

To begin with, respondents misstate this Court's standards for reviewing federal-court decisions. Texas Opp. 11-12. This Court regularly grants certiorari to decide dispositive legal issues in cases where a court of appeals has remanded for further proceedings. See, *e.g.*, *Intel Corp. Inv. Policy Comm.* v. *Sulyma*, No. 18-1116 (argued Dec. 4, 2019); *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921 (2019); *Digital Realty Tr., Inc.* v. *Somers*, 138 S. Ct. 767 (2018); *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016); *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398 (2013). And none of the concerns that might justify denying review of an interlocutory decision are present here. The Fifth Circuit has already issued a final decision that plaintiffs have standing and that Section 5000A of the ACA is unconstitutional. If this Court grants certiorari and reverses on either of these issues, that will be the end of this case.

The only interlocutory feature of the decision below—the refusal to decide severability—involves straightforward questions of law that require no further factual development. A remand would therefore be pointless. Whatever its outcome, after a remand this Court would be asked to answer exactly the same question now before it: whether Section 5000A is severable from the rest of the ACA (as petitioners contend) or inseverable (as respondents assert).

Nor does the Fifth Circuit's abdication of its responsibility to decide severability justify deferring review. Quite the opposite. Respondents have offered no reason, and there is none, why this Court cannot decide

the core severability question now. This Court routinely addresses severability in the first instance. See *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1482 (2018); *Free Enterprise Fund* v. *PCAOB*, 561 U.S. 477, 508 (2010). Indeed, this Court did so in a challenge to the ACA's Medicaid expansion in *NFIB* v. *Sebelius*, 567 U.S. 519 (2012). Tellingly, respondents have not identified a *single case* in which this Court has done what the Fifth Circuit did here: declare an Act of Congress unconstitutional and then remand to the lower courts to address severability. That the Fifth Circuit has deviated so sharply from normal practice—in a case of such consequence—provides further reason to grant review now, not to delay.

Respondents' substantive position on severability gives away the game. State respondents acknowledge (at 29) that "severability is a pure question of law that the Fifth Circuit should have decided in [their] favor"—and will file a cross-petition asking this Court to so rule. Individual respondents agree (at 27) that severability is "straightforward." And DOJ argued below that the court should hold the entire ACA inseverable *without* any section-by-section analysis.[2] DOJ C.A. Br. 43-49. Having agreed that the severability issue is ripe for resolution, respondents lack any sound reason for opposing immediate review.

Indeed, deferring review would be antithetical to respondents' asserted interests. While this litigation

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[2] DOJ suggests (at 17) that the lower courts should address the scope of the remedy. But as DOJ conceded below, the remedial question is logically subsequent to severability because it arises only if the ACA is entirely invalidated—and it therefore could be obviated by this Court's decision. C.A. Oral Arg. Rec. 1:15:44-1:16:18, 1:19:03-55. State respondents agree that remand for scope-of-remedy analysis is "unnecessary." Texas Opp. 31.

drags on, the Executive Branch continues to deploy thousands of employees and spend billions of taxpayer dollars to administer the ACA. If DOJ really believes the ACA should be invalidated *in toto*, it would make no sense to perpetuate that state of affairs for years on end. In the same vein, it is impossible to understand why state respondents—who assert (wrongly) that the ACA's continued enforcement harms them in myriad ways—would prefer to endure those harms for years rather than have their constitutional challenge resolved now.[3]

Judicial economy considerations certainly do not justify delay. To the contrary, the provision-by-provision severability analysis prescribed by the Fifth Circuit would waste judicial resources if—as is overwhelmingly likely—this Court resolves the core question of Section 5000A's severability in favor of petitioner (or even if it resolves that question in favor of respondents). And if, as petitioner asserts, no plaintiff has established standing, then that analysis would be improper as well as wasteful. *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 90 (2013).

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[3] Given that state respondents argue severability at length in their opposition brief, there is no evident reason—apart from delay—that they could not have simultaneously filed their cross-petition. And this Court need not await the cross-petition before granting review. The severability issue is encompassed within the questions presented and fully argued in the extant briefing. The Court can therefore hold the cross-petition and dispose of it after decision on the merits in this case. Alternatively, the Court can add as an additional question whether Section 5000A is inseverable from the rest of the ACA, if that is deemed necessary to afford state respondents the possibility of complete relief.

II. THE QUESTIONS PRESENTED MERIT REVIEW.

This case presents three questions of exceptional importance. As to each, the court of appeals' decision is irreconcilable with this Court's precedents and, more fundamentally, with its admonition that courts "must respect the role of the Legislature, and take care not to undo what it has done." *King* v. *Burwell*, 135 S. Ct. 2480, 2496 (2015). Indeed, reflecting both the importance of this case and the panel's remarkable departure from precedent, the Fifth Circuit held a *sua sponte* en banc vote, in which it narrowly denied rehearing on a six to eight vote. Order (5th Cir. Jan. 29, 2020).

A. Respondents lack standing.

The Fifth Circuit's "unusually broad and novel view[s] of standing" plainly merit review. *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church and State*, 454 U.S. 464, 470 (1982); see *Clapper*, 568 U.S. at 408. The Fifth Circuit held that, so long as a plaintiff complies with a legal requirement, she has standing to challenge it, see Pet. App. 28a-29a—even if she does not claim that "that [she] ha[s] ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible." *Younger* v. *Harris*, 401 U.S. 37, 42 (1971). Put differently, according to the Fifth Circuit, "the mere existence of a * * * statute" with which a plaintiff complies "constitute[s] []sufficient grounds to support a federal court's adjudication of its constitutionality" even "if real threat of enforcement is wanting." *Poe* v. *Ullman*, 367 U.S. 497, 507 (1961) (plurality op.). That unprecedented standing analysis conflicts with

this Court's decisions. See, *e.g.*, *ibid.*; *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 15-16 (2010) (requiring credible threat of prosecution). So, too, does the Fifth Circuit's holding that a plaintiff has standing even though all of its alleged harms arise from aspects of a statutory scheme *other* than the provision being challenged. See, *e.g.*, *Davis* v. *FEC*, 554 U.S. 724, 733-734 (2008); *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring) ("the plaintiff had standing to challenge the unconstitutional part of the statute. But the severability doctrine comes into play only *after* the court has resolved that issue"). Respondents must show injury arising directly from Section 5000A to challenge it, and they simply have not done so.

The Fifth Circuit's broad and novel expansion of Article III standing would warrant review in any case challenging the constitutionality of an Act of Congress. That the Fifth Circuit countenanced such an expansion in a case seeking to invalidate a law as significant as the ACA only underscores why review is warranted.[4]

B. Section 5000A is constitutional.

1. The Fifth Circuit's invalidation of Section 5000A presents an issue of exceptional importance that warrants review. See *Gonzales* v. *Raich*, 545 U.S. 1, 9 (2005). Not only did the Fifth Circuit strike down an Act of Congress, but it did so on grounds that conflict

[4] State respondents suggest that even if this Court agreed that they lack standing, the lower courts might give them another chance to establish standing. See Texas Opp. 22. But the district court already gave the States an opportunity to present "any additional information" they thought necessary, Order, Dkt. 176 (N.D. Tex. 2018), and they stated that "further factual development of the record" was not needed, Dkt. 181, at 3.

with *NFIB*'s application of bedrock constitutional-avoidance principles. Pet. 20-21, 27.

2. DOJ contends that the invalidation of Section 5000A does not in itself warrant review because "the individual mandate no longer subjects any individual to any concrete consequence." DOJ Opp. 14; Texas Opp. 26-27. But viewed from any perspective, the question of Section 5000A's constitutionality is exceptionally important. That invalidation is the entire basis for the severability analysis the Fifth Circuit ordered on remand. And the Fifth Circuit concluded, at DOJ's urging, that Section 5000A *does* inflict "concrete" consequences on millions of individuals by "compelling [them] to purchase insurance *now*." Pet. App. 25a, 24a, 51a; DOJ C.A. Br. 22-23. According to DOJ's position on the merits, then, a great deal turns on whether Section 5000A is constitutional. And while petitioner disagrees that Section 5000A imposes those consequences, petitioner has identified other serious consequences that do flow from invalidation of Section 5000A. See pp. 2-3, *supra*.

C. Section 5000A is severable from the rest of the Act.

Respondents do not dispute that whether Section 5000A is severable from the remainder of the ACA is an exceptionally important question. For good reason: as the numerous amici confirm, the continuing validity of the ACA's myriad provisions—provisions that remade one fifth of the nation's economy and spurred billions of dollars in investment—is of utmost importance. And as petitioner has explained, the Fifth Circuit's refusal to decide severability provides no basis for denying review now. For as long as it endures, the prospect of total invalidation of the ACA will inflict

destabilizing uncertainty on the healthcare sector and millions of Americans.

III. PETITIONERS HAVE APPELLATE STANDING.

Respondents' arguments that petitioners may lack standing are meritless efforts to muddy the waters.

1. In the context of determining state government standing in federal courts, this Court has focused on whether the entity has a cognizable interest in the continued enforceability of the state's statutes and has been properly designated as an agent to represent the government's interests in court. See *Maine* v. *Taylor*, 477 U.S. 131, 137 (1986); *Virginia House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945, 1951-1952 (2019). Here, the House meets these criteria: when DOJ declined to defend the constitutionality of Section 5000A, the House of the 116th Congress resolved to defend the statute as a representative of the federal government, 28 U.S.C. 530D(b)(2), and this Court has recognized the House's standing under such circumstances, see *INS* v. *Chadha*, 462 U.S. 919, 930 n.5, 940 (1983); see also *United States* v. *Windsor*, 570 U.S. 744, 803-807 (2013) (Alito, J., dissenting).

2. In all events, state petitioners have standing. The Fifth Circuit's invalidation of Section 5000A and refusal to decide severability harms them in concrete ways. See, *e.g.*, State Defs. Mot. To Expedite 2-5 (5th Cir. Feb. 1, 2019).

DOJ does not go so far as to deny the state petitioners' standing. It merely suggests (at 23) that whether they have suffered injury is "unclear" because they might prevail on remand. On that view, however, there would never be standing to seek this Court's review when a court of appeals decides a threshold issue

and the petitioner might ultimately prevail in further proceedings. But this Court routinely grants review in just that situation, rebutting DOJ's suggestion. See, *e.g.*, *Sulyma*, No. 18-1116; *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1927. Moreover, the petitioner States are suffering harms *now*; those harms are not contingent on the eventual conclusion of this litigation.

3. Even if respondents' standing arguments were substantial (they are not), that is no ground for denying review given the "importance of the underlying issue[s]." *Massachusetts* v. *EPA*, 549 U.S. 497, 506 (2007) (granting certiorari and considering objection to petitioners' standing at merits stage); accord *Hollingsworth* v. *Perry*, 570 U.S. 693, 704 (2013). The Court should therefore grant both petitions and consolidate the cases. If the Court ultimately concludes that state petitioners have standing, it need not address the House's standing. See, *e.g.*, *Horne* v. *Flores*, 557 U.S. 433, 446 (2009) (granting separate petitions, consolidating, and adjudicating standing of only one set of petitioners).

That course is particularly appropriate because "[e]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 73 (1997) (citations omitted). Irrespective of petitioners' standing, therefore, this Court should grant review to correct the Fifth Circuit's erroneous holding that respondents have standing to bring this suit. *Ibid.*

* * *

The Fifth Circuit's decision invalidates an Act of Congress that guarantees millions of Americans ac-

cess to essential health care and casts a pall of uncertainty over a vital sector of this nation's economy—at the behest of plaintiffs who are uninjured by the statute they challenge. Denying review would permit that untenable situation to linger for years while the lower courts perform a task that no party thinks is necessary. This Court's review is manifestly warranted now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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