

No. _____

IN THE
Supreme Court of the United States

THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS,
IOWA, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW YORK,
NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON,
ANDY BESHEAR, THE GOVERNOR OF KENTUCKY, AND THE DISTRICT OF COLUMBIA,

Petitioners,

v.

THE STATE OF TEXAS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**MOTION TO EXPEDITE CONSIDERATION OF THE PETITION FOR A
WRIT OF CERTIORARI AND TO EXPEDITE CONSIDERATION OF THIS
MOTION**

Xavier Becerra
Attorney General of California
Kathleen Boergers
Supervising Deputy Attorney General
Nimrod P. Elias
Neli N. Palma
Deputy Attorneys General

Michael J. Mongan
Solicitor General
Samuel P. Siegel*
Helen H. Hong
Deputy Solicitors General
Amari L. Hammonds
Associate Deputy Solicitor General
*Counsel of record

California Department of Justice
1300 I Street
Sacramento, CA 95814
(916) 210-6269
sam.siegel@doj.ca.gov
Counsel for the State of California

January 3, 2020

(Additional counsel on signature pages)

The States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Massachusetts, Michigan, Minnesota (by and through its Department of Commerce), Nevada, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington, Andy Beshear, the Governor of Kentucky, and the District of Columbia hereby move, pursuant to Supreme Court Rule 21, for expedited consideration of the petition for a writ of certiorari, filed today, to the United States Court of Appeals for the Fifth Circuit. Because of the practical importance of the questions presented for review and the pressing need for their swift resolution by this Court, petitioners respectfully request that the Court consider the petition on an expedited schedule described below and, if the Court grants the petition, that it set an expedited merits briefing and oral argument schedule so that it may decide the case this Term. Petitioners also hereby move for expedited consideration of this motion.¹

STATEMENT

1. The Patient Protection and Affordable Care Act (ACA) affects the health and well-being of every American and has transformed our Nation's healthcare system. One of its hundreds of provisions is 26 U.S.C. § 5000A. As originally enacted, that provision required most Americans either to maintain a minimum level of healthcare coverage or to pay a specified amount to the Internal Revenue

¹ Petitioners understand that the U.S. House of Representatives, which intervened in the court of appeals to defend the Affordable Care Act, is also filing a petition for a writ of certiorari seeking review of the Fifth Circuit's decision, and that it is similarly moving to expedite the Court's consideration of its petition.

Service. This Court upheld that provision as an exercise of Congress's taxing power, affording individuals a "lawful choice" between buying insurance or paying the tax. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574 (2012) (*NFIB*). In 2017, Congress amended Section 5000A to set at zero the amount of the tax imposed on those who choose not to maintain healthcare coverage—thus rendering the minimum coverage provision effectively unenforceable. See Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017). At the same time, Congress left every other provision of the ACA in place.

2. Two months after Congress voted to reduce Section 5000A's alternative tax to zero, the plaintiffs here—two private citizens and a group of States—filed suit. Pet. App. 10a. They argued that, in light of this Court's holding in *NFIB* and the 2017 amendment, Section 5000A could no longer be construed as a tax, and that Section 5000A(a) was now an unconstitutional stand-alone command to buy health insurance. *Id.* at 10a-11a. They also argued that Section 5000A(a) could not be severed from any other part of the ACA. *Id.* at 11a. In the district court, the federal defendants agreed that the minimum coverage provision was now unconstitutional, and that it could not be severed from the ACA's guaranteed-issue, pre-existing exclusion ban, and community-rating requirements. *Id.* But they argued that it could be severed from the remainder of the Act. *Id.* Sixteen States and the District of Columbia intervened to defend the ACA. *Id.*

On December 14, 2018, the district court granted partial summary judgment and entered declaratory relief in the plaintiffs' favor. Pet. App. 11a-12a; 163a-231a.

It held that (1) the individual plaintiffs had standing, *id.* at 184a; (2) setting the alternative tax amount specified in Section 5000A(c) at zero transformed Section 5000A(a) into an unconstitutional command to purchase health insurance, *id.* at 189a-196a, 203a-204a; and (3) Section 5000A(a) could not be severed from the remainder of the ACA, which must therefore be invalidated in its entirety, *id.* at 231a. In a separate order, the district court entered a partial final judgment under Federal Rule of Civil Procedure 54(b) but stayed the effect of that judgment pending appeal. *Id.* at 114a, 162a.²

On December 18, 2019, a divided panel of the Fifth Circuit affirmed in part and vacated in part. Pet. App. 1a-113a. The panel majority agreed with the district court that the individual plaintiffs have standing to challenge Section 5000A(a) and further held that the state plaintiffs have standing. *Id.* at 29a-39a. The majority also affirmed the district court's conclusion that Section 5000A(a) must now be interpreted as an unconstitutional "command to purchase insurance," in light of Congress's decision to reduce the amount of the alternative tax to zero. *Id.* at 45a. But it vacated the district court's judgment as to severability, concluding that the district court's analysis on that point was "incomplete." *Id.* at 65a; *see id.* at 52a-

² After the notices of appeal were filed, the U.S. House of Representatives and the States of Colorado, Iowa, Michigan, and Nevada successfully moved to intervene in the appeal to defend the ACA. Pet. App. 12a & n.12. On the day the appellants' opening briefs were due, the federal defendants submitted a letter to the Fifth Circuit indicating that the Department of Justice had "determined that the district court's judgment should be affirmed" in its entirety. C.A. Dkt. No. 514887530 (Mar. 25, 2019).

70a. It remanded with directions to “conduct a more searching inquiry into which provisions of the ACA Congress intended to be inseverable from the individual mandate.” *Id.* at 68a.³

Judge King dissented. Pet. App. 73a-113a. She would have held that no plaintiff had standing, *id.* at 76a-85a, and that the minimum coverage provision remains “constitutional, albeit unenforceable,” *id.* at 74a; *see also id.* at 91a-98a. While she agreed that there were “serious flaws” in the district court’s severability analysis, *id.* at 73a, she believed remand was unnecessary, *id.* at 98a. In her view, the severability analysis in this case is “easy”: by removing Section 5000A’s “only enforcement mechanism” and leaving the rest of the ACA in place, Congress “plain[ly] indicat[ed] that [it] considered the coverage requirement entirely dispensable and, hence, severable.” *Id.* at 73a.

ARGUMENT

1. Expedited consideration of the petition for a writ of certiorari is warranted. As explained in the petition (at 16-19), the lower courts’ actions have created uncertainty about the future of the entire Affordable Care Act, and that uncertainty threatens adverse consequences for our Nation’s healthcare system, including for patients, doctors, insurers, and state and local governments.

The district court held that the minimum coverage provision in Section 5000A(a) is inseverable from every other provision of the ACA, Pet. App. 231a—a

³ The panel majority also instructed the district court to consider the federal defendants’ new arguments about the proper scope of relief. Pet. App. 70a-72a.

law that spans “10 titles [and] over 900 pages” and regulates a fifth of the Nation’s economy. *NFIB*, 567 U.S. at 538-539; *see also* D.Ct. Dkt. 91-2 at 164.⁴ As the federal respondents recognized below, the district court’s decision contributed to “uncertainty in the healthcare sector” and in “other areas affected by the Affordable Care Act.” C.A. Dkt. 514906506 at 3 (Apr. 8, 2019). The court of appeals exacerbated that uncertainty when it affirmed the district court’s holdings as to standing and the merits but remanded for a protracted inquiry into the severability question—while noting that “[i]t may still be that none of the ACA is severable from the individual mandate, even after this inquiry is concluded.” Pet. App. 69a. The remand directed by the court of appeals would undoubtedly “prolong this litigation and the concomitant uncertainty over the future of the healthcare sector.” *Id.* at 74a (King, J., dissenting).

That uncertainty is especially problematic because a wide range of fiscal, regulatory, commercial, and individual decisions hinge on provisions of the ACA. Each year, millions of Americans make life-changing decisions about whether to move, change jobs, start a family, or care for an elderly parent in reliance on the ACA’s patient protections and the greater access to affordable healthcare coverage it provides.⁵ States and local governments rely on the availability of tens of billions of dollars that the Act directs to them each year when setting their budgets, a

⁴ Citations to “D.Ct. Dkt.” are to the docket in N.D. Tex. Case No. 4:18-cv-167-O.

⁵ *See* Amicus Br. of Small Bus. Majority Found., C.A. Dkt. No. 514895946 (Apr. 1, 2019); Amicus Br. of Nat’l Women’s Law Center, *et al.*, C.A. Dkt. No. 514897602 (Apr. 1, 2019); D.Ct. Dkt. 91-1 at 13-22.

process that can take months or even years. *See* C.A. Dkt. No. 514820298 at 21-22, 28-32 (Feb. 1, 2019) (declarations of health policy experts and government health officials in support of state petitioners' motion to expedite appeal).⁶ State regulators begin working with insurers to set health insurance premiums long before those premium amounts take effect. *Id.* at 17, 25, 37. And when insurers want to develop and market an innovative product or change the way their service-provider networks are designed, their planning can start up to 24 months in advance. *Id.* at 25; *see also* Amicus Br. of America's Health Ins. Plans, C.A. Dkt. No. 514896554 at 14 (Apr. 1, 2019) ("health insurance providers . . . require significant lead time to develop strategies and offerings").

Prolonged uncertainty about whether or to what extent important provisions of the ACA might be invalidated substantially complicates these and other important choices. That uncertainty has already led some States to begin planning for the possibility that the entire ACA might be declared invalid, and to examine additional measures that might be necessary to stabilize their healthcare markets in that event. C.A. Dkt. No. 514820298 at 32-33, 36 (Feb. 1, 2019). The shadow cast by the decisions below may also negatively affect the health insurance market in future years by, for example, causing insurers to increase premiums or withdraw from the

⁶ *See also* D.Ct. Dkt. 91-1 at 33-66 (States that intervened in the district court would lose \$608.5 billion in federal Medicaid and Marketplace spending between 2019 and 2028 if district court's decision were affirmed); Amicus Br. of Counties and Cities, C.A. Dkt. No. 514897439 at 20-22 (describing healthcare funding as a complex multi-year process between federal, state, and local governments).

Exchanges altogether. *See, e.g., id.* at 16-17, 20, 26, 32-33, 36-37; D.Ct. Dkt. 91-1 at 8-13.

As the federal respondents argued below, the “[p]rompt resolution of this case will help reduce [the] uncertainty in the healthcare sector” that has resulted from this litigation. C.A. Dkt. 514906506 at 3 (Apr. 8, 2019). Were the Court to consider and grant the petition and hear argument in the ordinary course, however, there is little chance that it would resolve this dispute for at least another year. In the meantime, participants in our healthcare system would have to make critical choices—indeed, life-changing ones—without knowing whether important provisions of the ACA will be invalidated. By expediting its consideration of the petition and resolving the case this Term, this Court would allay that uncertainty and improve confidence in the markets about the future of the healthcare sector.

2. In light of the practical importance of this Court deciding this case before the end of the current Term, petitioners respectfully move for expedited consideration of the petition. Petitioners propose that amici curiae be directed to file briefs in support of the petition by January 17, 2020 and that respondents be directed to file responses to the petition by February 3, 2020, 31 days from the filing of the petition, with any amicus curiae briefs in support of respondents due on the same day. Petitioners hereby waive the 14-day waiting period for reply briefs under Rule 15.5, which would allow for the petition to be distributed on February 5, 2020 and considered at the Court’s February 21, 2020 conference. If the Court adopted that schedule, petitioners would file their reply briefs in support of the petition by

February 12, 2020. If the Court grants the petition at the February 21 conference, petitioners further request that oral argument be held on April 29, 2020 or at a special sitting in May 2020.

Alternatively, if the Court prefers to consider the petition at its January 24, 2020 conference to facilitate the completion of plenary review this Term, petitioners propose that amici curiae supporting petitioners be directed to file their briefs by January 15, 2020; that respondents be directed to file responses to the petition by January 21, 2020; and that amici curiae supporting respondents be directed to file their briefs by January 21, 2020. If the Court adopted that schedule, petitioners would file their reply briefs by noon eastern time on January 23, 2020. If the Court grants the petition at the January 24 conference, petitioners further request that oral argument be held on April 29, 2020.

3. If the Court grants the petition at either the January 24 or February 21 conference, petitioners respectfully request that the Court set an expedited merits briefing schedule.

Should the Court grant the petition on February 21 and set the case for oral argument in April, petitioners would propose the following schedule:

March 16, 2020	Petitioners' opening briefs due
April 6, 2020	Respondents' briefs due
April 20, 2020	Petitioners' reply briefs due

Should the Court grant the petition on February 21 and set the case for oral argument at a special sitting in May, petitioners would propose the following schedule:

March 20, 2020	Petitioners' opening briefs due
April 20, 2020	Respondents' briefs due
May 8, 2020	Petitioners' reply briefs due

Should the Court grant the petition on January 24, 2020 and set the case for oral argument in April, petitioners would propose the following schedule:

February 24, 2020	Petitioners' opening briefs due
March 23, 2020	Respondents' briefs due
April 17, 2020	Petitioners' reply briefs due

4. Petitioners also move for expedited consideration of this motion, so that the Court may consider it at the January 10, 2020 conference. Petitioners respectfully request that the Court direct respondents to respond to this motion by January 7, 2020.

5. Petitioners have conferred with counsel for the respondents and asked for their positions on the relief requested in this motion, including the request for expedited consideration of this motion. Counsel for the state respondents and counsel for the individual respondents stated that they were opposed to all of the relief requested in the motion. Counsel for the federal respondents did not respond with their position in time for it to be included in this motion.

CONCLUSION

For the reasons stated, petitioners respectfully request that the Court expedite consideration of this motion, expedite consideration of the petition for a writ of certiorari based on either of the schedules proposed above, and, if the Court grants the petition, set an expedited schedule for merits briefing and oral argument that enables the Court to hear and decide the case this Term.

Respectfully submitted,

/s/ Samuel P. Siegel

Xavier Becerra
Attorney General of California
Michael J. Mongan
Solicitor General
Samuel P. Siegel
Helen H. Hong
Deputy Solicitors General
Kathleen Boergers
Supervising Deputy Attorney General
Nimrod Pitsker Elias
Neli N. Palma
Deputy Attorneys General
Amari L. Hammonds
Associate Deputy Solicitor General
California Department of Justice
1300 I Street
Sacramento, CA 95814
(916) 210-6269
sam.siegel@doj.ca.gov
Counsel for the State of California

(Additional counsel listed on the following pages)

William Tong
Attorney General of Connecticut
 Joseph Rubin
Assistant Deputy Attorney General
Counsel for the State of Connecticut

Philip J. Weiser
Attorney General of Colorado
 Eric R. Olson
Solicitor General
Counsel for the State of Colorado

Kathleen Jennings
Attorney General of Delaware
 Ilona Kirshon
Deputy State Solicitor
 Jessica M. Wiley
 David J. Lyons
Deputy Attorneys General
Counsel for the State of Delaware

Clare E. Connors
Attorney General of Hawaii
 Robert T. Nakatsuji
First Deputy Solicitor General
Counsel for the State of Hawaii

Kwame Raoul
Attorney General of Illinois
 Jane Elinor Notz
Solicitor General
 David F. Buysse
Deputy Chief, Public Interest Division
 Matthew V. Chimienti
Assistant Attorney General, Special
Litigation Bureau
Counsel for the State of Illinois

Thomas J. Miller
Attorney General of Iowa
 Nathan Blake
Deputy Attorney General
Counsel for the State of Iowa

Maura Healey
Attorney General of Massachusetts
 Stephen B. Vogel
Assistant Attorney General
Counsel for the Commonwealth of
Massachusetts

Dana Nessel
Attorney General of Michigan
 Fadwa A. Hammoud
Solicitor General
Counsel for the State of Michigan

Keith Ellison
Attorney General of Minnesota
 Scott Ikeda
Assistant Attorney General
Counsel for the State of Minnesota, by
and through its Department of
Commerce

Aaron D. Ford
Attorney General of Nevada
 Heidi Parry Stern
Solicitor General
Counsel for the State of Nevada

Gurbir S. Grewal
Attorney General of New Jersey
 Matthew J. Berns
Assistant Attorney General
 Marie Soueid
Deputy Attorney General
Counsel for the State of New Jersey

Letitia James
Attorney General of New York
 Barbara D. Underwood
Solicitor General
 Steven C. Wu
Deputy Solicitor General
 Lisa Landau
Bureau Chief, Health Care Bureau
 Elizabeth Chesler
*Assistant Attorney General, Health
 Care Bureau*
Counsel for the State of New York

Joshua H. Stein
Attorney General of North Carolina
 Matthew W. Sawchak
Solicitor General
 Ryan Y. Park
Deputy Solicitor General
 Sripriya Narasimhan
Deputy General Counsel
*Counsel for the State of North
 Carolina*

Ellen F. Rosenblum
Attorney General of Oregon
 Benjamin Gutman
Solicitor General
Counsel for the State of Oregon

Peter F. Neronha
Attorney General of Rhode Island
 Michael W. Field
 Maria R. Lenz
Assistant Attorneys General
Counsel for the State of Rhode Island

Thomas J. Donovan, Jr.
Attorney General of Vermont
 Benjamin D. Battles
Solicitor General
Counsel for the State of Vermont

Mark R. Herring
Attorney General of Virginia
 Toby J. Heytens
Solicitor General
*Counsel for the Commonwealth of
 Virginia*

Robert W. Ferguson
Attorney General of Washington
 Jeffrey G. Rupert
Chief, Complex Litigation Division
 Jeffrey T. Sprung
Assistant Attorney General
Counsel for the State of Washington

La Tasha Buckner
General Counsel
 S. Travis Mayo
Chief Deputy General Counsel
 Taylor Payne
Deputy General Counsel
*Counsel for Andy Beshear, Governor of
 Kentucky*

Karl A. Racine
*Attorney General for the District of
 Columbia*
 Loren L. Alikhan
Solicitor General
 Carl J. Schifferle
Acting Deputy Solicitor General
Counsel for the District of Columbia



E-Mail Address:
briefs@wilsonepes.com

775 H Street, N.E.
Washington, D.C. 20002

Web Site:
www.wilsonepes.com

Tel (202) 789-0096
Fax (202) 842-4896

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THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT,
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GOVERNOR OF KENTUCKY, AND THE DISTRICT OF COLUMBIA,
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AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that on January 3, 2020, one (1) copy of the MOTION TO EXPEDITE CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI AND TO EXPEDITE CONSIDERATION OF THIS MOTION in the above-captioned case were served, as required by U.S. Supreme Court Rules 21.3 and 29.5(c), on the following:

DOUGLAS N. LETTER
General Counsel

OFFICE OF THE GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700

Counsel for the U.S. House of Representatives

NOEL J. FRANCISCO
Solicitor General

U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW Room 5616
Washington, D.C 20530-0001
(202) 514-2217

Counsel for the United States of America, et al.

KYLE D. HAWKINS
Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas, 78711-2548
(512) 936-1700

Counsel for the State of Texas, et al.

ROBERT HENNEKE
TEXAS PUBLIC POLICY FOUNDATION
CENTER FOR THE AMERICAN FUTURE
901 Congress Avenue
Austin, Texas 78701
(512) 472-2700

Counsel for Neill Hurley and John Nantz

The following email addresses have also been served electronically:

Sam.Siegel@doj.ca.gov

Douglas.Letter@mail.house.gov

SupremeCtBriefs@usdoj.gov

Kyle.Hawkins@oag.texas.gov

rhenneke@texaspolicy.com

Irene M. Carr

IRENE M. CARR
WILSON-EPES PRINTING COMPANY, INC.
775 H Street, N.E.
Washington, D.C. 20002
(202) 789-0096

Sworn to and subscribed before me this 3rd day of January 2020.

C. Hogan

COLIN CASEY HOGAN
NOTARY PUBLIC
District of Columbia

My commission expires April 14, 2022.

