Nos. 19-840 & 19-841

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,
and
UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioners,

v.

THE STATE OF TEXAS, ET AL.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In 2010, Congress commanded almost every American to buy "minimum essential [health-insurance] coverage." Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119, § 1501(b) (codified at 26 U.S.C. § 5000A). In 2012, this Court held that "[t]he Federal Government does not have the power order people to buy health insurance." *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 567 U.S. 519, 575 (2012). The Court upheld the law because that mandate was attached to a revenue-producing penalty and thus could "reasonably be characterized as a tax." *Id.* at 574.

In 2017, Congress eliminated that tax. But it left undisturbed both the mandate itself and the ACA's inseverability clause—that is, the sections of the statute that declare the mandate "essential" to the ACA's operation. 42 U.S.C. § 18091(2)(I). The questions presented are:

1. Whether at least one respondent has standing to challenge the constitutionality of Congress's ongoing command to buy health insurance.

2. Whether Congress may command Americans to purchase health insurance in the absence of any revenue-producing penalty for failing to do so.

3. Whether, in light of the 2017 Congress's decision to eliminate any penalty yet leave intact both the mandate and the inseverability clause, any provisions of the ACA remain operative.

4. Whether the U.S. House has standing to challenge the Fifth Circuit's decision. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019).

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OPINIONS BELOW

The court of appeals has revised its opinion twice to correct technical errors. The operative version is published at 945 F.3d 355 (App. 1a-113a). This opposition will refer to petitioner's appendix filed in *California v. Texas*, No. 19-840, to avoid confusion. The relevant orders of the district court are reported at 340 F. Supp. 3d 579 (App. 163a-231a) and 352 F. Supp. 3d 665 (App. 117a–62a).

JURISDICTION

State petitioners have invoked the jurisdiction of this Court under 28 U.S.C. § 1254.

The U.S. House, as one house of a bicameral legislature, lacks standing to independently petition this Court to defend a legislative enactment. *Bethune-Hill*, 139 S. Ct. at 1953-54. Therefore, the U.S. House has not properly invoked the jurisdiction of this Court. This is an independent reason to deny review in No. 19-841. *See id.*

STATEMENT

In 2010, Congress passed the ACA to achieve three express statutory goals: (1) "near-universal [health-insurance] coverage," (2) "lower health[-]insurance premiums," and (3) "creat[ion] [of] effective health[-]insurance markets." 42 U.S.C. § 18091(2)(D), (F), (I). To achieve these goals, Congress created a complex latticework of "closely interrelated" provisions resting on three key features. *NFIB*, 567 U.S. at 691 (Scalia, J., dissenting). Those features, which the D.C. Circuit referred to as a "three-legged stool," *Halbig v. Burwell*, 758 F.3d 390,

409 (D.C. Cir. 2014), *vacated on other grounds*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014), were: (1) a requirement that Americans buy minimum essential health-insurance, known as the "individual mandate;" (2) a guaranteed-issue provision; and (3) a community-rating provision. *Id.* In 2017, Congress eliminated the penalty for failing to maintain minimum-essential coverage—yet kept the mandate itself intact, along with statutory language declaring the mandate "essential" to the law's operation. 42 U.S.C. §§ 18091(2)(H)-(J).[1] By removing the tax that permitted this Court's saving construction, Congress rendered the individual mandate unconstitutional.

A. Statutory Framework

As relevant here, the ACA has four core and "closely interrelated" features. *See NFIB*, 567 U.S. at 691 (dissenting op.). Those provisions are the individual mandate, the accompanying tax penalty, the guaranteed-issue provision, and the community-rating provision.

1. Individual mandate and penalty

At the heart of the ACA is what is referred to as the individual mandate and its accompanying tax penalty, enforceable against those who do not comply with it. The text provides: "An applicable individual shall . . . ensure that the individual . . . is covered under minimum essential coverage." 26 U.S.C. § 5000A(a). The statutory title of this subsection reiterates that it imposes a

[1] Tax Cut and Jobs Act of 2017 ("TCJA"), Pub. L. No. 115-97, 131 Stat. 2054, 2092, § 11081 (2017).

"[r]equirement" on applicable individuals "to maintain minimum essential coverage." *Id.* (capitalization altered).

Subsection (b) imposes a tax penalty on many "applicable individual[s]" who fail to comply with the individual mandate. *Id.* § 5000A(b). Congress titled this tax penalty a "Shared [R]esponsibility [P]ayment," *id.*, providing: "If a taxpayer who is an applicable individual . . . fails to meet the requirement of subsection (a) . . . then . . . there is hereby imposed on the taxpayer a penalty with respect to such failure[]." *Id.* § 5000A(b)(1).

Some individuals who are bound by the mandate's command are nonetheless exempt from any tax penalty. *See id.* §§ 5000A(e)(1)-(5). Five classes of people, including the poor and members of "an Indian tribe," fall into this category. *Id.* These individuals must obtain "minimum essential coverage" in order to "comply with [the] mandate, even in the absence of penalties." CONGRESSIONAL BUDGET OFFICE, KEY ISSUES IN ANALYZING MAJOR HEALTH INSURANCE PROPOSALS 53 (Dec. 2008), https://tinyurl.com/CBO2008Report ("CBO 2008 REPORT").

Congress's reason for subjecting many individuals to the mandate, but not to the tax penalty, was sensible: for many people, especially the poor, imposing a tax penalty would be unjust. Nevertheless, Congress still wanted to require those individuals to sign up for ACA-compliant health insurance. A core purpose of the ACA was to prevent the emergency-room cost-shifting problem—where individuals without health insurance obtain uncompensated care in an emergency room, inevitably requiring medical providers to increase costs for insured persons.

See 42 U.S.C. §§ 18091(2)(A), (F), (I). So Congress mandated that those individuals obtain coverage, offered them the means to satisfy the mandate through the Medicaid system, 26 U.S.C. §§ 5000A(f)(1)(A)(i)-(iii), but then exempted them from the tax penalty if they nevertheless failed to comply with the mandate, *id.* § 5000A(e)(1). This tracked a CBO recommendation, which found that "[m]any individuals" who are subject to the mandate, but are not subject to the penalty, will obtain coverage because of the mandate "because they believe in abiding by the nation's laws." CBO 2008 REPORT at 53.

The financial penalty for failing to maintain health insurance is not the only consideration that gives the mandate teeth. In 2008, the CBO identified at least three major factors that would ensure compliance with the mandate to buy insurance: (1) "personal values" and "social norms" that lead "[m]any individuals and employers [to] comply . . . because they believe in abiding by the nation's laws;" (2) provisions that make compliance easier, such as subsidies and exemptions; and (3) penalties for noncompliance. *Id.* at 50-53.

Congress took advantage of all three. In addition to ever-present social norms, Congress built numerous provisions of the ACA to effectuate the minimum-essential-coverage requirement. For example, Congress obliged States to provide what it defined as minimum-essential care in their Medicaid programs, 42 U.S.C. § 1396a(k)(1) (incorporating the standard through 42 U.S.C. §§ 1396u-7(b)(1), (5)), and employers to provide insurance to employees, 26 U.S.C. § 4980H. Congress used the minimum-essential-coverage requirement to define insurance companies' disclosure obligations to their

customers, 42 U.S.C. § 300gg-15, and employers' disclosure obligations to the IRS, 26 U.S.C. § 6056. And it used the same requirement to trigger individuals' ability to access public insurance exchanges, 42 U.S.C. § 18081; their right to receive public subsidies to buy insurance, 26 U.S.C. § 36B; and their obligation to pay a tax penalty if they chose not to do so, *id.* § 5000A(c). In 2010, Congress found that the insurance "requirement, together with the[s]e other provisions of the Act" would lead to universal healthcare coverage and lower health-insurance premiums. 42 U.S.C. § 18091(2)(F).

2. Guaranteed issue and community rating

The ACA imposes voluminous regulations on health-insurance companies, with the most prominent being "guaranteed issue" and "community rating" requirements. *See id.* §§ 300gg to gg-4. The guaranteed-issue provision mandates that health-insurance companies "accept every employer and individual in the State that applies for . . . coverage," regardless of preexisting conditions. *Id.* § 300gg-1. The community-rating provision prohibits health insurers from charging higher rates to individuals within a given geographic area on the basis of their age, sex, health status, or other factors. *See id.* §§ 300gg, 300gg-4(a).

Together with the individual mandate, the guaranteed-issue and community-rating provisions form what the D.C. Circuit called a "three-legged stool[:] remove any one, and the ACA will collapse." *Halbig*, 758 F.3d at 409. Indeed, the ACA's text itself states that "[t]he requirement [to buy health insurance] is essential to creating effective health[-]insurance markets in which

improved health[-]insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." 42 U.S.C. § 18091(2)(I). As the United States conceded in *NFIB*, "the minimum[-]coverage provision is necessary to make effective the Act's guaranteed-issue and community-rating insurance market reforms." Br. for Fed. Gov't on Severability 26, *NFIB v. Sebelius*, 567 U.S. 519 (2012) ("*NFIB* Br."). The government explained that "Congress's findings expressly state that enforcement of [community and guaranteed issue] without a minimum[-]coverage provision would *restrict* the availability of health insurance and make it *less* affordable—the opposite of Congress's goals in enacting the Affordable Care Act." *Id.* at 44-45. This outcome would result because, "in a market with guaranteed issue and community rating, but without a minimum[-]coverage provision, 'many individuals would wait to purchase health insurance until they needed care.'" *Id.* at 45 (quoting 42 U.S.C. § 18091(2)(I)).

This "adverse selection" problem would cause premiums to "go up, further impeding entry into the market by those currently without acute medical needs, risking a 'marketwide adverse-selection death spiral.'" *Id.* at 46; 42 U.S.C. § 18091(2)(J). This hazard is why Congress "twice described" minimum coverage "as 'essential'" to "the guaranteed-issue and community-rating reforms" in the ACA's text. *NFIB* Br. 46-47. In sum, "without a minimum[-]coverage provision, the guaranteed-issue and community-rating provisions would drive up costs and reduce coverage, the opposite of Congress's goals." *Id.* at 26.

B. *NFIB v. Sibelius* and the Tax Cut and Jobs Act of 2017

In 2012, before the mandate went into effect, this Court considered whether the Constitution grants Congress power to require individuals to buy insurance in light of Congress's conclusion that "the absence of [such a] requirement would undercut federal regulation of the health[-]insurance market." 42 U.S.C. § 18091(2)(H). The Court concluded that Congress could *not* do so as an exercise of its power to regulate interstate commerce. Though Congress may regulate the insurance market, the Court held, Congress may not "create the necessary predicate to the exercise of an enumerated power." *NFIB*, 567 U.S. at 560. Cognizant of its "duty to construe a statute to save it, if fairly possible," however, the Court upheld the minimum-essential-coverage requirement as a trigger for a tax, namely section 5000A's penalty. *Id.* at 574-75.

In 2017, Congress "eliminat[ed]," TCJA § 11081 (capitalization altered), this Court's statutory "basis to adopt such a saving construction," *NFIB*, 567 U.S. at 575. TCJA § 11081 reduced the operative parts of section 5000A(c)'s tax penalty to "[z]ero percent" and "$0."

As petitioners acknowledge, the TCJA left "every other provision of the ACA in place," including the mandate and the inseverability clause labeling that mandate "essential." States Pet. 2; *cf.* House Pet. 31. Specifically, Congress preserved all of its earlier findings that the individual mandate "is an essential part of [the Government's] regulation of economic activity." 42 U.S.C. § 18091(2)(H).

As it stands today, the U.S. Code includes the following: (1) a naked command to the American people to buy insurance, (2) a penalty provision for failure to comply that raises no revenue, and (3) Congress's textual declarations that the individual mandate remains "essential" to the operation of the law.

C. Procedural History

The two individual and eighteen state respondents who brought this suit are among the many individuals and employers who continue to obey the law. The operative complaint documents the various harms they are suffering as a result. ROA.518-29.[2] They have pleaded five claims because the ACA, as amended, "forces an unconstitutional and irrational regime on the States and their citizens." ROA.504; ROA.530-35. Because the United States agrees that the minimum-essential-coverage requirement is unconstitutional, state petitioners intervened to defend the law. ROA.220-56, 946-52.

In December 2018, the district court granted respondents' claim for a declaratory judgment that the individual mandate is unconstitutional and the rest of the ACA inseverable. App. 163a-231a. The court concluded that individual respondents have standing because they "are the object of the Individual Mandate" and have been financially harmed by buying insurance. *Id.* 181a-85a. (Because Article III requires only one party to have standing, the district court did not address state respondents' standing. App. 184a-85a.)

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[2] ROA refers to the record on appeal in *Texas v. United States*, No. 19-10011 (5th Cir.).

On the merits, the court concluded that the individual mandate was unconstitutional because the saving construction adopted by *NFIB* was no longer fairly permissible after the TCJA. App. 185a-204a. As to remedy, the court noted that respondents (individual, state, and federal) "agree[d] . . . that the guaranteed-issue and community-rating provisions . . . are inseverable" from the individual mandate. *Id.* 204a.[3] The court issued a declaration that the remainder of the ACA was inseverable from the requirement as well. *Id.* 204a-05a. At the request of the state petitioners, ROA.2674-2706, the district court entered a partial judgment to allow immediate appeal and stayed litigation regarding respondents' remaining claims pending the outcome, App. 117a-62a.

The Fifth Circuit affirmed on everything except remedy. In particular, the Fifth Circuit agreed that individual respondents have standing, *id.* 32a, and that the individual mandate is unconstitutional, *id.* 52a. The court further concluded that state respondents have standing based on "fiscal injuries as employers." *Id.* 32a-33a. Without reaching whether the mandate injured States' sovereign right to enforce their own laws, the Fifth Circuit concluded that "[t]he record is replete with evidence that the individual mandate itself has increased" states respondents' compliance costs, which satisfies Article III. *Id.* 33a-34a & n.28.

The Fifth Circuit declined to affirm, however, the district court's conclusion that the remainder of the ACA is inseverable from the unconstitutional mandate. The

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[3] The ACA's defenders took the same position in 2012. *NFIB* Br. 44-54.

court noted that the United States "ha[d] shifted their position on [severability and remedy] more than once." *Id.* 13a. At oral argument, the United States argued that under *Gill v. Whitford*, 138 S. Ct. 1916 (2018), remand was necessary because the remedy "should only reach ACA provisions that injure" respondents. App. 71a. Because this remedial argument "came as a surprise" to state respondents, the Fifth Circuit ordered the district court to consider this new argument—including whether it was "timely raised"—in the first instance. *Id.*

SUMMARY OF ARGUMENT

This case comes to this Court in an interlocutory posture that leaves it unripe for review at this time. Where, as here, a court of appeals resolves the merits of an appeal but not the remedy, and remands to the district court to enter an appropriate remedial order, this Court's practice is to deny review. *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari).

Not one of the three questions presented in these petitions justifies deviation from that rule. While the Fifth Circuit's resolution of standing and the question of the mandate's unconstitutionality is now complete, there is no operative remedy in place. Because this is a "court of review, not of first view," which does not address questions in the first instance, it should deny review. *Ret. Plans. Comm. of IBM v. Jander*, No. 18-1165, 2020 WL 201024, at *2 (U.S. Jan. 14, 2020) (per curiam) (quoting *Cutter v. Wilkinson*, 544 U.S. 708, 718 n.7 (2005)). This Court applies that well-established principle even where "the argument before [it]

involves a pure question of law." *Id.* at *3 (Gorsuch, J., concurring). It should do the same here.

REASONS TO DENY THE PETITION

I. The Interlocutory Posture of this Case, Where the Remedy Is Undecided, Raises a Strong Presumption Against Granting Review.

A.1. For more than a century, it has been this Court's "normal practice [to] deny[] interlocutory review," even where cases present significant statutory or constitutional questions. *Estelle v. Gamble*, 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting) (criticizing deviation to address novel Eighth Amendment claims as "inexplicable"). Indeed, this Court has stated that lack of finality "alone [can] furnish[] sufficient ground for the denial of [an] application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Because this Court's "power [sh]ould seldom be exercised before final judgment in the circuit court of appeals," the circumstances when it should grant interlocutory review are "very rare[] indeed." *Am. Const. Co. v. Jacksonville T.& K.W. Ry. Co.*, 148 U.S. 372, 385 (1893); *see also Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (where "the Court of Appeals remand[s] the case" for further consideration, the case is "not yet ripe for review by this Court").

The Chief Justice perhaps best articulated this Court's policy when it comes to interlocutory decisions in *Abbott v. Veasey*. There, the en banc Fifth Circuit affirmed the district court's conclusion that Texas's voter ID law violated section 2 of the Voting Rights Act and

remanded "for further proceedings on an appropriate remedy." 137 S. Ct. at 613 (Roberts, C.J.). Texas sought immediate review in this Court. *Id.* The Chief Justice explained that the denial was warranted because "the District Court has yet to enter a final remedial order." *Id.* The proper course, he wrote, is to defer review until "after entry of final judgment," because "[t]he issues will be better suited for certiorari review at that time." *Id.*

That practice has been restated time and again, and it applies even in cases of national import. For example, the validity of the voter ID laws at issue in *Abbott* surely carried nationwide importance to the nearly three dozen States with similar laws—yet this Court denied review. *See id.*; Br. of States of Indiana, et al. as Amici Curiae at 1, *Abbott*, 137 S. Ct. 612.

Or consider *Virginia Military Institute v. United States ("VMI")*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari). There, this Court refused to consider the Fourth Circuit's ruling that VMI's admission policies violated female students' fundamental right to equal protection because the circuit court had "expressly declined to rule" on the appropriate remedy. *Id.* The question was indubitably important, and immediate review could have provided certainty, obviated the need for years of litigation, and ensured that the question "receive[d] the attention of this Court before, rather than after" a venerable institution was "compelled to transform itself." *Id.* Nevertheless, Justice Scalia explained, it was "prudent" to wait. *Id.* There would be time enough later to review the merits decision once the lower courts had fashioned a remedy. *Id.*; *see also, e.g.*, *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012)

(Alito, J., respecting the denial of certiorari); *Wrotten v. New York*, 560 U.S. 959 (2010) (Sotomayor, J.) (same) (citing *Moreland v. Fed. Bureau of Prisons*, 547 U.S. 1106, 1107 (2006) (Stevens, J.) (same)).

This prudential rule serves a highly salutary purpose. Justice Brennan once observed that "we have made mistakes in granting certiorari at an interlocutory stage in a case," because litigation is inherently unpredictable, and later developments may change the character of the question presented. William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 231-32 (1983). At this time, "it remains unclear precisely what action the Federal Government will be required to take" to remedy respondents' injuries. *Mount Soledad Mem'l Ass'n*, 567 U.S. at 944 (Alito, J.). The lower courts' assessment of those issues may (or may not) significantly narrow those disputes. Under such circumstances, it would be "prudent," *VMI*, 508 U.S. at 946 (Scalia, J.), to wait until the Court "ha[s] the benefit of the [lower] court's full consideration," *Wrotten*, 560 U.S. at 959 (Sotomayor, J.).[4]

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[4] *Abbott* proves that Justice Brennan's observations were correct. That case never returned to this Court because the Texas Legislature amended the voter ID law at issue. *Veasey v. Abbott*, 888 F.3d 792, 795 (5th Cir. 2018) ("This appeal by the state of Texas follows remand from the en banc court concerning the state's former photo voter ID law ('S 14'). During the remand, the Texas legislature passed a law designed to cure all the flaws cited in evidence when the case was first tried. The legislature succeeded in its goal."). Had the Court taken up the case in an interlocutory posture, it would have done so unnecessarily. The same could be true here. *See, e.g.*, Robert Pearl, *Healthcare Promises: What 2020 Presidential*

2. To be sure, this Court has recognized a small set of "extraordinary cases" where the Court departs from its settled practice. STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 283 (10th ed. 2013). Those cases involve situations where "the lower court's decision is patently incorrect *and* the interlocutory decision . . . will have immediate consequences on the petitioner." *Id.* (emphasis added) (collecting cases). That narrow test is met in situations where the circuit court's decision implicates a matter that is "effectively unreviewable" if the Court were to wait until final judgment. *Will v. Hallock*, 546 U.S. 345, 351-52 (2006) (addressing related collateral-order doctrine).

The cases that meet that exception can involve questions of a sovereign's or public official's immunity from suit that would be lost if the Court were to wait until final judgment. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 671-72 (2009). Or the Court may hear a case involving class certification where an adverse decision leads to such *in terrorem* pressure to settle that it is unlikely any case presenting the issue will ever reach final judgment. *E.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). Or the Court may hear a case where a burdensome preliminary injunction will cause the petitioner concrete, irreparable harm during the pendency of the litigation. *E.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997).

B. That settled practice compels the Court to deny review here. As in *Abbott*, the Fifth Circuit has resolved

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Candidates Aren't Telling You, FORBES, Aug. 26, 2019 (describing healthcare as "the nation's top voting issue ahead of 2020 elections").

a core merits question—namely, that the individual mandate is unconstitutional—but declined to fashion a remedy in the first instance. Just as the *Abbott* court directed the district court to fashion a remedy in the first instance, so too did the Fifth Circuit below. The Court should deny review in keeping with its standard practice.

Adherence to this practice is especially warranted here because no harm will flow from answering the questions presented later. This Court routinely reviews questions of standing and statutory interpretation after final judgment. *E.g.*, *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (discussing evidence of standing adduced at trial in statutory-interpretation case); *accord Duke Power Co. v. Carolina Envt'l Study Grp., Inc.*, 438 U.S. 59, 72 (1978) (noting that the "District Judge held four days of hearings on the questions of standing and ripeness" before declaring a statute invalid).

II. Petitioners Provide No Reason to Depart from the Court's Settled Practice of Denying Review in Interlocutory Matters.

This Court should not allow petitioners to leapfrog lower-court consideration based on their own asserted "need for certainty." House Pet. 13. The Fifth Circuit correctly decided the two questions on which it ruled: standing and the constitutionality of the individual mandate. But, in any event, the questions are not certworthy at this juncture. Indeed, petitioners are not really arguing that the issues the Fifth Circuit *decided* merit immediate review. Instead, they assert that such review is necessary due to the "Fifth Circuit's refusal" to rule on severability. House Pet. 15. Petitioners have not cited any

cases in which this Court granted interlocutory review precisely *because* the ruling was interlocutory.

A. This Court does not need to review the Fifth Circuit's standing decision.

The Fifth Circuit correctly applied this Court's well-established standing precedent to the particular facts before it. Indeed, petitioners do not even challenge most of its analysis. The arguments they do raise do not merit this Court's attention because they would, at most, affect the *scope* of the Fifth Circuit's remand to the district court—not its necessity.

1. The standards for judging standing are well established and undisputed. As the Fifth Circuit correctly noted, at least one plaintiff must demonstrate an injury that (1) is "actual or imminent, not conjectural or hypothetical," (2) is fairly traceable to the challenged act of the defendant," and (3) "likely . . . will be redressed by a favorable decision." App. 19a (cleaned up) (quoting, *inter alia*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

This Court's precedent has not set a high evidentiary bar to demonstrate standing, requiring only that a plaintiff show a sufficient stake in the outcome of a case to ensure that the dispute "will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015). That inquiry is not to be confused with the merits of a plaintiff's claim. *Id.* at 2663 (quoting *Davis v. United States*, 564 U.S. 229, 249 n.10 (2011)). The quantum of the injury does not matter, and Article III

"requires no more than *de facto* causality." *Dep't of Commerce*, 139 S. Ct. at 2566 (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.)). Finally, Article III demands only that one plaintiff satisfy these standards for a case to proceed. *E.g.*, *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006).

The Fifth Circuit correctly held that the individual and state respondents are suffering direct financial injury and increased regulatory burden from the ACA's mandate that nearly all Americans purchase insurance. App. 23a, 32a-33a. The record is "replete with evidence that the individual mandate itself increased the cost[s]" to state respondents in their capacity as employers, including the reporting costs upon which the Fifth Circuit focused. *Id.* 33a, 36a-37a. As petitioners did not challenge the factual sufficiency of this evidence or offer contrary proof in the district court, *id.* 36a, the Fifth Circuit was correct to hold that respondents satisfied their burden of proof in the current procedural posture (*i.e.*, plaintiff's motion for partial summary judgment). *Texas v. United States*, 497 F.3d 491, 496-97 (5th Cir. 2007); *see also, e.g.*, *United States v. Students Challenging Regulatory Agency Procedures* ("*SCRAP*"), 412 U.S. 669, 689 & n.15 (1973) ("If . . . these allegations were in fact untrue, then the appellants should have moved for summary judgment on the standing issue.").

2. Petitioners do not challenge most of this analysis and admit that "[a] fiscal injury caused by a federal statute or policy can of course be a basis for [establishing] standing." States Pet. 20. Instead, petitioners challenge only whether respondents have demonstrated that the individual mandate caused their fiscal injury absent the

now-zeroed tax penalty. States Pet. 20-21; House Pet. 23-27. This argument fails for at least three reasons.

First, petitioners' arguments take *NFIB*'s statements describing the individual mandate as a "'lawful choice' between buying insurance or paying the tax" out of context. States Pet. 2 (quoting *NFIB*, 567 U.S. at 574). The individual mandate was not yet effective in 2012. 26 U.S.C. § 5000A(a) (applying "for each month beginning after 2013"). Standing analysis in such a pre-enforcement challenge focuses on the extent to which there is a "credible threat of prosecution" under the challenged statute. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *accord Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). In 2012, the only threat of prosecution was through the tax penalty. *NFIB*, 567 U.S. at 574. But this "is not a pre-enforcement challenge." App. 29a. The individual mandate has been in effect for more than five years.

Second, because the mandate is in force, the Fifth Circuit properly looked not only to the costs imposed by section 5000A but also costs that "are created in part by the individual mandate's practical *interaction* with other ACA provisions." App. 36a-37a n. 29 (citing *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016)). Because "legislatures[] do not generally resolve massive problems in one fell swoop," courts look to whether different provisions of an integrated regulatory scheme have worked together to harm the plaintiff. *Massachusetts v. EPA*, 549 U.S. 497, 499, 524 (2007); *see also, e.g.*, *United States v. Windsor*, 570 U.S. 744, 755 (2013); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 683 (1987).

Petitioners' contrary assertions depend on the incorrect premise that because the mandate lacks a specific penalty, it is not enforced. Almost since the Founding, this Court has recognized that "[a] law is an expression of the public will; which, when expressed, is not the less obligatory, because it imposes no penalty." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 212 (1796); *see also, e.g.*, *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 457 (1841) ("A law containing no penalty for transgression may be defective in its operation on the individual, but it is complete to establish the nature of the offence."). The law is full of instances where statutes are enforced through means other than direct penalties—*e.g.*, preemption provisions, statutes of limitations, self-executing treaties, and statutory definitions. And when such provisions (either alone or in combination with other laws) cause harm, they may be challenged. *Alaska Airlines*, 480 U.S. at 683 (allowing airlines to challenge various provisions of the Airline Deregulatory Act based on a separate legislative-veto provision).

This Court's decision in *United States v. Windsor*, is particularly instructive. In that case, a taxpayer sought to challenge the Defense of Marriage Act, 28 U.S.C. § 1738C, in an action for a tax refund under the marital exemption from the federal estate tax, 26 U.S.C. § 2056(a). Under the U.S. House's view here, the taxpayer should not have been permitted to "bootstrap any injury" from her tax claim "into standing to challenge" DOMA because they were set forth in completely different titles of the U.S. Code. House Pet. 25-26. There was, however, "no dispute" that Ms. Windsor had standing because "being forced to pay [the allegedly unconstitutional] tax causes a real and immediate economic injury." 570 U.S. at 755 (quoting

Hein v. Freedom from Religion Found., 551 U.S. 587, 599 (2002) (plurality op.)). So too, here.

The authorities cited by the U.S. House (at 26) are not to the contrary. The plaintiffs in *Daimler Chrysler Corp. v. Cuno* tried to use their status as *municipal* taxpayers to challenge their *state* taxes. 547 U.S. 332, 351-52 (2006). The Court refused to allow them to use a federal court's pendent jurisdiction under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), to evade Article III standing requirements. *Cuno*, 547 U.S. at 354. *Cuno* says nothing about how to analyze standing where two federal statutes work together to harm a plaintiff. And *Davis v. FEC* supports respondents because it requires courts to examine how a challenged statute works in practice when assessing a plaintiff's standing. 554 U.S. 724, 733-34 (2008). The Fifth Circuit did precisely that.

Third, petitioners' complaint that state respondents offered insufficient evidence "that state employees within the respondent states purchased employer-provided health insurance *because of* amended 5000A," House Pet. 26, misstates the record. State respondents offered extensive evidence of the impact of the ACA, including the individual mandate, on their management of their internal affairs, which the Fifth Circuit summarized at length. App. 33a-37a. In light of that evidence, state petitioners, as non-movants, could not rest on conclusory denials. 10A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2727.2 (4th ed. 2008).[5] They were instead required to

[5] The U.S. House did not seek to intervene until after the district court had issued its December 2018 decision. ROA.2793.

offer competent evidence showing a genuine issue of fact. *E.g.*, *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 747-48 (9th Cir. 2012) (citing, *inter alia*, *Duke Power Co.*, 438 U.S. at 72); *Bischoff v. Osceola County*, 222 F.3d 874, 878-81 (11th Cir. 2000) (citing *Barret Comput. Servs. v. PDA, Inc.*, 884 F.3d 214, 215-20 (5th Cir. 1989); *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 423-25 (1st Cir. 1983)). But "as even counsel for the [petitioner] states admitted at oral argument, nobody challenged [state respondents'] evidence as conclusory"—or otherwise insufficient "in the district court or in the [circuit] court." App. 33a.

State petitioners did not challenge respondents' proffer because it was sufficient in the current procedural posture. The evidence included, among other things, detailed personal affidavits from the officials charged with overseeing the reporting requirements in South Dakota, Missouri, Georgia, Texas, and Wisconsin. *See generally* ROA.634-785 (Preliminary Injunction Appendix). These affidavits detailed States' estimated expenses to operate their human-resources systems in compliance with the ACA, including their reporting costs as large employers. *Id.* Respondents were not required to show that these costs increased because particular employees bought insurance as a result of the amended mandate. Such a question goes (at most) to proximate cause, and this Court has recognized that standing does not turn on questions of proximate cause. *Dep't of Commerce*, 139 S. Ct. at 2566.

3. Even if the Fifth Circuit were incorrect, however, the issue would not be certworthy. As an initial matter, petitioners' arguments are largely about evidentiary sufficiency. This Court "do[es] not grant a certiorari to

review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also* SHAPIRO, *supra*, at 272-75.

Assuming petitioners' supposed need to "reduce uncertainty" overcomes that hurdle, States Pet. 19, the question still would not be certworthy because this Court cannot provide that certainty in the current procedural posture. This is an appeal from an order granting what was treated as respondents' motion for partial summary judgment. Petitioners neither argued that respondents failed to plead standing nor cross-moved for summary judgment based on lack of proof of standing. As a result, this case would not go away if the Court were to vacate the district court's finding of standing. It would go to trial. *See, e.g.*, *Dep't of Commerce*, 139 S. Ct. at 2565; *SCRAP*, 412 U.S. at 689; *In re ATM Fee Antitrust Litig.*, 686 F.3d at 747-48. At that trial, respondents will be allowed to put on evidence of their standing as well as the appropriate remedy.[6]

The Fifth Circuit has, however, already ordered a hearing on the scope of the remedy necessary to redress the injury that led to the district court's finding of standing at summary judgment. As a result, petitioners' request for review of respondents' standing amounts to nothing more than a fact-bound dispute over the *scope* of the Fifth Circuit's remand. It does not justify the use of this Court's limited resources.

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[6] Trial would also address any issues of material fact regarding respondents' four remaining claims, which have never been evaluated by any court.

B. The constitutionality of the individual mandate is not certworthy at this time.

The constitutionality of amended section 5000A similarly does not merit the Court's review ahead of final judgment. The Fifth Circuit's analysis was a correct application of *NFIB*. Even if it were not, petitioners' entire theory can be summarized by Judge King's statement in dissent "that the coverage requirement is constitutional, albeit unenforceable." App. 74a. But even Judge King's dissent argued that the court's holding regarding the mandate, removed from any discussion of severability, is "harmless." *Id.* 73a. This Court grants certiorari "in cases of peculiar gravity and general importance, or in order to secure uniformity of decision"—not to correct errors, no matter how significant the general subject matter. *Hamilton-Brown*, 240 U.S. at 258.

1. The Fifth Circuit correctly held that without a revenue-producing penalty, section 5000A is unconstitutional. In *NFIB*, this Court squarely held that Congress may not—as it purported to do—use its power to regulate interstate commerce to order Americans to buy health insurance, any more than it can order them to buy a new car or broccoli. 567 U.S. at 547-61 (Roberts, C.J.) (holding law also exceeded power under Necessary and Proper Clause); *id.* at 657 (dissenting opinion). Though Congress has "broad authority" to "regulate existing commercial activity," that authority does not extend to compelling individuals to create commercial activity. *Id.* at 549, 552 (Roberts, C.J.); *id.* at 650 (dissenting op.).

The only reason that section 5000A survived was because it was "fairly possible" to read its minimum-

essential-coverage mandate as the trigger for a tax. *Id.* at 563 (Roberts, C.J.). Key to that construction was that section 5000A, as a whole, had the "essential feature of any tax: it produces at least some revenue for the Government." *Id.* at 563-64 (citing *United States v. Kahriger*, 345 U.S. 22, 28 n.4 (1953), *overruled in part on other grounds*, *Marchetti v. United Sates*, 390 U.S. 39 (1968)). Because, following the 2017 amendment, the provision no longer produces revenue, that saving construction is no longer valid. *E.g.*, *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937); *In re Kollock*, 165 U.S. 526, 536 (1897). Petitioner makes three arguments to the contrary. None has merit.[7]

First, contrary to the U.S. House's assertion (at 19), section 5000A did not forever become a tax because *NFIB* construed the combination of a mandate to buy minimum essential coverage with a tax penalty to create a tax. Courts have an important role in our constitutional system because "[a]ll new laws ... are considered as more or less obscure and equivocal" until ruled upon in litigation, even when—unlike the ACA—those laws are "penned with the greatest technical skill and passed on the fullest and most mature deliberation." THE FEDERALIST No. 37, at 225 (Madison) (Clinton Rossiter, ed.,

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[7] Also without merit is the suggestion of one amicus that section 5000A continues to produce revenue because of taxpayer delinquency. Doerre Br. 8-10. Assuming an individual's failure to abide by the law can somehow make that law constitutional, the United States has used accrual accounting for decades. DEP'T OF TREASURY, FY18 FINANCIAL REPORT OF THE UNITED STATES GOVERNMENT 8 (2019). This revenue was recognized before the amendment took effect.

1961). This Court's constructions of a statute are binding under principles of stare decisis, but they are still just that—interpretations of the statute passed by Congress. Jonathan Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 968-70 (2018).

As petitioners' own authority recognizes, this Court's "interpretative decisions" are "subject (just like the rest) to congressional change." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Whether to continue to apply a saving construction is a separate question, which must be analyzed under the text as it exists post-amendment. *Cf. Gross v. FBL Fin. Servs.*, 557 U.S. 167, 173-78 (2009).

In its post-amendment form, section 5000A contains no revenue-producing penalty, and thus cannot be constructed as tax—or as a choice between buying insurance or paying a tax. *Contra* House Pet. 27; State Pet. 21-22. As amended, the only "fairly possible" interpretation is as a "command to buy insurance." *NFIB*, 567 U.S. at 574 (Roberts, C.J.). Far from "an implausible construction of section 5000A that bears no resemblance to what Congress actually did," House Pet. 18, this has always been the most "natural[]" reading of the individual mandate. *NFIB*, 567 U.S. at 574 (Roberts, C.J.).

Second, equally unavailing is the assertion that because section 5000A lacks an enforcement provision, it "imposes no obligation whatsoever" and "no longer depends on an enumerated power." House Pet. 28; *see* States Pet. 22. As an initial matter, because Congress has no police power, it cannot do *anything* without an enumerated power. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 617-18 (2000); *id.* at 639 (Souter, J.,

dissenting) ("The premise that the enumeration of powers implies that other powers are withheld is sound."). The fact that Congress has purported to pass (supposedly) nonbinding laws and concurrent resolutions that fall outside the scope of its enumerated authority "does not, by itself, create power" to do so. *Medellin v. Texas*, 552 U.S. 491, 531-32 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)).

Third, the individual mandate does not remain a tax merely because Congress chose to zero out section 5000A's formula rather than deleting it entirely. Petitioners maintain that the mandate is still a tax because it "provides a structure through which future taxpayers could be directed to pay a tax," thereby allowing Congress to "increase the amount of the tax again later if it decides to do so." States Pet. 22-23; *cf.* House Pet. 29 n.8 (making similar argument under Necessary and Proper Clause). The same logic would allow Congress to order consumers to buy any good because "future taxpayers could [always] be directed to pay a tax" for refusing to purchase today's favored commodity if Congress "later . . . decides to do so." States Pet. 22-23. This Court has, however, already said that Congress has no authority to issue such a command. *NFIB*, 567 U.S. at 557-58 (Roberts, C.J.); *id.* at 650 (dissenting op.).

2. Even if the individual mandate is constitutional because some hypothetical future Congress may pass a tax, review would not be warranted ahead of final judgment. According to Judge King, the primary difference between the Fifth Circuit majority and the dissent was whether the individual mandate was "unenforceable by congressional design or constitutional demand." App.

73a. Though state respondents disagree with Judge King's premise, petitioners endorse it wholesale. States Pet. 3, 20-23; House Pet. 33-34. Nowhere do petitioners explain why what they believe to be an "academic curiosit[y]," App. 73a, requires this Court to depart from its "normal practice [to] deny[] interlocutory review" pending resolution of the open severability question. *Estelle*, 429 U.S. at 114-15 (Stevens, J., dissenting).[8]

C. The question of severability is not ripe for review.

The Court should not grant review of this case merely to address the Fifth Circuit's severability analysis. The circuit court remanded for further proceedings on this question because, in its view, the district court's analysis was "incomplete." App. 65a. State respondents respectfully disagree with that conclusion and will be filing a conditional cross-petition to preserve their argument that the district court's ruling should have been affirmed in full. Petitioners are wrong, however, to lambast the Fifth Circuit for "abdicating the responsibility to address severability" when it remanded the question of appropriate remedy to the district court in the first instance. House Pet. 4. Their arguments fail for at least three reasons.

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[8] Equally telling, petitioners' amici offer only one reason why immediate review of the Fifth Circuit's merits ruling is necessary: uncertainty about its severability ruling. 33 State Hosp. Ass'ns Br. 12-14; AARP Br. 5-13; Am. Cancer Soc'y Br. 11-12; Alliance Br. 7-17; Am. Health Ins. Plans Br. 8-21; Econ. Scholars Br. 22-25; Nat'l Hosps. Ass'n Br. 16-23; Small Bus. Majority Br. 11-13; *accord generally* Doerre Br. (providing no reason for review ahead of judgment).

1. Though an appellate court *may* review pure questions of law in the first instance, it is under no obligation to do so. *Jander*, 2020 WL 201024, at *2. Put another way, the presence of an open question of fact can be *sufficient* to justify a remand, but it is not necessary. This Court has frequently remanded cases involving complex questions of severability. *E.g.*, *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 901 (1992); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230 (1990); *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 772 (1988); *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983); *Guste v. Jackson*, 429 U.S. 399, 400 (1977) (per curiam). Though unnecessary, the Fifth Circuit's decision to do so here was hardly "indefensible," House Pet. 14, and does not independently warrant review. This is particularly true given that "the federal defendants have shifted their position [regarding remedy] on appeal more than once." App. 13a.

2. Petitioners' assertion that the Fifth Circuit was obliged to address severability misconstrues the court's holding by conflating two concepts: severability and remedy. Severability is a question of statutory interpretation that has remedial consequences, but the principles that govern severability "and the principles that govern constitutional invalidity are not part of the law of remedies." John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56, 87 (2014). The Fifth Circuit remanded so the district court could consider *both* severability and remedy in the first instance. App. 71 (citing *Murphy v. NCAA*, 138 S. Ct. 1461 (2018) and *Gill*).

Disentangling the two inquiries demonstrates why this case is not ripe for review. When addressing

severability, a court that has concluded that the Constitution forbids it to enforce one statutory provision asks whether Congress would permit it to enforce the rest. *Murphy*, 138 S. Ct. at 1482. When fashioning a remedy, by contrast, a court must ask how much of a statutory scheme must be left unenforced to "vindicate an individual plaintiff's right[s]." *Gill*, 138 S. Ct. at 1930. Where a statute's constitutionality is raised as a defense to an enforcement action, the remedy is simple: The enforcement action must begin anew after the unconstitutional provision has been excised. *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2055 (2018). Where (as here) different plaintiffs suffering different harms seek prospective relief, the question of remedy is more complex.

a. The question of severability is a pure question of law that the Fifth Circuit should have decided in respondents' favor. A provision is inseverable if, removing the offending language, (1) the remainder of the statute would not "function in a *manner* consistent with the intent of Congress," or (2) "the Legislature would not have enacted" the remaining provisions "independently of" the provisions found unconstitutional. *Alaska Airlines*, 480 U.S. at 684; *see also NFIB*, 567 U.S. at 692-93 (dissenting op.). In many scenarios, "the severability doctrine requires courts to make a nebulous inquiry into hypothetical congressional intent." *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring) (quotation marks omitted). Moreover, any inquiry here into hypothetical intent spans multiple Congresses because the ACA has frequently been amended.

In this case, the question of severability is simple: In 2010, Congress repeatedly stated that the "[t]he

requirement" to purchase health insurance—that is, the mandate, *not* the associated tax penalty—is critical to the functioning of the ACA's major features. 42 U.S.C. § 18091. In particular, section 18091(2)(I) explains that "if there were no requirement [to buy health insurance], many individuals would wait to purchase health insurance until they needed care," since the guaranteed-issue and community-ratings provisions would guarantee those individuals coverage irrespective of their current medical status. *See id.* So "[b]y significantly increasing health[-]insurance coverage, the requirement . . . will minimize this adverse selection and broaden the health[-]insurance risk pool to include healthy individuals, which will lower health[-]insurance premiums." *Id.* Thus "*[t]he requirement is essential* to creating effective health[-]insurance markets in which improved health[-]insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." *Id.* (emphasis added). Congress did not disturb those findings in 2017.

State petitioners acknowledge (at 8-9 & n.5) that "[b]etween 2010 and 2016, Congress considered several bills to defund, delay, or otherwise amend" the ACA, including the individual mandate. They further acknowledge that Congress left "every other provision in . . . place." States Pet. 2. Nevertheless, petitioners and their amici exhort the Court to ignore Congress's express statutory findings. Because Congress removed section 5000A's penalty in 2017, they say, it must have wanted the individual mandate to be unenforceable. House Pet. 31-33; States Pet. 23-24. Petitioners' amici, in particular, ask this Court to examine numerous economic

studies that purport to show that the individual mandate was never as important to the structure of the ACA as Congress anticipated and that it is essentially irrelevant now. Nat'l Hosp. Ass'n Br. 8-10.

This argument is, however, circular. The penalty was just one mechanism that Congress used to effectuate the mandate that Americans buy minimum-essential coverage. CBO 2008 REPORT at 50-53. Subsidies were another. All that we can confidently infer from Congress's actions in 2017 is that most members of Congress no longer thought it good policy to penalize their constituents for refusing to buy a product that they did not want. The question of whether Congress thought that the mandate itself was necessary to the continued function of the ACA was "[q]uite separate[]." *NFIB*, 567 U.S. at 664 (dissenting op.). As Congress opted *not* to remove its legislative finding, the best view is that the entirety of the ACA is inseverable from the mandate. *Id.* at 704-06.

That said, it was hardly indefensible for the Fifth Circuit to remand to the district court to conduct the provision-by-provision analysis that the United States has asserted was necessary since 2012. *NFIB* Br. 44-54 (acknowledging that the guaranteed-issue and community-rating provisions were inseverable).

b. It was also defensible (albeit unnecessary) for the Fifth Circuit to remand for the district court to consider the United States' shifting position on remedy. In addition to the severance question, "[t]he federal defendants admitted at oral argument that they had raised" an additional "scope-of-relief issue" under *Gill* "on appeal 'for the first time.'" App. 71a.

In *Gill*, this Court required plaintiffs who alleged that Wisconsin had violated the Voting Rights Act by diluting their votes to demonstrate that they lived in affected districts. 138 S. Ct. at 1930. The *Gill* plaintiffs had originally requested (and been awarded) prospective relief requiring the entire map to be redrawn, but the Court held that a "plaintiff's remedy must be 'limited to the inadequacy that produced [his] injury in fact.'" *Id.* at 1930 (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). To merit a remedy as broad as the one plaintiffs had requested, the plaintiffs needed to show such widespread violations of federal law that their rights could be vindicated only "through a wholesale 'restructuring of the geographical distribution of seats.'" *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)).

In this case, the federal government maintained for the first time on appeal that, under *Gill*, the declaratory judgment entered by the district court should have been limited to (1) respondents, and (2) the provisions necessary to vindicate the harms that gave rise to respondents' standing. App. 70a-71a.

Unlike severability, the appropriate scope of an injunction is *not* a pure question of law but a question that requires a district court sitting in equity to weigh numerous competing considerations (both factual and legal). *E.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 24 (2008); 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948 (3d ed. 1999)). And, contrary to petitioners' assertion, that question has not been "fully briefed." House Pet. 3. The United States asked

the district court to treat respondents' request for a preliminary injunction as a motion for summary judgment because there were no issues of disputed fact—about remedy or anything else. ROA.1563. Any non-jurisdictional arguments regarding the scope of the district court's remedy have thus been waived. *E.g.*, *Armstrong v. Brown*, 768 F.3d 975, 981 (9th Cir. 2014); *cf. O2 Micro Int'l Ltd. v. Beyond Innovation Tech., Co.*, 449 F. App'x 923, 934 (Fed. Cir. 2011). But if the circuit court had concerns about the scope of the United States' waiver, remand was appropriate "so that the plaintiffs may have an opportunity to prove concrete and particularized injuries [supporting their requested relief] using evidence." *Gill*, 138 S. Ct. at 1934.

III. Petitioners' Policy Arguments Also Do Not Justify Review.

Petitioners offer two final arguments grounded in policy. First, they claim that they (and the healthcare market) desire certainty. Second, they suggest immediate review will advance judicial economy. Both arguments are wrong.

First, the ACA's future is chronically uncertain, and nothing this Court does will change that. Since its inception, the ACA has been the target of countless legislative repeal efforts. *See* Annie L. Mach & Janet Kinzer, Congressional Research Service, *Legislative Actions to Modify the Affordable Care Act in the 111th-115th Congresses* 5-16 (June 27, 2018), https://fas.org/sgp/crs/misc/R45244.pdf (listing legislative efforts to repeal the ACA). Efforts to repeal the Affordable Care Act are so widespread that they have

earned their own dedicated Wikipedia page. *See* "Efforts to Repeal the Patient Protection and Affordable Care Act," Wikipedia, https://en.wikipedia.org/wiki/Efforts_to_repeal_ the_Patient_Protection_and_Affordable_Care_Act. Already, candidates seeking office in the 2020 national elections are calling for the ACA to be repealed. *See, e.g.*, "Restore Healthcare Freedom," Chip for Congress 2020, https://chiproy.com/issues/. The Nation may be one election away from the end of the ACA, regardless of anything this Court might do.

And in any event, this is not the only lawsuit that would weaken or end the ACA. Many of the ACA's core features are the subject of legal challenges both here and elsewhere. *E.g.*, *Moda Health Plan, Inc. v. United States*, No. 18-1028 (U.S.) (ACA § 1342); *Trump v. Pennsylvania*, No. 19-454 (U.S.) (ACA § 1001); *Texas v. Rettig*, No. 18-10545 (5th Cir.) (ACA § 9010); *cf. Sanford Health Plan v. United States*, No. 18-136C (Ct. Fed. Cl.) (ACA §§ 1401, 1412); Timothy S. Jost, *2018: The Year of Renewed Affordable Care Act Litigation*, Jan. 9, 2019, https://www.commonwealthfund.org/blog/2019/ 2018-year-renewed-affordable-care-act-litigation.

Second, immediate review will hinder, not advance, judicial economy. This Court insists repeatedly that it is one "of review, not of first view." *Jander*, 2020 WL 201024, at *2. That maxim protects this Court's limited resources and reduces the likelihood of error. *See id.*; *see also Cutter*, 544 U.S. at 718 n.7 (declining to resolve central issue not addressed by court of appeals). Yet petitioners ask the Court to take the "first view" of the severability issue without the benefit of a reasoned decision from the court of appeals. That is the type of request this

Court declines as a matter of course. *Abbott*, 137 S. Ct. at 613 (Roberts, C.J.); *see supra* pp. 11-13 (discussing *Abbott* and related cases).

IV. No. 19-841 Should Be Denied Because the U.S. House Lacks Standing Under *Bethune-Hill*.

There is an additional reason to deny the petition in No. 19-841: The U.S. House lacks standing to challenge the Fifth Circuit's judgment. Just last year, this Court held in *Bethune-Hill* that one house of a bicameral legislature lacks standing to independently petition this Court to defend a legislative enactment. 139 S. Ct. at 1953-54. That rule applies here. The U.S. House is a single chamber of a bicameral legislature. It cannot challenge the Fifth Circuit's decision for the reasons set out in *Bethune-Hill*. Standing is jurisdictional; if the Court were to grant No. 19-841, the parties would be forced to brief the proper application of a decision of this Court that is barely a year old. The better course is to simply deny No. 19-841 altogether.

CONCLUSION

The petitions of the California coalition in No. 19-840 and the United States House of Representatives in No. 19-841 should be denied.

Respectfully submitted.

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February 2020