

Nos. 19-840, 19-841

In The
Supreme Court of the United States

—◆—

CALIFORNIA, et al.,

Petitioners,

v.

TEXAS, et al.,

Respondents.

—◆—

UNITED STATES HOUSE OF REPRESENTATIVES,

Petitioner,

v.

TEXAS, et al.,

Respondents.

—◆—

**On Petitions For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

—◆—

**INDIVIDUAL RESPONDENTS'
BRIEF IN OPPOSITION**

—◆—

ROBERT HENNEKE
TEXAS PUBLIC
POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
rhenneke@texaspolicy.com
*Counsel of Record for
Individual Respondents*

QUESTIONS PRESENTED

In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (“*NFIB*”), this Court held that 26 U.S.C. § 5000A(a) was unconstitutional as a stand-alone command to purchase health insurance. However, the Court then went on to collectively construe Section 5000A as a lawful exercise of tax powers since the payment required in subsections 5000A(b) and 5000A(c) yielded the essential feature of any tax—it raised revenue for the government. Congress subsequently eliminated the payment in 2017 by reducing the amount in Section 5000A(c) to zero dollars, which left the individual mandate standing alone as an unconstitutional command to participate in commerce. The questions presented are:

1. Whether, in light of this Court’s ruling in *NFIB*, 26 U.S.C. § 5000A(a) exceeds the constitutional powers of Congress.
2. Whether, if 26 U.S.C. § 5000A(a) is invalid, the provision is severable from the remainder of the Patient Protection and Affordable Care Act.
3. Whether *NFIB* resolved the question of Individual Respondents’ standing to challenge the constitutionality of the individual mandate provision in 26 U.S.C. § 5000A(a).

RELATED PROCEEDINGS

The proceedings directly related to this opposition to the petitions for a writ of certiorari are:

United States Court of Appeals for the Fifth Circuit:

Texas, et al. v. United States, et al., No. 19-10011 (Dec. 18, 2019).

United States District Court for the Northern District of Texas:

Texas, et al. v. United States, et al., No. 4:18-cv-167-O (Dec. 30, 2018).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit will be reported at 945 F.3d 355 (5th Cir. 2019). The relevant orders and partial final judgment of the United States District Court for the Northern District of Texas are reported at 340 F. Supp. 3d 579 and 352 F. Supp. 3d 665.

**JURISDICTION**

The Court of Appeals had jurisdiction over Petitioners' appeal of the District Court's partial final judgment under 28 U.S.C. § 1291. The judgment of the Court of Appeals was entered on December 18, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

**STATEMENT**

Congress passed in 2010 the Patient Protection and Affordable Care Act ("Affordable Care Act" or "the Act"), 124 Stat. 119. The Act describes the individual mandate of 26 U.S.C. § 5000A(a), which commands the majority of Americans to maintain minimum essential health insurance coverage, as "essential." 42 U.S.C. § 18091(2)(I).

The individual mandate requires that "every applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of

the individual who is an applicable individual, is covered under minimum essential coverage.” 26 U.S.C. § 5000A(a). From 2014 until 2019, individuals who were subject to the mandate and failed to comply with it were then obligated to make a “shared responsibility payment” to the Internal Revenue Service. 26 U.S.C. § 5000A(b)(1). The Act describes the payment as a “penalty,” 26 U.S.C. § 5000A(c), and provides that it “shall be assessed and collected in the same manner” as tax penalties. 26 U.S.C. § 5000A(g)(1).

In 2010, twenty-six states, the National Federation of Independent Business, and multiple individuals challenged the constitutionality of the individual mandate. In *NFIB*, this Court repudiated the notion that the individual mandate was a lawful exercise of the congressional power to regulate interstate commerce. 567 U.S. 519, 562 (2012). However, by reading the individual mandate, 26 U.S.C. § 5000A(a), in conjunction with the shared responsibility payment, 26 U.S.C. § 5000A(b), this Court adopted a saving construction that treated the penalty together with the mandate as a constitutional exercise of Congress’s power to tax. *Id.* at 544-46.

In 2017, President Trump signed the Tax Cuts and Jobs Act, 131 Stat. 2054, which reduced the Act’s shared responsibility payment to zero without regard to income. 26 U.S.C. § 5000A(c). In 2018, a coalition of States, led by Texas, and Neill Hurley and John Nantz, two individuals who are subject to the mandate (“Respondents”), filed suit in the United States District Court for the Northern District of Texas. Pet. App. 10a.

Respondents argued that the savings construction utilized by the Court in *NFIB* to construe the mandate as a tax no longer applied, thus leaving the mandate as an unconstitutional command to participate in commerce by purchasing insurance. *Id.* at 10a-11a. Respondents also argued that the individual mandate was inseverable from the remainder of the Affordable Care Act. *Id.* at 10a. The District Court agreed, holding that the individual mandate “is no longer fairly readable as an exercise of Congress’s Tax Power and continues to be unsustainable under Congress’s Interstate Commerce Power.” *Id.* at 204a. The District Court also held the individual mandate inseverable from the law’s remaining provisions and invalidated the entire Act. *Id.* at 231a. The District Court entered a partial final summary judgment granting declaratory relief. *Id.* at 117a. Because its ruling affected only one of five claims asserted in the operative complaint, the district court entered an order staying further litigation and the effect of its judgment pending appeal. *Id.*

The United States Court of Appeals for the Fifth Circuit affirmed the District Court’s partial final judgment in part, vacated it in part, and remanded to the District Court for further proceedings. *Id.* at 72a. The Fifth Circuit affirmed the District Court’s ruling that the individual mandate is unconstitutional and “was saved from unconstitutionality” in *NFIB* only “because it could be read together with the shared responsibility payment as an option to purchase insurance or pay a tax.” *Id.* at 51a. The Fifth Circuit also affirmed the District Court’s ruling that the mandate can no longer be

read as a tax because the shared responsibility payment no longer produces revenue, so it must now be read in the most straightforward way—as a command to purchase insurance. *Id.* at 51a-52a. The Fifth Circuit vacated the District Court’s ruling on severability and remanded to the District Court to analyze in more complete detail which provisions, if any, could be severed from the mandate. *Id.* at 68a-69a.



REASONS FOR DENYING THE PETITION

This Court’s longstanding rules and precedent show this case is not appropriate for review at this time. Review “is not a matter of right, but of judicial discretion.” Sup. Ct. R. 10. While the considerations announced in Rule 10 are “neither controlling nor fully measuring [of] the Court’s discretion,” *id.*, distinguished members of this Court have counseled that “laxity by the Court in respecting its own rules is bound to stimulate petitions for certiorari with which the Court should never be burdened.” *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 460 (1959) (Frankfurter, J., dissenting). The instant case represents just such an unwarranted burden both because the Fifth Circuit’s decision was correct and because there remains considerable work to be done by the lower courts.

The United States Court of Appeals for the Fifth Circuit correctly concluded that *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (“*NFIB*”) required it to affirm the individual mandate provision of the

Affordable Care Act as unconstitutional. In *NFIB*, this Court held that a stand-alone command to purchase health insurance is unconstitutional. However, the Court then went on to collectively construe Section 5000A as a lawful exercise of the taxing power, as the payment required in subsections 5000A(b) and 5000A(c) yielded the essential feature of any tax by raising revenue for the government. In 2017, Congress reduced the amount in Section 5000A(c) to \$0, which left the individual mandate standing alone as an unconstitutional command to participate in commerce. Both the appellate court’s and trial court’s analyses of the individual mandate adhere to the binding precedent of *NFIB*.

To justify premature review, Petitioners assume the role of Chicken Little, claiming “the sky is falling” despite the trial court stay having been in place for well over a year. But the “crippling uncertainty” alleged by Petitioners has yet to materialize. Nor is it likely to manifest while this case is remanded to the trial court to resolve the severability issue.

I. THIS CASE DOES NOT PRESENT A COMPELLING REASON OR AN UNUSUAL CIRCUMSTANCE TO GRANT CERTIORARI, PARTICULARLY AHEAD OF JUDGMENT.

The Rules of this Court state unequivocally that “[a] petition for a writ of certiorari will be granted *only for compelling reasons.*” Sup. Ct. R. 10 (emphasis added). But no such compelling reason exists here. The District Court’s stay remains in place. *See* Pet. App. 114a. And because there is no final ruling on scope of remedy, the decision below presents no immediate impact, either on the parties to this case or the public in general. Far from having departed from the normal course of proceedings, the Fifth Circuit’s decision to remand for further proceedings about remedy represents a completely unremarkable occurrence that happens regularly in courts of appeals across the country. The only real departure from the normal course of litigation in this case is Petitioners’ premature request for certiorari, not the routine actions of either the District Court or the Fifth Circuit.

A. Because the decision below lacks a remedy, there is no sufficiently compelling reason to grant certiorari at this time.

In December 2018, the District Court entered a partial final judgment on Respondents’ claim for declaratory relief regarding one of their five claims, Pet.

App. 116a,¹ but also stayed that judgment pending appeal, *id.* at 117a-162a. Notably, the District Court justified this stay in light of the risk that “many everyday Americans would otherwise face great uncertainty during the pendency of appeal.” *Id.* at 162a. On appeal, the Fifth Circuit upheld the District Court’s invalidation of the individual mandate without lifting the stay, but then chose to vacate and remand with regard to the issues of severability and the proper scope of judicial relief. *Id.* at 52a-72a. Accordingly, neither decision has had a real-world impact thus far, and the status quo will remain until this case is finally resolved.

Since the District Court’s order was entered over a year ago, health insurance markets have continued to function under the Act just as they did before the judgment. Ignoring this, Petitioners now predict that “uncertainty” created by the decision below will result in widespread chaos as their justification for this Court to grant certiorari. *See* House Pet. at 4 (“Paralyzing uncertainty now hangs over the ACA.”); States Pet. at 16 (“The uncertainty created by this litigation is especially problematic because individuals, businesses, and state and local governments make important decisions in reliance on the ACA.”). However, Petitioners do not cite to any immediate consequence flowing from the Fifth Circuit’s decision. Furthermore, the continuing stay was specifically targeted toward ameliorating any “uncertainty.” Thus, Petitioners’ attempt to conjure up a “compelling reason” for immediate review by this

¹ Unless otherwise indicated, this response refers to the appendix to the petition for a writ of certiorari in No. 19-840.

Court falls short. That this case has generated interest in the media and in politics does nothing to change the reality that its current posture is poorly suited for review by this Court.

Petitioners also now contend that the mandate presents a pressing, real-world concern, even after consistently arguing throughout the litigation that the Act's lack of a penalty post-2017 means it harms no one. Indeed, Petitioners continue to press this argument even while petitioning this Court for certiorari. *See States Pet.* at 3 (“Section 5000A is merely a precautionary provision that [at most] encourages Americans to buy health insurance but does not compel anyone to do anything.”); *House Pet.* at 24 (“there is no threat, much less a credible one, that the individual respondents will be subject to government enforcement of Section 5000A.”). This provides one more reason to deny certiorari at this early stage of the litigation.

B. While the Fifth Circuit's remand falls well within the accepted and usual course of judicial proceedings, a premature grant of certiorari does not.

This Court's Rule 10 provides that among the considerations governing the decision of whether to grant certiorari is a court of appeals having “so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.” Sup. Ct. R. 10(a). But the only real departure

from the accepted and usual course of judicial proceedings is what the Petitioners request from this Court—a premature grant of certiorari before the lower court has finally resolved all legal issues in the case. By contrast, the Fifth Circuit’s decision to remand this case to the District Court with guidance on what legal standards to apply is a normal and routine undertaking.

1. This Court rarely grants certiorari on questions that have not yet been addressed by the court below.

It is exceedingly rare for this Court to grant certiorari in order to address legal issues not decided below. *See National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470 (1999) (stating that “we do not decide in the first instance issues not decided below”); *see also Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in the denial of the petition for writ of certiorari) (“We generally await final judgment in the lower courts before exercising our certiorari jurisdiction”). It has long been recognized that denying the writ is appropriate when “the judgment of the lower court may not be final.” *Maryland v. Balt. Radio Show, Inc.*, 338 U.S. 912, 917-18 (1950). And this makes perfect sense, given that this Court is “a court of review, not of first view.” *See United States v. Stitt*, 139 S.Ct. 399, 407 (2018) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005)).

The well-founded reticence to grant certiorari prior to the issuance of a final decree, absent extraordinary circumstances not present here, goes back well over a century. See *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (observing that “except in extraordinary cases, the writ is not issued until final decree”); *The Conqueror*, 166 U.S. 110, 113 (1897) (observing that certiorari “is ordinarily only issued, after a final decree in the Court of Appeals”). That this Court possesses the power to hear this case now does not mean that it would be prudent for it to do so. See *Abbott v. Veasey*, 137 S.Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari) (“Although there is no barrier to our review, [one] claim is in an interlocutory posture, having been remanded for further consideration. As for [that] claim, the District Court has yet to enter a final remedial order. . . . The issues will be better suited for certiorari review at that time.”); see also *Va. Military Inst.*, 508 U.S. at 946 (Scalia, J., concurring in the denial of the petition for writ of certiorari) (stating that it was “prudent” to await final judgment in the lower courts before granting certiorari since doing so would not “preclude [Petitioners] from raising the same issues in a later petition, after final judgment has been rendered”).

This Court has long recognized that because “[w]ise adjudication has its own time for ripening,” it is often “desirable to have different aspects of an issue further illumined by the lower courts.” *Maryland v. Balt. Radio Show, Inc.*, 338 U.S. 912, 918 (1950). Thus, “because the Court of Appeals remanded the case, it is

not yet ripe for review by this Court” and certiorari should thus be denied. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967).

2. Courts of appeals regularly remand a case to a district court for further consideration.

This is not a case that justifies deviating from this Court’s ordinary practice of waiting to take a case until after final judgment. Rather, the instant case features a common, everyday occurrence in this nation’s courts of appeals—a vacatur and remand for further proceedings about remedy, accompanied by ample guidance on the legal standard to be applied. *See* Pet. App. 52a-72a. This cannot be considered a departure from the “accepted and usual course of judicial proceedings” that justifies certiorari—let alone certiorari ahead of final judgment. *Cf. Huch v. United States*, 439 U.S. 1007, 1012 (1978) (Rehnquist, J., dissenting from the denial of certiorari) (arguing that it is a departure from the accepted and usual course of judicial proceedings where a “Court of Appeals’ opinion gives no clue to the District Court as to where it went wrong or how it can correct whatever mistake the Court of Appeals believes that it made”); *accord DSS Tech. Mgmt. v. Apple Inc.*, 885 F.3d 1367, 1377 (Fed. Cir. 2018) (Newman, J., dissenting) (observing that where there is an inadequate explanation to support the decision below, one “appropriate action is . . . to remand for additional explanation”). Furthermore, as Chief Justice Roberts has

observed, a case that neither involves a circuit split nor calls for an exercise of this Court’s supervisory authority typically constitutes “exactly the sort of issue that could benefit from further attention in the courts of appeals.” *Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting). That is the circumstance here.

The routine nature of the Fifth Circuit’s remand to the District Court to implement its ruling on severability was addressed by Judge Elrod during oral argument: “In any other normal case, you would send it back to the district court in the first instance to make its best stab at trying to implement the ruling that we made. That would be the normal proceeding in a hundred cases that we have this month.” Oral Argument at 1:41:44, *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019) (No. 19-10011), http://www.ca5.uscourts.gov/OralArgRecordings/19/19-10011_7-9-2019.mp3. In fact, another Court of Appeals previously vacated and remanded on the issue of severability—the exact legal question implicated in this case—without any fanfare or controversy. See *Harvey E. Yates Co. v. Powell*, 98 F.3d 1222, 1240-41 (10th Cir. 1996) (vacating and remanding due to “the district court’s failure to consider the independent validity of the other portions” of the invalidated rule).

The Fifth Circuit also remanded in the instant case “so that the district court may consider the federal defendants’ new arguments as to the proper scope of relief in this case.” Pet. App. 70a. But remanding a case for consideration of the proper scope of a remedy is not

a new or innovative judicial action. *See, e.g., Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in the denial of the petition for writ of certiorari) (arguing that this Court’s “intervention before the litigation below has come to final judgment” would be improper where the Court of Appeals had vacated and remanded “for determination of an appropriate remedy”); *City & Cty. of S.F. v. Trump*, 897 F.3d 1225, 1245 (9th Cir. 2018) (vacating a nationwide injunction “to the extent that it applies outside California” and remanding to the district court “for a more searching inquiry into whether this case justifies the breadth of the injunction imposed”); *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1182 (9th Cir. 2010) (vacating an injunction and remanding for reconsideration because “the district court is in a better position to assess in the first instance . . . the scope of the remedy, if any remedy should prove to be required”).

Finally, remand by the appellate court in the instant case is appropriate because, as the Fifth Circuit recognized and the Federal Defendants themselves admitted, the government’s scope-of-relief arguments were only raised for the first time on appeal. *See* Pet. App. 12a-13a, 63a, 71a. It is widely recognized that where “there is an issue that the district court did not decide in the first instance, it is not properly before” the Court of Appeals and should thus be “remand[ed] for the district court’s consideration.” *See Nyland v. Moore*, 216 F.3d 1264, 1266 (11th Cir. 2000); *accord Anonymous v. Omnicom Grp., Inc.*, 852 F.3d 195, 201

n.3 (2d Cir. 2017) (deciding that “[b]ecause the district court did not reach the time-bar issue below,” the Court of Appeals would remand rather than “decide it here in the first instance”); *Carter v. Bigelow*, 787 F.3d 1269, 1282-83 (10th Cir. 2015) (remanding where “the district court did not decide the issue whether a stay to pursue unexhausted claims is appropriate” so that the district court could “make this determination in the first instance”); *Douglass v. Convergent Outsourcing*, 765 F.3d 299, 305 n.8 (3d Cir. 2014) (declining to decide whether certain damages should still be awarded if there “was at most a technical breach” since this was “for the District Court to determine in the first instance”).

When the argument first raised on appeal deals with the scope of relief to be granted, a remand may be especially appropriate. *See EEOC v. BNSF Ry. Co.*, 902 F.3d 916, 929 n.13 (9th Cir. 2018) (remanding for consideration of the argument that the court “should cabin the scope of any injunction to the Ninth Circuit” so that this issue could “be considered in the first instance by the district court”). Because that is exactly the scenario in this case, the Fifth Circuit’s remand falls well within “the accepted and usual course of judicial proceedings” that falls outside the scope of this Court’s “supervisory power,” Sup. Ct. R. 10(a); *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010) (per curiam) (describing circumstances where that power is appropriate); *Khanh Phuong Nguyen v. United States*, 539 U.S. 69, 73 (2003) (same).

II. CERTIORARI IS ALSO IMPROPER BECAUSE THIS CASE INVOLVES ONLY STRAIGHTFORWARD APPLICATION OF SETTLED LAW.

This case presents questions of federal law that are well-settled. Indeed, this Court has already decided the exact issues Petitioners now ask it to consider. A straightforward application of this Court’s holdings in *NFIB*, as well as *Murphy v. NCAA*, 138 S.Ct. 1461 (2018) (“*Murphy*”), will continue to guide the courts below in deciding this case. Yet Petitioners ask this Court to rule on the same issues—namely, standing and the constitutionality of the individual mandate—that were decided eight years ago in *NFIB*. Similarly, a simple application of the severability doctrine reaffirmed just two years ago in *Murphy* will lead the courts to the correct result in the instant case. This case breaks no new legal ground, and denial of the petitions for a writ of certiorari is appropriate.

A. This Court already resolved the issue of an individual’s standing to challenge the individual mandate in *NFIB*.

The majority opinion in *NFIB* implicitly decided that, even absent any collateral consequences, Section 5000A(a) causes individuals to suffer an injury in fact sufficient to confer Article III standing. The Fifth Circuit’s decision in the instant case did nothing more than straightforwardly apply that implicit ruling to Individual Respondents that are nearly identically situated to the *NFIB* private plaintiffs. Accordingly, the issue of Individual Respondents’ standing in this case

does not constitute the kind of unsettled question of federal law that justifies this Court’s review. *See* Sup. Ct. R. 10(c).

1. This Court considered and implicitly decided private plaintiffs’ standing in *NFIB*.

In responding to the majority’s observation that “[t]he standing issues presented by the individual plaintiffs are not novel” since “[t]he Supreme Court faced a similar situation when it decided *NFIB* in 2012,” Pet. App. 20a, the dissenting judge below argued that any reliance on *NFIB* with regard to standing is a “violation of the Supreme Court’s ‘repeated[.]’ command ‘that the existence of unaddressed jurisdictional defects has no precedential effect.’” *Id.* at 85a (quoting *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996)). But the dissent’s argument misunderstands this Court’s rule that “drive-by jurisdictional rulings . . . have no precedential effect.” *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998). As the Court made clear in *Lewis*, the rule against drive-by jurisdiction deals only with scenarios where “standing was *neither challenged* nor discussed” in the previous case. 518 U.S. at 352 n.2 (emphasis added). A close examination of the history of *NFIB* and the decision itself shows that though standing is not explicitly discussed, it was not a “drive-by” ruling at all.

Standing to challenge the mandate—not the tax penalty—was clearly both “challenged” and “discussed”

in *NFIB*. *Id.* The private plaintiffs specifically challenged the individual mandate throughout the pendency of the *NFIB* litigation. In particular, their brief explicitly stated that, “Private Respondents are *not challenging the penalty*, but rather the antecedent legal duty to purchase insurance, with which they must comply unless the mandate is invalidated.” Brief for Private Respondents on the Anti-Injunction Act at 6-7, *U.S. Dep’t of Health and Human Servs. v. Florida*, 567 U.S. 519 (2012) (No. 11-398) (emphasis added). The mandate was the target of their challenge “precisely because they are *law-abiding citizens* who intend to comply with the mandate unless it is invalidated.” *Id.* at 14 (emphasis in the original); *see also id.* at 6, 10. In support of their argument for standing, the brief further cited a 2008 Congressional Budget Office (“CBO”) report stating that “many individuals . . . would comply with a mandate, even in the absence of penalties, because they believe in abiding by the nation’s laws.” *Id.* at 14-15 (quoting Cong. Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 53 (Dec. 2008)).

The *NFIB* private plaintiffs also discussed their specific injury in fact. Specifically, they claimed in their declarations that they would be “harmed” if they were “required” to purchase the insurance mandated by the Act because each would be “forced to divert financial resources” from more important priorities. Appendix of Exhibits in Support of Plaintiffs’ Motion for Summary Judgment, *Florida v. U.S. Dep’t of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT (N.D. Fla. Nov. 10, 2010),

ECF No. 80-6. In addition, as the Fifth Circuit emphasized in this case (Pet. App. 22a), each private plaintiff declared that “[t]o comply with the individual insurance mandate, . . . I must now investigate whether and how to rearrange my personal finance affairs.” *Id.*

The lower courts in *NFIB* expressly ruled upon plaintiffs’ standing to challenge the mandate (as opposed to the penalty). The district court found that “the financial expense [that they would] definitively incur under the Act in 2014” was the cause of their need “to take investigatory steps and make financial arrangements now to ensure compliance then,” which in turn was “enough to show standing.” *Florida v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1271 (N.D. Fla. 2011). Importantly, the District Court made no mention of the penalty as part of this analysis. Furthermore, when the case was appealed to the Eleventh Circuit, the court observed that the Defendants did “not dispute that [private] plaintiff Brown’s challenge to the minimum coverage provision is justiciable.” Pet. App. 22a (quoting *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1243 (11th Cir. 2011) (emphasis added)). In other words, both the District Court and the Eleventh Circuit considered the private plaintiffs’ standing to be based on the individual mandate, not the penalty.

Even though these standing arguments were not specifically addressed in the Court’s opinion in *NFIB*, they were nonetheless presented to and discussed by the Court. The critical exchange on this issue occurred when Justice Kagan directly asked *NFIB*’s counsel

whether he “th[ought] a person who is subject to the mandate but not subject to the penalty would have standing.” *Id.* at 68. Counsel responded in the affirmative, explaining that such a person “is injured by compliance with the mandate” and further elaborating that when “a person is required to purchase health insurance,” that constitutes “a forced acquisition of an unwanted good” and is thus “a classic pocketbook injury.” *Id.* at 68-69.² And in answering Chief Justice Roberts’ question about why there would be “a requirement that is completely toothless,” NFIB’s counsel responded that “Congress reasonably could think that at least some people will follow the law precisely because it is the law.” Transcript of Oral Argument at 67, *U.S. Dep’t of Health and Human Servs. v. Florida*, 567 U.S. 519 (2012) (No. 11-398).

Given the extensive history of standing being argued by counsel, addressed by the lower courts, and questioned by the justices of this Court, it becomes clear that the majority in *NFIB* actually did consider and decide the issue even though it was not explicitly addressed in the opinion itself. Indeed, any other reading of this Court’s decision would make no sense. First, as the Fifth Circuit observed, “neither the individual mandate nor the shared responsibility payment would be assessed” until well after the *NFIB* litigation had concluded. Pet. App. 21a. However, the Act specifically

² This exchange between Justice Kagan and NFIB’s counsel did not escape the Fifth Circuit’s notice in the instant case, as evidenced by the court’s reliance on, and extensive quoting of, that interaction. See Pet. App. 20a-21a.

exempted certain groups from the penalty that would be imposed for noncompliance. *Id.* (referencing 26 U.S.C. § 5000A(e)). Accordingly, the Fifth Circuit recognized that it was only “certainly imminent that the private plaintiffs would be subject to the individual mandate, which applies to everyone,” as opposed to “the shared responsibility payment, which exempts certain people.” *Id.* Therefore, the only basis for standing at that time was the mandate, not the penalty that would not even be assessed for another two years.

The acknowledgement of individual standing is also implicit in Part III-A of *NFIB*. *See generally* 567 U.S. 519, 547-61 (2012). In response to a criticism from Justice Ginsberg, Chief Justice Roberts explained that he addressed the Government’s commerce power argument because “the statute reads more naturally as a command to buy insurance than as a tax.” *Id.* at 574. And in applying this more natural reading throughout Part III-A, no reference is made to the penalty contained in § 5000A(b). Instead, the focus in Part III-A remains squarely and exclusively on the individual mandate, repudiating Congress’s attempt “to compel individuals not engaged in commerce to purchase an unwanted product.” *Id.* at 549. Taken together, all of this adds up to an undeniable conclusion: Part III-A shows that the mandate and the penalty are separate legal provisions, and the former causes the private plaintiffs’ injury through its compulsion to purchase health insurance.

To reach the issues addressed in Part III-A, the Court must have concluded that the mandate, absent

any penalty, conveyed standing to the private plaintiffs. Were it otherwise, the Chief Justice would have been required to dismiss the case for lack of standing, or at least to adhere to Justice Ginsburg’s view that there was “no reason to undertake a Commerce Clause analysis that is not outcome determinative.” *Id.* at 623 n.12 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). But rather than dismiss, the Court engaged in a full and thoughtful discussion of the merits of the Government’s Commerce Clause arguments. Accordingly, the very existence of Part III-A speaks to the fact that this Court necessarily resolved the private plaintiffs’ standing.

2. The individual respondents’ circumstances and arguments are nearly identical to those of the private plaintiff in *NFIB*.

As explained by the Fifth Circuit, John Nantz and Neill Hurley both declared that they “value compliance with [their] legal obligations” and bought insurance because they “believe that following the law is the right thing to do.” Pet. App. 24a (quoting Individual Respondents’ declarations filed in the District Court). Both also declared that the mandate forced them to “divert resources” in order to obtain the health insurance mandated by the Act. As the Fifth Circuit recognized, “it is this injury—the time and money spent complying with the statute, not the penalty for failing to do so—that constitutes the plaintiffs’ injury.” *Id.* at 27a.

In reaching the conclusion that Individual Respondents have standing, the Fifth Circuit relied on the same 2008 CBO report cited in the private plaintiffs’ brief in *NFIB*, as well as a 2017 CBO report stating that “a small number of people” would continue to purchase insurance even without a penalty “solely because” of a desire to comply with the law. *Id.* at 25a (quoting Cong. Budget Office, *Repealing the Individual Health Insurance Mandate: An Updated Estimate 1* (Nov. 2017)). Petitioners question why any individual would be so “irrational” as to abide by the law absent a penalty for not doing so. *See* House Pet. at 26. But, as the Fifth Circuit observed, whether those that would adhere to the mandate absent any legal consequences includes “many individuals” or “a small number of people,” the Individual Respondents “have undisputed evidence showing that they are a part of this group.” *Id.* at 25a. Indeed, the evidence supporting Nantz’s and Hurley’s injuries was “even stronger than it was in *NFIB*” since they were both compelled “to purchase insurance now as opposed to two years in the future.” *Id.* at 24a. Because the Fifth Circuit did nothing more than apply the same reasoning to the Individual Respondents’ standing in the instant case, review is not warranted.

B. The Fifth Circuit followed this Court’s unambiguous, directly-on-point precedent in *NFIB* to invalidate the individual mandate.

In arguing that the Fifth Circuit erred, Petitioners badly misread *NFIB*. As the Fifth Circuit recognized,

the decision below “breaks no new ground,” but rather “simply observe[d] that § 5000A[,] [which] was originally cognizable as either a command or a tax,” is now “only cognizable as a command.” Pet. App. 51a. The appellate court merely applied this Court’s unambiguous precedent to the exact same legal provision that had only been altered in one important way—the zeroing out of the penalty for noncompliance. By carefully tracking this Court’s reasoning in *NFIB*, the Fifth Circuit simply applied binding law. It was not even required to apply legal precedent to somewhat dissimilar facts, fill in jurisprudential gaps that this Court has not directly addressed, or decide how broadly or narrowly to read this Court’s decision. In other words, with regard to the individual mandate, this case in no way required the Fifth Circuit to determine an “important question of federal law that has not been, but should be, settled,” *see* Sup. Ct. R. 10(c), and thus the appeal from that decision also provides no such opportunity for this Court.

In analyzing § 5000A, the Court held that the individual mandate could be read as either a command for individuals to buy insurance pursuant to Congress’s power under the Commerce Clause or, alternatively, as a condition (being uninsured) that triggers a tax under the Taxing Power. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 561-63 (2012). But since the provision unambiguously “states that individuals ‘shall’ maintain health insurance,” the “most straightforward reading of the individual mandate is that it commands individuals to purchase insurance.” *Id.* at 562; *see also*

id. at 574 (“[T]he statute reads more naturally as a command to buy insurance than as a tax”). This was further supported by the observation that “Congress thought it could enact such a command under the Commerce Clause, and the Government primarily defended the law on that basis.” *Id.* at 562. And four otherwise-dissenting Justices agreed with the Chief Justice’s straightforward reading of the provision, writing that there was “simply no way, without doing violence to the fair meaning of the words used,” to interpret Section 5000A as anything but a command to maintain minimum essential coverage. *Id.* at 662 (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting) (hereinafter “joint dissent”) (internal citations and quotations excluded).

Accordingly, the Court held the individual mandate could not be maintained as a valid exercise of Congress’s power to regulate interstate commerce. *Id.* at 558 (Roberts, C.J.) (holding that because “[t]he individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity,” it “cannot be sustained under a clause authorizing Congress to ‘regulate Commerce’”); *id.* at 649 (joint dissent) (“To be sure, *purchasing* insurance is ‘Commerce’; but one does not regulate commerce that does not exist by compelling its existence.”).³ Nor could the provision be upheld by invoking the Necessary and

³ *Marks v. United States*, 430 U.S. 188, 193 (1977) (holding that where no opinion garnered five votes, the “position taken by the Members who concurred in the judgment[] on the narrowest grounds” represents the holding of the case).

Proper Clause. *See id.* at 560 (Roberts, C.J.) (such an interpretation of the individual mandate would “vest[] Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power,” and this sort of “expansion of federal power is not a ‘proper’ means for making those reforms effective”); *id.* at 653 (joint dissent) (“the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not *carte blanche* for doing whatever will help achieve the ends Congress seeks”).

However, citing this Court’s “duty to construe a statute to save it, if fairly possible,” *id.* at 574, a different majority went on to collectively analyze § 5000A under Congress’s power to “lay and collect Taxes,” *id.* at 561-75. Finding that such a “saving construction” was indeed possible, *id.* at 575, this Court upheld the validity of the individual mandate and shared responsibility payment since “the Constitution permits such a tax,” *id.* at 574. Crucial to finding that § 5000A could be read as a legitimate exercise of Congress’ taxing power was the Court’s observation that the shared responsibility payment “looks like a tax in many respects.” *Id.* at 563. The Court pointed to four particular reasons for this interpretation. *First* and most importantly, the provision yielded “the essential feature of any tax: It produce[d] at least some revenue for the Government.” *Id.* at 564. *Second*, the penalty was also “paid into the Treasury by ‘taxpayer[s]’ when they file their tax returns.” *Id.* at 563. *Third*, “its amount [was] determined by such familiar factors as taxable income, number of dependents, and joint filing status.” *Id.* *Fourth*, “[t]he requirement to pay [was] found in the

Internal Revenue Code and enforced by the IRS, which . . . collect[ed] it in the same manner as taxes.” *Id.* at 563-64 (internal quotation marks omitted). Following the change in the Act in 2017, these reasons no longer apply.

In construing the individual mandate in this case, the Fifth Circuit walked through, step-by-step, Part III of the *NFIB* opinion. The court first observed that after the shared responsibility payment was set to zero, “[t]he four central attributes that once saved the statute because it could be read as a tax no longer exist.” Pet. App. 44a. Since “the provision no longer yields the essential feature of any tax because it does not produce at least some revenue for the Government,” it also now “necessarily lacks the three other characteristics that once rendered the provision a tax.” *Id.* at 44a-45a. Therefore, “the provision’s saving construction is no longer available,” *id.* at 44a, and thus it is “no longer ‘fairly possible’ to save the mandate’s constitutionality under Congress’ taxing power,” *id.* at 45a.

Given this, “[t]he proper application of *NFIB* to the new version of the statute” is now what five justices on this Court “said was the ‘most straightforward’ reading of that provision: a command to purchase insurance.” *Id.* at 45a. Accordingly, the Fifth Circuit correctly held the mandate to be “unconstitutional because, under *NFIB*, it finds no constitutional footing in either the Interstate Commerce Clause or the Necessary and Proper Clause.” *Id.* at 45a. Because its ruling meticulously followed this Court’s settled precedent and careful reasoning as announced in *NFIB*, the petitions for a writ of certiorari should be denied.

C. In deciding severability, the courts below need only apply this Court’s settled precedent.

Since the Fifth Circuit properly applied this Court’s precedent in holding the individual mandate unconstitutional, the next step is for the District Court on remand to thoroughly analyze whether this provision is severable from the remainder of the Act. But in determining the issue of severability, the courts below need only apply this Court’s well-established precedent. This is another straightforward undertaking, as this Court’s doctrines on severability have been repeatedly and consistently applied for generations. *See, e.g., Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987); *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330 (1935). In fact, this Court recited its precedent and reaffirmed the proper severability analysis just two years ago. *See Murphy*, 138 S.Ct. at 1482-484.⁴

In determining whether an unconstitutional provision can be severed from the remainder of the law, a court must inquire “whether the law remains ‘fully operative’ without the invalid provisions[.]” *Murphy*, 138 S.Ct. at 1482 (quoting *Free Enterprise Fund*, 561 U.S. at 509). If Congress would not have enacted the

⁴ To the extent that there is any confusion about how to apply the severability doctrine, this Court has already granted review in two cases that will allow it to provide additional clarity. *Seila Law v. CFPB*, 19-7; *Barr v. Am. Ass’n of Political Consultants Inc.*, No. 19-631.

remaining statutory provisions independent of the unconstitutional provision, those other provisions must also fall. *Id.* (citing *Alaska Airlines*, 480 U.S. at 684). Furthermore, a court “cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole.” *Id.* (quoting *Railroad Retirement Bd.*, 295 U.S. at 362).

To determine whether Congress would have preferred no statute to the statute without the unconstitutional provision, a reviewing court should analyze the text of the statute and its historical context. *Free Enterprise Fund*, 561 U.S. at 509. Here, it is exceedingly unlikely that Congress would have passed the Affordable Care Act without including the requirement that individuals must maintain minimum essential health insurance coverage. The individual mandate is not only central to the goals Congress sought to accomplish by passing the Act, it is the bedrock of the entire law. The unconstitutionality of the mandate thus dooms the entire Act.

The primary objective of the Affordable Care Act, to expand health insurance coverage to as many people as possible, was driven by the individual mandate command. This was not a secret. In fact, President Obama, in widely publicized speeches about the Act, repeatedly emphasized that this was the predominant goal of the legislation. *See, e.g.*, The White House, Office of the Press Secretary, Official Transcript of News Conference by President Obama, July 22, 2009, https://obamawhitehouse.archives.gov/realitycheck/the_press_office/News-Conference-by-the-President-July-22-2009 (stating his

desire “to cover everybody” and stating that “the estimates are at least 97 to 98 percent of Americans” would be covered under the legislation); The White House, Office of the Press Secretary, Official Transcript of Remarks by President Obama at Health Care Reform Town Hall, July 23, 2009, <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-health-care-reform-town-hall> (“We are pursuing health insurance reform so that every American has access to quality, affordable health coverage”); The White House, Office of the Press Secretary, Official Transcript of Remarks of President Barack Obama, Address to Joint Session of Congress, February 24, 2009, <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-barack-obama-address-joint-session-congress> (referencing “the principle that we must have quality, affordable health care for every American”).

Under the Act, these dramatic expansions in healthcare coverage would have been unworkable absent the individual mandate. Indeed, as this Court has recognized, Congress codified in the text of the Act that the individual mandate was “essential to creating effective health insurance markets.” *King v. Burwell*, 135 S.Ct. 2480, 2486 (2015) (quoting 42 U.S.C. § 18091(2)(I)). Congress’s unambiguously expressed conclusion was that “[b]y significantly increasing health insurance coverage,” the individual mandate would work “together with the other provisions of this Act” in order to “minimize . . . adverse selection and broaden the health insurance risk pool to include healthy individuals.” 42 U.S.C. § 18091(2)(I). Thus, the mandate was

inseparable from the Act's other insurance market reforms, and those reforms were indispensable to accomplishing the Act's fundamental purpose. This is not a case where the excised portion of the statute is of "relative unimportance" to the legislation as a whole. See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 696 (1987). Rather, the individual mandate and the Act's other provisions were "obviously meant to work together." See *Murphy v. NCAA*, 138 S.Ct. 1461, 1483 (2018). Therefore, the provision is not severable because the remainder of the statute would not "function in a manner consistent with the intent of Congress" about the individual mandate. *Alaska Airlines v. Brock*, 480 U.S. at 684.

Also weighing against severability is the Act's lack of a severability clause. While the absence of such a clause "does not raise a presumption against severability," *New York v. United States*, 505 U.S. 144, 186 (1992), it remains highly relevant to the court's analysis. For example, in *INS v. Chadha*, this Court held that it "need not embark on that elusive inquiry" of whether an unconstitutional provision was severable from the remainder of the law since Congress had included an unambiguous severability clause in the statute. 462 U.S. 919, 932 (1983). And in *Alaska Airlines*, this Court similarly held that the severability inquiry "is eased when Congress has explicitly provided for severance by including a severability clause in the statute," unless there is "strong evidence that Congress intended otherwise." 480 U.S. at 686. Consequently, when such a clause is lacking, courts may infer that the evidence against severability need not be as robust.

Severing the individual mandate and leaving the remaining provisions standing would result in “a scheme sharply different from what Congress contemplated” when the Act was enacted. *Murphy*, 138 S.Ct. at 1482. Health insurance reform was the chief legislative goal of the Act and the individual mandate is the core driver of those reforms. The other provisions of the Act work in tandem with and depend heavily upon the mandate to create a comprehensive regulatory scheme. It is evident that the remaining sections of the Act cannot function in the manner intended by Congress independent of the individual mandate because they are so inextricably intertwined. Therefore, application of this Court’s existing severability precedents confirms that the whole Act must fall along with the unconstitutional command.

◆

CONCLUSION

This Court has clearly articulated the considerations it finds relevant in reviewing petitions for a writ of certiorari. Were any of those considerations applicable, Petitioners’ request might warrant this Court’s attention. But here, there is no circuit split to resolve: only the ruling of a single court of appeals. There is no departure from the accepted and usual course of judicial proceedings: only a routine vacatur and remand. And there is no important federal question that has yet to be decided: only a lower court applying well-established precedent. In short, there is no compelling reason whatsoever for this Court to burden

itself by prematurely hearing this case. Accordingly, for all the reasons set forth above, this Court should deny the petitions for a writ of certiorari.

Respectfully submitted,

ROBERT HENNEKE

TEXAS PUBLIC

POLICY FOUNDATION

901 Congress Avenue

Austin, Texas 78701

Telephone: (512) 472-2700

rhenneke@texaspolicy.com

Counsel of Record for

Individual Respondents