Nos. 19-840/1019

In the Supreme Court of the United States

STATE OF CALIFORNIA, *ET AL.*,
Petitioners,

v.

STATE OF TEXAS, *ET AL.*,
Respondents.

STATE OF TEXAS, *ET AL.*,
Cross-petitioners,

v.

STATE OF CALIFORNIA, *ET AL.*,
Cross-respondents.

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

MOTION TO PARTICIPATE IN ORAL ARGUMENT AND FOR EXPANDED ARGUMENT

The *amici* States—Ohio and Montana—respectfully ask this Court to expand argument and allow the *amici* States ten minutes of argument time in support of neither side. The *amici* States make this request pursuant to Supreme Court Rules 28.4 and 28.7.

Almost all the States have weighed in on one side of this case or the other. But only Ohio and Montana have taken the position that the individual mandate is *both* unconstitutional *and* severable from the remainder of the Affordable Care Act. Put differently, if Ohio and Montana are correct, then the petitioner and respondent States (along with the other parties) have all taken positions that improperly aggrandize the power of one branch of government. The petitioner States, in defend-

ing the mandate's constitutionality, would arrogate to Congress power the Constitution does not give it. And the respondent States, in asking the Court to strike down the entire Affordable Care Act based on the unconstitutionality of a single, insignificant provision, would arrogate to the Judiciary power the Constitution does not give it.

Ohio and Montana seek argument time primarily to argue for severability. More precisely, they wish to argue that that modern severability doctrine, if it is to be retained, should be grounded in statutory text rather than hypothetical congressional intent. As it now stands, this Court's severability doctrine requires courts to make the "severability determination by asking a counterfactual question: 'Would Congress still have passed the valid sections had it known about the constitutional invalidity of the other portions of the statute?" *Murphy v. NCAA*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring) (quoting *United States v. Booker*, 543 U.S. 220, 246 (2005)). Ohio and Montana argue that this approach is misguided: It gives the Judiciary what amounts to legislative power; Congress's intent is often unknowable and so, "[w]ithout any actual evidence of intent, the severability doctrine invites courts to rely on their own views about what the best statute would be." *Id.* at 1487; *see* Br. of Ohio and Montana 30. The modern approach is also contrary to Article III, as it allows parties to win the invalidation of provisions they lack standing to challenge. *Id.* at 28–29. And this approach contradicts "traditional limits on judicial authority," which did not include the power to strike down constitutional pro-

visions of partially unconstitutional laws. *Murphy,* 138 S. Ct. at 1485 (Thomas, J., concurring); *see* Br. of Ohio and Montana 25–27.

Instead of engaging in this inquiry, the Court should, if it retains the severability doctrine at all, treat severability as "an exercise in statutory interpretation"—rather than asking what Congress would have wanted, courts should just apply standard interpretive tools to "decide how a statute operates once they conclude that part of it cannot be constitutionally enforced." *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring); *see* Br. of Ohio and Montana 32–34. This approach better accords with the Judiciary's constitutional role. And, more important for purposes of this motion, this approach would protect the States' sovereign authority to govern themselves. Parties often challenge state laws in federal court. *See, e.g., Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). When courts hold such laws partially invalid, they must decide whether to "sever" the remaining portion. By making the severability inquiry turn strictly on what the state legislature said—not on what a federal court thinks it would have said about a problem it probably never considered—this Court would better respect two foundational principles of our Constitution's structure. First, States are permitted to "function as political entities in their own right." *Bond v. United States*, 564 U.S. 211, 221 (2011). Second, the national government leaves breathing space for local policies "more sensitive to the diverse needs of a heterogeneous society." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991).

Only the *amici* States argue to cabin severability in a way that respects these federalism-based principles. The *amici* States thus offer "a distinct perspective" from the parties. Dan Schweitzer, *A Modern History of State Attorneys Arguing as Amici Curiae in the U.S. Supreme Court*, 22 Green Bag 2d 143, 153 (2019). When an *amicus* State offers a unique state-focused perspective not otherwise advanced, the Court has granted the State's motion for argument time. *See id.*; *see, e.g.*, Order in *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, No. 18-96 (Jan. 4, 2019); Order in *Oneok Inc. v. Learjet, Inc.*, No. 13-271 (Dec. 15, 2014). The *amici* States, because of their position in this case and their role in our federalist system, have a unique perspective to offer. They move for ten minutes of time to present that perspective at oral argument.

Respectfully submitted,

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