

IN THE SUPREME COURT OF THE UNITED STATES

No. 19A__

UNITED STATES HOUSE OF REPRESENTATIVES, Petitioner,

v.

STATE OF TEXAS, ET AL., Respondents,

and

UNITED STATES OF AMERICA, ET AL., Respondents.

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

MOTION TO EXPEDITE CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI, TO
EXPEDITE MERITS BRIEFING AND ORAL ARGUMENT IN THE EVENT THAT THE COURT GRANTS
THE PETITION, AND TO EXPEDITE CONSIDERATION OF THIS MOTION

Pursuant to Supreme Court Rule 21, the United States House of Representatives (House) respectfully moves for expedited consideration of its petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, filed simultaneously with this motion today, as well as expedited consideration of this motion. A divided panel of the Fifth Circuit invalidated 26 U.S.C. 5000A, a provision of the Affordable Care Act (ACA) that is sometimes called the “individual mandate,” and indicated that the ACA’s insurance market reforms, or perhaps the entirety of the law, may well fall as a result. The decision below thus poses a severe, immediate, and ongoing threat to the orderly operation of healthcare markets throughout the country, casts

doubt over whether millions of individuals will continue to be able to afford vitally important care, and leaves a critical sector of the nation's economy in unacceptable limbo.

Under the ordinary briefing schedules provided by this Court's rules, the House's petition for certiorari would not be resolved until March 2020 at the earliest, and in the event that this Court grants review, the case would not be argued and decided until next Term. In the meantime, individuals, businesses, and States will continue to face crippling uncertainty about the ACA's validity through the 2020 enrollment period, for 2021 health coverage, and beyond. The House therefore respectfully requests that this Court expedite its consideration of the petition for certiorari under either of the two alternative schedules set forth in this motion. The schedules would permit the Court to consider the petition either at its conference on January 24, 2020, or at its conference on February 21, 2020.

Should the Court grant the petition for certiorari, the House further requests that the Court set a briefing and argument schedule that permits the Court to hear and decide the case this Term. The House has proposed several potential schedules below. The House also respectfully requests expedited consideration of this motion.¹

STATEMENT

1. In the decade since it was enacted, the ACA has become a fixture of the American healthcare system. The Act reformed the individual health insurance market to bar discrimination against persons with preexisting conditions and to provide affordable subsidized insurance to millions of people who could not previously obtain it. The Act also expanded Medicaid to cover

¹ The House understands that the States that intervened below to defend the ACA are also filing a petition for a writ of certiorari seeking review of the Fifth Circuit's decision, and that they are similarly moving to expedite this Court's consideration of their petition.

millions more Americans. And it reshaped the Medicare program in important ways to control costs and provide additional benefits to senior citizens, along with myriad additional reforms.

One of the ACA's original provisions, 26 U.S.C. 5000A, created an incentive for individuals to purchase health insurance in order to increase the prospects that the newly reformed individual insurance market would develop in an economically sustainable manner. This provision stated that certain individuals "shall * * * ensure" that they and their dependents are "covered under minimum essential coverage" and then provided a "[s]hared responsibility payment" for those who decided not to obtain such coverage.

2. Although the ACA continued to be the subject of policy debates in Congress well after its enactment, this Court has definitively held that the Act's core provisions are constitutional. In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (*NFIB*), this Court upheld the constitutionality of Section 5000A. Applying constitutional avoidance principles, the Court held that Section 5000A established a choice between two lawful alternatives and ruled that Congress possessed authority under the Taxing Clause to enact the provision. *Id.* at 563-575.

In December 2017, Congress eliminated the Act's monetary incentive to purchase insurance by reducing the shared responsibility payment in Section 5000A(c) to zero. Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092. But Congress deliberately left intact the rest of Section 5000A and the rest of the ACA.

3. Three months after Congress enacted the 2017 amendment, respondents—a group of States and two individuals—filed this suit in the Northern District of Texas. Pet. App. 128a-129a. They challenged the amended Section 5000A, claiming that it exceeds Congress's constitutional powers on the theory that it can no longer be justified under the Taxing Clause. They also asserted

that Section 5000A is inseverable from the remainder of the ACA and that the entire statute therefore must be invalidated.

The district court (O'Connor, J.) ruled that the individual respondents had standing to challenge Section 5000A and that Section 5000A is unconstitutional. Congress's 2017 amendment, the district court concluded, had transformed Section 5000A from a choice between lawful alternatives to an unconstitutional command that exceeded Congress's enumerated powers. The district court then took the remarkable step of striking down the ACA in its entirety. Pet App. 184a-185a, 233a-234a.

A divided panel of the Fifth Circuit affirmed in large part. The majority ruled that both individual and state respondents possessed Article III standing. It then concluded, like the district court, that Section 5000A was unconstitutional. The court of appeals declined, however, to address whether that provision was severable from the rest of the ACA, notwithstanding that severability is a pure question of law that was fully briefed and argued and was ruled upon by the district court. The majority instead returned the case to the district court to undertake a more thorough severability analysis than it had previously conducted—although the majority declined to offer any guidance as to which legal principles the district court should apply. See Pet. App. 68a (district court should use a “finer-toothed comb,” although that court could determine “just how fine-toothed that comb should be”); Pet. App. 54a, 58a, 65a-66a (district court should put in more “legwork” and engage in a “careful, granular approach” that is “meticulous” and involves a “careful parsing of the statutory scheme”). After that analysis is done, the Fifth Circuit stated, “[i]t may still be that none of the ACA is severable from the individual mandate, * * * that all of the ACA is severable from the individual mandate,” or that “some of the ACA is severable from the individual mandate, and some is not.” Pet. App. 68a-69a.

Judge King dissented, characterizing the majority’s decision as “perpetuat[ing]” the district court’s “textbook judicial overreach.” Pet. App. 111a. In addition to finding that no respondent had standing and that, even if one did, Section 5000A, as amended, remained within Congress’s powers, Judge King also expressed strong disagreement with the majority’s approach to severability. She concluded that the decision to remand—leaving “no end * * * in sight”—will “prolong the uncertainty this litigation has caused to the future of this indubitably significant statute” and “the concomitant uncertainty over the future of the healthcare sector.” Pet. App. 73a, 97a, 111a; see Pet. App. 111a (ACA critical to “the welfare of the economy and the American populace at large”).

ARGUMENT

Expedited consideration of the petition for certiorari is warranted to permit this Court to resolve the questions presented this Term and end the crippling uncertainty that now pervades the health-insurance and health-care marketplace. For the reasons explained in the petition, this case involves matters of exceptional national importance: the court of appeals has invalidated a provision of “one of the most consequential laws ever enacted by Congress,” *Sissel v. U.S. Dep’t of Health & Human Servs.*, 799 F.3d 1035, 1049 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc), and it has suggested that the entire statute may fall as a result, despite the fact that respondents have suffered no concrete injury that would support their standing to challenge Section 5000A. The court of appeals’ decision thus poses a severe and immediate threat to the orderly operation of the health-care marketplace. This Court’s review during the current Term is warranted.

1. In the years since its enactment, the ACA has become deeply embedded in the nation’s economy and essential to its citizens. The healthcare sector comprises nearly one-fifth of the

economy, and has adapted itself in myriad ways to the ACA's reforms. Millions of individuals have purchased health coverage for the first time; the markets established by the exchanges are stable and effective; States have expanded their Medicaid programs to accommodate the massive increase in enrollment; Medicare reimbursement systems have been substantially reformed; and States, insurers, and other market actors have invested billions of dollars in reliance on the statute's continued operation. See, *e.g.*, *State Defs.' Mot. To Expedite 2-5* (5th Cir. Feb. 1, 2019).

2. The Fifth Circuit's decision has cast an intolerable cloud of uncertainty over this critical sector of the nation's economy. By invalidating Section 5000A and indicating that the ACA's insurance market reforms, or perhaps the entirety of the law, may well fall as a result, the decision will inflict enduring concrete harms on the health-insurance market, individuals, States, and insurers and other businesses.

Under the current state of affairs, there is considerable doubt over whether millions of individuals will continue to be able to afford vitally important care. Millions of individuals will live with the insecurity of not knowing that they have access to affordable health care, and will be forced to make important life decisions without knowing how those decisions will affect their continued access to such care. If the Court does not hear the case this Term, that uncertainty will likely persist through next year's open enrollment period. And while no market seeks uncertainty, it is particularly pernicious in the market for health insurance, which relies to an unusual extent on stability and predictability to function.

Businesses will be unable to accurately plan for the future without knowing how they will approach health insurance for their employees and the amount to budget. Insurers will face continuing uncertainty about how the individual insurance market will operate (and whether subsidies will remain available). That uncertainty will increase the cost of insurance policies sold

on the exchanges and may discourage insurers from offering policies on the exchanges at all. States, for their part, will not know whether they will continue to receive the billions of dollars in Medicaid and other funding that the ACA provides—uncertainty that could wreak havoc on state budgeting processes. And States will be forced to investigate steps necessary to stabilize their insurance markets in the event of a full or partial invalidation of the ACA. See State Defs.’ Mot. To Expedite 2-5 (5th Cir. Feb. 1, 2019); see also Pet. App. 72a-73a, 111a (King, J., dissenting).

3. Recognizing the importance of definitively resolving respondents’ challenge to Section 5000A and their argument that the entire statute must fall, the courts below proceeded on an expedited basis. As the federal respondents argued below in urging expedition, the “[p]rompt resolution of this case will help reduce [the] uncertainty in the healthcare sector” that has resulted from this litigation. U.S. Mot. To Expedite Oral Argument 2 (5th Cir. Apr. 8, 2019). Now that the court of appeals has invalidated Section 5000A and suggested that the entire ACA may be invalid as a result, that uncertainty has only worsened, and the need for expedition has become more acute.

4. The House therefore respectfully submits that this Court should definitively resolve the questions presented this Term. The ordinary briefing schedules prescribed by Rules 15 and 25 of this Court, however, would not permit that. Absent expedition, uncertainty about the ACA’s status will endure at least into late 2020, likely through next year’s open enrollment period. Accordingly, the House respectfully requests that the Court issue a schedule for certiorari briefing and, if applicable, merits briefing that permits the Court to hear this case on an expedited basis.

5. The House proposes two alternative schedules for certiorari-stage briefing that would permit the Court to consider the petition either at the January 24 or February 21 conference. Under either alternative, the House waives the 14-day waiting period, provided by Supreme Court Rule

15.5, between the filing of a brief in opposition and distribution of the petition and other materials to the Court.

Under the first alternative, the House respectfully requests that any amici wishing to file briefs in support of certiorari be directed to do so by January 15, 2020, and that respondents be directed to file responses to the petition by January 21, 2020. The petition could then be immediately distributed, permitting the Court to consider the petition at the Court's conference on January 24, 2020. If the Court adopts this schedule, the House would file its reply brief no later than noon on January 23, 2020.

Alternatively, the Court could direct amici to file briefs in support of certiorari by January 17, 2020, and direct respondents to file responses by February 3, 2020, which would allow the petition to be distributed on February 5, 2020, and to be considered at the Court's February 21, 2020 conference. If the Court adopts this schedule, the House would file its reply brief no later than noon on February 12, 2020.

6. If the Court grants the petition following either conference, the House respectfully requests that the Court set an expedited merits briefing schedule.

If the Court grants the petition on January 24, 2020, the House proposes the following schedule for merits briefing and oral argument:

February 24, 2020	Petitioner's opening brief due
March 23, 2020	Respondents' brief due
April 17, 2020	Petitioner's reply brief due
April 27, 28, or 29, 2020	Oral argument

If the Court grants the petition on February 21, 2020, the House requests the following schedule for merits briefing and argument:

March 16, 2020	Petitioner's opening brief due
April 6, 2020	Respondents' brief due
April 20, 2020	Petitioner's reply brief due
April 27, 28, or 29, 2020	Oral argument

Alternatively, the Court could enter a longer schedule and hear the case at a special sitting in May. In that case, the House requests the following schedule for merits briefing and argument:

March 20, 2020	Petitioner's opening brief due
April 20, 2020	Respondents' brief due
May 8, 2020	Petitioner's reply brief due
May 2020	Oral argument

Under any schedule, the House respectfully requests that amicus briefs supporting the parties be due on the date the parties' briefs are due.

7. Finally, the House also moves for expedited consideration of this motion, so that the Court may consider it at the January 10, 2020 conference. The House respectfully requests that the Court direct respondents to respond to this motion by January 7, 2020.

8. The individual and state respondents oppose the relief sought in this motion. Counsel for petitioner contacted counsel for the United States, but the government responded that it was unable to provide its position.

CONCLUSION

For the reasons stated, the House respectfully requests that the Court expedite consideration of the House's petition for certiorari based on one of the two proposed schedules above and, if the Court grants the petition, that the Court set an expedited briefing and oral argument schedule that

permits the Court to hear this case during the current Term. The House also respectfully requests expedited consideration of this motion.

Respectfully submitted,

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