Nos. 19-840 and 19-841

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

STATE OF TEXAS, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

STATE OF TEXAS, ET AL.

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

RESPONSE OF THE FEDERAL RESPONDENTS IN OPPOSITION TO PETITIONERS' MOTIONS TO EXPEDITE CONSIDERATION OF THE PETITIONS FOR WRITS OF CERTIORARI

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Petitioners' requests to expedite consideration of their petitions for writs of certiorari should be denied. Neither the court of appeals' decision nor the district court's underlying judgment presents any current exigency that warrants accelerated

interlocutory review; to the contrary, the decision below eliminated any such exigency. Although the district court's judgment declared the individual mandate, 26 U.S.C. 5000A, unconstitutional and inseverable from the rest of the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119, that judgment never took effect because it was stayed upon issuance and has now been vacated in substantial part by the decision below. The Fifth Circuit's decision itself does not warrant immediate review because it did not definitively resolve any question of practical consequence. On the merits, the court of appeals held only that Section 5000A's individual mandate now exceeds Congress's authority because Congress's elimination of the monetary penalty for noncompliance (as of January 1, 2019) precludes sustaining the individual mandate as a tax. That ruling creates no present, real-world emergency precisely because, as all parties agree, Section 5000A no longer subjects any individual to any concrete consequence: the elimination of the monetary penalty renders the mandate either invalid (as the Fifth Circuit held) or precatory (as petitioners argue).

Petitioners' requests for expedition instead are ultimately premised on a question the court of appeals expressly reserved. They contend that immediate review is warranted to determine, assuming Section 5000A's individual mandate is now invalid, which if any other ACA provisions are severable from it. But the court declined to address that question. Instead, finding the district

court's severability analysis inadequate, the Fifth Circuit vacated and remanded for further consideration. It also directed the district court to reconsider the proper scope of relief, including whether the remedy plaintiffs seek exceeds what is needed to redress their injuries. As the case comes to this Court, no lower-court ruling exists on severability or the appropriate remedy. Far from being urgently needed, this Court's review thus would be premature.

Petitioners' submission, at bottom, is that the vitality of the ACA's myriad provisions is too important to be left unresolved. But definitive resolution of that issue will be facilitated, not frustrated, by allowing the lower courts to complete their own consideration of the question. Rather than intervene to interrupt that process and decide the validity and severability of the ACA's provisions in the first instance -- in an interlocutory posture, without the benefit of a decision from the court of appeals on that issue -- this Court should defer any review pending a final Fifth Circuit decision. Absent any operative ruling invalidating the ACA's other provisions in the interim, the accelerated review petitioners seek is unnecessary.

STATEMENT

1. The ACA, enacted in 2010, established a framework of economic regulations and incentives that restructured the health-

insurance and healthcare industries. See Pet. App. 4a.* Among many other provisions, Title I of the ACA enacted 26 U.S.C. 5000A, captioned "Requirement to maintain minimum essential coverage," ibid., and colloquially known as the "individual mandate," e.g., Pet. App. 3a. Subsection (a) of Section 5000A mandates that certain individuals "shall * * * ensure" that they are "covered under minimum essential coverage." 26 U.S.C. 5000A(a). Subsection (b) imposes "a penalty," denominated as a "[s]hared responsibility payment," on certain taxpayers who "fail[] to meet the requirement of subsection (a)." 26 U.S.C. 5000A(b). And subsection (c) specifies "[t]he amount of the penalty imposed" for noncompliance. 26 U.S.C. 5000A(c). The penalty originally was calculated as a percentage of household income, within certain limits. National Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 539 (2012) (NFIB).

In NFIB, this Court addressed whether "Congress has the power under the Constitution to enact" the individual mandate. 567 U.S. at 532. In an opinion by the Chief Justice, the Court concluded that the individual mandate and shared-responsibility payment were a valid exercise of Congress's taxing power, under a saving construction adopted in light of the canon of constitutional avoidance. Id. at 563-574. That construction was necessary because the Chief Justice agreed with the four dissenting Justices that the individual mandate was not a valid exercise of Congress's

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

authority under the Constitution's Commerce Clause, Art. I, § 8, Cl. 3, or Necessary and Proper Clause, id. Art. I, § 8, Cl. 18. See NFIB, 567 U.S. at 547-561, 574 (opinion of Roberts, C.J.); id. at 649-660 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

2. In December 2017, Congress enacted the Tax Cuts and Jobs Act of 2017 (TCJA), Pub. L. No. 115-97, 131 Stat. 2054, which among other things eliminated the shared-responsibility payment as of January 1, 2019. § 11081, 131 Stat. 2092. It did so by reducing the amount of the required payment specified in Section 5000A(c) to zero. Ibid. The TCJA did not otherwise modify Section 5000A.

Following the TCJA's enactment, Texas, 17 other States, and two individuals brought suit challenging the constitutionality of the individual mandate and the enforceability of the ACA, on the ground that the elimination of the shared-responsibility payment abrogated the basis of the saving construction adopted in NFIB, and the remainder of the statute is inseverable. Pet. App. 10a. The federal government agreed with the plaintiffs that the individual mandate is no longer constitutional, and it argued that two other ACA provisions -- the guaranteed-issue and community-rating requirements -- are inseverable from it. Id. at 11a. California, 15 other States, and the District of Columbia intervened to defend the ACA. Ibid.

The district court denied the plaintiffs' request for a preliminary injunction but granted them partial summary judgment

on their claim for declaratory relief, concluding that the individual mandate is unconstitutional and not severable from the remainder of the ACA. Pet. App. 11a-12a; see id. at 163a-231a. All parties in the district court -- the plaintiffs, the intervenor States, and the federal government -- agreed that the district court's decision should not take effect pending appeal. See D. Ct. Doc. 213-1, at 1-2 (Dec. 17, 2018); D. Ct. Doc. 216, at 2-3 (Dec. 21, 2018); D. Ct. Doc. 217, at 2 (Dec. 21, 2018). The court entered a partial final judgment as to the plaintiffs' claim for declaratory relief, Pet. App. 116a, but it stayed that judgment pending appeal, id. at 117a-162a.

3. a. The federal government and the intervenor States appealed. The United States House of Representatives and several additional States were granted permissive intervention on appeal to defend the ACA. Pet. App. 12a & n.12. While the appeal was pending, the federal government notified the court of appeals that it had determined that all of the ACA's provisions are inseverable from the individual mandate. Id. at 12a. It also argued that any relief should be limited to only what is necessary to remedy the plaintiffs' own injuries. Id. at 12a-13a. The federal government subsequently moved unopposed to expedite oral argument but did not request acceleration of the remaining briefing. Gov't C.A. Mot. to Expedite 2 (Apr. 8, 2019).

b. The court of appeals affirmed in a divided decision. Pet. App. 1a-72a. The majority concluded that the individual and

State plaintiffs had standing to bring the lawsuit. Id. at 19a-39a. On the merits, the majority concluded that the individual mandate is no longer "a constitutional exercise of congressional power." Id. at 39a; see id. at 39a-52a. It explained that, "[n]ow that the shared responsibility payment amount is set at zero, the provision's saving construction" -- as an exercise of Congress's taxing power -- "is no longer available." Id. at 44a (footnote omitted).

The panel majority then turned to whether the ACA's remaining provisions are severable from Section 5000A, but it did not decide that question. Instead, the court "remand[ed] to the district court to undertake two tasks." Pet. App. 52a. First, it directed the district court to reevaluate the severability question "with more precision" using a "finer-toothed comb." Id. at 52a, 68a. The panel stated that the "issue involves a challenging legal doctrine applied to an extensive, complex, and oft-amended statutory scheme" and requires "a careful, granular approach" that the district court had not undertaken. Id. at 59a. The panel stated that the district court had "give[n] relatively little attention to the intent of the 2017 Congress" that eliminated the shared-responsibility payment and had "not do[ne] the necessary legwork of parsing through the over 900 pages of the post-2017 ACA." Id. at 65a.

Second, the panel majority directed the district court to consider the federal government's argument that relief should be confined to the plaintiffs' injuries. Pet. App. 70a-72a. The

district court, the panel observed, "is in a far better position than [the court of appeals] to determine which ACA provisions actually injure the plaintiffs." Id. at 71a. The panel "place[d] no thumb on the scale as to the ultimate outcome." Id. at 72a.

Judge King dissented. Pet. App. 73a-113a. In her view, the plaintiffs lacked standing. Id. at 74a-91a. On the merits, Judge King concluded that the individual mandate is constitutional and that, in any event, it is severable from the remainder of the ACA's provisions. Id. at 91a-113a.

ARGUMENT

1. Petitioners' requests for expedition should be denied because immediate review in this interlocutory posture is plainly unwarranted. Petitioners identify no aspect of any operative lower-court ruling in this case that creates any exigency or otherwise necessitates accelerated consideration.

The intervenor States point to the district court's underlying decision, 19-840 Pet. Mot. to Expedite (Intervenor States Mot.) 4-5, but it does not support expedited review at this juncture. The district court's partial final judgment -- which has been stayed pending appeal since it was issued in December 2018, Pet. App. 117a-162a; see id. at 116a -- was vacated by the court of appeals' decision, except as to the district court's rulings that the plaintiffs have standing and that Section 5000A's individual mandate is invalid. The aspect of the judgment on which the intervenor States rely (Mot. 4) -- which held Section 5000A

inseverable from the rest of the ACA -- has never been in force and has now been set aside.

The intervenor States and the House of Representatives also contend that the court of appeals' decision warrants immediate review. Intervenor States Mot. 5; 19-841 Pet. Mot. to Expedite (House Mot.) 6. But that decision does not present any urgency; to the contrary, it eliminated any exigency. The panel first concluded that the individual and State plaintiffs have standing to challenge the individual mandate. Pet. App. 19a-39a. Although petitioners seek review of that conclusion, see 19-840 Pet. 19-21; 19-841 Pet. 21-27, they do not contend that the court's case-specific analysis of the plaintiffs' ability to bring suit nearly two years ago independently warrants plenary (much less expedited) review today.

The only merits issue the court of appeals decided -- the invalidity of the individual mandate in 26 U.S.C. 5000A -- also does not justify immediate review. To be sure, lower-court decisions holding federal statutes invalid often do warrant this Court's review. See 19-840 Pet. 15 (collecting cases). But here the Fifth Circuit held that the mandate is unconstitutional precisely because it is no longer backed by the only original consequence (a monetary obligation) for noncompliance. See Pet. App. 44a. And petitioners themselves defend the mandate on the ground that it is "simply precatory" and leaves individuals free to "cho[ose] between having health insurance and not having health

insurance -- without paying any tax if they make the latter choice." 19-840 Pet. 21; see 19-841 Pet. 19-20. On either view of the merits -- whether the elimination of the shared-responsibility payment leaves the mandate invalid or valid but merely precatory -- that question presents no practical urgency that warrants immediate review.

2. a. Instead, petitioners principally seek expedition based on a question the Fifth Circuit expressly did not decide. They contend that this Court should consider the petitions on an accelerated basis to resolve "uncertainty" as to which other provisions of the ACA are severable from Section 5000A's individual mandate. Intervenor States Mot. 4; see id. at 4-7; House Mot. 5-7. The court of appeals, however, expressly reserved that question.

The Fifth Circuit concluded only that the district court had not undertaken the necessary severability analysis. Pet. App. 52a-70a. It remanded to the district court to provide a more "careful, precise explanation of whether" and to what extent the ACA's other provisions should remain in effect. Id. at 70a. The panel "direct[ed] the district court to employ a finer-toothed comb on remand and conduct a more searching inquiry into which provisions of the ACA Congress intended to be inseverable." Id. at 68a. The court of appeals expressed no opinion on the ultimate answer or on various subsidiary issues, observing that "the district court * * * is best positioned to determine" those questions "in the first instance." Id. at 69a; see id. at 68a-69a.

The court of appeals' decision declining to resolve the severability question does not warrant this Court's review at all, let alone accelerated consideration of the petitions. As "a court of review, not of first view," United States v. Stitt, 139 S. Ct. 399, 407 (2018) (citation omitted), this Court ordinarily does not consider in the first instance questions that the court below has not decided. That general rule applies with full force here. If the Court were to grant review of the severability question at this juncture, it would have to confront the severability of statutory provisions spanning 900 pages without the benefit of any decision from the court of appeals on that question, or of a decision from the district court applying the more granular analysis that the court of appeals prescribed.

The appropriate course is instead to defer any review in this Court until after the district court has completed its reassessment of severability on remand and the court of appeals has reviewed that determination on appeal. That approach not only will ensure that the Court has the benefit of the lower courts' considered views, but it also may narrow the scope of the issue ultimately presented to this Court. The Fifth Circuit directed the district court on remand to consider the government's argument that relief should be limited to those applications of particular ACA provisions necessary to redress the plaintiffs' injuries. Pet. App. 71a; see Gov't C.A. Br. 26-29. A proper threshold analysis of which if any ACA provisions other than the individual mandate

the plaintiffs have standing to challenge may obviate the need to address provisions that do not cause the plaintiffs in this case any cognizable injury. Courts generally "have no business answering" questions about the validity of provisions that concern only "the rights and obligations of parties not before the Court." Printz v. United States, 521 U.S. 898, 935 (1997). Deferring review until the litigation in the lower courts is complete thus may help streamline this Court's consideration and avoid a partially advisory opinion.

b. Petitioners' contrary arguments lack merit. The intervenor States contend that the absence of a Fifth Circuit ruling on severability counsels in favor of immediate review because it has resulted in "uncertainty" about the ACA's "future." Intervenor States Mot. 4; see id. at 5-7. The House contends (Mot. 6) that many or all ACA provisions "may well fall" on remand, casting a "cloud" over the healthcare sector. But all of this was true when the plaintiffs first filed their complaint. Now, as then, the district court will consider the parties' arguments and render a final decision. The prospect that the parties challenging the law may prevail does not justify intervening before the district court has ruled.

Petitioners also observe that the federal government requested expedition of oral argument in the Fifth Circuit in part to "help reduce uncertainty in the healthcare sector, and other areas affected by the [ACA]." Gov't C.A. Mot. to Expedite 2; see

Intervenor States Mot. 7; House Mot. 7. From that request, petitioners extrapolate that expedition of their petitions must be appropriate as well. But the circumstances then and now are materially different. When the government urged accelerating oral argument in April 2019, the district court's judgment then under review -- which had declared all provisions of the ACA inseverable from the individual mandate -- was the only decision in the case. Even then, moreover, the government did not urge immediate intervention by this Court.

Now, in contrast, the Fifth Circuit's decision has made clear that its ruling has no imminent consequences. The court of appeals vacated the portion of the district court's judgment deeming all other ACA provisions inseverable, remanding for the district court to revisit that question applying a more "granular approach." Pet. App. 59a. The Fifth Circuit's decision also ensures that the district court will now consider on remand the government's argument that, irrespective of the severability analysis, any relief should be limited to only what is necessary to redress injuries to the plaintiffs. See id. at 70a-72a. That in turn makes more remote the prospect of a ruling declaring invalid many ACA provisions that do not injure any plaintiff in the litigation. The decision below, therefore, addresses the government's previous concern.

3. If the Court nevertheless elects to expedite briefing and consideration of the petitions, it should adopt a schedule no more compressed than the intervenor States' principal (and the House's

alternative) proposal. Under that schedule, responses to the petitions would be due February 3, 2020, and the case could be considered at the Court's February 21, 2020, Conference. Intervenor States Mot. 7-8; House Mot. 7-8. As petitioners note, that schedule would permit the Court, if it chooses, to hear oral argument in April or May. See ibid. The Court should reject the intervenor States' alternative (and the House's primary) proposal -- which calls for responses to the petitions by January 21, 2020, just two and a half weeks after the petitions were filed. Petitioners offer no compelling justification for that accelerated timeline.

CONCLUSION

The motions to expedite consideration of the petitions for writs of certiorari should be denied.

Respectfully submitted.

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