IN THE SUPREME COURT OF THE UNITED STATES

No. 19–841

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

REPLY IN SUPPORT OF 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

In opposing the House's motion to expedite, no respondent meaningfully disputes that the Fifth Circuit's decision poses a severe, immediate, and ongoing threat to the orderly operation of health-care markets throughout the country and casts doubt over whether millions of individuals will continue to be able to afford vitally important care. Nor could respondents do so, as the federal government itself successfully urged expedition below for that exact reason—*i.e.*, that continuing uncertainty about the ACA's lawfulness would seriously damage the health-care sector. Respondents also do not dispute that the validity of the ACA is a question "of the utmost national importance" that warrants this Court's review. State Respondents Opp. 3; see DOJ Opp. 3 (asking only that the Court "defer any review").

Instead, respondents make the astonishing argument that the very cause of the crippling uncertainty now afflicting the health-care sector—the Fifth Circuit's abdication of its responsibility to decide whether Section 5000A of the ACA is severable from the remainder of the statute or whether instead the entire ACA must fall—requires this Court, the American people, and the massive health-care industry to wait *years* before any of the critically important questions presented in this case are resolved. Yet no respondent contends that the district court is in fact better placed than this Court to resolve those core severability questions, and with good reason: severability is a pure question of law that this Court routinely decides in the first instance. Moreover, respondents disclaim any need for the section-by-section analysis that the Fifth Circuit believed the district court should perform; they believe that the entire ACA must fall as a result of the Fifth Circuit's invalidation of Section 5000A. And in all events, respondents have announced that they will argue for complete inseverability in the district court if there is a remand. See Attorney General of Texas, *Fifth Circuit Declares Obamacare Mandate Unconstitutional; Remands to District Court to Determine If Any Portions of the Law Can Remain* ("'I look forward to demonstrating in district court that the rest of the law cannot stand without this central provision,' said Attorney General Ken Paxton.").[1] The Fifth Circuit's unjustifiable refusal to decide severability thus provides no reason for this Court to refuse to expedite consideration of this petition or the petition in 19-840, and no reason to deny certiorari.

Respondents, moreover, do not contend that they would be prejudiced if this Court adopted the House's alternative proposed schedule, pursuant to which opposition briefs would be due on February 3 and the case would be conferenced on February 21. The House therefore respectfully

[1] https://www.texasattorneygeneral.gov/news/releases/fifth-circuit-declares-obamacare-mandate-unconstitutional-remands-district-court-determine-if-any.

requests that the Court adopt that schedule and direct respondents to file any conditional cross-petitions on February 3.

ARGUMENT

1. As the House explained in its motion, the Fifth Circuit's decision creates crippling uncertainty for the health-care and health insurance marketplaces, and those harms fully warrant this Court's review during the present Term. See House Mot. To Expedite 5-6; see also State Intervenors Mot. To Expedite 5-7; State Defs. Mot. To Expedite 2-5 (5th Cir. Feb. 1, 2019). As the record reveals, uncertainty over the ACA's viability makes it difficult for insurers to predict the future of the marketplace, forcing some to raise premiums to account for that instability or to withdraw from the market. See, *e.g.*, State Defs. Mot. To Expedite, Bertko Decl. ¶ 4; Blewett Decl. ¶ 7; 7; Corlette Decl. ¶¶ 4-5, 7; Gobeille Decl. ¶ 4. For smaller states with fewer insurers, losing even a single insurer will "negatively impact the stability and competitiveness" of the states' health insurance markets. *E.g.*, *id.* Gobeille Decl. ¶ 2; Sherman Decl. ¶ 2. That uncertainty also makes the process of rate-setting and managing the health insurance marketplace more complicated and costly. *E.g.*, *id.* Gobeille Decl. ¶¶ 6, 7; Sherman Decl. ¶ 7. And, given that uncertainty, market participants and state governments must invest tremendous time and resources in developing contingency plans to alleviate the catastrophic effects of a sudden and immensely broad invalidation of the ACA. *E.g.*, *id.* Blewett Decl. ¶ 9; Gobeille Decl. ¶ 6; Sherman Decl. ¶ 7.

That evidence demonstrates that this litigation has caused, and continues to cause, concrete and immediate harms to the health-care sector.[2] Indeed, respondents do not seriously contend

[2] The harms are not limited to those detailed in the affidavits accompanying the States' Motion to Expedite. The ACA made fundamental changes to the way that health care is delivered and funded in the United States, and these changes have deeply influenced how hospitals structure care and payment systems. Leaving the ACA in limbo for years will force health-care providers to choose whether to prematurely abandon reforms made to comply with and take advantage of the ACA or

otherwise. While the state respondents halfheartedly challenge the evidence of ongoing harm as "vague and conclusory," State Respondents Opp. 4, petitioner's demonstration of the severe harms flowing from continuing uncertainty persuaded the Fifth Circuit to expedite proceedings below. Rhetoric aside, the state respondents do not meaningfully attempt to rebut any of the detailed factual evidence described in the materials cited above.

The Department of Justice (DOJ), for its part, does not make *any* attempt to challenge petitioner's proof of the immediate and ongoing threat to the orderly operation of health-care markets. And DOJ argued before the Fifth Circuit that the need to prevent harms resulting from continued "uncertainty in the healthcare sector" warranted expedition. See DOJ Mot. To Expedite Oral Argument 2 (5th Cir. Apr. 8, 2019). DOJ now tries to walk back its prior representations, arguing that expedition was necessary in the Fifth Circuit because the district court had declared the entire ACA invalid. DOJ Opp. 13. But the district court's judgment was stayed at the time; thus, DOJ evidently believed that even a nonprecedential, stayed district court declaration of the ACA's inseverability from Section 5000A could cause sufficient uncertainty to gravely harm the health insurance marketplace.

Events since the district court's judgment have made expedition more critical. Most obviously, the Fifth Circuit agreed with the district court that Section 5000A is unconstitutional and made clear that the entire ACA may fall as a result. Rather than reversing the district court's declaration of complete inseverability—a ruling that scholars of widely diverging jurisprudential

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risk further structuring their systems and policies to comport with provisions that may be ruled invalid several years from now. Similarly, the entire biosimilars industry has adapted to the regulatory pathway provided by the Biologics Price Competition and Innovation Act, which was passed as part of the ACA. Years of additional litigation will lead to destabilizing uncertainty regarding whether any regulatory pathway for biosimilars will exist whenever this case is finally adjudicated.

views described as indefensible and therefore likely to be reversed[3]—the Fifth Circuit announced that it would be prepared to hold that the ACA is completely inseverable following remand. That alone exponentially worsens the uncertainty created by the district court's decision. In addition, the federal government—which is responsible for enforcing and administering the ACA—changed its position on appeal to argue that the entire ACA is invalid. DOJ has recognized that its decision to take that extreme position intensifies the uncertainty surrounding the law, as it told the Fifth Circuit that its change in position made expedited review all the more important. DOJ Mot. To Expedite Oral Argument 2. Those developments have exacerbated the already severe uncertainty surrounding the statute.[4]

2. Unable to dispute that the Fifth Circuit's decision inflicts debilitating uncertainty on a critical sector of the nation's economy, respondents next argue that the decision below is interlocutory and that this Court should not weigh in until the severability question has gone through another round of litigation—likely lasting two or three years—in the district court and court of appeals. That argument goes to whether this Court should grant certiorari now—not whether the Court should expedite consideration of the petitions for certiorari and, should it grant certiorari despite respondents' arguments, decide the case this Term.[5]

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[3] See, *e.g.*, Jonathan H. Adler & Abbe R. Gluck, *What the Lawless Obamacare Ruling Means* (Dec. 15, 2018), https://www.nytimes.com/2018/12/15/opinion/obamacare-ruling-unconstitutional-affordable-care-act.html; Ilya Somin, *Thoughts on Today's Federal Court Decision Against Obamacare* (Dec. 14, 2018), https://reason.com/2018/12/14/thoughts-on-todays-federal-court-decisio/.

[4] DOJ's observation that, from the day the plaintiffs filed suit, there was "a 'cloud' over the healthcare sector," DOJ Opp. 12, fails for the same reason. That argument ignores the subsequent judicial rulings and DOJ's decision to seek the total invalidation of the ACA.

[5] The state respondents allege that the House's motion to expedite should be denied because the House lacks standing. State Respondents Opp. 2 n.1. The respondents are wrong, see House Supp. Letter Br. 4-7 (5th Cir. July 5, 2019), and, even if they were not, that is neither a reason to deny expedition nor to deny review, see *United States* v. *Windsor*, 570 U.S. 744, 757, 761-62 (2013) (because "the United States retains a stake sufficient to support Article III jurisdiction on appeal"

In any event, respondents' argument is wrong. As the House explained in its petition, the decision is interlocutory only because the Fifth Circuit abdicated its responsibility to decide the pure legal question of severability that was fully briefed and argued before it. Respondents have offered no reason, and there is none, that this Court cannot decide the core severability question now—this Court routinely addresses severability in the first instance, when the lower courts have not done so. See, *e.g.*, *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1482 (2018); *Free Enterprise Fund* v. *PCAOB*, 561 U.S. 477, 508 (2010). Indeed, this Court addressed severability in the first instance in a challenge to some of the same provisions that respondents seek to invalidate on inseverability grounds in this case—the ACA's Medicaid expansion—in *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519 (2012). The core severability issue is no less straightforward in this case than it was in those cases: petitioner argues that the entirety of the ACA is severable from Section 5000A, while respondents (including DOJ) argue that the entirety of the ACA is inseverable. See, *e.g.*, U.S. Br. 2-3 (5th Cir. May 1, 2019) (arguing that guaranteed-issue and community-rating provisions are inseverable from Section 5000A and "it is the position of the United States that the balance of the ACA also is inseverable and must be struck down").[6] Adjudicating that all-or-nothing question entails an uncomplicated analysis of congressional intent. And the answer is obvious: given that Congress eliminated any incentive to purchase

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and prudential considerations, "the Court need not decide whether BLAG would have standing to challenge the District Court's ruling and its affirmance in the Court of Appeals on BLAG's own authority"); *Horne* v. *Flores*, 557 U.S. 433, 446 (2009).

[6] DOJ further argued that after the court entered a judgment invalidating the entire ACA as inseverable, it would need to address a subsequent, "technical" question concerning the scope of the remedy with respect to the specific plaintiffs in this case, in that the relief awarded to each plaintiff should be limited to those provisions that actually injured it. U.S. Br. 27-28 (5th Cir. May 1, 2019); C.A. Oral Arg. Rec. 1:14:10-:15:25; *id.* 1:21:22-24.

insurance while leaving the rest of the statute intact, it clearly anticipated that the remainder of the ACA would continue to function.

Immediate review is particularly necessary given the serious challenges petitioner has raised to respondents' standing. If petitioner is correct, the years of further litigation on severability contemplated by the Fifth Circuit would occur in a case over which the federal courts lack Article III jurisdiction. The courts "have 'no business' * * * expounding on" the important constitutional and severability questions presented here "in the absence of * * * a case or controversy." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 90 (2013) (quoting *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006)). And while DOJ has suggested that the standing question presented in the petition would not be independently worthy of plenary review, "the importance of the issue and the novel view of standing adopted by the Court of Appeals" in this case provides at least as strong a justification for review by this Court as was present in *Clapper* v. *Amnesty International*, 568 U.S. 398, 408 (2013)—a case in which the United States sought certiorari on the standing issue.

Given their position on the merits of the severability question, respondents' insistence that this Court should not decide severability now betrays that their real objective is delay pure and simple. They would prefer that this Court take up the issue of the ACA's lawfulness in 2022 (the earliest realistic time at which the case could return to this Court after remand) rather than now. But respondents have offered nothing close to a persuasive principled justification for imposing the harms that such a delay would cause. That DOJ in particular would countenance such delay is extraordinary. DOJ contends that the entire ACA is inseverable from Section 5000A, *e.g.*, U.S. Br. 2-3 (5th Cir. May 1, 2019)—which means that while this litigation continues, the Executive Branch is being forced to devote massive resources, and spend billions of taxpayer dollars, to

administer a comprehensive statutory scheme that it believes is wholly invalid. It is difficult to fathom why the Executive would want that state of affairs to persist for years as this Court awaits the outcome of unnecessary further proceedings in the lower courts. DOJ's position is even more remarkable in light of the fact that it *does not dispute* that the constitutionality of Section 5000A is a question that will merit this Court's review.

The only reason DOJ advances in support of this approach is that judicial economy would purportedly be better served by allowing the lower courts to conduct a provision-by-provision severability analysis in advance of any consideration of the core severability questions by this Court. Even if there were some conceivable judicial economy benefit to deferring review for this reason, any such benefit would be vastly outweighed by the massive harms that will follow from the resulting delay in resolution of this case. But deferring review would not serve judicial economy. It would do the opposite. The painstaking analysis prescribed by the court of appeals would be a massive waste of judicial resources if—as is overwhelmingly likely—this Court resolves the core question of Section 5000A's severability in favor of petitioner (or even if it resolves that question in favor of respondents). And if, as petitioner asserts, neither the state nor the individual respondents have established standing, then that painstaking analysis would be improper as well as wasteful. See p. 7, *supra*.

3. Finally, respondents are unable to demonstrate that they will suffer any prejudice should this Court grant expedition.

a. Notably, DOJ (while opposing expedition) has stated that, should the Court grant expedition, DOJ has no objection to the House's alternative proposed schedule, which gives respondents the full 30 days provided by this Court's rules in which to file their oppositions. See Sup. Ct. Rule 15(3). And should the Court grant the petition, DOJ likewise offers no objection to

petitioner's request for expedited merits briefing, which would permit the Court to hear the case this Term. See DOJ Opp. 14.

For their part, the individual respondents insist (Opp. 4) they need "at least thirty days" for their briefs in opposition, but they do not suggest that 30 days would be insufficient. The state respondents also do not attempt to argue that 30 days would be insufficient. They do (despite the resources at their disposal) complain generally of difficulty staffing the case, State Respondents Opp. 6, but they make no concrete assertion that they would suffer any prejudice from filing an opposition in 30 days.[7] Having brought the lawsuit that threatens to throw a vital sector of the national economy into disarray, they should not be heard to complain of the burden of filing a brief in opposition within the 30-day period presumptively provided for in this Court's rules.

As things stand, therefore, no respondent asserts that it would be prejudiced by the House's alternative proposed schedule, pursuant to which opposition briefs would be due on February 3, 2020. House Mot. To Expedite 8. While the House disagrees that its first-choice schedule (under which oppositions would be filed by January 21) would cause any prejudice, the House respectfully submits that, in light of the now-undisputed absence of prejudice from the House's alternative schedule, this Court should adopt the House's alternative proposed schedule, pursuant

[7] The state respondents' assertion (Opp. 6) that petitioners somehow acted "stealth[ily]" in filing their petitions is meritless. Petitioners made immediate public statements that they would seek speedy review by this Court. See, *e.g.*, Paige Winfield Cunningham, *The Health 202: Democrats want a 2020 Supreme Court hearing on the lawsuit that could upend Obamacare* (Dec. 19, 2019), https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2019/12/19/the-health-202-democrats-want-a-2020-supreme-court-hearing-on-the-lawsuit-that-could-upend-obamacare/5dfa7e29602ff125ce5b6b71/ (quoting California Attorney General's statement that states would seek Supreme Court review "in due speed and deliberatively * * * far faster than what the clock allows"); NPR, *Calif. Attorney General Xavier Becerra On Latest Challenge To Affordable Care Act* (Dec. 19, 2019), https://www.npr.org/2019/12/19/789949225/calif-attorney-general-xavier-becerra-on-latest-challenge-to-affordable-care-act (similar); see also Speaker of the House Newsroom, *Pelosi Statement on 5th Circuit Decision on Affordable Care Act* (Dec. 18, 2019), https://www.speaker.gov/newsroom/121819-0.

to which opposition briefs would be due on February 3 and this Court would consider whether to grant certiorari on February 21.

b. The individual and state respondents (but not DOJ) also invoke the possibility that they might file a conditional cross-petition as a reason not to expedite review. Although respondents do not explain what issue such a cross-petition might raise, it seems certain that any such cross-petition would argue that the Fifth Circuit should have affirmed the district court's severability decision striking down the entirety of the Act—respondents won on everything else. That respondents are evidently considering a conditional cross-petition *on severability* simply confirms the need for the Court's review now: the individual and state respondents agree that there is no reason to remand for lengthy lower-court proceedings, when the exact same questions will then return to this Court. And, even assuming that respondents must file such a petition rather than simply acquiescing in certiorari, there is no conceivable reason the respondents need another two months to prepare a petition that—given the overlap with the petitions for certiorari—is, at best, a technical formality.

The House therefore respectfully submits that the Court should direct that any conditional cross-petitions be filed on the same day as briefs in opposition—in other words, on February 3, 2020, 31 days after the filing of the petition. Petitioner could then respond to any cross-petitions concurrently with its reply to respondents' briefs in opposition.

CONCLUSION

For the foregoing reasons and the reasons stated in the House's motion, the House respectfully requests that the Court expedite consideration of the House's petition for certiorari,

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.

Respectfully submitted,

/s/ Douglas N. Letter

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