No. 19-840

IN THE
Supreme Court of the United States

THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON, ANDY BESHEAR, THE GOVERNOR OF KENTUCKY, AND THE DISTRICT OF COLUMBIA,

Petitioners,

V.

THE STATE OF TEXAS, *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 AND TO EXPEDITE CONSIDERATION OF THE MOTION

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As explained in petitioners' motion (at 4-7), expedited consideration of the petition for a writ of certiorari is warranted in this case. The petition raises questions that are "undoubtedly a matter of the utmost national importance" (Texas Resp. 3); those questions are purely legal and fully ripe for review by this Court; and prolonged litigation in the lower courts would exacerbate uncertainty about the future of hundreds of statutory provisions that regulate nearly a fifth of the Nation's economy. Petitioners respectfully request that the Court expedite its consideration of the motion, expedite consideration of the petition, and, if it grants the petition, set a schedule for merits briefing and argument that would allow it to decide the case this Term.

1. Respondents largely ignore the central consideration warranting expedited review. Although they agree that the case raises issues of profound importance, *see* Texas Resp. 3; Federal Resp. 3, they oppose the motion to expedite on the ground that "no aspect of any operative lower-court ruling in this case . . . creates any exigency or otherwise necessitates accelerated consideration," Federal Resp. 8; *see* Texas Resp. 4. As petitioners have explained, however, the lower courts' actions have created doubt about the future of the entire Affordable Care Act, which in turn threatens adverse consequences for governments, individuals, doctors, hospitals, insurers, and other businesses. *See* Mot. 4-7; Pet. 15-19. Delaying or deferring review would "prolong this litigation and the concomitant uncertainty over the future of the healthcare sector." Pet. App. 74a (King, J., dissenting). Respondents do not meaningfully dispute the practical threat that continued

uncertainty about the future of the ACA poses to our Nation and its healthcare system. Indeed, it was the evident need to "reduce uncertainty in the healthcare sector, and other areas affected by the Affordable Care Act," that impelled the federal respondents to move to expedite oral argument in the court below. C.A. Dkt. 514906506 at 3 (Apr. 8, 2019).

The federal respondents now argue that the circumstances are "materially different" from when they supported expedition, because "the Fifth Circuit's decision has made clear that its ruling has no imminent consequences." Federal Resp. 13. But the district court, too, had made clear that its judgment had no imminent consequences when "it stayed that judgment pending appeal." *Id.* at 6. Then, as now, the need for expedited review arose not from a "currently operative remedy," Texas Resp. 4, but from the "uncertainty in the healthcare sector" arising from the court's ruling, C.A. Dkt. 514906506 at 3. And contrary to the federal respondents' suggestion (at 13), the panel majority's decision has not quelled concerns about the ACA's future. If anything, it has had the opposite effect: a federal court of appeals has now held that the plaintiffs have standing and that the minimum coverage provision is unconstitutional, and suggested that it "may still be that none of the ACA is severable from the individual mandate." Pet. App. 69a.

Nor are the state respondents correct that "the long-term viability of the Act is fundamentally uncertain regardless of anything to do with this case." Texas Resp. 4-5. The Affordable Care Act has now been in place for a decade. It has transformed how healthcare is delivered and implemented patient protections that

benefit millions of Americans. Over the course of six Congresses, every effort to repeal it has failed. It is this litigation that is creating doubts about the future of the Act, and there is every reason for this Court to review the case expeditiously.

2. Respondents argue that the Court should delay review because of the "interlocutory" posture of this case. Federal Resp. 2, 3, 11; Texas Resp. 1, 7. That argument is misplaced. Respondents are free to argue in their briefs in opposition that the Court should deny the petition in light of the Fifth Circuit's remand order. But that is not a consideration weighing against expedited consideration of the petition—which would put the Court in a position to consider respondents' argument about the appropriateness of plenary review and, if it disagrees with respondents, to decide the case this Term.

In any event, the argument is incorrect. As petitioners have explained (Pet. 17-19, 23-26), the fact that the panel majority declined to answer the severability question and remanded for protracted proceedings in the district court is not a reason for this Court to delay or defer review. Severability presents a pure question of law that is ripe for immediate review by this Court; and it requires no extended analysis here because Congress plainly intended that the minimum coverage provision would be severable from the rest of the ACA. *See* Pet. 23-26. The remand proceedings directed by the panel majority are thus unnecessary, and would prolong and exacerbate the harmful uncertainty created by this litigation.[1]

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[1] The state respondents' argument that "[t]he 'interlocutory posture' of the Fifth Circuit's decision counsels against granting review here," Texas Resp. 7, is in

The federal respondents note that "this Court ordinarily does not consider in the first instance questions that the court below has not decided." Federal Resp. 11. But the federal government is no stranger to the concept that the importance of a question may warrant review by this Court before the court of appeals has finally decided that question. Here, all agree that the issues raised in this litigation are profoundly important; the court of appeals has already decided two of the three questions presented; and it had every opportunity to decide the third. Nor would a decision on severability from this Court be one of "first view." Federal Resp. 11; *see also* Texas Resp. 1. The district court issued two orders explaining its view that the minimum coverage provision cannot be severed from any other provision of the ACA. *See* Pet. App. 151a-159a, 204a-231a. Both the panel majority and the dissenting judge below addressed severability at length. *See id.* at 52a-70a, 98a-112a. And there is no need for the Court to wait for the district court's "granular analysis" of "the severability of statutory provisions spanning 900 pages" before granting review. Federal Resp. 11. The severability inquiry here is "quite simple": "Congress removed the coverage requirement's only enforcement mechanism but left the rest of the Affordable Care Act in place"; it "is difficult to imagine a plainer indication

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tension with their litigating position below. In the district court, they described the three questions presented in this petition as "purely legal and controlling questions of law that are central to this suit and highly disputed among the parties." D.Ct. Dkt. 217 at 4. And they "agree[d] with the Intervenor-Defendants that an 'interlocutory appeal will help bring this lawsuit to a speedier conclusion.'" *Id.* at 5.

that Congress considered the coverage requirement entirely dispensable and, hence, severable." Pet. App. 73a, 98a (King, J., dissenting).[2]

3. Contrary to the arguments of the state respondents (at 5-6) and the individual respondents (at 4-5), petitioners did not delay in filing the petition or this motion, and respondents would not be prejudiced by the schedule petitioners have proposed. The petition and appendix were filed on January 3, just 16 days after the Fifth Circuit issued its 98-page opinion. The motion to expedite was filed concurrently. Under the principal briefing schedule proposed by petitioners, briefs in opposition would be due 31 days after the petitions were filed—the same period prescribed by the Court's rules. Mot. 7; *see* Sup. Ct. R. 15.3, 30.1. That is ample time for respondents' counsel to prepare briefs reflecting "the thorough and effective presentation of the issues that this Court deserves." Individual Resp. 3.

4. The possibility that certain respondents might file conditional cross-petitions does not provide any reason for denying the motion to expedite. *See* Texas Resp. 2, 7; Individual Resp. 6. Although the individual respondents assert that a cross-petition is "likely," Individual Resp. 2, no respondent has committed to filing a cross-petition or indicated what additional questions might be raised in a cross-petition. Respondents' principal concern is that *if* they were to file a cross-petition, it would "set the petitions and any cross-petitions on separate tracks." Texas Resp.

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[2] The federal respondents' novel remedial arguments, *see* Federal Resp. 11-12, are not a reason to delay review in this case. They would only become relevant if the Court ruled against petitioners on each of the questions presented here. *See* Pet. 18-19 n.16.

7; *see* Individual Resp. 6. But that concern would only arise if respondents delayed in filing a cross-petition. *Cf.* Texas Resp. 2 (noting that the "deadline for any cross-petitions is March 17, 2020 . . . and any change in the March 17 deadline would prejudice respondents"). Under the circumstances of this case, respondents are surely capable of preparing and filing any cross-petition in time for it to be considered by the Court, on an expedited basis, alongside the pending petitions. *Cf.* Texas Resp. 5 (asserting that "[p]etitioners could have filed their petitions the next day" after the Fifth Circuit issued its decision on December 18, 2019). To avoid any concerns about prejudice or separate tracks, if the Court adopts the principal briefing schedule proposed by petitioners, *see* Mot. 7, and if respondents file any conditional cross-petition by the February 3 deadline for their briefs in opposition, petitioners would respond to the cross-petition on the same day they intend to file their reply brief (February 12). That schedule would give respondents 31 days from the filing of the petition (and 47 days from the Fifth Circuit's decision) to prepare any cross-petition, while allowing the Court to consider the two pending petitions and any cross-petitions at the February 21 conference.

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For the reasons stated, petitioners respectfully request that the Court expedite consideration of the motion, expedite consideration of the petition for a writ of certiorari, and, if it grants the petition, set a schedule for merits briefing and argument that would allow the Court to hear and decide the case this Term.

Respectfully submitted,

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