Nos. 19-840 & 19-841

IN THE

Supreme Court of the United States

STATE OF CALIFORNIA, ET AL.,
Petitioners,
v.
STATE OF TEXAS, ET AL.,
Respondents.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,
v.
STATE OF TEXAS, ET AL.,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS AS *AMICUS CURIAE* IN OPPOSITION TO THE PETITIONS

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QUESTIONS PRESENTED

In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), this Court upheld 26 U.S.C. § 5000A, a provision of the Affordable Care Act, as a valid exercise of Congress's taxing power because the provision offered individuals a lawful choice between purchasing insurance and paying a tax, known as a "shared responsibility payment." In December 2017, Congress eliminated the Act's monetary incentive to purchase insurance by reducing the shared responsibility payment to zero, such that Section 5000A now offers individuals a choice between purchasing insurance and paying a tax of $0. In this case, the court of appeals held that Section 5000A, as amended, exceeds Congress's constitutional authority and that the Act's thousands of other provisions may be invalid as a result.

The questions presented are:

1. Whether the individual and state plaintiffs (respondents here) possess Article III standing to challenge the constitutionality of Section 5000A?
2. Whether Section 5000A, as amended, exceeds Congress's constitutional authority?
3. Whether, if Section 5000A is invalid, the provision is severable from the remainder of the Act?

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Association of American Physicians and Surgeons ("AAPS") is a national association of physicians. Founded in 1943, AAPS is dedicated to

[1] *Amicus* files this brief after providing the requisite ten days' prior written notice and receiving written consent by all the parties. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has been a litigant in this Court and in other appellate courts. *See, e.g.*, *Ass'n of Am. Physicians & Surgs. v. Mathews*, 423 U.S. 975 (1975); *Ass'n of Am. Physicians & Surgs. v. Tex. Med. Bd.*, 627 F.3d 547 (5th Cir. 2010); *Ass'n of Am. Physicians & Surgs. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993).

This Court has expressly made use of *amicus* briefs submitted by AAPS. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 933 (2000); *id.* at 959, 963 (Kennedy, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting). The Third and Seventh Circuits have also made use of *amicus* briefs by AAPS. *See United States v. Natale*, 719 F.3d 719, 739 (7th Cir. 2013); *Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006).

Amicus AAPS files this brief to assist the Court in addressing issues raised by the United States House of Representatives ("House") in its petition, dated January 3, 2020 (No. 19-841) ("House Petition" or "Petition '841") and by the State Intervenors, in their Petition, also dated January 3, 2020 (No. 19-840) ("State Petition" or "Petition '840"). Both petitions seek review of the same Fifth Circuit opinion. *Texas v United States*, 945 F.3d 355 (5th Cir. 2019). A petition for rehearing en banc was denied on January 29, 2020.

AAPS filed an *amicus* brief with the Fifth Circuit in this case below, and has a strong interest in opposing these petitions for a writ of *certiorari*.

SUMMARY OF ARGUMENT

The House and State Intervenors cannot and do not speak for the United States, and when the United States informed the Fifth Circuit that it was no longer challenging the District Court's decision, the appeal should have been dismissed immediately. Both the House and State Intervenors lacked standing below and thereby lack standing to petition for *certiorari* here.

It is incumbent on this Court to assess its own federal subject matter jurisdiction and to dismiss a petition if its subject matter jurisdiction is lacking. The Fifth Circuit incorrectly allowed the intervention and did not reverse the intervention that was permitted by the District Court. *Amicus* AAPS suggests that *de novo* review of both interventions is warranted. Such review will establish that none of the intervenors were parties, let alone aggrieved parties, who can properly petition this Court as parties.

In our federal system, "[c]ourts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (internal citations omitted). Moreover, "every federal appellate court has a special obligation to 'satisfy itself not only of its own obligation, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (internal citations omitted).[2]

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[2] Whether or not this Court has subject matter jurisdiction is a question of law and should be addressed *de novo*. *See, e.g.*, *In re*

"The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). "The decision to seek review is not to be placed in the hands of concerned bystanders, persons who would seize it as a vehicle for the vindication of value interests." *Id*. at 64-65 (internal quotation marks and citation omitted).

In this case, the House and State Intervenors are mere bystanders. The Plaintiffs-Appellees[3] did not seek (nor would they) any relief from the House and the House did not make any claim against the Plaintiffs-Appellees. Similarly, the Plaintiffs-Appellees did not seek (nor would they) any relief from the State Intervenors and the State Intervenors did not make any claim against the Plaintiffs-Appellees. The appeal should have been dismissed, and these petitions denied.

An intervenor cannot plug a gaping jurisdictional deficiency unless it independently satisfies Article III standing. As this Court explained in *Wittman*:

> [A]n "intervenor cannot step into the shoes of the original party" (here, the Commonwealth) "unless the intervenor independently 'fulfills the requirements of Article III.'" [*Arizonans for Official English*, 520 U.S.] at 65, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (quoting *Diamond* v. *Charles*, 476 U.S. 54, 68, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986)).

W.R. Grace & Co., 591 F.3d 164, 170 n.7 (3d Cir. 2009), *cert. denied*, 562 U.S. 839 (2010).

[3] The Plaintiffs-Appellees are Respondents in connection with Petition '840 and Petition '841.

Wittman v. Personhuballah, 195 L. Ed. 2d 37, 42 (2016).

The importance of standing cannot be overstated. *See, e.g.*, *Raines v Byrd*, 521 U.S. 811 (1997) (denying standing to the four United States Senators and two Members of the House in connection with a challenge to the constitutionality of the Line Item Veto Act, Pub. L. 104-130, 110 Stat. 1200 (1996)); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L. J. 1219, 1220 (1993) ("[I]t may be worthwhile to recall that the Supreme Court for some time has recognized standing as a constitutionally based doctrine designed to implement the Framers' concept of the proper – and properly limited – role of the courts in a democratic society.") (internal quotations and citations omitted); Wilson C. Freeman and Kevin M. Lewis, *Congressional Participation in Litigation: Article III and Legislative Standing*, CRS Report No. R45636 (November 8, 2019) ("CRS Report") (examining, in depth, the issues of legislative and interventional standing).

The Fifth Circuit addressed both the question of standing of the Intervenor States in the District Court and the question of the House's ability to intervene in the Court of Appeals. The Court of Appeals answered both questions affirmatively. Petition '840 at 14a-19a; Petition '841 at 13a-19a.

The Fifth Circuit erred with respect to both the House's and Intervening States' standing and, because of those errors, neither of the petitions for *certiorari* should be granted. If and when another petition (emanating from the Fifth Circuit's decision) is filed, the House and State Intervenors will still be able to participate as *amicus curiae*:

> If Congress (or a unit or individual Member thereof) cannot participate as a full party to a particular lawsuit due to one or more of the constitutional, statutory, procedural, and prudential obstacles discussed [in this Report], it may still be able to participate in the case in a more limited capacity as an *amicus curiae*.

CRS Report at 39-40 (footnote omitted).

ARGUMENT

I. THE PURELY SPECULATIVE INJURIES TO THE INTERVENOR STATES DO NOT JUSTIFY THEIR INTERVENTION IN THE DISTRICT COURT.

The State Petitioners have argued at length against standing by the individuals and states which initiated this action, but the State Petitioners themselves lack the standing required: (1) to have intervened in the District Court, (2) to have appealed to the Fifth Circuit, and (3) to have filed the '840 Petition.

The State Intervenors cannot step into the shoes of the United States as a party. Thus, when the United States informed the Fifth Circuit that it was no longer challenging the District Court's decision, that should have been the end of this case. Moreover, the State Intervenors should have been denied the ability to intervene in the District Court, and thus they should not have had any ability to appeal to the Fifth Circuit. They thereby lack standing to file Petition '840.

Article I vests the power to make law in Congress and Article II vests the power to execute the law in the Executive Branch. Therefore the Executive Branch has the exclusive authority under the

Constitution to defend a federal law notwithstanding any statute or rule to the contrary.[4] Perhaps the State Intervenors could sue the United States to compel such enforcement should the Executive Branch decline to defend the law, but the State Intervenors cannot pretend to be the United States in order to defend federal law.

A State can have standing to challenge a federal law, but it does not follow that a State has standing to defend federal law, as the State Intervenors attempt here. The State Intervenors are not consumers of medical care, in contrast with the Individual Plaintiffs-Appellees, Neill Hurley and John Nantz, and thus the State Intervenors further lack standing on that basis.

Put another way, one group of States pitted philosophically against another group of States on appeal over the constitutionality of a federal law amounts to an Article III absurdity, not a legitimate "case" or "controversy". Once the United States conceded the Plaintiffs' position, that should have meant that the Plaintiffs had won and that the federal appellate subject matter jurisdiction evaporated. The State Intervenors have no more standing to replace the United States as a defendant in litigation over the constitutionality of a federal law than an average American voter would, which is nil.

The requirements for Article III standing – which the Supreme Court has ruled must "be extant" throughout the life of the lawsuit – are not met here,

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[4] No statute may expand or contract the powers of any branch (even with the consent of the affected branch). Reallocation in power of that magnitude is not permitted without the ratification of an Article V amendment.

Arizonans for Official English, 520 U.S. at 67, by the State Intervenors. Petition '840 should therefore be dismissed.

A. The State Intervenors' Allegations Expressed Their Wishes, Not Actual Injuries.

The alleged "interest" or "injury" to the State Intervenors was that they would lose "hundreds of billions of dollars" of anticipated federal funds. Motion to Intervene and Memorandum in Support Thereof by State Intervenors in *Texas v. United States* (N.D. Tex. Civil Action No. 4:18-cv-00167-O), at 12. Such alleged injuries were and are entirely speculative and are dependent upon events that may never occur, *i.e.* the enactment of ***future*** federal appropriations – enacted through and subject to future federal legislation. Such future legislation may only be enacted by the ***future*** concurrences between ***future*** Houses, ***future*** Senates and ***future*** Presidents. Consequently, the State Intervenors should have been relegated in the District Court to the status of mere *amici curiae* rather than having been elevated to the status of Intervenors-Defendants. Once properly understood to have been nothing more than mere *amici curiae* in the District Court, it follows that the State Intervenors lack the requisite standing to have appealed to the Fifth Circuit and to have filed Petition '840.

As *Amicus* explains in Argument I-B, it is impossible for the State Intervenors to have any legally cognizable expectation of future federal funds unless and until an interceding event occurs, *i.e.* Congress enacts further appropriations.

B. Any Future Flow of Federal Funds To The States Is Contingent Upon Further Federal Legislation Enacted by Future Houses, Future Senates and Future Presidents.

There is no question that any future flow of federal funds to the states is contingent upon further federal legislation enacted by future Houses, future Senates, and future Presidents. This principle is incorporated into the Appropriations Clause which provides: "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." U.S. CONST. art. I, sec. 9, cl. 7. The words "by Law" implicate the Bicameral and Presentment Clauses.

It is well-established that the United States Constitution provides "a single, finely wrought and exhaustively considered, procedure" for enacting legislation. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983); *see also Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998). Strict adherence to that procedure is required and is set forth in the Bicameral Clause, U.S. CONST. art. I, sec. 1, and the Presentment Clause, U.S. CONST. art. I, sec. 7, cl. 2.

The Appropriations Clause is the Constitution's non-delegable bulwark against aggrandizement by the Executive Branch. It is firmly established that "Congress's control over federal expenditures is 'absolute.'" *U.S. Department of the Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, 1348 (D.C. Cir. 2012); *Rochester Pure Waters District v. EPA*, 960 F.2d 180, 185 (D.C. Cir. 1992) (concerning Framers'

decision to give Congress "absolute control of the moneys of the United States").

The problem with the Intervening States' argument is that it presumes a continuous flow of funds from the Treasury to the states. This argument fails to consider that the Appropriations Clause prevents any expectation of a permanent appropriation. A permanent appropriation would violate the Appropriations Clause by inverting the Constitution's default setting: from a default of "no appropriation" without Congressional approval, to a default of making an "appropriation" unless Congress disapproves. U.S. CONST. art. I, § 9, cl. 7.

Simply stated, permanent appropriations would fundamentally transform the political calculus and are not authorized by the Constitution without an Article V amendment. Furthermore, the Appropriations Clause ensures Congressional involvement whenever money is to be withdrawn from the Treasury. *OPM v. Richmond*, 496 U.S. 414, 424-26 (1990). Whenever any Congress enacts a permanent appropriation, it blatantly removes the requirement of future Congressional involvement.

Assuming *arguendo* that the Court determines that the State Intervenors' intervention in the District Court was improper, the State Intervenors would lack standing on appeal. Therefore, their appeal should have been dismissed.

With an expectation of zero future federal funding, the Intervening States' standing to intervene in the District disappears and, with it, their ability to appeal to the Fifth Circuit and to petition this Court.

II. AS IMPROPER INTERVENORS IN THE DISTRICT COURT, THE INTERVENOR STATES DID NOT BECOME "PARTIES" THAT COULD APPEAL TO THE FIFTH CIRCUIT OR THIS COURT.

Once this Court determines that the State Intervenors were improper intervenors in the District Court, the State Intervenors may no longer be treated as "parties". Without such status, they may not appeal. This Court has stated that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v Ortiz*, 484 U.S. 301, 304 (1988) (per curiam).

The Federal Rules of Appellate Procedure ("FRAP"), as well as the corresponding Local Rules for the Fifth Circuit, contain many references to the term "party" or "parties". If the Intervening States may not be deemed "parties", then the jurisdictional statement required by FRAP 28(a)(4)(B) is insufficient.

In addition, this Court requires Petitioners to supply: "[a] list of all parties to the proceeding in the court whose judgment is sought to be reviewed …" S. Ct. Rule 14(b)(i). If the State Intervenors cannot be deemed "parties", then their Petition is defective.

III. THE HOUSE'S INTERVENTION IN THE FIFTH CIRCUIT WAS IMPROPER BECAUSE THE HOUSE SUFFERED NO INSTITUTIONAL INJURY, ITS MEMBERS SUFFERED NO INDIVIDUAL INJURIES, AND APPELLATE INTERVENTION IS NOT CONTEMPLATED BY THE FEDERAL RULES OF APPELLATE PROCEDURE.

In connection with Petition '841, the House did not participate in the District Court case. Rather, the House moved to intervene in the United States Court of Appeals for the Fifth Circuit. The motion was granted. Petition '841 at 113a-114a and Order dated February 14, 2019 ("Order"). According to the Order, the House had argued that it was entitled to intervene as of right or, alternatively, it was entitled to permissive intervention. While Fifth Circuit ruled that the House had no right to intervene under Rule 24(a)(1) or under 28 U.S.C. § 530D, the lower appellate court did grant intervention under Rule 24(b)(1)(B). The Fifth Circuit stated that the House has "a claim or defense that shares with the main action a common question of law or fact." Order, *supra*.

The Supreme Court rejected legislative standing in *Raines*. There this Court denied standing to Senator Byrd, three other Senators and two members of the House of Representatives because they "alleged no injury to themselves as individuals … [and] the institutional injury they allege is wholly abstract and widely dispersed …." *Raines*, 521 U.S. at 829. This case is conceptually not any different. Because the House suffered no injury, it should have been relegated below to the status of a mere *amicus curiae*

rather than having been elevated to the status of an Intervenor-Appellant (and, now, Petitioner).

Likewise, the House of Representatives does not speak for the United States. Thus, when the United States informed the Fifth Circuit that it was no longer challenging the District Court decision, the appeal should have been dismissed immediately.

Here, the House intervened at the appellate level, having failed to participate at the trial level. The House tried to pursue the appeal despite how the original defendant, the United States, had decided to end the dispute. The jurisdictional defect is clear with respect to the House.

The Fifth Circuit erred by basing the House's intervention on Rule 24 of the FRCP, which generally does not contemplate appellate intervention. We begin with the plain words of the FRAP and the FRCP. Rule 1 of FRAP governs procedures in the United States Courts of Appeals. FRAP Rule 1(a)(1) ("These rules govern procedure in the United States courts of appeals."). There is no crossover of the rules from the District Court to the Court of Appeals. The Order of the Fifth Circuit, authorizing the permissive intervention of the House pursuant to FRCP 24(b)(1)(B), was plainly in error.

FRAP contains a Rule regarding intervention, Rule 15, which is quite limited in applicability. It refers only to interventions in connection with the review or enforcement of an agency order. Thus the

FRAP should be interpreted as excluding all other forms of intervention.[5]

Assuming *arguendo* that this Court determines that the intervention below by the House was improper, the House would thereby lack standing to petition here.

CONCLUSION

For the foregoing reasons, Petitions '840 and '841 should be denied.

Respectfully submitted,

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[5] *Amicus* agrees with the Fifth Circuit that "[t]he House has no right to intervene under Rule 24(a)(1) or under 28 U.S.C. § 530D." Order, Petition '841 at 113a.