**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*

**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that at least one of the plaintiffs has standing to challenge the minimum-essential-coverage requirement of 26 U.S.C. 5000A(a).

2. Whether, as a result of the elimination of the monetary penalty for noncompliance with the minimum-essential-coverage requirement, that requirement is no longer a valid exercise of Congress's legislative authority.

3. Whether, if the minimum-essential-coverage requirement is invalid, the remainder of the provisions of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, are severable from it.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-113a[*]) is reported at 945 F.3d 355. The memorandum opinion and order of the district court granting partial summary judgment (Pet. App. 163a-231a) is reported at 340 F. Supp. 3d 579. The order of the district

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

court granting a stay and partial final judgment (Pet. App. 117a-162a) is reported at 352 F. Supp. 3d 665.

## JURISDICTION

The judgment of the court of appeals was entered on December 18, 2019. The petitions for writs of certiorari were filed on January 3, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119, 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, 124 Stat. 130, enacted 26 U.S.C. 5000A, see ACA § 1501(b), 124 Stat. 244, which is captioned "Requirement to maintain minimum essential coverage," 26 U.S.C. 5000A, and is 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) (emphasis omitted). 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 addition to the individual mandate, the ACA included a number of additional provisions addressing the health-insurance and healthcare sectors. For example,

the ACA's "guaranteed-issue" provisions prohibit insurers from denying coverage because of an individual's medical condition or history. Pet. App. 4a; see 42 U.S.C. 300gg-1, 300gg-3, 300gg-4(a). And its "community-rating" provisions prohibit insurers from charging higher premiums because of an individual's medical condition or history. Pet. App. 4a; see 42 U.S.C. 300gg(a)(1), 300gg-4(b). Other provisions of Title I impose prohibitions on coverage limits, requirements to cover dependent children, and essential benefits packages for insurance plans. 42 U.S.C. 300gg-11, 300gg-14(a), 18022. The ACA also created insurance exchanges to allow consumers to shop for insurance plans, and provided subsidies and tax incentives. 42 U.S.C. 18031-18044 (creation of insurance exchanges); 26 U.S.C. 36B, 45R, 4980H (tax changes). Other Titles of the ACA enacted a number of other changes, including expanding the Medicaid program (Title II, 124 Stat. 271), amending the Medicare program (Title III, 124 Stat. 353), enacting a range of prevention programs (Title IV, 124 Stat. 538), and imposing anti-fraud requirements (Title VI, 124 Stat. 684).

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 authority under the Constitution's Commerce Clause, Art. I, § 8, Cl. 3,

or Necessary and Proper Clause, 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 (TCJA), Pub. L. No. 115-97, Tit. I, 131 Stat. 2054. Among other things, the TCJA 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. Pet. App. 10a. The plaintiffs contended that the elimination of the shared-responsibility payment abrogated the basis of the saving construction of the individual mandate that this Court had adopted in *NFIB*, and they argued that the remainder of the ACA is inseverable from the individual mandate. *Ibid.* 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 the individual mandate. *Id.* at 11a. California, 15 other States, and the District of Columbia intervened to defend the ACA. *Id.* at 11a & n.10.

The district court denied the plaintiffs' request for a preliminary injunction, but it granted them partial summary judgment on their claim for declaratory relief. Pet. App. 11a-12a; see *id.* at 163a-231a. The court concluded that the individual mandate is unconstitutional, stating that "[this] Court's reasoning in *NFIB* * * *

compels the conclusion that the Individual Mandate may no longer be upheld under the Tax Power," and it "remains unsustainable under the Interstate Commerce Clause." *Id.* at 164a. The court further determined that "the Individual Mandate is inseverable from the ACA's remaining provisions." *Id.* at 165a.

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. The court issued an order staying "the remainder of this case * * * pending further order[]" of the court. *Id.* at 114a.

3. The federal government and the intervenor States appealed. Pet. App. 12a. Several additional States moved unopposed in the court of appeals for permissive intervention, seeking to join California and the other States that had intervened in the district court to defend the ACA. *Id.* at 12a & n.12; see Colorado et al. C.A. Mot. to Intervene 6-7 (Jan. 31, 2019).

The United States House of Representatives also moved in the court of appeals to intervene as of right under Federal Rule of Civil Procedure 24(a) or, alternatively, for permissive intervention under Rule 24(b). House C.A. Mot. to Intervene 5-20 (Jan. 7, 2019). The federal government opposed the House's motion, explaining that the House has no statutory right to intervene and no cognizable legal interest that would be impaired if it were not allowed to intervene. Gov't C.A. Opp. to House Mot. to Intervene 4-17 (Feb. 8, 2019).

The government argued that permissive intervention was also unwarranted because the House had no concrete legal interest at stake, its motion was untimely, and the House could adequately convey its views as an amicus. *Id.* at 18-19. The court of appeals rejected the House's contention that it has a "right to intervene under Rule 24(a)(1) or under 28 U.S.C. § 530D." 2/14/19 C.A. Order 2. The court also found it "questionable" whether the House "has the right [to intervene] under Rule 24(a)(2)," but the court reserved judgment on that question and instead granted permissive intervention under Rule 24(b). *Ibid.*; see Pet. App. 12a.

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. Pet. App. 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 it did not request acceleration of the remaining briefing. Gov't C.A. Mot. to Expedite 2 (Apr. 8, 2019).

4. The court of appeals affirmed in part and vacated in part in a divided decision. Pet. App. 1a-72a.

a. The court of appeals concluded that both the federal government and the intervenor States had standing to appeal the district court's judgment. Pet. App. 14a-19a. The court reserved judgment on whether the House also had standing to appeal, stating that "'Article III does not require intervenors to independently possess standing' when a party already in the lawsuit has standing and seeks the same 'ultimate relief' as the intervenor," which the court found was true here. *Id.* at 19a (citation omitted).

The court of appeals next concluded that the individual and State plaintiffs had standing to bring this lawsuit. Pet. App. 19a-39a. The court stated that "[t]he standing issues presented by the individual plaintiffs are not novel," observing that a very similar question of standing had arisen with respect to certain plaintiffs challenging the individual mandate in *NFIB*. *Id.* at 20a; see *id.* at 20a-22a. The court of appeals agreed with the district court that "the undisputed evidence" in this case "showed that the individual mandate caused" two injuries to the individual plaintiffs: a "financial injury" of being forced to obtain insurance and an "'increased regulatory burden' that the individual mandate imposes." *Id.* at 23a. It further concluded that "a favorable judgment would redress both injuries." *Ibid.*; see *id.* at 23a-32a. The court of appeals concluded that the State plaintiffs also have standing because the ACA causes them "fiscal injuries as employers" subject to various ACA requirements. *Id.* at 33a; see *id.* at 32a-39a. The court noted, however, that "even if the state plaintiffs did not have standing, this case could still proceed because the individual plaintiffs have standing," *id.* at 32a n.26, and vice versa, see *id.* at 32a n.25.

On the merits, the court of appeals concluded that the individual mandate is no longer "a constitutional exercise of congressional power." Pet. App. 39a; see *id.* at 39a-52a. The court stated that "[a] majority" of this Court in *NFIB* had "concluded that the individual mandate is not constitutional under either the Interstate Commerce Clause or the Necessary and Proper Clause." *Id.* at 41a; see *id.* at 40a-43a; cf. *NFIB*, 567 U.S. at 572 ("The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity."). As

the court of appeals observed, the Court in *NFIB* had upheld the individual mandate instead on the ground that, "in order to save the individual mandate from unconstitutionality," the mandate could be "[r]ead together with the shared responsibility payment * * * as a legitimate exercise of Congress' taxing power." Pet. App. 43a; see *id.* at 43a-44a. But "[n]ow that the shared responsibility payment amount is set at zero" under the TCJA, the court of appeals reasoned, "the provision's saving construction is no longer available." *Id.* at 44a; see *id.* at 44a-52a.

The court of appeals then turned to "whether, or how much of, the rest of the ACA is severable from" the individual mandate. Pet. App. 52a. But the court did not decide that question. Instead, it "remand[ed] to the district court to undertake two tasks." *Ibid.* First, the court of appeals determined that the district court had not undertaken "the meticulous analysis required by severability doctrine" under this Court's precedents, and it remanded the case for the district court to conduct that analysis in the first instance. *Id.* at 55a; see *id.* at 69a. The court of appeals explained that the severability issue "involves a challenging legal doctrine applied to an extensive, complex, and oft-amended statutory scheme." *Id.* at 59a. The court emphasized the "need for a careful, granular approach to carrying out the inherently difficult task of severability analysis in the specific context of this case," and it was "not persuaded that the approach to the severability question set out in the district court opinion satisfie[d] that need." *Ibid.* The court of appeals stated that "[t]he district court opinion does not explain with precision how particular portions of the ACA as it exists post-2017 rise

or fall on the constitutionality of the individual mandate," and it "gives relatively little attention to the intent of the 2017 Congress, which appears in the analysis only as an afterthought." *Id.* at 59a, 65a; see *id.* at 59a-62a. The court of appeals further noted that "the district court opinion does not do the necessary legwork of parsing through the over 900 pages of the post-2017 ACA, explaining how particular segments are inextricably linked to the individual mandate." *Id.* at 65a.

The court of appeals noted that this Court "has remanded in the severability context upon a determination that additional analysis was necessary." Pet. App. 68a (citing *Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006)). The court of appeals "d[id] the same here, directing 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 from the individual mandate." *Ibid.* The court of appeals stressed that it was not prescribing the precise contours of the analysis; for example, it left it to the district court's "best judgment to determine how best to break the ACA down into constituent groupings, segments, or provisions to be analyzed." *Ibid.* The court of appeals also did not "suggest what result will be merited 'after a more thorough inquiry.'" *Id.* at 69a (brackets and citation omitted).

Second, the court of appeals directed the district court on remand to consider the federal government's argument that relief should be confined to redressing the plaintiffs' own injuries. Pet. App. 70a-72a. The court of appeals explained that "[t]he relief the plaintiffs sought in the district court was a universal nationwide injunction: an order that totally 'enjoined Defend-

ants from enforcing the [ACA] and its associated regulations.'" *Id.* at 70a (brackets omitted). Although the district court had not granted injunctive relief, it had entered "a judgment declaring the entire ACA 'invalid.'" *Ibid.* The court of appeals noted that, in granting that relief, "[t]he district court did not have the benefit of considering" the government's argument that "the declaratory judgment should only reach ACA provisions that injure the plaintiffs." *Id.* at 71a. The court of appeals "agree[d]" with the federal government "that remand is appropriate for the district court to consider" that question of the proper scope of relief "in the first instance." *Ibid.* The court of appeals observed that the district court "is in a far better position than [the court of appeals] to determine which ACA provisions actually injure the plaintiffs." *Ibid.* It "place[d] no thumb on the scale as to the ultimate outcome." *Id.* at 72a.

b. Judge King dissented. Pet. App. 73a-113a. In her view, all of the plaintiffs lacked standing to challenge the individual mandate. *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.

5. Following a request by a judge on the court of appeals for a poll on whether to rehear the case en banc, the court denied rehearing. 1/29/20 19-10011 C.A. Order 2. Six of the 14 judges who voted would have granted rehearing en banc. *Ibid.*

**ARGUMENT**

Petitioners seek interlocutory review of the court of appeals' decision vacating the district court's partial final judgment in substantial part and remanding for further proceedings. Immediate review is unwarranted in the case's present posture because the court of appeals

did not definitively resolve any question of practical consequence. The court concluded only that the plaintiffs have standing to challenge the individual mandate, 26 U.S.C. 5000A(a), and that the mandate now exceeds Congress's constitutional authority. Neither conclusion warrants interlocutory review in this Court. The court of appeals' case-specific, factbound application of standing principles does not meet this Court's ordinary certiorari criteria. And the court's determination that the individual mandate is no longer valid presents no real-world exigency that might warrant immediate review because, as all parties agree, the elimination of the monetary penalty renders the mandate either invalid (as the Fifth Circuit held) or precatory (as petitioners argue).

Instead, petitioners principally urge the Court to grant review (19-840 Pet. 15-19, 23-26; 19-841 Pet. 12-17, 29-34) to address a question that the court of appeals did *not* decide: which if any other ACA provisions are severable from the individual mandate. The court expressly declined to resolve that issue. Instead, it vacated the district court's severability ruling and remanded for a more fine-grained analysis of severability, and for further consideration of the appropriate scope of any relief. Petitioners offer no compelling reason for this Court to short-circuit the lower-court litigation by granting review now to address severability and the scope of relief in the first instance, without the benefit of decisions from the lower courts on those issues. And granting review in the case's current posture would require the Court to confront threshold questions of the existence and scope of petitioners' appellate standing to challenge the Fifth Circuit's decision. Those questions might not arise, or at a minimum might be simplified, in

review of a final Fifth Circuit decision following the proceedings on remand. Any eventual review in this Court would thus be better facilitated by allowing the lower courts to complete their own consideration of those questions.

1. The court of appeals determined that both the individual plaintiffs and the State plaintiffs have standing to challenge the individual mandate. Pet. App. 19a-39a. Petitioners disagree with those determinations. See 19-840 Pet. 19-20; 19-841 Pet. 23-25. But they offer no reason why that case-specific application of Article III principles to these plaintiffs and circumstances independently warrants plenary review at all, let alone in the case's current interlocutory posture.

As to the individual plaintiffs, the district court found that "the undisputed evidence showed that the individual mandate caused" them concrete injuries—including a "financial injury of buying [health] insurance." Pet. App. 23a. The Fifth Circuit agreed, explaining that "[r]ecord evidence supports" the district court's finding that the individual plaintiffs purchased insurance in order to comply with the individual mandate, and the intervenor States had "fail[ed] to point to any evidence contradicting" that finding. *Id.* at 24a; see *id.* at 24a-26a. Petitioners do not appear to dispute in this Court that the financial cost of complying with the individual mandate by buying insurance constitutes an Article III injury-in-fact. Instead, they contend (19-840 Pet. 20; 19-841 Pet. 23-24) that the individual plaintiffs could have chosen to ignore the mandate without facing a financial penalty. But the court of appeals found it sufficient that "the record in the instant case contains undisputed evidence" that the individual plaintiffs "fe[lt] compelled by the individual mandate to buy insurance"

and that "they bought insurance solely for that reason." Pet. App. 29a-30a. That case-specific determination does not warrant interlocutory review in this Court.

The court of appeals also concluded that the State plaintiffs have standing. Pet. App. 32a-39a. Petitioners dispute that conclusion as well, 19-840 Pet. 20-21; 19-841 Pet. 25-27, but they again identify no reason why it warrants interlocutory review. To the contrary, as the court of appeals emphasized, its analysis of whether the State plaintiffs have standing has no practical bearing on the district court's jurisdiction to decide the validity of the individual mandate. Pet. App. 32a n.26. The court of appeals observed that, "even if the state plaintiffs did not have standing, this case could still proceed because the individual plaintiffs have standing." *Ibid.* The question whether the State plaintiffs also have standing thus would not affect the existence of a case or controversy unless this Court were to grant review of, and reverse, the Fifth Circuit's conclusion that the individual plaintiffs have standing. See, *e.g.*, *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986).

Conversely, as the court of appeals additionally noted, its conclusion that the State plaintiffs have standing means that, "[e]ven if the individual plaintiffs did not have standing, this case could still proceed." Pet. App. 32a n.25. Neither of the Fifth Circuit's rulings on the plaintiffs' standing would affect the lower courts' jurisdiction to adjudicate the merits unless this Court reviews and reverses both. And although the existence and nature of the plaintiffs' asserted injuries bear on the proper scope of any judicial relief, the court of appeals has already specifically directed the district court to examine that issue on remand. See *id.* at 70a-72a.

Petitioners identify no reason for this Court to undertake that fact-dependent inquiry in the first instance.

2. The only conclusion that the Fifth Circuit reached on the merits was that Congress's elimination of the monetary penalty (as of January 1, 2019) for noncompliance with the mandate precludes sustaining the mandate as a tax. Pet. App. 39a-52a. That conclusion also does not warrant this Court's review. To be sure, lower-court decisions holding federal statutes invalid often do warrant certiorari, see 19-840 Pet. 15 (collecting cases), even absent a lower-court conflict. But further review is unwarranted here because the court of appeals and petitioners agree that the individual mandate no longer subjects any individual to any concrete consequence.

The Fifth Circuit held that the "saving construction" of the individual mandate this Court adopted in *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519 (2012)—as an exercise of Congress's taxing power—"is no longer available" in light of Congress's elimination of the shared-responsibility payment. Pet. App. 44a. Petitioners agree that the individual mandate is no longer backed by any concrete sanction for noncompliance, and they defend the individual mandate's continuing validity on the ground that it is "simply precatory." 19-840 Pet. 21. The intervenor States argue that the mandate now 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." *Ibid.* The House similarly asserts that "amended Section 5000A * * * allow[s] individuals to 'choose not to enroll in health coverage once the penalty for doing so is no longer in effect.'" 19-841 Pet. 20 (brackets and citation omitted).

Thus, although the court of appeals and petitioners draw different legal conclusions from the elimination of the monetary penalty, it is common ground that non-compliance with the individual mandate no longer carries any significant real-world consequence. On either view of the merits—*i.e.*, whether the elimination of the shared-responsibility payment renders the individual mandate now invalid, or valid but merely precatory—the question of the mandate's validity is not itself a matter of any practical urgency. No exigency exists that warrants granting interlocutory review to decide that issue alone.

3. Instead, petitioners principally contend that immediate review is warranted to address a question the court of appeals did not decide. They urge this Court (19-840 Pet. 15-19, 23-26; 19-841 Pet. 12-17, 29-34) to grant certiorari to determine, assuming the individual mandate is now invalid, which if any other ACA provisions are severable from it. But that question does not warrant review in the case's present posture because the court of appeals expressly declined to resolve it.

a. The only court below to address the severability issue was the district court, which concluded that all of the ACA's provisions are inseverable from the individual mandate. Pet. App. 165a; see *id.* at 204a-231a. But the court of appeals found the district court's severability analysis inadequate and accordingly vacated the district court's decision on that issue. *Id.* at 59a-68a. The Fifth Circuit did not render any determination on the ultimate issue of severability. Instead, it remanded for the district court to conduct a more thorough analysis addressing the deficiencies the court of appeals identified. *Id.* at 68a-70a. The Fifth Circuit instructed the district court "to employ a finer-toothed comb on

remand," to "conduct a more searching inquiry into which provisions of the ACA Congress intended to be inseverable," and to provide a more "careful, precise explanation" of its conclusions. *Id.* at 68a, 70a. The court of appeals expressed no opinion on the ultimate answer, disclaiming any "suggest[ion]" of "what result will be merited 'after a more thorough inquiry.'" *Id.* at 69a (brackets and citation omitted). It also reserved judgment on various subsidiary issues, such as "how best to break the ACA down into constituent groupings," which it entrusted to the district court to decide "'in the first instance.'" *Id.* at 68a-69a (citation omitted).

The court of appeals' decision declining to resolve the severability question does not warrant this Court's review at this juncture. As the case comes to this Court, no operative lower-court ruling exists on severability. 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 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 now, 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.

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 severability issue ultimately presented to this Court. In addition to directing the district court to revisit the severability issue on remand, the Fifth Circuit also directed that court 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); see *Murphy* v. *National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1487 (2018) (Thomas, J., concurring). Deferring review until the litigation in the lower courts is complete thus may help to streamline this Court's eventual consideration if and when it considers the severability issue and to avoid a partially advisory opinion in the meantime.

b. Petitioners' contrary arguments lack merit. They broadly contend that the general rule against resolving issues not addressed by the decision below should not apply at all because severability is a legal issue. The intervenor States observe (19-840 Pet. 17) that severability presents a "legal question" that does not require "further factfinding." The House likewise contends (19-841 Pet. 14) that a remand is unwarranted because severability "is a pure question of law." But this Court's ordinary practice of declining to resolve issues the court below has not reached applies to legal issues as well as

to questions of fact. See, *e.g.*, *Retirement Plans Comm. of IBM* v. *Jander*, No. 18-1165 (Jan. 14, 2020) (per curiam), slip op. 3; *Stitt*, 139 S. Ct. at 407-408; *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 851 (2018); *Hernandez* v. *Mesa*, 137 S. Ct. 2003, 2006-2007 (2017) (per curiam); *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1151 (2017). The Court has previously remanded for lower courts to consider an "open question" of severability in particular. *Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320, 331 (2006); see *id.* at 330-331.

Moreover, in addition to severability, the Fifth Circuit also directed the district court to address the appropriate scope of any relief that is necessary to redress the plaintiffs' cognizable injuries. Pet. App. 70a-72a. That analysis likely will entail a factual inquiry into the existence and nature of the plaintiffs' asserted injuries stemming from particular ACA provisions. As the court of appeals noted, the district court "is in a far better position than [an appellate court] to determine which ACA provisions actually injure the plaintiffs." *Id.* at 71a.

Petitioners also assert (19-840 Pet. 17; 19-841 Pet. 14) that this Court should decide the severability question now, despite the absence of a Fifth Circuit ruling on that issue, because of "uncertainty" about the ACA's future. The House points (19-841 Pet. 14) to the prospect that many or all other ACA provisions "may well fall" in the course of further litigation. The intervenor States similarly express concern (19-840 Pet. 18) that continued litigation in the lower courts will "compound doubts * * * about the future of important provisions of the ACA." But all of this was true when the plaintiffs first filed their complaint. Now, as then, the district court will consider the parties' arguments about the severability of other ACA provisions and render a final

decision, which can then be reviewed on appeal. The prospect that the parties challenging the law may prevail does not justify intervening before the district court has ruled.

The intervenor States point (19-840 Pet. 16) to the district court's December 2018 decision as a source of increased uncertainty. But 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 that underlies petitioners' assertions of uncertainty—the portion holding Section 5000A inseverable from the rest of the ACA—has never been in force and in any event has now been set aside. With respect to severability of the ACA's provisions other than the individual mandate, the situation now is the same as it was before the district court rendered its December 2018 ruling. Petitioners do not suggest that this Court's review of the severability issue would have been warranted even before the district court had addressed the issue. The district court's now-vacated severability ruling equally does not warrant interlocutory review today.

Finally, the intervenor States observe that the federal government requested expedition of oral argument in the Fifth Circuit in part to "help reduce uncertainty in the healthcare sector." 19-840 Pet. 19 (quoting Gov't C.A. Mot. to Expedite 2). From that request, they extrapolate that interlocutory review in this Court must be warranted now. *Ibid.* Petitioners advanced the same argument in their motions to expedite consideration of the petitions, see 19-840 Pet. Mot to Expedite 7; 19-841

Pet. Mot. to Expedite 7, which this Court denied, Order, Nos. 19-840 & 19-841 (Jan. 21, 2020). That argument likewise does not support interlocutory review. When the government urged accelerating oral argument in April 2019, the district court's judgment that was then under review—which had declared all provisions of the ACA inseverable from the individual mandate—was the only decision in the case. And even then, the government did not urge immediate intervention by this Court.

Now, in contrast, the Fifth Circuit's decision has made clear that neither its own ruling nor the district court's decision has any imminent consequences. The court of appeals vacated the portion of the district court's judgment that deemed 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 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 thus addresses the government's previous concern.

4. Granting review in the case's current posture would also require this Court to confront threshold questions of the existence and scope of petitioners' appellate standing, which might be avoided or simplified by deferring plenary review. Like "any person invoking the power of a federal court," to obtain "appellate review" of the court of appeals' decision, petitioners "must demonstrate standing to do so." *Virginia House*

*of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945, 1950-1951 (2019) (citations omitted); see *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997). The House of Representatives does not have standing to seek this Court's review of the Fifth Circuit's decision at all. And serious questions exist about the scope of the intervenor States' appellate standing and which particular issues they may ask this Court to adjudicate.

a. The House has no cognizable interest in this litigation. See Gov't C.A. Opp. to House Mot. to Intervene 6-13. The House has no authority to represent the United States, a task that the Constitution and federal statutes vest in the Executive Branch. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 138-141 (1976) (per curiam); 28 U.S.C. 515-519. And the House has not identified any "discrete," "'legally and judicially cognizable'" harm to the chamber itself from a decision holding the ACA invalid in part or in full. *Bethune-Hill*, 139 S. Ct. at 1953 (citation omitted). Although the House was permitted to intervene in the court of appeals, its "status as an intervenor below" by itself "does not confer standing sufficient to keep the case alive." *Diamond* v. *Charles*, 476 U.S. 54, 68 (1986). And the House's participation in originally enacting the ACA a decade ago and later amending it does not confer a judicially cognizable interest. "Th[is] Court's precedent * * * lends no support for the notion that one House of a bicameral legislature, resting solely on its role in the legislative process, may appeal on its own behalf a judgment invalidating a [legislative] enactment." *Bethune-Hill*, 139 S. Ct. at 1953; see *Synar*, 478 U.S. at 733 ("[O]nce Congress makes its choice in enacting legislation, its participation ends.").

The court of appeals found it unnecessary to decide whether the House had standing to intervene in the appeal. Pet. App. 19a (noting that this Court's decision in *Bethune-Hill* had "call[ed] the House's standing to intervene into doubt"). The court "pretermit[ted] th[at] issue," concluding that the House could participate even if it did not have standing because it sought the same relief as the intervenor States, which the court had held did have standing. *Ibid.* But if this Court were to conclude that the intervenor States lack standing to seek review of any of the aspects of the court of appeals' decision that they challenge, the Court would have to confront whether the House may seek such review.

b. The scope of the intervenor States' standing to seek review of the court of appeals' decision is unclear. The court of appeals concluded that the intervenor States had standing to appeal "the district court's judgment" because that judgment, "if ultimately given effect," would cause them injury. Pet. App. 17a; see *id.* at 17a-19a. Specifically, the Fifth Circuit found that, if the district court's decision declaring the entire ACA inseverable from the individual mandate were allowed to take effect, then the intervenor States would lose "funding that they receive under the ACA"—for example, under the ACA's Medicaid provisions. *Id.* at 17a-18a. It also stated that the intervenor States might be hindered in "future litigation because of the district court judgment's potentially preclusive effect." *Id.* at 17a.

But the relevant question now is whether and to what extent the intervenor States have standing to seek review in this Court of the *court of appeals'* decision. And the injuries the intervenor States purportedly would have suffered if the district court's severability ruling had ever taken effect are now irrelevant, because

the court of appeals vacated that entire portion of the district court's judgment. The basis on which the court of appeals held that the intervenor States had appellate standing to raise the severability issue thus has been eliminated.

Because no operative lower-court ruling now exists in this case on the severability issue, it is at best unclear on what basis the intervenor States would have appellate standing to seek review of that issue in this Court. The court of appeals' decision vacating the district court's determination on severability does not itself appear to cause any harm to the intervenor States. To the contrary, the district court's decision was the source of the injuries to the intervenor States that the court of appeals identified, see Pet. App. 17a-19a, and those States prevailed below in seeking to have that decision set aside. Nor did the court of appeals render any ruling on the severability of any other ACA provisions that "may have prospective effect on" the intervenor States. *Camreta* v. *Greene*, 563 U.S. 692, 702 (2011); cf. *id.* at 702-703 (holding that a government-official defendant could seek appellate review of court of appeals' decision that official had violated the plaintiff's constitutional rights, even though defendant had prevailed on qualified-immunity grounds, given the "prospective effect" of the court's constitutional ruling). The court of appeals made clear that it was not "suggest[ing]" any view on the merits of the severability issue. Pet. App. 69a.

The court of appeals did conclude that the plaintiffs had standing to bring this suit, Pet. App. 14a-19a, and that the individual mandate is invalid, *id.* at 14a-39a. It is unclear whether the latter ruling causes the intervenor States any cognizable injury, given their position that the mandate is "simply precatory." 19-840 Pet. 21.

And neither of those two questions independently warrants review in the case's current posture. See pp. 12-15, *supra*. In any event, even if the intervenor States have appellate standing to challenge the court of appeals' rulings on the plaintiffs' standing and the individual mandate's validity, that would not necessarily enable them to seek immediate review in this Court on the separate severability question. "'[S]tanding is not dispensed in gross,'" and a party invoking federal jurisdiction "must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352-353 (2006) (citation omitted).

c. Whatever conclusion this Court ultimately might reach on the existence and scope of petitioners' appellate standing, granting review in the case's current posture would require confronting those potentially complicated threshold questions before reaching the merits. Deferring any review in this Court until proceedings on remand are complete and the Fifth Circuit has rendered a final decision might avoid or significantly streamline that inquiry. For example, if the court of appeals concludes that the ACA provisions on which the intervenor States' claimed injuries rest are inseverable from the individual mandate, it may then be clear that they have appellate standing to seek review in this Court. Conversely, if the court of appeals concludes that the intervenor States' injuries stem exclusively from provisions that are severable, it may be clear that they lack standing. Either way, deferring review until after the lower courts have completed their consideration of severability could substantially simplify the issues presented to this Court.

## CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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