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.

STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE RESPONDENTS' OPPOSITION TO MOTION TO EXPEDITE CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI AND TO EXPEDITE CONSIDERATION OF THIS MOTION

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The Court should deny the petitioners' motions to expedite consideration of their petitions. The interlocutory decision below affirms the district court's declaration that the Affordable Care Act's individual mandate is unconstitutional, and remands for the district court to determine in the first instance whether any portion of the Affordable Care Act survives the unconstitutional mandate that Congress declared "essential" to the law's operation. There may come a day when this Court's review is appropriate, but it is after the issue of severability is decided below. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."); *see also Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari) ("Although there is no barrier to our review, [one] claim is in an interlocutory posture, having been remanded for further consideration. As for [that] claim, the District Court has yet to enter a final remedial order. . . . The issues will be better suited for certiorari review at that time.").

Throughout this litigation, petitioners have argued that the Affordable Care Act's individual mandate impacts no one in any way. Yet now, they claim that a decision declaring that mandate unconstitutional is so consequential to the Republic that this Court must upend its rules, rush the briefing and argument, truncate its own consideration of the complex questions presented, and hastily render a decision. In reality, there is no emergency justifying that departure from the ordinary course. The district court has stayed its judgment, and that stay remains in place today. If this were really an emergency, petitioners would not have waited 16 days to bring it to this Court's attention. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2085 (2017) (per curiam) (noting emergency cert petition and requests for stay and expedited relief were filed one day after adverse decision below). Indeed, if petitioners truly needed their petitions to be briefed before the January

24 Conference, they could have filed them the day after the court of appeals issued its decision. *Id.* Instead, they waited almost two-and-a-half weeks, and now claim a crisis.

In addition, respondents are evaluating the need to file a conditional cross-petition to protect their rights and preserve all arguments in the event the Court grants the pending petitions. The deadline for any cross-petitions is March 17, 2020. *See* Sup. Ct. Rule 13; *accord* Sup. Ct. Rule 12.5 (allowing conditional cross petition under ordinary schedule or 30 days from time of petition, whichever is later). Yet under petitioners' proposed schedules, any conditional cross-petition would not be due until merits briefing is well underway. It would be inefficient to set this case on two different tracks, and any change in the March 17 deadline would prejudice respondents.

The motions should be denied.[1]

ARGUMENT

1. The two individuals and eighteen States that are now before this Court as respondents brought this lawsuit following a 2017 change to the tax code that eliminated the "shared responsibility payment" associated with the so-called "individual mandate" created by Section 5000A of the Affordable Care Act. *See* Pub L. No. 115-97, § 11081, 131 Stat. 2054, 2092. Respondents argued that by eliminating the associated tax, Congress eliminated the statutory basis for this Court's holding in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 563-75 (2012), that the individual mandate was a constitutional exercise

[1] The motion of the U.S. House of Representatives should be denied for an additional and independent reason: it lacks standing to participate in this case and has not properly intervened. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019) (holding that one House of a bicameral legislature lacks standing to "appeal on its own behalf a judgment invalidating a [legislative] enactment"); Pet. App. 19a (questioning whether House has standing to participate in this appeal).

of Congress's taxing power. And because the statutory text calls that mandate "essential" to the Act's operation, it could not be severed. After all, the law includes to this day an inseverability clause—drafted in the original Affordable Care Act and left undisturbed by the 2017 Congress. 42 U.S.C. § 18091(2). The district court agreed that the mandate is unconstitutional and the rest of the Act inseverable. *See generally* Pet. App. 163a-231a. The Fifth Circuit upheld the district court's holding on the merits that the mandate is unconstitutional, but it remanded for further proceedings regarding the appropriate remedy. Pet. App. 3a-4a. In particular, the Fifth Circuit ordered the district court to consider a question raised for the first time on appeal that its original remedial order was not properly "tailored to redress the plaintiff's particular injury" as required by this Court's recent decisions in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), and *Murphy v. NCAA*, 138 S. Ct. 1461 (2018). Pet. App. 71a.

2. The lawfulness of the Act is undoubtedly a matter of the utmost national importance, but the current petitions do not justify immediate, emergency review by this Court. The Court has expedited cases when there is an ongoing violation to fundamental rights such as in the school-desegregation cases, *Aaron v. Cooper*, 358 U.S. 27, 27 (1958) (Little Rock); *Alexander v. Holmes Cty. Bd. of Educ.*, 396 U.S. 19, 20 (1969) (per curiam) (Mississippi); or when they involve important questions of executive privilege during a pending impeachment inquiry, *United States v. Nixon*, 418 U.S. 683, 690 (1974); or when they impact the outcome of an election, *Bush v. Gore*, 531 U.S. 1046, 1046 (2000); or when they raise time-sensitive questions of the Executive's authority in the fields of immigration or international relations, *e.g.*, *Trump*, 137 S. Ct. at 2085; *Dames & Moore v. Regan*, 452 U.S. 932, 933 (1981). These cases have one unifying characteristic: Expedition was

necessary because the Court's failure to act promptly would lead to some concrete, irreparable harm to the party seeking expedition or to an individual or entity that the party represents. *E.g.*, *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 530 n.4, 880 (1972) (advancing argument involving union election "in view of the fact that the litigation is presently pending in the District Court and has not been stayed").

Petitioners point to no such concrete harm. Instead, they point only to a continued "cloud of uncertainty" that will supposedly linger over the healthcare market because the Fifth Circuit "*indicat[ed]* that the ACA's insurance market reforms, or perhaps the entirety of the law, *may* well fall" with the individual mandate. House Mot. at 6 (emphasis added); *see also* States Mot. at 4-5. This speculation fails to show cause to expedite this case for at least three reasons. *First*, vague and conclusory assertions about potential uncertainty in the marketplace are not the type of imminent harm that justifies expedited consideration in this (or any other) Court over the objection of an adversely affected party. *Cf. United Steel Workers of Am. v. United States*, 361 U.S. 39, 41 (1959) (per curiam) (examining "findings that the continuation of [an ongoing steel] strike would imperil the national health and safety" on expedited basis). *Second*, the district court's declaratory judgment has been stayed pending appeal since December 30, 2018, specifically to address the "great uncertainty" that "everyday Americans would otherwise face" pending appeal. Pet. App. 162a. That stay remains in place today; there is no currently operative remedy. And, *third*, the long-term viability of the Act is fundamentally uncertain regardless of anything to do

with this case. As petitioners are well aware, Congress has considered efforts to amend or repeal large sections of the Act continuously for the last decade.[2]

3. Until now, the Act's defenders have argued that because the tax associated with the individual mandate is set at $0, the provision does nothing to anyone, thereby depriving respondents of standing to sue. Moreover, they have asserted, if the mandate were unconstitutional, any relief must be tailored to save as much of the statute as possible. Now that the Fifth Circuit has ruled that the mandate is unconstitutional and ordered the district court to tailor a remedy, the Act's defenders insist that the constitutionality of the individual mandate is vitally important to the functioning of the healthcare market. In fact, the lawfulness of the mandate is so crucial, the petitioners claim, that this Court should suspend its ordinary rules and procedures in the name of haste. Petitioners seek to rush everything: cert-stage briefing, merits-stage briefing, argument, consideration, and decision. Yet they do not explain why this so-called emergency is consistent with their theory that the individual mandate is nothing more than an ink blot.

4. The petitioners' actions speak louder than words about whether they really think this case presents an emergency. The Fifth Circuit issued its opinion on December 18, 2019. Petitioners could have filed their cert petitions the next day, *cf. Trump*, 137 S. Ct. at 2085, which would have made the briefs in opposition due well before the January 24 Conference. But petitioners did nothing. They did not seek an order accelerating the briefing schedule from this Court at that time, nor did they indicate to anyone that they would seek

[2] Annie L. Mach & Janet Kinzer, Congressional Research Service, Legislative Actions to Modify the Affordable Care Act in the 111th-115th Congresses at 5-16 (June 27, 2018), https://fas.org/sgp/crs/misc/R45244.pdf (listing such efforts).

emergency review. Indeed, petitioners notified respondents about their emergency petitions for the first time on January 2—more than two weeks after the panel remanded the case for further proceedings, but barely twenty-four hours before the petitions were filed.

5. This delay in informing the Court and respondents' counsel that petitioners intended to seek emergency review has prejudiced respondents. Two of the attorneys who had significant drafting responsibility for respondents in the Fifth Circuit have left the Office of the Texas Attorney General, one of them in early December. Their replacement is working diligently to get up to speed but is already managing a busy docket. Lead counsel is also stretched by the press of other business, including (among other things) an en banc oral argument in the Fifth Circuit on January 22 and numerous additional briefing deadlines. If petitioners had informed respondents that they intended to seek expedited relief in a timely manner, respondents could have planned their staffing accordingly. Petitioners, however, chose the stealth approach, and now demand substantive briefs in opposition in just over two weeks.

6. This behavior not only prejudices respondents, it ultimately disserves the Court and the public whose interests the current motions supposedly seek to protect. There is no dispute that this case "raises a serious constitutional question about the 2010 Affordable Care Act, one of the most consequential laws ever enacted by Congress." *Sissel v. U.S. Dep't of Health & Human Servs.*, 799 F.3d 1035, 1049 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc). It is far more important that the Court gets the answer right than that the petitioners get an answer right now.

7. To that end, the case should—as the Fifth Circuit ordered—go back to the district court "for further proceedings on an appropriate remedy." *Abbott*, 137 S. Ct. at 613

(Roberts, C.J.). The "interlocutory posture" of the Fifth Circuit's decision counsels against granting review here. *Id.*

8. If the Court is nonetheless inclined to take up this interlocutory matter, it should at least consider the petitions alongside any conditional cross-petitions that may be filed. *See* Sup. Ct. Rule 13. Respondents won a partial—but not complete—victory below, and a conditional cross-petition may be necessary to preserve their rights in the event the pending petitions are granted. Under this Court's rules, any conditional cross-petitions are due March 17. *See id.* The expedited schedules the petitioners propose would set the petitions and any cross-petitions on separate tracks. And any change in the deadline for cross-petitions would prejudice respondents.

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CONCLUSION

The Court should deny expedited consideration. The petitions—and any forthcoming conditional cross-petitions—should be briefed in the ordinary course.

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January 2020