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 BRIEF FOR THE PETITIONERS

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ARGUMENT

The individual and state respondents seek a judgment invalidating the entire Patient Protection and Affordable Care Act (ACA). This litigation, including the court of appeals' decision affirming the district court as to standing and the merits, has already created harmful uncertainty about the future of the ACA. As the state respondents acknowledge, it was "unnecessary" (Texas Opp. 28) for the court of appeals to prolong the litigation by remanding for further proceedings regarding severability—a legal question that was thoroughly briefed and argued below. All three questions presented by the petition are ripe for this Court's review; the Court should grant certiorari and decide the case this Term.

1. The petition raises purely legal questions in a case of enormous practical importance, and respondents identify no good reason for this Court to defer review.

a. Respondents do not dispute the importance of this case. The ACA adopted a "comprehensive regulatory scheme," Ind. Opp. 31, which affects almost every aspect of an industry that accounts for nearly one-fifth of the Nation's economy, Pet. 4. Respondents acknowledge that the Act has led to "dramatic expansions in healthcare coverage," Ind. Opp. 29, and "prominent" regulatory changes, such as prohibiting insurance companies from denying coverage or charging higher premiums based on pre-existing health conditions, Texas Opp. 5. If the individual and state respondents succeed in obtaining a judgment "invalidat[ing] the entire Act," Ind. Opp. 3, it would erase critical patient protections, cause millions of Americans to lose their healthcare coverage, and deprive the

States of billions of dollars. *See, e.g.*, Pet. 4-7; America's Health Ins. Plans (AHIP) Br. 8-21; American Cancer Society Br. 12-19. A ruling by this Court in petitioners' favor on any of the three questions presented would foreclose that result.

Amici from nearly every corner of the healthcare sector have confirmed that this litigation is creating profound uncertainty and have detailed the harms that would result from prolonging it. Further delay would make it more difficult for hospitals to "rais[e] money to finance" investments that would "improve health care and lower costs," State Hospital Ass'ns Br. 3; create "decision-paralysis" for small business owners about how to plan for the future or whether to start new enterprises, Small Bus. Majority Found. Br. 12; and force individuals to live with the "constant[] fear[]" that they will "lose their access to affordable health care," AARP Br. 4. Delay is also "likely to lead to insurers operating in fewer markets and charging higher premiums, with the potential that 100,000 people or more will become uninsured during the pendency of proceedings in the lower courts." Bipartisan Economic Scholars Br. 3; *cf.* AHIP Br. 7 (delay will leave insurers on "unsure footing" about whether to "continue[] invest[ing] and participat[ing]" in ACA markets).

Respondents dismiss these concerns, arguing that there is no "practical urgency" because "no operative lower-court ruling exists on severability." U.S. Opp. 15-16. That misses the point. The need for swift judicial resolution of this dispute comes not from the present or "imminent" effect of any judicial order, *id.* at 20, but from practical harms created by the pendency of this litigation. Indeed, notwithstanding the stay of the district court's judgment, the federal respondents

asked the court of appeals to expedite oral argument because these proceedings were causing harmful "uncertainty in the healthcare sector, and other areas affected by the Affordable Care Act," C.A. Dkt. 514906506 at 3 (Apr. 8, 2019). The same consideration applies with even greater force now that the court of appeals has affirmed the district court's jurisdictional and constitutional holdings and remanded for a "searching" severability inquiry—for which it has provided little practical guidance—while suggesting that it "may still be that none of the ACA is severable from the individual mandate." Pet. App. 68a-69a.

b. Respondents principally argue that the Court should deny review because of the current "interlocutory posture" of the case. U.S. Opp. 12. Invoking the "Court's ordinary practice of declining to resolve issues the court below has not reached," respondents contend that immediate review is inappropriate "because the court of appeals did not definitively resolve" the severability question. *Id.* at 10-11, 17; *see also* Texas Opp. 11-15; Ind. Opp. 9-11. That is not a persuasive argument here. Where appropriate, this Court frequently grants review of cases in an interlocutory posture. And the Court often addresses questions of remedy—including severability—in the first instance. *See, e.g.*, *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1482 (2018); *Lucia v. SEC*, 138 S. Ct. 2044, 2055-2056 (2018).

Moreover, the considerations that typically counsel against reviewing a question not resolved below are absent here. This is not a case where the court of appeals had no "opportunity to decide" a legal question. *Ret. Plans Comm. of IBM v. Jander*, No. 18-1165, slip op. 3 (U.S. Jan. 14, 2020) (per curiam); *see also* U.S. Opp. 18 (collecting cases). The Fifth Circuit had every

opportunity to resolve the severability question, but instead chose to "remand[] for a do-over." Pet. App. 73a (King, J., dissenting). Nor would this Court be "tak[ing] the 'first view' of the severability issue." Texas Opp. 34; *see also* U.S. Opp. 16; Ind. Opp. 9. The district court and the dissenting judge in the court of appeals examined the severability question, reached opposite conclusions, and wrote reasoned opinions explaining their contrasting views. *See* Pet. App. 98a-112a, 151a-159a, 204a-231a; *cf. id.* at 52a-70a (panel majority's discussion of severability).

Respondents also fail to support their assertion that further severability analysis by the lower courts would materially assist future review by this Court. *See* U.S. Opp. 11, 16; Ind. Opp. 12. True, this Court has previously "remanded cases involving complex questions of severability." Texas Opp. 28 (collecting cases). But no party argues that the severability question here is complex. On the contrary, in this case the question is "quite simple." Pet. App. 98a (King, J., dissenting). Congress eliminated the "only enforcement mechanism" for the minimum coverage provision while leaving "the rest of the Affordable Care Act in place," which "plain[ly] indicat[es] that Congress considered the coverage requirement entirely dispensable and, hence, severable." *Id.* at 73a; *see also* Pet. 23. While respondents disagree with that conclusion, they agree that the analysis of the severability question is "simple." Texas Opp. 29; Ind. Opp. 15. They contend that the entire ACA is inseverable from the minimum coverage provision based on statutory findings from 2010 regarding the effects of that

provision on interstate commerce. *See* Texas Opp. 29-30 (discussing 42 U.S.C. § 18091(2)(I)).[1]

Thus, the severability issue arrives at this Court as a square conflict between two straightforward legal positions. In petitioners' view (and Judge King's), even if the minimum coverage provision is unconstitutional, the balance of the ACA must remain in place. In respondents' view (and the district court's), the entire Act must fall. In this context, any benefit that might arise from deferring review to allow the district court to conduct a "more granular analysis" of "statutory provisions spanning 900 pages" (U.S. Opp. 16) is far outweighed by the substantial practical harms that would result from further delay in bringing this case to a final resolution.

Nor does the remedial theory lately suggested by the federal respondents provide any basis for denying review. *See* U.S. Opp. 17 ("[R]elief should be limited to those applications of particular ACA provisions necessary to redress the plaintiffs' injuries."). The federal respondents raised that argument "on appeal 'for the first time,'" Pet. App. 71a, and even other respondents contend that the argument has been forfeited and does not warrant remand, Texas Opp. 31, 33. Rather than defer review for protracted consideration of this novel and belated theory by the lower courts, this Court should grant review, resolve the questions presented, and then (if necessary) remand the case for focused consideration of any remedial issue that might remain.

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[1] The state respondents invoke (at 11) *Abbott v. Veasey*, 137 S. Ct. 612 (2017) (mem.). But here, unlike in *Abbott*, there is no genuine need for "further consideration of the facts" on remand. *Id.* at 613 (Roberts, C.J., respecting the denial of certiorari).

c. The federal respondents also contend that the Court should defer review to avoid "potentially complicated threshold questions" regarding the state petitioners' "appellate standing." U.S. Opp. 24. No other respondent joins in this argument, and the federal respondents never actually argue that the state petitioners lack standing. Instead, they suggest that petitioners' standing to seek review of the Fifth Circuit's judgment "is unclear." *Id.* at 22. They are mistaken. Petitioners have a sufficiently "personal stake in the appeal" to support Article III jurisdiction with respect to all three questions presented. *Camreta v. Greene*, 563 U.S. 692, 702 (2011).

In the court of appeals, petitioners sought reversal of a partial final judgment that, if implemented, would have harmed them by eliminating hundreds of billions of dollars in federal funding to the States conferred by the ACA. Pet. App. 17a-18a. The Fifth Circuit did not provide that relief. Instead, it ruled against petitioners on two of the three grounds that would have provided a basis for reversing the district court's judgment; and it rejected petitioners' argument that they were nonetheless entitled to an immediate judgment in their favor on the severability question. Petitioners did not receive "all[] of the relief [they] requested" from the Fifth Circuit, *Forney v. Apfel*, 524 U.S. 266, 271 (1998), and they have an ongoing and concrete interest in the reversal of that court's adverse judgment.[2]

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[2] The situation would not be materially different if the district court had deferred ruling on the severability issue and certified an interlocutory appeal of its rulings on standing and the constitutionality of the minimum coverage provision. *See* 28 U.S.C. § 1292(b). In that scenario, no one could seriously contest

The fact that "no operative lower-court ruling now exists in this case on the severability issue" (U.S. Opp. 23) does not deprive this Court of jurisdiction. This Court routinely reviews appellate judgments that do not definitively resolve all the parties' rights and obligations. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (reviewing court of appeals' judgment reversing grant of motion to dismiss). And to the extent that the federal respondents suggest (at 22-24) that the court of appeals' decision does not legally harm petitioners, they are incorrect. For example, the court of appeals itself recognized the "potentially preclusive effect" of the district court's rulings on standing and the merits, which the court of appeals' judgment affirms. Pet. App. 18a.[3]

2. Review is also warranted because the decision below is wrong on each question presented. *See* Pet. 19-26. Although the federal respondents now agree with the district court that the individual respondents have standing to sue, that the minimum coverage provision is unconstitutional, and that every other provision in the ACA is inseverable from it, *see* U.S. Opp. 4, 6, they offer no legal argument in defense of those positions, *see id.* at 10-24. And the arguments advanced by the state and individual respondents are unpersuasive.

a. As to standing, after the 2017 amendment to 26 U.S.C. § 5000A, "the individual mandate no longer

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the court of appeals' jurisdiction to consider the appeal—or this Court's jurisdiction to review a judgment of the court of appeals affirming the district court's order.

[3] It is beyond dispute, moreover, that this Court has jurisdiction to consider whether the individual and state respondents have standing to sue. *See, e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997).

subjects any individual to any concrete consequence." U.S. Opp. 14. The individual respondents recognize (at 15) that Section 5000A now imposes no "collateral consequences" on them, but nonetheless insist (at 22) that they are injured by the minimum coverage provision because it "compel[s]" them to "purchase insurance." They are incorrect. Because "absolutely nothing" will happen to the individual respondents if they choose not to purchase health insurance, any "injury they incur by freely choosing to obtain insurance" is "entirely self-inflicted." Pet. App. 79a, 81a (King, J., dissenting). That is not a proper basis for invoking the jurisdiction of the federal courts.[4]

The state respondents argue that they have standing because of costs incurred "in their capacity as employers," specifically with regard to "reporting." Texas Opp. 17. To establish standing on that theory, the state respondents would have had to demonstrate a causal link between Section 5000A(a) and increased reporting costs. The panel majority assumed such a link, reasoning that every time a state employee enrolls in state healthcare programs, the State must pay to "send the individual a form" required by other provisions of the ACA. Pet. App. 36a (citing 26 U.S.C. §§ 6055, 6056). But the state respondents offered "no evidence" that any employees will enroll in their healthcare programs because of the now-unenforceable minimum coverage provision. *Id.* at 87a & n.7

[4] This Court did not "implicitly decide[]" (Ind. Opp. 15) that the individual respondents have standing to bring this suit in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (*NFIB*), because the Court "did not address standing" in that case, Pet. App. 85a n.5 (King, J., dissenting); *cf. Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (the "existence of unaddressed jurisdictional defects has no precedential effect").

(King, J., dissenting). The state respondents acknowledge that they did not make that showing; they simply assert that they were "not required" to do so. Texas Opp. 21. That assertion is contrary to this Court's standing jurisprudence. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (record evidence established "*de facto* causality"); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-561 (1992) (at summary judgment, plaintiffs must set forth "specific facts" demonstrating "causal connection between the injury and the conduct complained of").[5]

b. On the merits, the state and individual respondents argue that a "straightforward application of this Court's holdings in *NFIB*" requires the conclusion that Section 5000A is now an unconstitutional "command to purchase" health insurance. Ind. Opp. 15, 22-26; Texas Opp. 23-24. But *NFIB* construed Section 5000A as offering a lawful choice between buying insurance and paying a tax, 567 U.S. at 574, and the only change Congress made to Section 5000A in 2017 was to reduce the amount of the alternative tax to zero. It "boggles the mind to suggest that Congress intended to turn a non-mandatory provision into a mandatory"—and unconstitutional—"provision by doing away with the only means of incentivizing compliance with that provision." Pet. App. 96a-97a (King, J., dissenting).

Like the lower courts, respondents ignore the basic lesson of *NFIB*: that courts have a "duty to construe a statute to save it, if fairly possible." 567 U.S. at 574 (Roberts, C.J.). As amended, Section 5000A may be

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[5] The state respondents are not entitled to "put on evidence of their standing" at a trial, Texas Opp. 22, because they did not carry their burden at the summary-judgment phase, *see, e.g.*, *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 240-242, 246 (D.C. Cir. 2015).

construed as a precatory encouragement to buy health insurance, akin to other statutes that encourage individuals to take action without imposing any negative consequence on those who choose not to do so. *See* Pet. 21-22, 22 & n.17. Indeed, respondents do not even attempt to distinguish the current Section 5000A from the many "nonbinding laws and concurrent resolutions" that Congress has passed over the years. Texas Opp. 26. Section 5000A may also be construed as a tax, albeit one that is currently set at zero. *See* Pet. 22-23. Respondents disagree, *see* Texas Opp. 26; Ind. Opp. 25-26, but they ignore the fact that Section 5000A retains many features of a tax, including references to taxable income, number of dependents, and filing status. *See* 26 U.S.C. § 5000A(b)(3), (c)(2), (c)(4); Pet. 22-23. "The question is not whether" these are "the most natural interpretation[s]" of Section 5000A, "but only whether [they are] 'fairly possible.'" *NFIB*, 567 U.S. at 563 (Roberts, C.J.). Because both alternative interpretations are possible, the lower courts erred by adopting an interpretation that renders the statute unconstitutional.

c. Finally, respondents offer no serious defense of the Fifth Circuit's decision to remand the severability question. The state respondents, for example, argue that the "Fifth Circuit should have decided" this issue and that remand was "unnecessary." Texas Opp. 28, 29. And both the state and individual respondents agree with petitioners that the severability question is "simple." *Id.* at 29; Ind. Opp. 15. Those arguments only underscore why remand was inappropriate.

Respondents' analysis of the severability question focuses almost entirely on the considerations that led the 2010 Congress to adopt an enforceable Section 5000A in the first instance. *See* Ind. Opp. 27-31; Texas

Opp. 29-31. The relevant inquiry, however, is the intent of the 2017 Congress that created the purported constitutional defect by reducing the alternative tax to zero and rendering the minimum coverage provision unenforceable. *See* Pet. App. 65a (faulting the district court for giving too "little attention to the intent of the 2017 Congress"); *id.* at 105a (King, J., dissenting) (addressing the same "glaring flaw"). And the intent of that Congress could not be clearer. The 2017 Congress eliminated the only negative legal consequence for choosing to go without healthcare coverage; at the same time, it left every other provision of the ACA in place. Those actions show beyond any reasonable debate that it "believed the ACA could stand"—and *intended* it to stand—"in its entirety without the unenforceable coverage requirement." *Id.* at 98a (King, J., dissenting); *see also* Pet. 23-26.

Petitioners and respondents obviously differ over the proper resolution of the severability question; but all agree that it is a "pure question of law," Texas Opp. 29, and the arguments on both sides have been thoroughly ventilated in the courts below. Postponing review would accomplish little beyond prolonging uncertainty about the future of the ACA, with accompanying harm to patients, doctors, businesses, and the Nation as a whole.

CONCLUSION

The petition for a writ of certiorari should be granted.

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