Nos. 19-840; 19-1019

In the Supreme Court of the United States

STATE OF CALIFORNIA, ET AL., PETITIONERS/CROSS-RESPONDENTS

v.

STATE OF TEXAS, ET AL.

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

STATE RESPONDENTS' OPPOSITION TO MOTION OF U.S. HOUSE OF REPRESENTATIVES FOR ENLARGEMENT OF ARGUMENT TIME AND DIVIDED ARGUMENT

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The Court should deny the Motion of the U.S. House of Representatives for Enlargement of Argument Time and for Divided Argument. Divided argument is appropriate when aligned parties make different arguments or represent unique sovereign interests. That is not the case here. The House's briefing in this case largely repeats California's; the House does not deny that any oral argument would be similarly duplicative. Instead, the House claims a "unique" interest in this case as a single chamber of a bicameral legislature that enacted the statute challenged in this case. But *Virginia House of Delegates v. Bethune-Hill* rejected special solicitude for such single chambers, 139 S. Ct. 1945, 1950, 1956 (2019), and in any event, if the House were correct, it would have the right to participate in oral argument anytime it disagrees with the Attorney General's view of a statute.

The Court thus should not allow the House to participate in oral argument. In the event the House is permitted to participate, any such argument time should be drawn from California's allotted time, without expanding the total time for oral argument.

STATEMENT

1. This case concerns whether any portion of the Affordable Care Act survives Congress's decision to remove the textual basis that allowed this Court to uphold, in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), the constitutionality of the individual mandate. In 2018, a coalition of States led by Texas and joined by two individuals filed suit, claiming that the mandate does not survive, and that it is inseverable from both the major and minor provisions of the ACA. Though it disagrees on the remedial consequences, the United States agrees that the mandate is no longer constitutional.

A second group of States, led by California, intervened to defend the law in its entirety. The House did not seek to intervene or participate in summary judgment briefing before

the district court. In December 2018, the district court agreed with state and individual respondents. It held that the individual mandate was unconstitutional and that, pursuant to a statutory inseverability clause, the remainder of the ACA fell with the mandate.

2. After the district court ruled, the House intervened to defend the law on appeal. The Fifth Circuit permitted the House to intervene, though it did so before this Court decided *Bethune-Hill*. *See* 139 S. Ct. at 1953-54, 1956. Ultimately, the Fifth Circuit affirmed the district court's merits holding and remanded for further proceedings regarding severability and remedy. Assured of California's standing, the Fifth Circuit had no need to reassess the propriety of the House's involvement.

3. California and the House filed separate petitions for writs of certiorari. *See* Nos. 19-840 (California), 19-841 (House). The House petition insisted that immediate review was appropriate because the case presented "straightforward legal question[s]," whose answers were "obvious." House Pet. 15. Texas filed a conditional cross-petition. *See* No. 19-1019.

4. The Court granted California's petition and Texas's conditional cross-petition. But the Court did not grant the House's petition.

ARGUMENT

There is no basis to enlarge oral argument time or permit the House to participate. The House does not deny that its interests and arguments are entirely duplicative of California's. It instead relies on its supposed "important institutional interest" in the ACA. Mot. at 3. But it has no legally cognizable special interest at stake in this case, and it has nothing distinct to add to the argument. Its motion should be denied.

1. Divided argument is warranted in cases where nominally aligned parties disagree as to important matters, *e.g.*, *Rapanos v. United States*, 546 U.S. 1000 (2005); *Clinton v. City*

of New York, 523 U.S. 1058 (1998), or when unique sovereign interests are at stake, *e.g.*, *Banister v. Davis*, 140 S. Ct. 493 (2019); *Gamble v. United States*, 139 S. Ct. 582 (2018). That is why the United States's request for divided argument in this case is appropriate. The United States and state respondents/cross-petitioners take different legal positions regarding the questions presented in No. 19-1019; it follows that they both should be heard.

2. In other situations, though, "[d]ivided argument is not favored." Sup. Ct. R. 28.4. That is so because it leads to "overlapping, repetitious, and incomplete and, at worst, contradictory, inconsistent and confusing" presentations. Justice Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 ABA J. 801, 802 (1951). That is exactly what the House promises here. Its merits briefing to date has largely tracked California's. It offers no distinct legal arguments, and it has not disagreed with California as to any material issue.

Instead, the House justifies its request based on its status as the House—a "federal entity defending the Act." Mot. at 4. But this Court has held that "the House, as a single chamber of a bicameral legislature, has no standing" to defend a statute on appeal. *Bethune-Hill*, 139 S. Ct. at 1950. Instead, absent specific legislative authorization, it "lacks authority to displace [the] Attorney General as representative" of the government. *Id.* at 1950. *Bethune-Hill* forecloses the House's argument and confirms that it has no special institutional interests that set it apart from anyone else. *See id.*

The House invokes sections 2403(a) and 530D of title 28 of the U.S. Code, but it misunderstands both statutes. Section 2403 merely requires courts to notify the Attorney General of constitutional challenges to federal statutes in cases "to which the United States . . . is not a party." 28 U.S.C. § 2403(a). It has no application where, as here, the United States *is*

a party. Moreover, section 2403 authorizes the *Attorney General* to intervene as of right to defend the constitutionality of a federal law; it says nothing about Houses of Congress.

Section 530D is equally unavailing. It requires the Attorney General to submit a report to Congress when the Department of Justice determines that it will "refrain (on the grounds that the provision is unconstitutional) from defending or asserting" the constitutionality of a federal law "or not to appeal or request review" of a decision "affecting the constitutionality of any such" law. 28 U.S.C. § 530D(a)(1)(B)(ii). While section 530D does set a deadline so that the House and Senate may consider intervention if otherwise permitted by law, *id.* § 530D(b)(2), the statute does not itself grant authority to the House to intervene in any given case—much less over the objection of the Attorney General.

Nor has this Court permitted the House to intervene as a matter of right over the objection of the parties to the litigation. Members of Congress, like anyone else, can move to participate in argument as amici where there is good cause for them to do so and the parties consent. *See* Mot. 4-5 (collecting cases). In rare instances, the Court has allowed the *bicameral* Congress to intervene to defend a law. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919 (1983) (determining that Congress may defend the legislative veto). But *Bethune-Hill* confirms that these cases do not recognize a unilateral right by a single chamber of a bicameral legislature to defend a legislative action that the executive branch has determined to be unconstitutional. That was so even though the Virginia House argued that the subject of the legislation—redistricting seats for the General Assembly—directly impacted its very composition. *See Bethune-Hill*, 139 S. Ct. at 1957 (Alito, J., dissenting). Such an interest does not suffice because "[o]ne House of [a] bicameral legislature cannot alone" represent "the will of its partners in the legislative process." *Id.* at 1956.

The same considerations counsel against allowing the House to participate here. Declaring a federal law unconstitutional is serious business, *cf.* Mot. at 3-4, but it falls to the Attorney General to represent the federal government in such circumstances. 28 U.S.C. §§ 516, 519. Where the House and Attorney General disagree, this Court has held that Congress may *not* intervene to enforce legislative prerogatives because such "political battle[s] . . . waged between the President and Congress" are not the kinds of disputes "capable of resolution through the judicial process." *Raines v. Byrd*, 521 U.S. 811, 819, 827 (1997). To accept the House's arguments would be to invite one House of Congress to seek to participate in litigation any time it disagrees with the Attorney General.

CONCLUSION

For the reasons discussed above as well as those explained by the U.S. Solicitor General, the Court should deny the U.S. House's motion for expanded and divided argument.

Respectfully submitted.

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