Nos. 19-840, 19-1019

In the Supreme Court of the United States

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

REPLY BRIEF FOR STATE CROSS-PETITIONERS

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QUESTION PRESENTED

Per the Court's order of April 2, 2020, this reply brief is "limited to Question 2 presented by the petition for certiorari in No. 19-1019." That question is:

Whether the district court properly declared the ACA invalid in its entirety and unenforceable anywhere.

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INTRODUCTION

The district court properly applied this Court's cases to declare the Affordable Care Act's major and minor provisions invalid and unenforceable nationwide. The ACA's text includes an inseverability clause that repeatedly declares the unconstitutional mandate "essential" to the broad reforms the ACA set out to achieve. When Congress declares a statutory provision "essential," this Court takes Congress at its word. That is all the more true here, where Congress amended the ACA in 2017 and had the opportunity to remove the inseverability clause, but chose not to. And there is no basis to cabin the geographic reach of the conclusion that the ACA's major and minor provisions fall with the unconstitutional mandate.

Petitioners argue that the Court need not declare any other portion of the ACA invalid along with the unlawful individual mandate, but that argument misreads both the ACA and this Court's severability jurisprudence.[1] Petitioners lean heavily on this Court's recent decision in *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), but *Barr* only confirms that the ACA's inseverability clause requires broad invalidation here. *Barr* restated the uncontroversial proposition that statutes are presumed severable unless Congress says otherwise. Where, as here, Congress included an inseverability clause, then "absent extraordinary circumstances, the Court should adhere to the text of [that] nonseverability clause." *Id.* at 2349 (Kavanaugh, J., writing for plurality); *cf. id.* at 2363 (Breyer, J., concurring as to severability).

[1] To avoid confusion, this brief refers to the parties by their designations in No. 19-840.

Petitioners further argue that the inseverability clause is not really an inseverability clause, and, at any rate, that it has somehow expired even though it still appears in the United States Code today. But both the Obama and Trump Administrations have argued that 42 U.S.C. § 18091 "effectively serves as an inseverability clause."[2] No magic words are required to create an inseverability clause; section 18091 functions as one because it tells this Court that Congress believes the ACA cannot achieve its goals without the mandate. And statutory text does not expire merely because it becomes inconvenient in later litigation. If Congress now disavows the inseverability clause, it has a duty to say so and excise that statutory language. Until then, nothing allows the district court or this Court to ignore that provision of the U.S. Code.

The Court should likewise reject the United States' request to limit the scope of remedy to the provisions of the ACA that injure the two *individual* plaintiffs. The United States correctly acknowledges that the individual plaintiffs are injured, that the mandate is unconstitutional, and that the mandate is inseverable from the ACA's major and minor provisions. But the respondent states are injured in their own right. Their injury cannot be remedied by anything short of nationwide relief. There is no basis to cabin the district court's remedy to afford relief to some plaintiffs but not others when all have prevailed on fundamentally the same claim.

The district court's judgment is correct. The portion of the Fifth Circuit's judgment ordering the district

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[2] Br. for Fed. Gov't on Severability 26, *NFIB v. Sebelius*, 567 U.S. 519 (2012).

court to reconsider its remedial analysis should be reversed.

ARGUMENT

I. The District Court Properly Declared the ACA's Major and Minor Provisions Invalid.

The district court declared the ACA's major and minor provisions invalid, without geographic limitation, because the text of ACA and this Court's precedents require that result. Congress insisted that the individual mandate is "essential" to the ACA, particularly the Act's community-rating and guaranteed-issue components, not once, but three separate times. 42 U.S.C. §§ 18091(2)(H), (I), (J). Without the mandate, Congress determined, these reforms do not work. And without this "three-legged stool," *Halbig v. Burwell*, 758 F.3d 390, 409 (D.C. Cir. 2014), *vacated on other grounds*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014), the ACA's remaining major and minor provisions do not provide the near-universal healthcare coverage that the ACA's drafters attempted to create. *King v. Burwell*, 135 S. Ct. 2480, 2487 (2015).

Petitioners challenge the district court's remedial order on two bases, each of which is tied to their merits argument regarding severability. First, they assert that following the elimination of the tax penalty, the individual mandate is unenforced and unenforceable, so its defects cannot bring down other provisions of the ACA. *E.g.*, House Rep. 2, 17; States Rep. 1-2, 21. Second, because Congress left the rest of the ACA in force while rendering the mandate unenforceable, per petitioners, Congress must have intended the Court to sever *only* the unenforceable mandate from the ACA—the still-enacted inseverability clause notwithstanding. House Rep. 17-18; States Rep. 21-22. As part of this argument, petitioners

demand that this Court avoid any greater invalidation by applying the presumption in favor of severability—notwithstanding clear congressional language declaring that the mandate is "essential" to the function of the ACA. House Rep. 19; States Rep. 17.

Both arguments are unsound. The first oversimplifies how the ACA functions. And the second asks this Court to ignore the ACA's text in favor of a reconstructed view of congressional intent. This Court rejected that approach in *Barr* and *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), and it should do so again here.

A. The inseverability clause continues to declare the individual mandate essential.

Petitioners first argue that the district court should have left intact other provisions of the ACA because, as they put it, the individual mandate is no longer enforced through a shared-responsibility payment. But as state respondents explained (at 20-21), the mandate is enforced through numerous other obligations that it triggers throughout the ACA. Petitioners acknowledge, as they must, that "[t]here are, of course, cases in which multiple statutory provisions interact to cause an injury." House Rep. 13. And they do not dispute, as they cannot, that the multiple obligations triggered by the mandate, like "the entire ACA," have been in force "for years." States Rep. 22. Petitioners try to brush these obligations off as "third-order effects," House Rep. 2-3, but these obligations only confirm that the district court properly refused to cabin its remedy to the mandate itself.

The U.S. House errs when it asserts that the district court should have ignored the consequences of the ACA's obligations because "Section 5000A does not mandate" these consequences. House Rep. 13. But this is a

situation of "impermissible statutory convergence[]," and both statutes must be considered. *See generally* Brian Charles Lea, *Situational Severability*, 103 VA. L. REV. 735, 776-88 (2017). Indeed, to accept this argument would be to discount categorically injuries caused by more than one statutory provision—the opposite of this Court's determinations in cases like *United States v. Windsor*, 570 U.S. 744, 755 (2013), and *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 683 (1987).

Put another way, the text of section 5000A may not list every obligation it triggers, but those obligations reference the minimum-essential coverage requirement that section 5000A creates.[3] And, as petitioners recognize, the Tax Cuts and Jobs Act[4] left each of these obligations in place. *E.g.*, House Rep. 4-6; States Rep. 19. Because these obligations remain and continue to injure plaintiffs, the mandate is *not* unenforceable as petitioners' challenge to the district court's remedial order presumes. *See* House Rep. 17; States Rep. 21. Instead, the mandate injures respondents by triggering these other obligations. By extension, these obligations must be considered when crafting a proper remedy. *Barr*, 140 S. Ct. at 2352 n.9; *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999); *Hill v. Wallace*, 259 U.S. 44, 70 (1922).

Barr and *Seila Law* both support the district court's judgment declaring the ACA inseverable and unenforceable. Both applied settled principles to underscore the primacy of express statutory severability and inseverability clauses. *Barr*, 140 S. Ct. at 2349; *Seila Law*, 140 S. Ct. at 2209. Far from supporting petitioners' view that

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[3] *See, e.g.*, 42 U.S.C. § 300gg-15; 26 U.S.C. § 36B.

[4] Pub. L. No. 115-97, § 11081, 131 Stat. 2054 (2017).

statutory interactions may be ignored in light of the presumption of severability, *Barr* explicitly acknowledges there are instances when "surrounding or connected provision[s]" may need to be severed along with the "offending provision" in order to cure a plaintiff's injury. *Barr*, 140 S. Ct. at 2352 n.9 (Kavanaugh, J.).

"Courts address [a] scenario" of interlocking statutory provisions "as it arises." *Id.* at 2352. No such scenario arose in *Barr* because the only constitutional violation was unequal treatment caused by an exception to a ban on robocalling that had no impact on the function of the ban itself. *Id.* at 2352-54. *Seila Law* involved an improper limit on the President's control of a federal agency that similarly did not affect the function of the agency itself. 140 S. Ct. at 2209. Neither *Barr* nor *Seila Law* involved a provision that triggered numerous obligations for both public and private actors. *Id.* at 2209 (noting that the remaining "provisions [of Dodd-Frank] are capable of functioning independently"); *Barr*, 140 S. Ct. at 2353 (Kavanaugh, J.) ("[T]he remainder of the robocall restriction did function independently and fully operate as a law for 20-plus years before the government-debt exception was added."). These many interlocking obligations, which do not function correctly (if at all) without the mandate, are what make this case different from *Barr* or *Seila Law*.

B. Under *Barr* and *Seila Law*, the inseverability clause controls the proper scope of remedy.

Petitioners further err by elevating the drafting history of failed legislation and suppositions about congressional intent above the ACA's enacted text. Indeed, petitioners' argument gets *Barr* and *Seila Law* backwards: Whatever presumptions might exist in the absence of congressional language, "[w]hen Congress includes an

express severability *or nonseverability* clause," the Court's remedial "inquiry is straightforward." *Barr*, 140 S. Ct. at 2349 (Kavanaugh, J.) (emphasis added).[5] The inclusion of "a severability clause indicates 'that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provisions.' . . . [A] nonseverability clause does the opposite." *Id.* (quoting *Alaska Airlines, Inc.*, 480 U.S. at 686).

As state respondents explained (at 37-40), and as the United States has acknowledged before this Court multiple times over the past decade, the ACA contains an inseverability clause—or, in *Barr*'s terminology, a nonseverability clause. Far from being silent on the relationship between the individual mandate and the ACA's other provisions, Congress stated that "[t]he requirement [to buy health insurance] is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." 42 U.S.C. § 18091(2)(I). And it did so three times. *Id.*; *id.* §§ 18091(2)(H), (J). This congressional conclusion dictates this Court's "straightforward" remedial inquiry. *Barr*, 140 S. Ct. at 2349 (Kavanaugh, J). Petitioners make four counterarguments, none of which has merit.

First, petitioners argue that section 18091 is not an inseverability clause because it does not follow a specific statutory formula, and therefore, the mandate's unconstitutionality has no impact on any other part of the ACA. House Rep. 19-20; States Rep. 17. From there, they

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[5] The terms "inseverability," "nonseverability," and "nonseparability" are interchangeable. *See generally* NORMAN J. SINGER AND J.D. SHAMBIE SINGER, 2 SUTHERLAND STATUTORY CONSTRUCTION § 44:8 (7th ed. 2009) (collecting cases and secondary authorities).

argue that this Court should apply its ordinary presumption of severability because it "cannot really know what the two Houses of Congress and the President from the time of the original enactment of the law would have wanted if one provision of a law were declared unconstitutional." *Barr*, 140 S. Ct. at 2350 (Kavanaugh, J.).

Petitioners are wrong to invent a magic-words standard that inseverability clauses must follow to be valid. Severability clauses are so common and so uniform as to be described as "boilerplate," *Seila Law*, 140 S. Ct. at 2209. "Inseverability clauses," by contrast, "are anything but boilerplate." Israel E. Friedman, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903, 911 (1997). For example, the statute at issue in *Heckler v. Matthews*, 465 U.S. 728 (1984), does not meet petitioners' magic-words test of an inseverability clause, but it is well recognized to have "functioned very much like one." Fred Kameny, *Are Inseverability Clauses Constitutional?*, 68 ALB. L. REV. 997, 1006 (2005). So too here.

And petitioners are wrong to say that section 18091 is not an inseverability clause. The Department of Justice conceded on behalf of the very same president who signed the ACA that section 18091 "effectively serves as an inseverability clause." Reply Br. for Fed. Gov't on Severability at 10, *NFIB v. Sebelius*, 567 U.S. 519 (2012). That is because—regardless of their exact form—subsections H through J of section 18091 answer the questions posed by this Court's well-established severability inquiry: They declare unequivocally that "the minimum coverage provision is necessary to make effective the [ACA's] guaranteed-issue and community-rating insurance market reforms." *Id.* Under this Court's long-settled severability jurisprudence, the consequence of that congressional statement is that the remainder of the

ACA's major and minor provisions are inseverable from the individual mandate. That is, Congress's statement tells this Court that these other provisions would not have been passed or "function in a manner consistent with the intent of Congress" absent the now-unconstitutional mandate. *Alaska Airlines*, 480 U.S. at 685.

Second, state petitioners argue that this Court should ignore Congress's statements in 2010 because the 2017 Congress was the body that had the "relevant information" about the proposed amendment. States Rep. 16. This argument ignores the fundamental presumption of continuous reenactment—that is, the presumption that any Congress that amends a statute without removing language adopts the existing language. *See, e.g.*, Kameny, *supra*, at 1024 (describing this presumption as a "legislative counterpart to the common-law principle of stare decisis" and "so basic that one can scarcely imagine going about the business of lawmaking or statutory interpretation without it").[6] This Court applied that presumption in *Barr* when it rejected an argument that the inquiry depended on the subjective intent of any particular Congress. 140 S. Ct. at 2349. Instead, the only relevant "intent" is what is expressed in the U.S. Code. *Id.* That intent did not change in 2017 because the language in the U.S. Code did not.

The text of the law as it stands today thus controls and deviating from that text, as petitioners request, creates problems this Court should avoid. For example, while petitions assume much about Congress's subjective motivations in 2017, they do not dispute that the

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[6] *See also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 339 (2012) ("The real point . . . is that only the legislature has the power both to enact and to disenact statutes.").

TCJA was passed through reconciliation, a procedural mechanism that is limited to addressing budgetary issues. House Rep. 6 n.3 (acknowledging that Senate could not have spoken on non-budgetary issues); States Rep. 19 n.9 (same). But the role of the individual mandate is not a budgetary issue. House Rep. 6 n.3.

In an attempt to turn this vice into a virtue, petitioners instead cite Congress's *failure* to agree on such non-budgetary issues as proof of some relevant intent. *E.g.*, States Rep. 10-11. But, by default, Congress's failure to speak on a topic reveals nothing. *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 381 n.11 (1969) ("In any event, unsuccessful attempts at legislation are not the best of guides to legislative intent."); *cf. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) ("[W]e begin with the oft-repeated warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" (citation omitted)).

Third, petitioners make the closely related argument (*e.g.*, House Rep. 1) that the Court should infer from this failure to reach an agreement to repeal the ACA that section 18091 no longer accurately reflects Congress's preferences regarding remedy. As *Barr* confirmed, petitioners' arguments "may have carried some force back when courts paid less attention to statutory text as the definitive expression of Congress's will," but no more. 140 S. Ct. at 2349. The text governs. *Seila Law*, 140 S. Ct. 2183; *see also Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest.").

Fourth, the U.S. House argues (at 19) that the inseverability clause only addresses the mandate's role in

"creating effective insurance markets," and that the "relevant markets were 'created' years before 2017." This argument reflects a poor understanding of how financial markets work. They are not shopping malls that are built and continue to exist until destroyed. Instead, they are constantly created, recreated, and maintained as participants move in and out of the ecosystem, new problems arise, and new products are created.[7] That is why the ACA's text described the mandate as "an essential part of th[e] larger regulation" of the insurance market, "and the absence of the requirement would undercut" that regulation. 42 U.S.C. § 18091(2)(H).

If a majority of Congress found that statutory text no longer valid, it could have removed it, as Congress occasionally does with statutory provisions. It chose not to do so, and this Court "cannot take a blue pencil" to the ACA. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring). Because Congress stated that the individual mandate is essential to the functioning of the ACA, and Congress has not rescinded or contradicted that statutory text, Congress's intent is clear, and this Court's severability analysis here is straightforward. The district court's judgment thus is correct.

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[7] *See, e.g.*, Antony Ireland, 10 Imperative Regulatory Trends for Insurers in 2020, RISK & INSURANCE, Feb. 19, 2020, https://riskandinsurance.com/10-imperative-regulatory-trends-for-insurers-in-2020/ (discussing current trends in insurance); Anna Wilde Mathews and Stephanie Armour, Health Insurers' Pullback Threatens to Create Monopolies, WALL ST. J., Aug. 28, 2016, https://www.wsj.com/articles/health-insurers-pullback-threatens-to-create-monopolies-1472408338 (discussing troubles facing health-insurance exchanges even pre-TCJA).

II. The District Court Properly Declared the ACA Unenforceable Anywhere.

The United States largely agrees with the district court's severability analysis but argues that the district court should have limited its declaration to the provisions of the ACA that harm the individual plaintiffs. The Court should reject this position for three reasons. *First*, by "fail[ing] to distinguish injury from remedy," the United States takes a position that would unnecessarily complicate threshold questions regarding standing. *Gill v. Whitford*, 138 S. Ct. 1916, 1921 (2018). *Second*, the United States' arguments rely on cases that address how to tailor prophylactic injunctions and are inconsistent with the standard of proof established by the Declaratory Judgment Act. *Third*, the United States cannot now challenge to the portions of the district court's judgment that it consented to below.

A. The ACA injures States, and there is no basis to limit the remedy to the individual plaintiffs.

The United States asks (at 19) this Court to assess its jurisdiction by applying the well-established rule that Article III requires only one plaintiff to have been injured in order for a case to proceed to the merits. *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). Specifically, the United States asserts (at 19) that the Court need not decide whether state respondents have standing because individual respondents have standing. It is true that this Court need look no further than the individual plaintiffs to assure itself of its own jurisdiction, but it does not follow that the district court should have similarly limited its remedial analysis. For at least four reasons, the Court should decline to cabin the scope of remedy to the individual plaintiffs.

First, the United States' approach would unnecessarily aggrandize the standing inquiry beyond its role of ensuring federal jurisdiction. Standing doctrine is designed to ensure only that there is a case or controversy sufficient to satisfy Article III. *Town of Chester v. Laroe Estates, Inc.* 137 S. Ct. 1645, 1650 (2017). The requirement that at least one plaintiff have an injury does not mean that there is only one plaintiff whose injuries a federal court may remedy. *See id.* (discussing requirement).

Second, once Article III is satisfied, the burdens and standards of proof differ in the standing and remedial inquiries. Standing imposes burdens of production and persuasion on plaintiffs that vary with the stage of the litigation. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Once these burdens are met, however, plaintiffs' burden for proving entitlement to a remedy depends on the precise claim being asserted, *e.g.*, *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 198 (2014) (discussing who carries burden of proof in patent declaratory judgment actions), and the precise remedy being sought, *e.g.*, *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430 (1967) (discussing availability of remedies). Moreover, while the plaintiffs' burden to establish standing cannot be waived or forfeited, a defendant's objection to a type of remedy or its scope can. *See* DOUGLAS LAYCOCK, ET AL., MODERN AMERICAN REMEDIES: CASES AND MATERIALS 955 (4th ed. 2010). As discussed more below (at 18-19), that is precisely what happened here.

Third, this Court has recognized that there are indeed times when to cure a plaintiff's injury, it is necessary to order relief that extends beyond the plaintiff. *E.g.*, *Gill*, 138 S. Ct. at 1921 (citing *Reynolds v. Sims*, 377 U.S. 533, 561 (1964); *Baker v. Carr*, 369 U.S. 186, 206 (1962)). The remedy should obviously be informed by

plaintiffs' injury, and "[t]his Court has rejected remedial orders that unnecessarily reach out" to address "conditions other than those that violate the Constitution." *Brown v. Plata*, 563 U.S. 493, 531 (2011). But its "precedents do not suggest" that an "otherwise proper remedy for a constitutional violation is invalid simply because it will have collateral effects." *Id.*

Printz v. United States, 521 U.S. 898 (1997), is not to the contrary. In that case, plaintiffs had sought to enjoin five provisions of the Brady Handgun Violence Prevention Act, 18 U.S.C. §§ 922(s)(1)(A)(i)(III), 922(s)(1)(A)(i)(IV), 922(s)(2), 922(s)(6)(B)(i), and 922(s)(6)(C). This Court found that section 922(s)(2) was unconstitutional, and that sections 922(s)(1)(A)(i)(III) and (IV) could not be severed because they were left without meaning after the constitutional ruling. *Printz*, 521 U.S. 933-34. The Court did not enjoin the remaining provisions because they functioned independently—and were thus implicitly severable from those provisions that injured the plaintiffs. *See id.* at 934. The Court said nothing to not cabin its ruling to some subset of inseverable provisions. *Contra* U.S. Resp. 16.

Fourth, as the history of this case demonstrates, adopting the United States' approach would create practical problems when applied to complex litigation. The individual respondents are residents of Texas. ROA.507-08. State respondents are eighteen states, which include Texas and are situated within eight federal circuits. In early 2018, they sought nationwide injunctive and declaratory relief because—as neither the United States nor petitioners dispute—narrower relief would improperly require their citizens to subsidize other States with their general tax dollars. *See* State Respondents Principal Br. at 46-48. State petitioners both intervened and based

their appellate standing on the effect that plaintiffs' *requested* relief would have on them. ROA.220 (intervention); Oral Argument at 7:31-8:35, *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019) (No. 19-10011), https://tinyurl.com/ACAOralArg (appellate standing).

As the United States' own authority acknowledges, there was nothing inherently impermissible in a plaintiff's request for nationwide relief so long as that plaintiff had a good-faith basis to argue that such relief would be necessary to remedy their injuries. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("declin[ing] to adopt the extreme position" that nationwide relief is impermissible). And the district court ruled that the state petitioners' intervention based on the potential scope of remedy was proper.

But if the district court took the United States' approach, it is not clear what it should have done after confirming that the parties had standing to sue and to intervene. In particular, it is unclear whether the court should have (1) limited its declaration to the two individual plaintiffs on whose standing the case had proceeded, even though no party had requested such a limitation; (2) dismissed the case for lack of controversy because state petitioners presumably would have had no interest in whether the ACA is enforced as to two residents of Texas, even though the United States continued to dispute the exact scope of severability; or (3) assessed state respondents' standing even though Article III had been satisfied and the States sought (and received) the same relief the individual respondents sought. Indeed, although the United States argues (at 14) that plaintiffs are entitled to an order preventing "enforcement of the insurance reforms and other ACA provisions that injure

the individual plaintiffs," it still does specify what those "other provisions" are.

B. Because the district court did not order an injunction, many of the United States' arguments are not before the Court.

Adopting the United States' position here would also cause significant confusion regarding the scope and standard for two different remedies: injunctions and declaratory judgments. The authorities upon which the United States relies addresses the former. At the United States' express request, the district court ordered the latter.

The United States cites a number of cases in challenging the district court's remedial order, but they all are derived from *Lewis v. Casey*, 518 U.S. 343 (1996), which raised different concerns than those presented here. *See also Gill*, 138 S. Ct. at 1921 (applying *Lewis*); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) (same).[8] Specifically, *Lewis* addressed whether a federal court could create a very detailed set of quality standards for prison libraries and then enjoin the State from violating those standards. 518 U.S. at 347-48. The lawsuit involved differently situated prisoners who claimed to have been deprived of access to the courts in different ways through different actions by prison officials. *Id.* at 346. Many of the challenged actions did not actually violate the Constitution and thus could not support the

[8] *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), is an exception in that it does not apply *Lewis*. Instead, it merely stands for the unremarkable proposition that if the parties settle the only dispute that gave rise to plaintiffs' standing, plaintiffs must show that they are still injured to continue with their lawsuit. *Id.* at 491-92.

ordered relief. *Id.* at 357. No question of statutory interpretation was involved. Instead, the Court simply said that the limited violations of the Constitution could not support the highly invasive injunction ordered by the district court. *Id.*

While injunctions and declaratory judgments are often considered functionally interchangeable, Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1093 & n.9 (2014), they are not. An injunction, particularly a mandatory injunction that includes prophylactic measures like the one at issue in *Lewis*, itself changes parties' legal obligations in a way that is enforceable, preclusive, and supervised by the courts. *Id.* at 1093-94. Such an order may include prophylactic measures that extend beyond the plaintiff only if the plaintiff establishes that narrower relief is inadequate to remedy his injury, his need for the injunction outweighs the harm to the defendants, and that the public interest would not be harmed. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22-23 (2008).

"A declaratory judgment," by contrast "clarifies existing relations; it does not make new ones." John Harrison, *Severability, Remedies and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56, 82-83 & n.131 (2014) (citing Edwin M. Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 YALE L.J. 1, 5 (1918)). And plaintiffs who seek declaratory judgments are not subject to the same burdens of proof. *See Steffel v. Thompson*, 415 U.S. 452, 466 (1974). Such plaintiffs need not meet the traditional requirements of equity such as irreparable harm. *Id.* at 471. But a declaratory judgment does not formally obligate the government to do anything it was not already required to do. The primary value of a declaratory judgment—particularly

when affirmed by this Court—is to give certainty about how federal courts would apply the statute prospectively. *Id.* at 470.

Constitutional adjudication functions in much the same way. Rhetoric aside, it is well established that federal courts do not make a statute unconstitutional or delete it from the U.S. Code. *E.g.*, *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (noting that judicial review "amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right"). Instead, a court simply states what always was: that a higher law has made a particular provision—and any inseverable provisions—unenforceable. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

The district court did precisely that here. Its order did not affirmatively create unnecessary obligations similar to those at issue in *Lewis.* The district court simply stated what the law always was: that the Constitution has forbidden the individual mandate since the effective date of the TCJA. *Marbury*, 5 U.S. at 176. It likewise determined as a matter of statutory interpretation that the ACA's major and minor provisions could no longer be enforced consistent with Congress's intent as expressed in the text of the ACA. *Cf. Barr*, 140 S. Ct. at 2352. As the United States does not dispute that this analysis was correct, the Court should reject its request to extend principles regarding the proper scope of an injunction to the declaratory-judgment context.

C. The United States should not be permitted to contest the portions of the judgment it agreed to below.

Because United States consented to portions of the judgment below in district court, the Court should not

allow the United States to now challenge those same portions. *See* LAYCOCK, *supra*, at 955. Specifically, in the district court, the United States argued that the injunctive relief that conditional cross-petitioners had requested was not warranted because such a declaration "would be adequate relief against the government." ROA.1581. At oral argument before the district court, the United States again insisted that a declaration about the enforceability of the mandate and any inseverable provisions of the ACA would be both appropriate and adequate. ROA.2946-48.

The Court should not now entertain arguments to the contrary. Both state and individual respondents established standing to pursue the claim before this Court. *See* State Respondents Br. at 18-30. The only remedial question here is whether it was appropriate for the district court to declare inseverable pieces of the ACA to be inseverable. The United States repeatedly conceded that it was. JA.336; ROA.2722; ROA.2946-48; U.S. Resp. 14-15. It cannot now object that the district court issued such a declaration. *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1717 (2017) (Thomas, J., concurring) (recognizing, in different context, that "it has long been the rule that a party may not appeal" from the decision of a district court if "the party consented to the judgment against it"); LAYCOCK, supra, at 955 (citing *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004)).

CONCLUSION

The judgment of the court of appeals should be affirmed in part and reversed in part.

Respectfully submitted.

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