Nos. 19-840, 19-1019

In the
Supreme Court of the United States

CALIFORNIA, ET AL., *Petitioners*,

v.

TEXAS, ET AL., *Respondents.*

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v.

CALIFORNIA, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR RESPONDENTS-CROSS PETITIONERS NEILL HURLEY AND JOHN NANTZ

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CROSS-PETITION QUESTION PRESENTED

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

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I. The District Court correctly held that the ACA is unenforceable nationwide.

No party disputes that the District Court and this Court have Article III power to assess whether the mandate is inseverable from the ACA. Nor does any party contend that—if the mandate is inseverable—Article III imposes geographic bounds on the District Court's (or this Court's) declaratory judgment on severability. The upshot? There is no Article III hurdle to this Court's affirming the District Court's judgment declaring the individual mandate to be unenforceable anywhere in America. That ought to end the matter.

While no party argues for relief to be limited by geography, the United States contends that if the Court concludes the mandate is inseverable, then "any remedy … must be limited to enforcement of the insurance reforms and other ACA provisions that injure" Hurley and Nantz. U.S. Br. 14. Whatever else might be said about that argument, it does not undermine the District Court's judgment, which comports with this Court's traditional severability analysis.

Longstanding severability precedent allows plaintiffs to assert that an unconstitutional provision is inseverable from the rest of the law, and that the whole law must fall as a result. The Court's "cases do not support" an argument otherwise. *NFIB v. Sebelius*, 567 U.S. 519, 697 (2012) (joint dissent); *see, e.g.*, *Williams v. Standard Oil Co. of La.*, 278 U.S. 235, 242-44 (1929) (holding that statutory provisions that did not burden the parties were not severable). "It

would be particularly destructive of sound government to apply such a rule with regard to a multifaceted piece of legislation like the ACA" because "[i]t would take years, perhaps decades, for each of its provisions to be adjudicated separately." *NFIB*, 567 U.S. at 697 (joint dissent).

At any rate, the United States' suggestion—that on remand, the district court should limit its "declaratory judgment or injunction" to those provisions "necessary to redress [Hurley and Nantz's] own cognizable injuries," U.S. Br. 21—stops short of affording full relief to all Plaintiffs. The Fifth Circuit correctly held (PA32a-39a) that the individual mandate injures the State Plaintiffs, too. *See* Tex. Br. 19-30. Like Hurley and Nantz, the State Plaintiffs are entitled to relief "necessary to redress their own cognizable injuries," U.S. Br. 21, which differ in kind and scope from the Individual Plaintiffs' injuries. But remedies for those separate injuries do not meaningfully appear in the United States' analysis.

But even taking the United States at its word, its suggestion makes no practical difference to the outcome here given the parties' litigation choices. Among all the provisions that injure Hurley and Nantz is the individual mandate. The United States' position, like the Court's traditional analysis, allows the Court to decide whether the entire ACA must fall if the mandate is unconstitutional. And if it must, "executive respect in its enforcement policies for controlling decisional law, plus vertical and horizontal *stare decisis* in the courts, will mean that the [ACA] will not and cannot be lawfully enforced against

others." *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2351 n.8 (2020) (plurality op.). In other words, the United States and Hurley and Nantz "take different analytical paths, but … the different paths lead to the same place." *Id.* Presumably that's at least one reason why the United States acknowledged in District Court that a declaration "would be adequate relief against the government." JA337; *see also Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) (Scalia, J.) ("[I]t is presumed that federal officers will adhere to the law as declared by the court."). As a result, "no party" has actually "asked [the Court] to apply a different test" than the traditional one. *Murphy v. NCAA*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring). And that test requires affirming the District Court's declaratory judgment because—as shown below—it faithfully followed the principles reiterated in this Court's most recent severability cases.

II. The ACA is invalid in its entirety.

The District Court correctly held that the individual mandate is not severable. Congress made clear that the mandate was "essential" to the ACA. 42 U.S.C. §§18091(2)(H), (2)(I), (2)(J). The ACA's text, structure, and legislative history all confirm its indispensable role in the statute, *see* Hurley Br. 2-4, 38-40, a point that every member of this Court recognized in *King v. Burwell*, 135 S. Ct. 2480 (2015), Hurley Br. 39-40. Without the mandate, the entire ACA must fall.

Contrary to the House's contentions, neither *AAPC* nor *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), changed the Court's "approach to severability." House Reply Br. 16. Those cases applied the "ordinary severability principles," *AAPC*, 140 S. Ct. at 2348, 2349-54 (plurality opinion), which focus on Congress's intent, *Seila Law*, 140 S. Ct. at 2209.

Petitioners also err by contending that the intent of the 2017 Congress "controls the severability inquiry." CA Reply Br. 16; *see also* House Reply Br. 17-18. "The Court has long applied severability principles in cases like this one, where Congress added an unconstitutional amendment to a prior law." *AAPC*, 140 S. Ct. at 2353 (plurality op). In those cases, the Court has "treated the original, pre-amendment statute as the 'valid expression of legislative intent.'" *Id.* (quoting *Frost v. Corp. Comm'n of Okla.*, 278 U.S. 515, 526-27 (1929)).

That inquiry usually arises when the Court strikes down an amendment adding something new to an existing statute. *Id.* (collecting cases). In those circumstances, it typically takes little interpretive work to conclude that the original Congress thought the rest of the existing statute could stand without the new provision. After all, the original Congress "enacted the statute 'absent such a feature.'" *United States v. Jackson*, 390 U.S. 570, 590 (1968).

Here, however, the individual mandate was not a new provision that Congress added through the Tax Cuts and Jobs Act. Instead, the mandate was part of the ACA from the beginning. *See* Hurley Br. 4-6. The

severability inquiry thus focuses on whether the ACA authors (who drafted the mandate) would want the rest of the statute in place without it—not on what the 2017 Congress would say about it.

Indeed, any accurate inquiry into congressional intent must account for the two Congresses' two very different goals. The 2017 Congress passed the TCJA to overhaul the tax code, and its amendment to §5000A(c) was just one paragraph in a 185-page law accomplishing that effort. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, §11081, 131 Stat. 2054 (2017). In contrast, the 2010 Congress passed the ACA to overhaul the country's health insurance regime, and Congress carefully crafted the ACA's many interlocking provisions—including the mandate—to accomplish its goal of "near-universal coverage." 42 U.S.C. §18091(2)(D). Thus the Court must examine the 2010 Congress's intent to decide whether the ACA can stand without the mandate.[1]

And the 2010 Congress could not have been clearer that the mandate is not severable. Hurley Br. 38-40. Foremost, the ACA has a nonseverability

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[1] California's reliance (at Reply 16) on *Regan v. Time, Inc.*, 468 U.S. 641 (1984), and *Boumediene v. Bush*, 553 U.S. 723 (2008), is misplaced. In *Regan*, the Court decided whether other provisions of an amendment could survive when one provision of that amendment was unconstitutional. 468 U.S. at 652-55 (plurality op.). It did not address the original statute's validity. In *Boumediene*, the Court explained that Congress is aware of the risks of amending a statute when the Court previously advised that such an amendment would be constitutionally suspect. 553 U.S. at 738; *see* Hurley Br. 32.

provision making the mandate the ACA's undisputed cornerstone. *See* 42 U.S.C. §18091. That should resolve the inquiry: A "nonseverability clause leaves no doubt about what the enacting Congress wanted if one provision of the law were later declared unconstitutional." *AAPC*, 140 S. Ct. at 2349 (plurality opinion). Congress "'intend[ed] the validity of the statute in question to depend on the validity of the constitutionally offensive provision.'" *Id.* (citation omitted).

But according to Petitioners, §18091 is not a nonseverability provision at all. Focusing on only two of §18091's subsections, *see* House Reply Br. 18-20 (§18091(2)(I)); CA Reply Br. 17 (§18091(1)), they claim the section is merely a "'finding' concerning the 'effects' of Section 5000A on interstate commerce" that supported Congress's principal claimed authority to impose the mandate. House Reply Br. 18. Yet that narrow reading of §18091 ignores its nine separate subsections that explain *why* the mandate is not severable. *See* 42 U.S.C. §18091(2)(A), (C)-(J). Those sections state (three separate times) that the mandate is "essential" to the ACA, §§18091(2)(H)-(J); and they explain (six separate times) that the mandate must work "together with the other provisions of this Act," §§18091(C), (E)-(G), (I)-(J). As *King* already concluded, *see* 135 S. Ct. at 2493-94, that is far more than just "legislative findings" concerning Congress's power under the Commerce Clause.

Similarly, the House's myopic focus on §18091(2)(I)'s wording—that the mandate is "essential to *creating* effective health insurance

markets"—does not account for the statute's full context. The subsection immediately before §18091(2)(I) explains that the mandate is "essential" because "the absence of the requirement would undercut Federal regulation of the health insurance market." 42 U.S.C. §18091(2)(H). In other words, Congress believed the mandate was "essential" to both creating *and* maintaining effective health insurance markets. When read as a whole, §18091 says everything Congress needs to say to convey its view that the individual mandate isn't severable.

To be sure, Hurley and Nantz acknowledge that §18091 doesn't use the words "the individual mandate is not severable." Perhaps that's what the House means when it claims (at Reply 18) that the "text says nothing about severability." *See also* CA Reply Br. 17. But "Congress need not state its intent in any particular way"; this Court has "never required that Congress use magic words" to rebut background presumptions. *FAA v. Cooper*, 566 U.S. 284, 292 (2012).

Nor does this case raise a reason to be "skeptical" of traditional severability analysis. *Seila Law*, 140 S. Ct. at 2220 (Thomas, J., concurring in part and dissenting in part). While a *severability* clause may "provide[] no guidance as to *which* provision should be severed," *id.* at 2223, and thus require the Court to engage in "'nebulous inquir[ies] into hypothetical congressional intent,'" *id.* at 2220, a *nonseverability* provision creates no such problem. The Court doesn't need to parse the statute to decide which provisions survive and which don't. Instead, it "'follow[s] basic

principles of statutory interpretation,'" *id.* at 2220, and heeds Congress's command that it would prefer no ACA at all to a zombified ACA lacking its foundational provision. Thus, applying the plain language of a nonseverability provision does not present the same impetus for this Court "to take a close look at [its] precedents to make sure that [it is] not exceeding the scope of the judicial power." *Id.* at 2224.

In fact, this Court's ACA precedent already resolves the nonseverability question. The Court already has concluded that "Congress made the guaranteed issue and community rating requirements applicable in every State in the Nation," and that "those requirements only work when combined with the coverage requirement and the tax credits." *King*, 135 S. Ct. at 2494. Those "reforms work together to expand insurance coverage." *Id.* at 2493. Thus, the Court cannot hold that the individual mandate is severable from the community rating and guaranteed issue requirements without both contravening the ACA's plain text *and* effectively overruling *King*.

Even so, Petitioners try "[t]o get around the text" of §18091 by claiming it is no longer relevant because it "was enacted … before" the TCJA. *AAPC*, 140 S. Ct. at 2352 (plurality); *see* CA Reply Br. 18-19; House Reply Br. 20. But §18091 "must be interpreted according to its terms, regardless of when Congress enacted it." *AAPC*, 140 S. Ct. at 2352. If the Court must respect a severability clause enacted in 1934, *see id.*, there is no basis to disregard a nonseverability provision enacted just 10 years ago.

All of this dooms Petitioners' severability arguments, which rely almost entirely on their view of the 2017 Congress's intent. *See* CA Reply Br. 16-19, 21-22; House Reply Br. 17-18, 20-21. Yet that Congress is no help even on Petitioners' own terms. Their arguments rest on the notion that the TCJA "effectively" repealed the mandate, which (they contend) shows that the 2017 Congress believed the mandate was severable. *See, e.g.*, House Reply Br. 17-18. But those arguments merely rehash their standing and merits arguments that the mandate is no longer operational. And Respondents already have outlined all the reasons those arguments fail. *See, e.g.*, Hurley Br. 20-23, 29, 33-34.

Setting that aside, the 2017 Congress's actions actually cut against Petitioners' position. The 2017 Congress could have *expressly* repealed the mandate. But Congress left it in place and instead reduced the penalty for noncompliance. That comports with the conclusion that the mandate compels individual action even absent a penalty—the very conclusion the 2010 Congress adopted by exempting some people from the mandate itself while exempting others only from the penalty. Hurley Br. 20-21. The 2017 Congress's actions show fidelity to that same conclusion.

The only other evidence that Petitioners cite is a few more floor statements and a Congressional Budget Office report. CA Reply Br. 19-21; House Reply Br. 17-18, 21. None are helpful. It is unsurprising that a few Senators said the TCJA was not changing any text in the ACA other than its

penalty, CA Reply Br. 19, because the TCJA did not change any text in the ACA other than its penalty. But floor statements cannot override the *legal effect* of text Congress has enacted—or left unchanged. And whatever value a CBO report has in establishing Congress's intent, *see United States v. Reynard*, 220 F. Supp. 2d 1142, 1151 (S.D. Cal. 2002), the CBO long ago confirmed that "many individuals" will "comply with a mandate, even in the absence of penalties, because they believe in abiding by the nation's laws." Cong. Budget Office, Key Issues in Analyzing Major Health Insurance Proposals 53 (Dec. 2008).[2]

That leaves Petitioners' concerns about "'regulatory disruption.'" House Reply Br. 20-21; CA Reply Br. 21. That issue also turns on whether "Congress would have preferred" an ACA without the mandate to "*no [ACA] at all*." *Seila Law*, 140 S. Ct. at 2210. Congress would have preferred the latter. Hurley Br. 37-48; *supra* at 5-8. In any event, Petitioners ignore the "regulatory disruption" that would occur by leaving the ACA in place without a mandate. At best, those circumstances would exacerbate the problems that the ACA has created. *See* Hurley Br. 8-11. More likely, it "would trigger an adverse-selection death spiral in the health insurance market." *NFIB*, 567 U.S. at 619 (Ginsburg, J.). In short, concerns about "regulatory disruption" support inseverability.

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[2] *Amici*'s statements are not evidence of congressional intent. *See* CA Reply Br. 20.

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Petitioners' rhetoric notwithstanding, this is not a game of "gotcha." *NFIB* held that the mandate could survive only as a tax. Hurley Br. 26-28. And the only four Justices to pass on the question concluded that, if the mandate did not survive, the entire ACA must fall. *NFIB*, 567 U.S. at 691-706 (joint dissent). Yet Congress still chose to eliminate the tax penalty: the only thing saving the mandate—and, by extension, the entire ACA—from extinction. This is not the first time that Congress has chosen to ignore the Court's warnings about a law's constitutionality. *See, e.g.*, *Boumediene*, 553 U.S. at 738-39. Those choices have consequences. The Court has not previously hesitated to hold Congress to them. It shouldn't hesitate to do so here either.

CONCLUSION

The Court should affirm the Fifth Circuit's judgment that the individual mandate violates the Commerce Clause, and affirm the District Court's judgment that the individual mandate is not severable from the ACA.

Respectfully submitted.

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