SUPREME COURT OF THE UNITED STATES

Nos. 19–840 and 19–1019

CALIFORNIA, ET AL., PETITIONERS
19–840 *v.*
TEXAS, ET AL.

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19–1019 *v.*
CALIFORNIA, ET AL.

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

[June 17, 2021]

JUSTICE THOMAS, concurring.

There is much to commend JUSTICE ALITO's account of "our epic Affordable Care Act trilogy." *Post*, at 1 (dissenting opinion). This Court has gone to great lengths to rescue the Act from its own text. *Post,* at 1–2. So have the Act's defenders, who argued in first instance that the individual coverage mandate is the Act's linchpin, yet now, in an about-face, contend that it is just a throwaway sentence.

But, whatever the Act's dubious history in this Court, we must assess the current suit on its own terms. And, here, there is a fundamental problem with the arguments advanced by the plaintiffs in attacking the Act—they have not identified any unlawful action that has injured them. *Ante*, at 5, 11, 14–16. Today's result is thus not the consequence of the Court once again rescuing the Act, but rather of us adjudicating the particular claims the plaintiffs chose to bring.

I

This Court first encountered the Act in 2011. That case

involved the constitutionality of the Act's individual coverage mandate. *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 530 (2012). Despite correctly recognizing that Congress' enumerated powers did not allow it to impose such a mandate, the Court nonetheless upheld it by characterizing the "financial penalty" imposed on those who failed to comply with the mandate as a "tax." *Id.,* at 574.

That curious approach left us with no need to address a subsidiary question on which we had also granted review: whether the Act was inseverable from the mandate and thus would need to fall if the mandate were unconstitutional. The parties challenging the law argued "yes." And the Government agreed in part. It stressed that the mandate could not be severed from two other important features of the Act: the "guaranteed-issue" provision—which bars insurers from denying coverage based on medical conditions or history—and the "community-rating" provision—which bars insurers from charging individuals higher premiums for similar reasons. Brief for Respondents in *National Federation of Independent Business* v. *Sebelius*, O. T. 2011, No. 11–393, pp. 44–54; see 42 U. S. C. §§300gg–1, 300gg–3, 300gg–4(a), 300gg(a)(1), 300gg–4(b).

According to the Government, the mandate was "necessary to make those [other] reforms effective." Brief for Respondents in No. 11–393, at 44. It noted that "Congress's findings expressly state that enforcement of those provisions without a minimum coverage provision would *restrict* the availability of health insurance and make it *less* affordable—the opposite of Congress's goals in enacting the Affordable Care Act." *Id.,* at 44–45; see §§18091(2)(H)–(J). And as JUSTICE ALITO discusses in more detail, at the time we decided *NFIB*, "it was widely thought that without the mandate much of the Act—and perhaps even the whole scheme—would collapse." *Post*, at 1, 27–29.

This Court also embraced that view when we reencountered the Act in 2015. *King* v. *Burwell*, 576 U. S. 473. Saving the Act again through a feat of linguistic ingenuity—this time by redefining "State" to mean "'State or the Federal Government,'" *id.,* at 498 (Scalia, J., dissenting)—the Court explained that "Congress [had] found that the guaranteed issue and community rating requirements would not work without the [mandate]," *id.,* at 482; see also *post*, at 5 (ALITO, J., dissenting).

But times have changed. In this suit, the plaintiffs assert that the mandate is unconstitutional because it no longer imposes financial consequences and thus cannot be justified as a tax. And given that the mandate is unconstitutional, *other* portions of the Act that actually harm the plaintiffs must fall with it. In response to this theory, the current administration contends that the mandate can be severed from the rest of the Act. Letter from E. Kneedler, Deputy Solicitor General, to S. Harris, Clerk of Court (Feb. 10, 2021) (notifying the Court of the Federal Government's change in position). The Act's other defenders agree. Brief for Petitioners 35–49. In other words, those who would preserve the Act must reverse course and argue that the mandate has transformed from the cornerstone of the law into a standalone provision.

II

On all of this JUSTICE ALITO and I agree. Where we part ways is on the relief to which the plaintiffs are entitled. The Constitution gives this Court only the power to resolve "Cases" or "Controversies." Art. III, §2. As everyone agrees, we have interpreted this language to require a plaintiff to present an injury that is traceable to a particular "unlawful" action. *Ante,* at 5, 11, 14–16; *post*, at 9–10 (ALITO, J., dissenting). And in light of the specific theories and arguments advanced in this suit, I do not believe that

the plaintiffs have carried this burden. As the majority explains in detail, the individual plaintiffs allege only harm caused by the bare existence of an unlawful statute that does not impose any obligations or consequences. *Ante*, at 5–10. That is not enough. The state plaintiffs' arguments fail for similar reasons. Although they claim harms flowing from enforcement of certain parts of the Act, they attack only the lawfulness of a *different* provision. None of these theories trace a clear connection between an injury and unlawful conduct.

JUSTICE ALITO does not contest that analysis. Rather, he argues that the state plaintiffs can establish standing another way: through "inseverability." *Post*, at 15 ("First, [the States] contend that the individual mandate is unconstitutional . . . . Second, they argue that costly obligations imposed on them by other provisions of the ACA cannot be severed from the mandate. If both steps of the States' argument that the challenged enforcement actions are unlawful are correct, it follows that the Government cannot lawfully enforce those obligations against the States"). This theory offers a connection between harm and unlawful conduct. And, it might well support standing in some circumstances, as it has some support in history and our case law. See *post,* at 16–20; Lea, Situational Severability, 103 Va. L. Rev. 735, 764–776 (2017).

But, I do not think we should address this standing-through-inseverability argument for several reasons. First, the plaintiffs did not raise it below, and the lower courts did not address it in any detail. 945 F. 3d 355, 386, n. 29 (CA5 2019). That omission is reason enough not to address this theory because "'we are a court of review, not of first view.'" *Brownback* v. *King*, 592 U. S. ___, ___, n. 4 (2021) (slip op., at 5, n. 4). Second, the state plaintiffs did not raise this theory in their opening brief before this Court, see Brief for

Respondent/Cross-Petitioner States 18–30,[1] and they did not even clearly raise it in reply.[2] Third, this Court has not addressed standing-through-inseverability in any detail, largely relying on it through implication. See *post*, at 16–20; *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 91 (1998) ("We have often said that drive-by jurisdictional rulings . . . have no precedential effect"). And fourth, this Court has been inconsistent in describing whether inseverability is a remedy or merits question. To the extent the parties seek inseverability as a remedy, the Court is powerless to grant that relief. See *Murphy* v. *National Collegiate Athletic Assn.*, 584 U. S. ___, ___–___ (2018) (slip op., at 3–4) (THOMAS, J., concurring); see also *Barr* v. *American Assn. of Political Consultants*, 591 U. S. ___, ___, n. 8 (2020)

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[1]The States instead raised the two pocketbook injury theories discussed by the Court, *ante*, at 10; Brief for Respondent/Cross-Petitioner States 19–28, along with another irrelevant theory. Both theories focused only on the mandate's unlawfulness. The dissent points to certain language arguably touching on standing-through-inseverability, *post*, at 13–14, but I respectfully disagree. That language addresses a different theory—the argument that the unlawful mandate harms the States by increasing the cost of complying with other Act provisions, such as reporting requirements relating to the mandate. *Ante*, at 14–16; Brief for Respondent/Cross-Petitioner States 20–25 (discussing how "the individual mandate itself increased the costs to state respondents in at least six ways" (brackets and internal quotation marks omitted)). As the Court notes, "[n]o one claims these other provisions violate the Constitution." *Ante*, at 16. And, the Court does not address the argument that these provisions are otherwise unlawful. *Ante*, at 10 ("declin[ing] to consider" the standing-through-inseverability theory raised by the dissent "on behalf of the state plaintiffs").

[2]This lack of legal development is particularly significant because standing-through-inseverability—assuming it is a legitimate theory of standing—is fundamentally a merits-like exercise that requires courts to apply ordinary principles of statutory interpretation to determine if it is at least "arguable" that a statute links the lawfulness of one provision to the lawfulness of another. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 89 (1998). Thus, a failure to develop a standing-through-inseverability argument poses a significant obstacle to review.

(plurality opinion) (slip op., at 16, n. 8). Thus, standing-through-inseverability could only be a valid theory of standing to the extent it treats inseverability as a merits exercise of statutory interpretation. See *Post*, at 15–16 (ALITO, J., dissenting); Lea, *supra*, at 764–776. But petitioners have proposed no such theory.

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The plaintiffs failed to demonstrate that the harm they suffered is traceable to unlawful conduct. Although this Court has erred twice before in cases involving the Affordable Care Act, it does not err today.