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VIA CM/ECF

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RE: *State of Texas et al. v. United States et al.*, No. 19-10011
Response to the Court's June 26, 2019 order

Dear Mr. Cayce:

The United States respectfully files this letter brief in response to the Court's June 26, 2019 order. For the reasons discussed below, this case continues to present a live case or controversy between plaintiffs and the United States. There is no dispute that a live case or controversy existed when the United States filed a notice of appeal. Although the United States has informed the Court that it now agrees with the district court's conclusion that the individual mandate is unconstitutional and wholly inseverable, the government remains an appellant in this case and, critically, continues to enforce the Affordable Care Act (ACA), including the provisions that form the basis for plaintiffs' standing. In those circumstances, under *United States v. Windsor*, 570 U.S. 744 (2013), the case continues to present a justiciable controversy, especially

since the government also disagrees with the scope of relief entered by the district court.

Because there is a live case or controversy between plaintiffs and the United States, the question whether the intervenors also have standing is immaterial. That said, the Supreme Court's recent decision in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), confirms that the U.S. House of Representatives lacks standing in this Court. And the state intervenors have not met their burden to demonstrate standing. Although the presence of a continuing case or controversy means that the Court need not address the proper disposition of this appeal if no party on appeal has standing, if the government's change in position were thought to moot the appeal, the proper disposition would be to dismiss the appeal without vacating the judgment below. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994).

I. This Appeal Continues To Present a Live Case or Controversy Between the United States and Plaintiffs

The Supreme Court's decision in *United States v. Windsor*, 570 U.S. 744 (2013), demonstrates that this case continues to present a live case or controversy. In the *Windsor* litigation, the Executive Branch refused to defend a federal statute that had precluded the surviving spouse of a same-sex couple from receiving a spousal tax deduction. The district court ruled that the statute was unconstitutional and ordered a tax refund to the surviving spouse; although the Executive Branch agreed with the

district court's legal conclusion, it appealed the judgment and continued to enforce the statute by withholding the refund pending final judicial resolution.

The Supreme Court ruled that "the United States retains a stake sufficient to support Article III jurisdiction on appeal and in proceedings before this Court." 570 U.S. at 757. The district-court judgment injured the United States by ordering it to pay the refund, and even though "the Executive may [have] welcome[d]" that order "if it [were] accompanied by the constitutional ruling" the Executive Branch wanted, the order still "establishe[d] a controversy sufficient for Article III jurisdiction" on appeal. *Id.* at 758; *see ASARCO Inc. v. Kadish*, 490 U.S. 605, 619 (1989) (finding an Article III controversy where a defendant challenged "a final judgment altering tangible legal rights"). The Court explained that "the refusal of the Executive to provide the relief sought suffices to preserve a justiciable dispute as required by Article III." *Windsor*, 570 U.S. at 759; *see id.* (relying on *INS v. Chadha*, 462 U.S. 919 (1983), where the Supreme Court "h[e]ld that the INS was sufficiently aggrieved by the Court of Appeals decision prohibiting it from taking action it would otherwise take," even though the INS agreed with the Ninth Circuit that the statutory provision at issue was unconstitutional).[1]

[1] Although the United States' continued enforcement of the ACA despite its agreement with the district court's conclusion that the ACA is invalid is sufficient to satisfy Article III's case or controversy requirement, any "prudential" concerns about "adversarial presentation of the issues" is eliminated by the vigorous defense of the ACA presented by the House and the intervenor states—regardless of whether they are treated as proper intervenors or amici. *See Windsor*, 570 U.S. at 760.

Windsor makes clear that this case continues to present a live case or controversy. The individual plaintiffs alleged that they are "subject to the individual mandate and object[] to being required by federal law to comply with it." ROA.507-508. They also asserted that, "[i]n the absence of the ACA," they "would purchase a health-insurance plan different from the ACA-compliant plans that they are currently required to purchase." ROA.529. In other words, plaintiffs contend that the ACA's individual mandate and its inseverable insurance reforms increase the costs and decrease the options of the insurance that the individual plaintiffs and others can choose to buy. Although the government agrees that the individual mandate is unconstitutional, it continues to enforce the ACA—including the insurance-market regulations that are the source of plaintiffs' injury—and will continue to do so pending a final judicial determination of the constitutionality of the individual mandate as well as the severability of the ACA's other provisions. As in *Windsor*, the government's refusal to "provide the relief sought suffices to preserve a justiciable dispute as required by Article III." 570 U.S. at 759; *cf. Food Mktg. Inst. v. Argus Leader Media*, No. 18-481, 2019 WL 2570624, at *4 (U.S. June 24, 2019) (concluding that a justiciable controversy remained because the government "represented unequivocally" that it would not voluntarily moot the controversy absent a final judicial order, and "[t]hat is enough to satisfy Article III"). And, as in *Windsor*, this Court's "decision will have real meaning," 570 U.S. at 758-59: If the Court upholds the ACA, the Executive Branch will continue to enforce it; and if the Court rules for plaintiffs and that

decision goes into effect, the Executive Branch will no longer enforce with respect to plaintiffs the ACA provisions that actually injure them.

Windsor cannot be distinguished on the basis that the judgment in that case "order[ed] the United States to pay Windsor the refund she seeks," 570 U.S. at 757, while the judgment in this case declared that the individual mandate is unconstitutional and inseverable from the rest of the ACA, ROA.2785. Here, as in *Windsor*, the district court adjudicated a statute invalid, entering a judgment that imposes a cognizable injury on the government by barring it from enforcing the statute. *See ASARCO*, 490 U.S. at 618-19 (judgment at issue giving rise to an injury was a declaratory judgment that a state law authorizing mineral leases on state lands was unconstitutional and could not be enforced). And here, as in *Windsor*, the United States has both appealed that judgment and continued to enforce the statute to the detriment of the plaintiffs pending final judicial resolution of the constitutional question, even though the Executive Branch agrees with the district court's legal conclusions. In both cases, the government's refusal to acquiesce to the relief entered against it by the district court suffices to preserve an Article III controversy.

Finally, even apart from the *Windsor* principle, there remains a live controversy between the United States and plaintiffs because the government does not seek the unqualified affirmance of the judgment below that plaintiffs request. Instead, although the United States has argued (Br. 49) that "[t]he district court correctly held that the individual mandate is unconstitutional . . . and that the remainder of the ACA

is inseverable in turn," the government has explained that the district court's judgment is overbroad. As our brief states, the "court's judgment should be affirmed on the merits, *except insofar as it purports to extend relief to ACA provisions that are unnecessary to remedy plaintiffs' injuries*." *Id.* (emphasis added). Thus, while plaintiffs seek affirmance, the United States seeks a remand. Even if plaintiffs and the United States "are now aligned on the same side of the questions presented for" this Court's review, "the case is not moot because the parties continue to seek different relief." *McDaniel v. Brown*, 558 U.S. 120, 130 (2010) (per curiam) (quotation marks omitted).

II. Intervenor Standing

As discussed above, because the United States continues to enforce the ACA, this appeal of the district court's judgment that the ACA is invalid and non-enforceable presents a justiciable case or controversy between the United States and plaintiffs regardless of whether the intervenors also have standing. That said, the Supreme Court's decisions in *Raines v. Byrd*, 521 U.S. 811 (1997), and *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), demonstrate that the U.S. House of Representatives lacks standing to challenge the district court's judgment below. The state intervenors also have not carried their burden to establish standing to appeal because they have not demonstrated that the district court's judgment injures them: That judgment's invalidation of the ACA, properly construed in light of bedrock legal principles, does not extend beyond the plaintiff states to the intervenor states.

A. U.S. House of Representatives

This Court previously held that the House could participate as an intervenor. *See* Feb. 14, 2019 Order. But the Court did not address whether the House independently had standing. *See Ruiz v. Estelle*, 161 F.3d 814, 829-33 (5th Cir. 1998) (holding that an intervenor need not demonstrate standing when intervening in a case and not seeking relief beyond what was being sought by the parties). *Raines* and *Bethune-Hill* both demonstrate that the House cannot independently demonstrate standing. In *Raines*, the Supreme Court ruled that legislators generally lack Article III standing to vindicate the institutional interests of the legislative body in which they serve. Members of Congress may invoke the power of the federal courts only to assert legal claims to "something to which they *personally* are entitled"—for example, their paycheck or their seat. 521 U.S. at 821. But they cannot participate as an intervenor merely to enforce claimed legislative prerogatives, because such "political battle[s] . . . waged between the President and Congress" are not the kinds of disputes "traditionally thought to be capable of resolution through the judicial process." *Id.* at 819, 827. Here, the House does not assert any injury "in any private capacity" and instead seeks to defend the legislation of a prior Congress. *Id.* at 821. As the House stated in its motion to intervene in this Court (Br. 11), it claims an "institutional interest in defending an Act of Congress." Because the House asserts only non-cognizable "institutional" harm, it lacks standing to challenge the judgment below. 521 U.S. at 821.

That conclusion is confirmed and compelled by the Supreme Court's recent decision in *Bethune-Hill*. There, the Supreme Court held that Virginia's House of Delegates, "as a single chamber of a bicameral legislature, has no standing to appeal the invalidation of the redistricting plan separately from the State of which it is a part." 139 S. Ct. at 1950. In doing so, the Court rejected the House of Delegates' argument that it had standing to assert the institutional interests of the legislative body that enacted the redistricting plan. The Court explained that it had "never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage." *Id.* at 1953; *see id.* ("The Court's precedent thus lends no support for the notion that one House of a bicameral legislature, resting solely on its role in the legislative process, may appeal on its own behalf a judgment invalidating a state enactment."). To the contrary, the Court stressed, "*a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole*." *Id.* at 1953-54 (emphasis added).

Bethune-Hill forecloses the House's standing on appeal because its status as a single body of a bicameral legislature precludes the House's efforts here to assert any purported institutional interests belonging to Congress as a whole. Indeed, the House's lack of standing follows *a fortiori* from *Bethune-Hill*, for two reasons. *First*, separation-of-powers concerns are particularly acute where *federal* legislators are involved, *see Raines*, 521 U.S. at 824 n.8, because the Constitution assigns to the Executive Branch rather than the Legislative Branch the authority and duty to

represent all the sovereign interests of the United States in court, *see Buckley v. Valeo*, 424 U.S. 1, 138-39 (1976) (per curiam). *Second*, in *Bethune-Hill*, the House of Delegates was denied standing even though it was defending a law that concerned redistricting and thus specifically affected its own composition, whereas the U.S. House has no particular interest in the ACA compared to any of the other laws Congress has enacted.

The House has argued elsewhere that *Bethune-Hill* does not undermine its standing to defend the constitutionality of a federal statute, on the ground that *Bethune-Hill* addressed a *state* legislative body while the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), purportedly "stand[s] for the proposition that, when the Executive refuses to defend the validity of an Act of Congress, the House and Senate each institutionally may intervene to do so." Dkt. No. 48, *United States v. Nagarwala*, No. 19-1015 (6th Cir. June 20, 2019). The United States has already explained in this case how the House misreads *Chadha*. *See* U.S. Opp'n to House Intervention Motion 10-12 (Feb. 8, 2019). In *Chadha*, as here, a case or controversy existed without regard to Congress's participation, because even though the Executive Branch agreed with Chadha that the law at issue was unconstitutional, the Executive Branch continued to enforce the law against him. 462 U.S. at 939-40. But that is a basis for concluding that the Executive Branch has standing, not the House. Moreover, unlike here, "both Houses of Congress had intervened" in *Chadha*. *Bethune-Hill*, 139 S. Ct. at 1954 n.5. And, unlike here, "the statute at issue in *Chadha* granted

each Chamber of Congress an ongoing power—to veto certain Executive Branch decisions—that each House could exercise independent of any other body." *Id.* (emphasis omitted). In contrast to the factually unique circumstances present in *Chadha*, the Supreme Court in *Bethune-Hill* squarely held that a single House of a bicameral legislature does not have standing to defend any institutional interest the legislature as a whole may have in the validity of enacted legislation.[2]

B. State Intervenors

The state intervenors lack standing to challenge the district court's declaratory judgment on the ground that it "alter[s]" their "tangible legal rights," *ASARCO*, 490 U.S. at 619, because that judgment, properly construed, does not control the rights of nonparties like the state intervenors or the government's actions with respect to such nonparties. The judgment simply "declares that 26 U.S.C. § 5000A(a) is unconstitutional and inseverable from the remainder" of the ACA, ROA.2785, without expressly specifying whether that declaration may be invoked by plaintiffs or by any other person. Under bedrock legal principles, the judgment itself, as opposed to its underlying legal reasoning, cannot be understood as extending beyond the plaintiff states to invalidate the ACA in the intervenor states.

[2] Because *Raines* and *Bethune-Hill* foreclose any argument that the House has standing in this appeal, this Court need not address whether the House's intervention is timely as to orders issued by the district court that preceded the House's attempt to intervene. *But see* U.S. Opp'n to House Intervention Motion 16-17 (Feb. 8, 2019) (arguing that the House's motion was untimely); Feb. 14, 2019 Order (nonetheless granting House motion to intervene).

The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). That provision by its own terms allows a court to determine the rights of an "interested party seeking such declaration." It does not authorize courts to declare the rights of nonparties. *E.g.*, 10B Charles Alan Wright et al., *Federal Practice & Procedure* § 2771 (4th ed.) (noting that "[a] declaratory judgment is binding on the parties before the court"); John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 Geo. Wash. L. Rev. 56, 82 n.130 (2014) (the Declaratory Judgment Act "provides that a court may declare the rights or other legal relations" that is "specific to the parties," but "[t]he invalidity of a statutory provision is general, and so not the proper subject of a declaratory judgment"). That principle, moreover, is consistent with the Article III rule that a "remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Gill v. Whitford*, 138 S. Ct. 1916, 1921 (2018); *see id.* at 1934 ("[S]tanding is not dispensed in gross: A plaintiff's remedy must be tailored to redress the plaintiff's particular injury.") (quotation marks omitted). It is also consistent with the equivalent equitable principle that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see* Br. of Amici Curiae Samuel L. Bray et al. 3-4 (explaining that, under the Declaratory Judgment Act, a declaration is unavailable

"unless one of the parties to the action could have brought a nondeclaratory action about the same issue against the other party").

Accordingly, the state intervenors do not have standing to appeal the district court's judgment absent a showing that they somehow have a cognizable injury that is fairly traceable to the judgment's invalidation of the ACA in the plaintiff states. Thus, if this Court were to reject the government's reliance on *Windsor* and conclude that the dispute between the United States and plaintiffs is no longer justiciable, and further conclude that the House lacks standing, then the Court would need to determine whether the state intervenors have made the requisite showing. Although the state intervenors did not meet that burden below, given the changed circumstances on appeal, it would be appropriate for this Court to consider any such showing the state intervenors may attempt to make in their supplemental brief. Again, though, because there remains a live controversy between the United States and plaintiffs, there is no need for the Court to resolve these questions.

III. Disposition of the District Court's Judgment

For the reasons explained above, the United States does not believe that its change in position has mooted the controversy. If that view is incorrect, and no intervenor has standing to appeal, the appeal should be dismissed without vacating the judgment below. "[H]istorically, the established rule was to vacate the judgment if the case became moot on appeal." *Staley v. Harris County*, 485 F.3d 305, 310 (5th Cir. 2007) (en banc) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)). In *U.S.*

Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), however, the Supreme Court explained that vacatur typically is not warranted when a matter becomes moot on appeal through the voluntary conduct of the appellant. The United States is the appellant here. Accordingly, if the Court decides that the United States' change in position on appeal has mooted the controversy, and that no intervenor has standing to appeal, the proper disposition of this case would be to dismiss the appeal without vacatur.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2019, I electronically filed the foregoing letter brief with the Clerk of the Court by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/August E. Flentje
AUGUST E. FLENTJE

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the page limit of this Court's June 26, 2019 briefing order because it does not exceed fifteen pages. I further certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared using Microsoft Word 2016 in a proportionally spaced typeface, 14-point Garamond typeface.

s/August E. Flentje
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