January 3, 2020

ATTORNEY GENERAL RAOUL SEEKS U.S. SUPREME COURT REVIEW OF AFFORDABLE CARE ACT LAWSUIT

Chicago — Attorney General Kwame Raoul, as part of a coalition of 20 states and the District of Columbia, today filed a petition with the U.S. Supreme Court seeking review of the 5th Circuit's decision in Texas v. United States, a lawsuit challenging a key provision of the Affordable Care Act (ACA). The 5th Circuit issued a decision in December that held the individual mandate of the ACA unconstitutional and called into question whether the remaining provisions of the ACA could still stand, including those that protect and provide coverage to Americans with preexisting conditions.

In the petition, Attorney General Raoul and the coalition argue the 5th Circuit's decision causes uncertainty that may harm the health of hundreds of thousands of Illinois residents, as well as doctors, hospitals, clinics, businesses, and the health care market in Illinois. In the petition, as well as a motion to expedite consideration of the petition that also was filed today, Raoul and the coalition are asking the court to resolve the case before the end of its current term in June.

"The hundreds of thousands of Illinois residents who rely on the Affordable Care Act cannot afford the uncertainty and confusion resulting from the 5th Circuit's decision," Raoul said. "I am partnering with my colleagues around the country to urge the Supreme Court to take up this case because families deserve clarity when it comes to something as critical as health care coverage."

The lawsuit was originally filed by a Texas-led coalition supported by the president's administration, which argued that Congress rendered the ACA's individual mandate unconstitutional when it reduced the penalty for not obtaining insurance to $0. They further argued that the rest of the ACA should be held invalid as a result of that change.

In an opening brief filed in March, Raoul and the coalition defended the ACA in its entirety, which was supported by a bipartisan group of amici, including scholars, economists, public health experts, hospital and provider associations, patient groups, counties, cities, and more. In December, the 5th Circuit held that the individual mandate is unconstitutional but declined to rule on the validity of the ACA's remaining provisions. The court instead sent the case back to the Northern District of Texas to determine which provisions of the 900-page law are still valid.

Today's filing by Raoul and the coalition states makes clear that patients, doctors, hospitals, employers, states, pharmaceutical companies and more will be impacted by the looming uncertainty of the 5th Circuit's decision. In the petition, the coalition asks the Supreme Court to review the case this term. Raoul and the coalition also highlight important advancements in health care access made under the ACA, including:

- More than 12 million Americans receiving coverage through Medicaid expansion.
- Nearly 9 million individuals nationwide receiving tax credits to help them afford health insurance coverage through individual marketplaces.
- Millions of working families relying on high-quality employer-sponsored insurance plans.
- Important protections prohibiting insurers from denying health insurance to the 133 million Americans with preexisting conditions (like diabetes, cancer, or pregnancy) or from charging individuals higher premiums because of their health status.
- Nearly $1.3 trillion in federal funding being dedicated to keeping Americans healthy and covered, including Medicaid expansion and public health dollars.

Joining Raoul in today’s filing are the attorneys general of California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Massachusetts, Michigan, Minnesota (by and through its Department of Commerce), Nevada, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia, as well as the governor of Kentucky.

No. _____

In the Supreme Court of the United States

THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON, ANDY BESHEAR, THE GOVERNOR OF KENTUCKY, AND THE DISTRICT OF COLUMBIA,

Petitioners,

v.

THE STATE OF TEXAS, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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January 3, 2020

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QUESTIONS PRESENTED

As part of the Patient Protection and Affordable Care Act (ACA), Congress adopted 26 U.S.C. § 5000A. Section 5000A provided that "applicable individual[s] shall" ensure that they are "covered under minimum essential coverage," 26 U.S.C. § 5000A(a); required any "taxpayer" who did not obtain such coverage to make a "[s]hared responsibility payment," *id.* § 5000A(b); and set the amount of that payment, *id.* § 5000A(c). In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 574 (2012), this Court held that Congress lacked the power to impose a stand-alone command to purchase health insurance but upheld Section 5000A as a whole as an exercise of Congress's taxing power, concluding that it affords individuals a "lawful choice" between buying health insurance or paying a tax in the amount specified in Section 5000A(c). In 2017, Congress set that amount at zero but retained the remaining provisions of the ACA. The questions presented are:

1. Whether the individual and state plaintiffs in this case have established Article III standing to challenge the minimum coverage provision in Section 5000A(a).

2. Whether reducing the amount specified in Section 5000A(c) to zero rendered the minimum coverage provision unconstitutional.

3. If so, whether the minimum coverage provision is severable from the rest of the ACA.

PARTIES TO THE PROCEEDING

Petitioners the States of California, Connecticut, Delaware, Hawaii, Illinois, Massachusetts, Minnesota (by and through its Department of Commerce), New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington, Andy Beshear, the Governor of Kentucky, and the District of Columbia are intervenor-defendants in the district court and appellants in the court of appeals. Petitioners the States of Colorado, Iowa, Michigan, and Nevada intervened as defendants in the court of appeals.

The United States House of Representatives intervened as a defendant in the court of appeals and will be concurrently filing its own petition for a writ of certiorari.

Respondents the United States of America, the United States Department of Health and Human Services, Alex Azar II, Secretary of the U.S. Department of Health and Human Services, the United States Internal Revenue Service, and Charles P. Retting, the Commissioner of the Internal Revenue Service, are defendants in the district court and filed a notice of appeal. They remained appellants in the court of appeals, but ultimately filed their appellate brief on the appellees' schedule and defended the district court's judgment.

Respondents the States of Texas, Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Louisiana, Mississippi by and through Governor Phil Bryant, Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Utah, and West Virginia, and individuals Neill Hurley and John Nantz, are plaintiffs in the district court and appellees in the court of appeals.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit:

Texas, et al. v. United States, et al., No. 19-10011 (Dec. 18, 2019) (affirming in part and vacating in part the district court's grant of partial final judgment)

U.S. District Court for the Northern District of Texas:

Texas, et al. v. United States, et al., No. 4:18-cv-167-O (Dec. 30, 2018) (granting partial final judgment on Count I of plaintiffs' amended complaint)

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PETITION FOR A WRIT OF CERTIORARI

The States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Massachusetts, Michigan, Minnesota (by and through its Department of Commerce), Nevada, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington, Andy Beshear, the Governor of Kentucky, and the District of Columbia, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-113a) will be reported at ___ F.3d ____ (5th Cir. 2019), and is also available at 2019 WL 6888446. The relevant orders of the district court are reported at 340 F. Supp. 3d 579 (App. 163a-231a) and 352 F. Supp. 3d 665 (App. 117a-162a).

JURISDICTION

The court of appeals had jurisdiction over petitioners' appeal of the district court's partial final judgment under 28 U.S.C. § 1291. The judgment of the court of appeals was entered on December 18, 2019. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this petition. App. 232a-244a.

INTRODUCTION

The Patient Protection and Affordable Care Act (ACA) affects the health and well-being of every American and has transformed our Nation's healthcare system. One of its hundreds of provisions is 26 U.S.C. § 5000A. As originally enacted, that provision required most Americans either to maintain a minimum level of healthcare coverage or to pay a specified amount to the Internal Revenue Service. This Court upheld that provision as an exercise of Congress's taxing power, affording individuals a "lawful choice" between buying insurance or paying the tax. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574 (2012) (*NFIB*). In 2017, Congress amended Section 5000A to set at zero the amount of the tax imposed on those who choose not to maintain healthcare coverage—thus rendering the minimum coverage provision effectively unenforceable. At the same time, Congress left every other provision of the ACA in place.

The lower courts in this case held that the plaintiffs have standing to challenge the now-unenforceable minimum coverage provision and struck down that provision as an unconstitutional command to purchase health insurance. The district court also would have invalidated the entire ACA, on the theory that the minimum coverage provision is "so interwoven" with the rest of the Act that it could not be severed from any other provision. App. 224a. A panel of the court of appeals recognized that the district court's severability analysis was at least "incomplete." *Id.* at 65a. But instead of resolving that legal issue itself, the panel majority remanded for the district court to "pars[e] through the over 900 pages of the post-2017 ACA" with a "finer-toothed comb" to determine whether "particular segments" of the Act might be

"inextricably linked" to the minimum coverage provision. *Id.* at 65a, 68a.

The court of appeals' decision warrants immediate review. This Court normally grants certiorari when a lower court has invalidated a federal statutory provision on constitutional grounds, and that customary approach is especially appropriate here. The actions of the lower courts have cast doubt on hundreds of other statutory provisions that together regulate a substantial portion of the Nation's economy. States, health insurers, and millions of Americans rely on those provisions when making important—indeed, life-changing—decisions. The remand proceedings contemplated by the panel majority would only prolong and exacerbate the uncertainty already caused by this litigation.

The decision below is both ripe for review and incorrect on every point. As the dissent explains, after the 2017 amendment to the ACA, Section 5000A "does nothing more than require individuals to pay zero dollars to the IRS if they do not purchase health insurance, which is to say it does nothing at all." App. 75a (King, J., dissenting). The individual plaintiffs lack "standing to challenge a law that does nothing," *id.*, and the state plaintiffs have failed to substantiate their alleged fiscal injuries, *id.* at 86a. In any event, there is no constitutional problem. As amended, Section 5000A is merely a precatory provision that (at most) encourages Americans to buy health insurance but does not compel anyone to do anything. *Id.* at 91a-93a, 97a-98a. Finally, any question of severability in this case requires no extended analysis. Severability turns on the intent of Congress, and here "Congress removed the coverage requirement's only enforcement mechanism but left the rest of the Affordable Care Act

in place." *Id.* at 73a. It "is difficult to imagine a plainer indication that Congress considered the coverage requirement entirely dispensable and, hence, severable." *Id.* There is no need for any "searching inquiry" (*id.* at 68a (majority opinion)) into hundreds of distinct provisions, and no reason for this Court to defer review given the enormous practical significance of this case.

STATEMENT

A. Legal Background

1. Congress enacted the ACA in 2010 to expand healthcare coverage, lower the cost of healthcare, and improve health and quality of life. *See NFIB*, 567 U.S. at 538. "The Act's 10 titles stretch over 900 pages and contain hundreds of provisions." *Id.* at 538-539. Collectively, those provisions affect every level of government and almost every aspect of an industry that accounts for nearly one-fifth of the Nation's economy. D.Ct. Dkt. 91-2 at 164.[1]

Among its many reforms, the ACA expanded access to healthcare coverage by making a series of reforms in the individual health insurance market. *See generally King v. Burwell*, 135 S. Ct. 2480, 2485-2487 (2015); D.Ct. Dkt. 91-1 at 16-19. It made health insurance more affordable by providing billions of dollars of subsidies in the form of refundable tax credits to low- and middle-income Americans. *King*, 135 S. Ct. at 2487, 2489 (citing 26 U.S.C. § 36B and 42 U.S.C. §§ 18081, 18082). It created government-run health insurance marketplaces (known as "Exchanges") that allow consumers "to compare and purchase insurance

[1] Citations to "D.Ct. Dkt." are to the docket in N.D. Tex. Case No. 4:18-cv-167-O.

plans." *Id*. at 2485, 2487. And it adopted the provision at issue in this case, 26 U.S.C. § 5000A, which "generally require[d] individuals to maintain health insurance coverage or make a payment to the IRS." *Id.* at 2486.

The ACA also increased the number of people eligible for healthcare coverage through Medicaid. *See generally NFIB*, 567 U.S. at 541-542.[2] As a result, thirty-six States and the District of Columbia have expanded their Medicaid programs, with the federal government covering most of the cost of that expansion. *See* 42 U.S.C. § 1396d(y)(1).[3] Nearly 12 million individuals received healthcare coverage in 2016 through the ACA's Medicaid expansion. D.Ct. Dkt. 15-2 at 10-11.

Other provisions of the ACA protect consumers and their families. *See, e.g.*, D.Ct. Dkt. 91-1 at 96-97. The Act bars insurance companies from denying individuals coverage because of their health status (the "guaranteed issue" requirement), 42 U.S.C. §§ 300gg, 300gg-1; refusing to cover pre-existing health conditions, *id.* § 300gg-3; or charging higher premiums to

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[2] The ACA originally required each State to expand its Medicaid program or risk losing all of its federal Medicaid funds. *See NFIB*, 567 U.S. at 542. This Court struck down that requirement under the Spending Clause, *see id*. at 575-585 (plurality opinion); *id*. at 671-689 (joint dissent), but it held that States that wanted to expand their Medicaid programs could do so and receive the federal funding made available by the ACA, *see id*. at 585-586 (plurality opinion); *id*. at 645-646 (opinion of Ginsburg, J.).

[3] *See generally Status of State Medicaid Expansion Decisions: Interactive Map*, Kaiser Family Found. (Nov. 15, 2019), https://tinyurl.com/y9gseqv5 (Medicaid Map). Twenty-six of the States that have expanded Medicaid are parties to this litigation, including eighteen of the state petitioners and eight of the state respondents. *Id.*

less healthy individuals (the "community-rating" requirement), *id.* § 300gg-4. *See also NFIB*, 567 U.S. at 650-651. Because of those protections, more than 100 million Americans with pre-existing conditions—including cancer, diabetes, asthma, high blood pressure, and pregnancy—cannot be denied coverage or charged higher premiums because of their health status. *See* D.Ct. Dkt. 91-1 at 14, 93. The ACA further requires insurers to allow young adults to stay on their parents' health insurance plans until age 26, 42 U.S.C. § 300gg-14; prohibits insurers from imposing lifetime or annual limits on the value of benefits provided to any individual, *id.* § 300gg-11; and mandates that insurance plans cover ten essential health benefits, including prescription drugs, maternity and newborn care, and emergency services, *id.* § 18022.

The ACA reformed the Nation's healthcare system in other important respects as well. For example, the Act changes the way Medicare payments are made, encouraging healthcare providers to deliver higher quality and less expensive care. D.Ct. Dkt. 91-1 at 23-25, 29-30. It authorizes the FDA to approve "biosimilar[s]," drugs that are similar to but less expensive than ones that have already been approved. *Id.* at 23-24. The Act also creates the Prevention and Public Health Fund, which has supported state and local responses to emerging public health risks such as flu outbreaks and the opioid epidemic. *Id.* at 27, 30; *see also* 42 U.S.C. §§ 280h-5, 280k, 280k-1, 280k-2, 280k-3, 294e-1, 299b-33, 299b-34, 300u-13, 300u-14, 1396a. And the ACA invests billions of dollars in local community health programs. D.Ct. Dkt. 91-1 at 27-29.

Nearly a decade after its enactment, the ACA has achieved many of its goals. D.Ct. Dkt. 91-1 at 99-101.

Among other accomplishments, the Nation's uninsured rate dropped by 43 percent shortly after the Act's major reforms took effect. *Id.* at 9; *see also id.* at 19-20, 99; D.Ct. Dkt. 15-2 at 10-11. In 2017, 10.3 million people received coverage through the Exchanges, with over 8 million receiving tax credits to help them pay their premiums. D.Ct. Dkt. 15-1 at 97-98; D.Ct. Dkt. 91-1 at 17. An estimated 125,000 fewer patients died from conditions acquired in hospitals in 2015 than in 2010, due in part to an ACA-funded program. D.Ct. Dkt. 91-1 at 11. And the costs of "uncompensated care" (*i.e.*, providing healthcare services to individuals who are unable to pay) fell by a quarter nationally between 2013 and 2015—and by nearly half in States that had expanded Medicaid. *Id.* at 12-13, 101.

2. The ACA has been the subject of frequent legal challenges. *See, e.g.*, *NFIB*, 567 U.S. 519; *King*, 135 S. Ct. 2480. In *NFIB*, this Court addressed the constitutionality of 26 U.S.C. § 5000A. As originally enacted, that section provided that all "applicable individual[s] shall" ensure that they are "covered under minimum essential coverage." 26 U.S.C. § 5000A(a); *see also id.* § 5000A(f) (defining "minimum essential coverage"). Any "taxpayer" who did not obtain such coverage was required to make a "[s]hared responsibility payment," *id.* § 5000A(b), in the amount specified in Section 5000A(c).

With differing majorities, this Court upheld the constitutionality of Section 5000A. Writing for himself, Chief Justice Roberts first concluded that Section 5000A would exceed Congress's Commerce Clause powers if it were construed to impose an enforceable, stand-alone requirement that individuals purchase health insurance. *NFIB*, 567 U.S. at 547-558 (Roberts,

C.J.). The Chief Justice reasoned that the Commerce Clause gave Congress the power to "regulate Commerce," not to require individuals to "become active in commerce by purchasing a product." *Id.* at 550, 552 (Roberts, C.J.) (emphasis omitted). Four dissenting Justices reached the same conclusion. *See id.* at 657 (joint dissent). The same five Justices also held that an enforceable command to purchase minimum coverage could not be sustained under the Necessary and Proper Clause. *See id.* at 560 (Roberts, C.J.); *id.* at 653-655 (joint dissent).

In a separate part of his opinion, announcing the judgment of a different majority of the Court, the Chief Justice reasoned that Section 5000A could be upheld as a valid exercise of Congress's power to "lay and collect Taxes." *NFIB*, 567 U.S. at 561, 574.[4] He explained that it was "fairly possible" to read Section 5000A as imposing "a tax hike on certain taxpayers who do not have health insurance." *Id.* at 563 (Roberts, C.J.). Section 5000A as a whole was not a command to purchase insurance, but instead offered individuals a "lawful choice" between forgoing health insurance and paying higher taxes, or buying health insurance and paying lower taxes. *Id.* at 573-574 & n.11.

3. The ACA has also engendered passionate political debate. Between 2010 and 2016, Congress considered several bills to defund, delay, or otherwise amend

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[4] Four Justices joined Part III-C of the Chief Justice's opinion, which upheld Section 5000A under Congress's taxing powers. *See NFIB* 567 U.S. at 589 (opinion of Ginsburg, J.). Those Justices did not formally join Parts III-B and III-D of that opinion, which discussed the interpretation of Section 5000A. *Id.*

the ACA, including legislation that would have repealed the entire Act. *See* App. 8a. Except for a few modest changes that attracted bipartisan support, those efforts failed. *Id.*[5]

In 2017, congressional opponents of the ACA renewed their efforts to repeal many of the Act's most important reforms. Several votes were taken; each one failed.[6] Congress did, however, make one change to the law in December 2017. As part of the Tax Cuts and Jobs Act (TCJA), Congress reduced to zero the amount of the tax imposed by Section 5000A(c), effective January 1, 2019. *See* Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017). The TCJA did not make any other changes to the ACA. Indeed, several congressional proponents of the bill emphasized that it would not affect other aspects of the ACA. *See, e.g.*, 163 Cong. Rec. S7672 (daily ed. Dec. 1, 2017) (statement of Sen. Toomey that TCJA does not "change any of the subsidies" or "anything except one thing"); 163 Cong. Rec. S7666 (daily ed. Dec. 1, 2017) (statement of Sen. Scott that TCJA "take[s] nothing at all away from

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[5] *See generally* Redhead & Kinzer, Cong. Research Serv., *Legislative Actions in the 112th, 113th, and 114th Congresses to Repeal, Defund, or Delay the Affordable Care Act* at 1 (Feb. 7, 2017).

[6] *See, e.g.*, American Health Care Act of 2017, H.R. 1628, 115th Cong. (2017); Better Care Reconciliation Act of 2017, S. Amendment 270, 115th Cong. (2017); Obamacare Repeal Reconciliation Act of 2017, S. Amendment 271, 115th Cong. (2017); Health Care Freedom Act of 2017, S. Amendment 667, 115th Cong. (2017); *see generally* Roubein, *TIMELINE: The GOP's Failed Effort to Repeal Obamacare*, The Hill, Sept. 26, 2017, https://tinyurl.com/s2x2g6o.

anyone who needs a subsidy, anyone who wants to continue their coverage").[7]

B. Proceedings Below

1. Two months after Congress enacted the TCJA, two private individuals and a group of States filed this suit against the federal government. App. 10a. The plaintiffs argued that because Congress reduced the amount of the alternative tax provided for in Section 5000A(c) to zero, Section 5000A(a) was now unconstitutional on the ground that it could no longer be construed as part of a tax. *Id.* at 10a-11a. They further argued that the rest of the ACA was now invalid as well, because the minimum coverage provision was "essential to and inseverable from" the remainder of the Act. *Id.* at 10a. They sought declaratory relief and preliminary and permanent injunctions forbidding the federal defendants from enforcing any provision of the ACA or its associated regulations. *See id.* at 11a.

The federal defendants agreed with the plaintiffs that the minimum coverage provision now exceeded Congress's constitutional authority. App. 11a. At the start of the litigation, the federal defendants argued that the provision could not be severed from the ACA's guaranteed-issue and community-rating requirements, but that those three provisions could be severed from the remainder of the Act. *Id.* Sixteen States and the District of Columbia (the state petitioners here) intervened to defend the ACA. *Id.*

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[7] Since 2017, Congress has made additional limited changes to the ACA, including by recently repealing the Act's medical device and "Cadillac" taxes, *see* Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, §§ 501, 503, 133 Stat. ___, (2019), but it has continued to leave most of the Act's provisions in place.

The district court denied the plaintiffs' motion for a preliminary injunction but granted partial summary judgment and declaratory relief in their favor. App. 11a-12a; 163a-231a. The court first held that the individual plaintiffs had standing to bring their challenge because Section 5000A(a) "requires them to purchase and maintain certain health-insurance coverage." *Id.* at 182a.[8] As to the merits, the court held that Section 5000A as a whole could no longer be construed as an exercise of Congress's taxing power, principally because it would no longer "produce[] at least some revenue for the Government." *Id.* at 192a. The court instead construed Section 5000A(a) as a "standalone command" to purchase health insurance, which exceeded Congress's power under the Commerce Clause. *Id.* at 203a.

On the question of severability, the district court focused primarily on the intent of the 2010 Congress and certain legislative findings enacted by that Congress. It reasoned that "the text of the ACA is unequivocal" that the minimum coverage provision is "inseverable—because it is essential—from the entire ACA—because it must work together with the other provisions." App. 213a (citing 42 U.S.C § 18091) (emphasis omitted). The district court also believed that *NFIB* and *King* "ma[d]e clear" that its severability conclusion was correct. *Id.* at 220a; *see id.* at 214a-220a.

In a separate order, the district court entered a partial final judgment under Federal Rule of Civil Procedure 54(b), but stayed the effect of that judgment. App. 116a, 114a-162a. The state intervenor-

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[8] The district court did not address whether the state plaintiffs had established standing. *See* App. 181a-185a.

defendants and the federal defendants both filed notices of appeal. *Id.* at 14a & n.14.

2. a. Shortly after the appeal was docketed, the United States House of Representatives successfully moved to intervene to defend the ACA. App. 12a.[9] On the day that opening briefs were due, the federal defendants "changed their litigation position," *id.*, informing the court of appeals that they had "determined that the district court's judgment should be affirmed" in its entirety. C.A. Dkt. No. 514887530 at 1 (Mar. 25, 2019). In other words, the federal defendants agreed that the entire ACA should be invalidated and were no longer "urging that any portion of the district court's judgment be reversed." *Id.*

b. On December 18, 2019, a divided panel of the Fifth Circuit affirmed in part and vacated in part. App. 1a-113a. The panel majority first held that the individual plaintiffs have standing to challenge the minimum coverage provision because they "feel compelled by the individual mandate to buy insurance" and bought insurance "solely for that reason." *Id.* at 29a-30a. It also held that the state plaintiffs are injured by the minimum coverage provision, reasoning that Section 5000A(a) causes some state employees to seek health insurance from the States, which in turn must spend money "to issue forms verifying which employees are covered" in accordance with other provisions of the ACA. *Id.* at 33a (citing 26 U.S.C. §§ 6055, 6056); *see also id.* at 32a-39a.

On the merits, the majority agreed with the district court that *NFIB*'s savings construction of Section

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[9] Around the same time, the States of Colorado, Iowa, Michigan, and Nevada also successfully moved to intervene to defend the ACA. App. 12a n.12.

5000A was "no longer available," now that Congress had set the alternative tax provided for in Section 5000A(c) at zero. App. 44a. It held that "[t]he proper application of *NFIB* to the new version of the statute" required Section 5000A(a) to be read as a "command to purchase insurance." *Id.* at 45a. Interpreted that way, the majority concluded that the amended statute "finds no constitutional footing in either the Interstate Commerce Clause or the Necessary and Proper Clause." *Id.*

As to severability, the majority vacated the district court's judgment. App. 52a-72a. The majority concluded that the district court's analysis was "incomplete" because it gave "relatively little attention to the intent of the 2017 Congress," and failed to "do the necessary legwork of parsing through the over 900 pages of the post-2017 ACA" and "explaining how particular segments are inextricably linked to the individual mandate." *Id.* at 65a. It "direct[ed] the district court to employ a finer-toothed comb on remand and conduct a more searching inquiry into which provisions of the ACA Congress intended to be inseverable from the individual mandate." *Id.* at 68a. The majority stated that "[i]t may still be that none of the ACA is severable from the individual mandate," and "[i]t may be that all of the ACA is severable" or "that some of the ACA is severable . . . and some is not." *Id.* at 69a. It also directed the district court to consider the federal defendants' new arguments about the proper scope of relief. *Id.* at 70a-72a.[10]

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[10] In their Fifth Circuit brief, the federal defendants "changed their litigation position to argue that the relief in this case should be tailored to enjoin enforcement of the ACA in only the plaintiff states," and should "only reach ACA provisions that injure the plaintiffs." App. 70a-71a.

c. Judge King dissented. App. 73a-113a. She would have resolved the appeal at the outset on the ground that the plaintiffs lacked standing to sue. App. 76a-91a. She observed that Congress's 2017 amendment simply "change[d] the amount of the shared-responsibility payment to zero dollars," meaning that Section 5000A now "does nothing more than require individuals to pay zero dollars to the IRS if they do not purchase health insurance, which is to say it does nothing at all." *Id.* at 75a. Thus, even assuming that Section 5000A(a) "acts as a legal command," the individual plaintiffs are "free to disregard [it] without legal consequence." *Id.* at 80a. Any injury they might have incurred by purchasing health insurance was "entirely self-inflicted." *Id.* at 79a. Judge King also concluded that the state plaintiffs did not have standing because they failed to establish "that even a single state employee enrolled in one of the state plaintiffs' health insurance programs solely because of the unenforceable coverage requirement." *Id.* at 86a-87a.

On the merits, Judge King concluded that Section 5000A is "constitutional, albeit unenforceable." App. 74a; *id.* at 91a-98a. Because Congress "zeroed out" the shared-responsibility payment, the minimum coverage provision "affords individuals the same choice individuals have had since the dawn of private health insurance": either purchase insurance or "pay zero dollars." *Id.* at 91a. The majority's focus on whether "Congress's taxing power or the Necessary and Proper Clause authorizes" Section 5000A was a "red herring" because Congress does not "exceed[] its enumerated powers when it passes a law that does nothing." *Id.* at 91a-92a.

Judge King agreed with the majority that there were "serious flaws" in the district court's severability

analysis, App. 73a, but failed to see the "logic behind remanding this case for a do-over," *id.* at 98a. She noted that severability is a "question of law that we review de novo," and which the court of appeals is "just as competent as the district court" to address. *Id.* at 98a-99a. Moreover, in this case the severability analysis is "easy." *Id.* at 73a. "Congress removed the coverage requirement's only enforcement mechanism but left the rest of the Affordable Care Act in place." *Id.* That action "plain[ly] indicat[es] that Congress considered the coverage requirement entirely dispensable and, hence, severable." *Id.*

REASONS FOR GRANTING THE PETITION

I. THE QUESTIONS PRESENTED WARRANT IMMEDIATE REVIEW

"[W]hen a lower court has invalidated a federal statute," the "usual" approach of this Court is to "grant[] certiorari." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2298 (2019); *see, e.g.*, *United States v. Kebodeaux*, 570 U.S. 387, 391 (2013); *United States v. Morrison*, 529 U.S. 598, 605 (2000). As the United States recently told this Court, that "practice is consistent with the Court's recognition that judging the constitutionality of a federal statute is 'the gravest and most delicate duty that th[e] Court is called upon to perform.'" Pet. 16, *Barr v. Am. Ass'n of Political Consultants et al.*, No. 19-631 (filed Nov. 14, 2019); *see also* Pet. 24, *United States v. Sineneng-Smith*, No. 19-67 (filed July 12, 2019).

That usual approach is particularly appropriate in this case. The courts below not only "invalidated a federal" statutory provision "on constitutional grounds," *Morrison*, 529 U.S. at 605, they did so in a way that creates uncertainty about the status of the

entire Affordable Care Act. The district court asserted that the minimum coverage provision "'is essential to' and inseverable from 'the other provisions of' the ACA," App. 231a—meaning *every one* of the "hundreds of provisions" spread across the ACA's "10 titles [and] over 900 pages," *NFIB*, 567 U.S. at 538-539. And while all three judges on the panel below recognized serious flaws in that analysis, *see* App. 65a-70a, 73a, in remanding for further examination the panel majority commented that "[i]t may still be that none of the ACA is severable from the individual mandate, even after this inquiry is concluded," *id.* at 69a.

The uncertainty created by this litigation is especially problematic because individuals, businesses, and state and local governments make important decisions in reliance on the ACA. Each year, for example, millions of Americans make life-changing decisions—like starting a family or changing jobs—in reliance on the ACA's patient protections and the greater access to affordable healthcare coverage it provides.[11] Millions more decide whether to purchase health insurance on the state or federal Exchanges created by the Act.[12] Health insurance companies must decide whether to participate in the Exchanges and, if so, how to set their premiums and in which cities and counties to offer coverage.[13] And States

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[11] *See* Amicus Br. of Small Bus. Majority Found., C.A. Dkt. No. 514895946 (Apr. 1, 2019); Amicus Br. of Nat'l Women's Law Center, *et al.*, C.A. Dkt. No. 514897602 (Apr. 1, 2019).

[12] *See* D.Ct. Dkt. 15-1 at 97-98; D.Ct. Dkt. 91-1 at 17.

[13] *See* D.Ct. Dkt. 91-1 at 101-106; Amicus Br. of America's Health Ins. Plans, C.A. Dkt. No. 514896554 at 14 (Apr. 1, 2019) ("health insurance providers . . . require significant lead time to develop

must decide whether to expand their Medicaid programs (or continue existing expansions), whether to operate their own Exchanges, and how to budget for health-related spending in future years.[14] Prolonged uncertainty about whether or to what extent important provisions of the ACA might be invalidated makes these choices more difficult, threatening adverse consequences for American families, healthcare markets, and the broader economy.[15]

While the possibility of further proceedings in the lower courts sometimes weighs against certiorari, *see, e.g.*, *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam), here it supports immediate review. This is not a case where the court of appeals remanded for further factfinding, *see id.*, or for some other reason necessitating additional proceedings in the district court. The only reason this case is not final is because the panel majority declined to resolve the severability issue and instead "remand[ed] for a do-over." App. 73a (King, J., dissenting). But severability is a legal question, subject to de novo review, that is already poised for resolution by an appellate tribunal. Remand accomplishes little beyond "prolong[ing] this litigation and the concomitant uncertainty over the future of the healthcare sector." *Id.* at 74a.

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strategies and offerings").

[14] *See* D.Ct. Dkt. 91-1 at 31-66; Amicus Br. of Counties and Cities, C.A. Dkt. No. 514897439 at 20-22 (describing healthcare funding as a complex multi-year process between federal, state, and local governments); Medicaid Map, https://tinyurl.com/y9gseqv5 (detailing States' consideration of whether to expand Medicaid).

[15] *See, e.g.*, C.A. Dkt. No. 514820298 at 15-37 (Feb. 1, 2019) (declarations of health policy experts and government health officials in support of the state petitioners' motion to expedite appeal).

Indeed, the panel majority's decision directing the district court to conduct a "searching inquiry" into the entire ACA on remand only worsens the existing confusion about the ACA's future. App. 68a. At the majority's behest, the district court will "employ a finer-toothed comb" and the "many [other] tools at its disposal," *id.* at 69a, to "pars[e] through the over 900 pages of the post-2017 ACA, explaining [whether] particular segments are inextricably linked to the individual mandate," *id.* at 65a. That process would compound doubts in the healthcare markets about the future of important provisions of the ACA.

As addressed at greater length in the next section, such a process is also quite unnecessary here. There is no need to consider issues of severability at all because no plaintiff has established standing and, in any event, an unenforceable minimum coverage provision does not offend the Constitution. *See* App. 76a-98a (King, J., dissenting); *infra* pp. 19-23. At a minimum, however, there is no need for any court to conduct the granular severability analysis envisioned by the panel majority. Under the circumstances here there can be no doubt that Congress wanted to keep the rest of the ACA in place even without an enforceable minimum coverage provision, because that is precisely the effect of the amendment that Congress itself enacted. *See* App. 98a-112a (King, J., dissenting); *infra* pp. 23-26.[16]

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[16] The "federal defendants' new arguments as to the proper scope of relief in this case," App. 70a, are not a reason for this Court to defer review. Those belated and novel arguments would only be relevant if this Court ruled against petitioners on each of the questions presented here. *See id.* at 99a n.12 (King, J., dissenting) (remedial issues are "largely moot" if the "coverage requirement is completely severable from the rest of the ACA"). In that

To be sure, plaintiffs (and now the federal government) may dispute those conclusions; but there is every reason for this Court to resolve that dispute with dispatch. As the federal government argued to the court of appeals below, the "[p]rompt resolution of this case will help reduce uncertainty in the healthcare sector." C.A. Dkt. 514906506 at 3 (Apr. 8, 2019). The lower courts have struck down a federal statutory provision on constitutional grounds and cast doubt on the validity of the entire ACA, arguably the most consequential package of legislative reforms of this century. That uncertainty threatens adverse consequences for patients, providers, and insurers nationwide. *See supra* pp. 16-17. Further proceedings in the lower courts will not allay that uncertainty. Under these circumstances, this Court should grant immediate review and resolve the case this Term.

II. THE DECISION BELOW IS WRONG

Review is also warranted because the decision below is incorrect as to standing, the merits, and severability.

1. The panel majority's standing analysis disregards the central holding in *NFIB*. This Court held that Section 5000A as a whole must be read as offering a "lawful choice" between maintaining healthcare coverage and paying a tax in an amount specified by Congress. 567 U.S. at 573-574 & n.11. The only change Congress made to that statute in 2017 was to set the amount of the tax at zero. *See* Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017). As amended, Section 5000A "still gives individuals the choice to purchase insurance or make a shared-responsibility

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event, the Court could address the proper scope of relief itself or remand for further proceedings on that issue as appropriate.

payment—but the amount of that payment is zero dollars." App. 93a (King, J., dissenting). Now that Congress has reduced the tax to zero, the individual plaintiffs do not need to do anything to comply with the law. A statutory provision that offers individuals a choice between purchasing insurance and doing nothing does not impose any legally cognizable harm. *See id.* at 79a-85a.

The majority below reasoned that the individual plaintiffs have standing because they "feel compelled by the individual mandate to buy insurance" and have done so "solely for that reason." App. 29a-30a. But that analysis "overlooks what will happen if the individual plaintiffs fail to purchase insurance: absolutely nothing." *Id.* at 79a (King, J., dissenting). Any "injury they incur by freely choosing to obtain insurance" is "entirely self-inflicted." *Id.* at 79a, 81a. Article III does not allow plaintiffs to invoke the jurisdiction of the federal courts on that basis. *See id.* at 85a.

As to the state plaintiffs, the majority held that they have established standing based on "fiscal injury as employers." App. 32a. A fiscal injury caused by a federal statute or policy can of course be a basis for state standing. *See, e.g.*, *California v. Azar*, 911 F.3d 558, 570-573 (9th Cir. 2018); *Texas v. United States*, 787 F.3d 733, 752-753 (5th Cir. 2015). But the burden of establishing such an injury rests on the plaintiff States, and allegations of financial injury do not suffice if they are "purely speculative" and unsupported by "concrete evidence that [the State's] costs ha[ve] increased or will increase." *Crane v. Johnson*, 783 F.3d 244, 252 (5th Cir. 2015); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013). Here, the state plaintiffs did not produce concrete evidence supporting either their primary theory of injury—that

the existence of an unenforceable minimum coverage provision would "forc[e] individuals into the States' Medicaid and CHIP programs," C.A. Dkt. 514939271 at 20 (May 1, 2019)—or the panel majority's separate theory that the provision would increase state costs for "printing and processing [certain] forms," App. 33a. Indeed, as Judge King explained, "there is *no* evidence in the record" supporting these alleged injuries. *Id.* at 86a (King, J., dissenting) (emphasis added); *see id.* at 86a-91a.

2. The majority's analysis of the merits also ignores the basic lesson of *NFIB*. Federal courts "have a duty to construe a statute to save it, if fairly possible." *NFIB*, 567 U.S. at 574 (Roberts, C.J.). "This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). In *NFIB*, the Court invoked that canon when it construed Section 5000A as a whole as offering a lawful choice between purchasing health insurance and paying a tax, *see* 567 U.S. at 574 & n.11, even though Section 5000A(a) by itself might "more naturally" be read "as a command to buy insurance," *id.* at 574 (Roberts, C.J.).

Following the 2017 amendment, it remains fairly possible—and thus necessary—to construe Section 5000A in a manner that presents no constitutional problem. As noted, the only change Congress made was to reduce the amount of the tax in Section 5000A(c) to zero. Read in light of that amendment and the construction adopted in *NFIB*, Section 5000A continues to offer individuals a choice between having health insurance and not having health insurance—without paying any tax if they make the latter choice. The minimum coverage provision is now simply precatory;

it may encourage Americans to buy health insurance, but it imposes no legal obligation to do so. Viewed that way, Section 5000A is no more constitutionally problematic than many other provisions adopted by Congress, including "sense of Congress" resolutions and legislative findings, that may exhort or encourage but do not impose any enforceable requirement or prohibition.[17] There is no basis for concluding that "Congress exceeds its enumerated powers when it passes a law that does nothing." App. 91a-92a (King, J., dissenting); *see id.* at 98a (the minimum coverage provision now "functions as an expression of national policy or words of encouragement, at most").

In addition, Section 5000A may still be fairly interpreted as a lawful exercise of Congress's taxing powers, albeit one whose practical operation is currently suspended. Section 5000A retains several of the features that the Court pointed to in construing it as a tax. *NFIB*, 567 U.S. at 566. It is still set out in the Internal Revenue Code; it includes references to taxable income, number of dependents, and joint filing status, 26 U.S.C. § 5000A(b)(3), (c)(2), (c)(4); and it provides a structure through which future taxpayers could be directed to pay a tax as a consequence of choosing not to maintain minimum health coverage, *id.* § 5000A(b). While the "provision no longer produces revenue" at the moment because the tax is currently set at zero,

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[17] *See, e.g.*, 4 U.S.C. § 8 ("No disrespect should be shown to the flag of the United States of America; the flag should not be dipped to any person or thing."); 22 U.S.C. § 7674 (sense of Congress provision encouraging businesses to provide assistance to sub-Saharan Africa); 42 U.S.C. § 1751 (declaring it the policy of Congress to "encourage the domestic consumption of nutritious agricultural commodities").

App. 45a, there is nothing unconstitutional about leaving Section 5000A(a) on the books so that Congress can more easily increase the amount of the tax again later if it decides to do so.

The panel majority cast aside these interpretations, instead reading Section 5000A(a) in isolation as an unconstitutional "command to purchase insurance." App. 45a. But that is hardly the only construction that is "fairly possible." *NFIB*, 567 U.S. at 574 (Roberts, C.J.). Indeed, "it boggles the mind to suggest that Congress intended to turn a nonmandatory provision into a mandatory provision by doing away with the only means of incentivizing compliance with that provision." App. 96a-97a (King, J., dissenting).

3. Finally, the lower courts' approach to severability is incorrect. The "touchstone" of any inquiry into severability "is legislative intent." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006). When a court holds one part of a statute unconstitutional, it generally "sever[s] its problematic portions while leaving the remainder intact," *id.* at 329, unless it is "evident that Congress would not have enacted those provisions which are within its power, independently of those which are not," *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1482 (2018) (internal quotation marks and alterations omitted).

Applying those principles here is "quite simple." App. 98a (King, J., dissenting). If Section 5000A(a) is now viewed as an unconstitutional command to purchase health insurance, then it is one that Congress plainly intended to make unenforceable. By reducing the amount of the alternative tax to zero, Congress eliminated the only consequence for choosing not to maintain healthcare coverage. At the same time, it left every other provision of the ACA in place. So there

is no need to speculate about whether Congress "[w]ould . . . have preferred" to preserve the rest of the ACA if it had known that the minimum coverage provision could not be enforced. *Ayotte*, 546 U.S. at 330. We know from what Congress actually did that it "believed the ACA could stand in its entirety without the unenforceable coverage requirement." App. 98a (King, J., dissenting); *see Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 560 (Scalia, J., dissenting) ("One determines what Congress would have done by examining what it did.").

The surrounding circumstances only confirm that intent. Just months before Congress reduced the alternative tax to zero in the TCJA, it considered and rejected several bills that would have repealed major provisions of the ACA. *Supra* p. 9 & nn.5-6. Prominent congressional supporters of the TCJA also reassured the American public that the amendment to Section 5000A would not "tak[e] anyone's health insurance away," or do anything to "alter Title I of [the ACA], which includes all of the insurance mandates and requirements related to preexisting conditions and essential health benefits." *E.g.*, *Continuation of the Open Executive Session to Consider an Original Bill Entitled the Tax Cuts and Jobs Act Before the S. Comm. on Fin.*, 115th Cong. 106, 286 (2017) (statement of Chairman Orrin Hatch). The history of the 2017 amendment supports the conclusion that Congress would not have wanted a "statute on which millions of people rely for their healthcare and livelihoods to disappear overnight with the wave of a judicial wand." App. 106a (King, J., dissenting).

The panel majority identified multiple flaws in the district court's severability analysis. App. 65a-70a. In particular, it acknowledged that the district court all

but ignored "the intent of the 2017 Congress" that zeroed out Section 5000A's alternative tax. *Id.* at 65a. But rather than resolving the straightforward severability question that was before it, the majority remanded for a "more searching inquiry" by the district court. *Id.* at 68a. As noted above, any such remand is entirely unnecessary. *See supra* pp. 18-19. Severability is a "question of law that [appellate courts] review de novo." App. 98a (King, J., dissenting). The inquiry focuses exclusively on the "statute's text and historical context," which in this case the court of appeals was "just as competent" to analyze as the district court. *Id.* at 99a.

The remand proceeding directed by the panel majority is exactly the sort of remedial exercise that this Court has warned against. Courts may not use their remedial powers to conduct the "quintessentially legislative work" of "rewriting" statutes. *Ayotte*, 546 U.S. at 329 (brackets omitted). In telling the district court to "pars[e] through the over 900 pages of the post-2017 ACA" and conduct a "granular" analysis with "a finer-toothed comb," App. 59a, 65a, 68a, the majority appears to invite the district court to "take a blue pencil" to the ACA, *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring). That exercise involves an "editorial freedom" that "belongs to the Legislature, not the Judiciary." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010). And it is especially unwarranted here, where the intent of Congress as to the proper remedy could not be more plain.

The panel majority's flawed approach to severability, coupled with its mistaken analysis of standing and the merits, casts doubt on the fate of a landmark statute on which millions of Americans depend. The

questions presented by this petition are purely legal, of enormous practical importance, and fully ripe for review by this Court. Under the circumstances here, directing the district court to conduct a burdensome, time-consuming, and wholly unnecessary re-evaluation of severability would serve no useful purpose, while exacerbating uncertainty about the ACA's future and "ensur[ing] that no end for this litigation is in sight." App. 113a (King, J., dissenting). This Court should grant immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX A

REVISED December 20, 2019
FILED December 18, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10011

STATE OF TEXAS; STATE OF ALABAMA; STATE OR ARIZONA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MISSISSIPPI, by and through Governor Phil Bryant; STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF NORTH DAKOTA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TENNESSEE; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF ARKANSAS; NEILL HURLEY; JOHN NANTZ,

Plaintiffs – Appellees,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH; HUMAN SERVICES; ALEX AZAR, II, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF INTERNAL REVENUE; CHARLES P. RETTIG, in his Official Capacity as Commission of Internal Revenue,

Defendants – Appellants,

STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF KENTUCKY; STATE OF MASSACHUSETTS; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF VIRGINIA; STATE OF WASHINGTON; STATE OF MINNESOTA,

Intervenor-Defendants – Appellants.

Appeals from the United States District Court
for the Northern District of Texas

Before KING, ELROD, and ENGELHARDT, Circuit Judges.

JENNIFER WALKER ELROD, Circuit Judge:

The Patient Protection and Affordable Care Act (the Act or ACA) is a monumental piece of healthcare legislation that regulates a huge swath of the nation's economy and affects the healthcare decisions of millions of Americans. The law has been a focal point of our country's political debate since it was passed nearly a decade ago. Some say that the Act is a much-needed solution to the problem of increasing healthcare costs and lack of healthcare availability. Many of the amici in this case, for example, argue that the law has extensively benefitted everyone from children to senior citizens to local governments to small businesses. Others say that the Act is a costly exercise in burdensome governmental regulation that deprives people of economic liberty. Amici of this perspective argue, for example, that the Act "has deprived

patients nationwide of a competitive market for affordable high-deductible health insurance," leaving "patients with no alternative to . . . skyrocketing premiums." Association of American Physicians & Surgeons Amicus Br. at 15.

None of these policy issues are before the court. And for good reason—the courts are not institutionally equipped to address them. These issues are far better left to the other two branches of government. The questions before the court are far narrower: questions of law, not of policy. Those questions are: First, is there a live case or controversy before us even though the federal defendants have conceded many aspects of the dispute; and, relatedly, do the intervenor-defendant states and the U.S. House of Representatives have standing to appeal? Second, do the plaintiffs have standing? Third, if they do, is the individual mandate unconstitutional? Fourth, if it is, how much of the rest of the Act is inseverable from the individual mandate?

We answer those questions as follows: First, there is a live case or controversy because the intervenor-defendant states have standing to appeal and, even if they did not, there remains a live case or controversy between the plaintiffs and the federal defendants. Second, the plaintiffs have Article III standing to bring this challenge to the ACA; the individual mandate injures both the individual plaintiffs, by requiring them to buy insurance that they do not want, and the state plaintiffs, by increasing their costs of complying with the reporting requirements that accompany the individual mandate. Third, the individual mandate is unconstitutional because it can no longer be read as a tax, and there is no other constitutional provision that justifies this exercise of congressional power. Fourth, on the severability question, we remand to the district

court to provide additional analysis of the provisions of the ACA as they currently exist.

I.

On March 23, 2010, President Barack Obama signed the ACA into law. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). The Act sought to "increase the number of Americans covered by health insurance and decrease the cost of health care" through several key reforms. *See Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 538 (2012).

Some of those reforms implemented new consumer protections, aiming primarily to protect people with preexisting conditions. For example, the law prohibits insurers from refusing to cover preexisting conditions. 42 U.S.C. § 300gg-3. The "guaranteed-issue requirement" forbids insurers from turning customers away because of their health. *See* 42 U.S.C. §§ 300gg, 300gg-1. The "community-rating requirement" keeps insurers from charging people more because of their preexisting health issues. 42 U.S.C. § 300gg-4. [1] The law also requires insurers to provide coverage for certain

[1] The ACA features a few other consumer-protection reforms of note. For example, the Act requires insurance companies to allow young adults to stay on their parents' health insurance plans until they turn 26; prohibits insurers from imposing caps on the value of benefits provided; and mandates that the insurance plans cover at least ten "essential health benefits," including emergency services, prescription drugs, and maternity and newborn care. *See* 42 U.S.C. §§ 300gg-14 (young adults), 300gg-11 (restriction on benefit caps), 18022 (essential health benefits). The ACA also requires employers with at least fifty full-time employees to pay the federal government a penalty if they fail to provide their employees with ACA-compliant coverage. 26 U.S.C. § 4980H.

types of care, including women's and children's preventative care. 42 U.S.C. § 300gg-13(a)(3)–(4).[2]

Other reforms sought to lower the cost of health insurance by using both policy "carrots" and "sticks."[3] On the stick side, the individual mandate—which plaintiffs challenge in the instant case—requires individuals to "maintain [health insurance] coverage." 26 U.S.C. § 5000A(a). If individuals do not maintain this coverage, they must make a payment to the IRS called a "shared responsibility payment."[4] *Id.*; *see also King v. Burwell*, 135 S. Ct. 2480, 2486 (2015).

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[2] The women's preventative care provision was at issue in a trio of recent Supreme Court cases. *See Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Wheaton College v. Burwell*, 573 U.S. 958 (2014); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *see also California v. U.S. Dep't of Health & Human Servs.*, No. 19-15072, 2019 WL 5382250 (9th Cir. Oct. 22, 2019); *Pennsylvania v. President United States*, 930 F.3d 543 (3d Cir. 2019), *as amended* (July 18, 2019); *DeOtte v. Azar*, 393 F. Supp. 3d 490, 495 (N.D. Tex. 2019).

[3] Some opponents of the ACA assert that the goal was not to lower health insurance costs, but that the entire law was enacted as part of a fraud on the American people, designed to ultimately lead to a federal, single-payer healthcare system. In a hearing before the House Committee on Oversight and Government Reform, for example, Representative Kerry Bentivolio suggested that Jonathan Gruber, who assisted in crafting the legislation, had "help[ed] the administration deceive the American people on this healthcare act or [told] the truth in [a] video . . . about how [the Act] was a fraud upon the American people." *Examining Obamacare Transparency Failures: Hearing Before the H. Comm. on Oversight and Government Reform*, 113th Cong. 83 (2014) (statement of Rep. Kerry Bentivolio).

[4] The Act exempts several groups of people from the shared responsibility payment. Specifically, the Act provides that "[n]o penalty shall be imposed" on those "who cannot afford [insurance]

The individual mandate was designed to lower insurance premiums by broadening the insurance pool. *See* 42 U.S.C. § 18091(2)(J) ("By significantly increasing . . . the size of purchasing pools, . . . the [individual mandate] will significantly . . . lower health insurance premiums."). When the young and healthy must buy insurance, the insurance pool faces less risk, which, at least in theory, leads to lower premiums for everyone. *See* 42 U.S.C. § 18091(2)(I) (positing that the individual mandate will "broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums"). The individual mandate thus serves as a counterweight to the ACA's protections for preexisting conditions, which push riskier, costlier individuals into the insurance pool. Under the protections for consumers with preexisting conditions, if there were no individual mandate, there would arguably be an "adverse selection" problem: "many individuals would," in theory, "wait to purchase health insurance until they needed care." *Id.*[5]

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coverage," on "[t]axpayers with income below [the] filing threshold," on "[m]embers of Indian tribes," on those who had only "short coverage gaps," or on anyone who, in the Secretary of Health and Human Services' determination, has "suffered a hardship." 26 U.S.C. § 5000A(e).

[5] Opponents of the ACA, however, argue that the Act goes too far in limiting individuals' freedom to choose healthcare coverage. For example, at a House committee hearing, Representative Darrell Issa argued that one of the "false claims" that the Obama administration made in passing the Act was that "[i]f you like your doctor, you will be able to keep your doctor, period. . . . [And i]f you like your [insurance] plan, you can keep your plan." *Examining Obamacare Transparency Failures: Hearing Before the H. Comm. on Oversight and Government Reform*, 113th Cong. 2 (2014) (statement of Rep. Darrell Issa, Chairman, H. Comm. on Oversight and Government Reform).

The Act also sought to lower insurance costs for some consumers through policy "carrots," providing tax credits to offset the cost of insurance to those with incomes under 400 percent of the federal poverty line. *See* 26 U.S.C. § 36B; 42 U.S.C. §§ 18081, 18082. The Act also created government-run, taxpayer-funded health insurance marketplaces—known as "Exchanges"—which allow customers "to compare and purchase insurance plans." *King*, 135 S. Ct. at 2485; *see also* 42 U.S.C. § 18031. Opponents of the law argue that the law has led to unintended subsidies to keep plans afloat and insurance companies in the black. Texas points in its brief, for example, to a Congressional Budget Office study estimating that federal outlays for health insurance subsidies and related spending will rise by about 60 percent over the next ten years, from $58 billion in 2018 to $91 billion by 2028. CBO, *The Budget and Economic Outlook: 2018 to 2028* at 51 (April 2018), *available at* https://tinyurl.com/CBOBudgetEconOutlook-2018-2028; State Plaintiffs' Br. at 13–14.

The ACA also enlarged the class of people eligible for Medicaid to include childless adults with incomes up to 133 percent of the federal poverty line. 42 U.S.C. §§ 1396a(a)(10)(A)(i)(VII), 1396a(e)(14)(I)(i); *NFIB*, 567 U.S. at 541–42. The ACA originally required each state to expand its Medicaid program or risk losing "all of its federal Medicaid funds." *NFIB*, 567 U.S. at 542. In *NFIB*, however, the Supreme Court held that this exceeded Congress' powers under the Spending Clause. *Id.* at 585 (plurality opinion). But the Court allowed those states that wanted to accept Medicaid expansion funds to do so. *See id.* at 585–86 (plurality opinion); *id.* at 645–46 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissent-

ing in part). As a result, the states that have not participated in the expansion now subsidize, through their general tax dollars, the states that have participated in expansion.

Since the Act was passed, its opponents have attempted to attack it both through congressional amendment and through litigation. Between 2010 and 2016, Congress considered several bills to repeal, defund, delay, or amend the ACA. *See* Intervenor-Defendant States' Br. at 10. Except for a few modest changes, these efforts were closely fought but ultimately failed. Intervenor-Defendant States' Br. at 10–11. In 2017, the shift in presidential administrations reinvigorated opposition to the law, but many of these later legislative efforts failed as well. In March 2017, House leaders pulled a bill that would have repealed many of the ACA's essential provisions. In July 2017, the Senate voted on three separate bills that similarly would have repealed major provisions of the Act, but each vote failed.[6] Finally, in September 2017, several Senators introduced another bill that would have repealed some of the ACA's most significant provisions, but Senate leaders ultimately chose not to bring it to the floor for a vote. Intervenor-Defendant States' Br. at 11.

The ACA's opponents also took their cause to the courts in a series of lawsuits, some of which reached the Supreme Court. Particularly relevant here, the Court, in *NFIB*, upheld the law's individual mandate. 567 U.S. at 574. Through fractured voting and shifting majorities—explained in more detail in Part V of

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[6] One of these bills failed by a razor-thin vote of fifty-one against, forty-nine in favor. *See* 163 Cong. Rec. S4415 (daily ed. July 27, 2017).

this opinion—the Court decided that the ACA's individual mandate could be read as a tax on an individual's decision not to purchase insurance, which was a constitutional exercise of Congress' taxing powers under Article I of the U.S. Constitution. *Id.*; U.S. Const. art. I, § 8, cl. 1. The Court favored this tax interpretation to save the provision from unconstitutionality. Reading the provision as a standalone command to purchase insurance would have rendered it unconstitutional. This reading could not have been justified under the Commerce Clause because it would have done more than "regulate commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3. It would have *compelled* individuals to enter commerce in the first place.[7] *NFIB*, 567 U.S. at 557–58. The Court also held that the provision could not be justified under the Constitution's Necessary and Proper Clause. *Id.* at 561 (Roberts, C.J.); *id.* at 654–55 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

In December 2017, the ACA's opponents achieved some legislative success. As part of the Tax Cuts and Jobs Act, Congress set the "shared responsibility payment" amount—the amount a person must pay for failing to comply with the individual mandate—to the "lesser" of "zero percent" of an individual's household income or "$0," effective January 2019. Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017); *see also* 26 U.S.C. § 5000A(c). The individual mandate is still "on the books" of the U.S. Code and still consists of the three fundamental components it always featured.

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[7] Chief Justice Roberts cautioned that concluding otherwise would empower the government to compel Americans into all kinds of behavior that the government thinks is beneficial for them, including, for example, compelling them to purchase broccoli. *See NFIB*, 567 U.S. at 558 (Roberts, C.J.).

Subsection (a) prescribes that certain individuals "shall . . . ensure" that they and their dependents are "covered under minimum essential coverage." 26 U.S.C. § 5000A(a). Subsection (b) "impose[s] . . . a penalty" called a "[s]hared responsibility payment" on those who fail to ensure they have minimum essential coverage. 26 U.S.C. § 5000A(b). Subsection (c) sets the amount of that payment. All Congress did in 2017 was change the amount in subsection (c) to zero dollars. 26 U.S.C. § 5000A(c).

Two months after the shared responsibility payment was set at zero dollars, the plaintiffs here—two private citizens[8] and eighteen states[9]—filed this lawsuit against several federal defendants: the United States of America, the Department of Health and Human Services and its Secretary, Alex Azar, as well as the Internal Revenue Service and its Acting Commissioner, David J. Kautter. The plaintiffs argued that the individual mandate was no longer constitutional because: (1) *NFIB* rested the individual mandate's constitutionality exclusively on reading the provision as a tax; and (2) the 2017 amendment undermined any ability to characterize the individual mandate as a tax because the provision no longer generates revenue, a requirement for a tax. The plaintiffs argued further that, because the individual mandate was essential to and inseverable from the rest of the ACA, the entire ACA must be enjoined. On this theory, the plaintiffs sought declaratory relief that the individual mandate

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[8] Namely, Neill Hurley and John Nantz.

[9] Namely, Texas, Alabama, Arizona, Florida, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Arkansas. Wisconsin, which was originally a plaintiff state, sought and was granted dismissal from the appeal.

is unconstitutional and the rest of the ACA is inseverable. The plaintiffs also sought an injunction prohibiting the federal defendants from enforcing any provision of the ACA or its regulations.

The federal defendants agreed with the plaintiffs that once the shared responsibility payment was reduced to zero dollars, the individual mandate was no longer constitutional. They also agreed that the individual mandate could not be severed from the ACA's guaranteed-issue and community-rating requirements. Unlike the plaintiffs, however, the federal defendants contended in the district court that those three provisions could be severed from the rest of the Act. Driven by the federal defendants' decision not to fully defend against the lawsuit, sixteen states[10] and the District of Columbia intervened to defend the ACA.

The district court agreed with the plaintiffs' arguments on the merits. Specifically, the court held that: (1) the individual plaintiffs had standing because the individual mandate compelled them to purchase insurance; (2) setting the shared responsibility payment to zero rendered the individual mandate unconstitutional; and (3) the unconstitutional provision could not be severed from any other part of the ACA. The district court granted the plaintiffs' claim for declaratory relief. Specifically, the district court's order "declares the Individual Mandate, 26 U.S.C. § 5000A(a), UNCONSTITUTIONAL," and the order further declares

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[10] Namely, California, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Massachusetts, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, and Minnesota.

that "the remaining provisions of the ACA, Pub L. 111-148, are INSEVERABLE and therefore INVALID." The district court, however, denied the plaintiffs' application for a preliminary injunction. The district court entered partial final judgment[11] as to the grant of summary judgment for declaratory relief, but stayed judgment pending appeal. This appeal followed.

On appeal, the U.S. House of Representatives intervened to join the intervenor-defendant states in defending the ACA.[12] Also on appeal, the federal defendants changed their litigation position. After contending in the district court that only a few provisions of the ACA were inseverable from the individual mandate, the federal defendants contend in their opening brief for the first time that all of the ACA is inseverable. *See* Fed. Defendants' Br. at 43–49. Moreover, the federal defendants contend for the first time

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[11] The final judgment is only partial because it addresses only Count One of the plaintiffs' amended complaint. Count One requests a declaratory judgment that the individual mandate exceeds Congress' constitutional powers. The district court has not yet ruled on the other counts in the amended complaint. In Count Two, the plaintiffs request a declaratory judgment that the ACA violates the Due Process Clause of the Fifth Amendment. In Count Three, the plaintiffs request a declaratory judgment that the ACA violates the Tenth Amendment. In Count Four, the plaintiffs request a declaratory judgment that agency rules promulgated pursuant to the ACA are unlawful. In Count Five, the plaintiffs request an injunction prohibiting federal officials from "implementing, regulating, or otherwise enforcing any part of the ACA."

[12] In addition to the U.S. House, four other states intervened on appeal to join the original group that defended the Act in the district court: Colorado, Iowa, Michigan, and Nevada.

on appeal that—even though the entire ACA is inseverable—the court should not enjoin the enforcement of the entire ACA. The federal defendants now argue that the district court's judgment should be affirmed "except insofar as it purports to extend relief to ACA provisions that are unnecessary to remedy plaintiffs' injuries."[13] Fed. Defendants' Br. at 49. They also now argue that the district court's judgment "cannot be understood as extending beyond the plaintiff states to invalidate the ACA in the intervenor states." Fed. Defendants' Supp. Br. at 10. Simply put, the federal defendants have shifted their position on appeal more than once.

II.

We review a district court's grant of summary judgment *de novo*. *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 638 (5th Cir. 2012). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 250 (5th Cir. 2019). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Amerisure Ins. v. Navigators Ins.*, 611 F.3d 299, 304 (5th Cir. 2010) (quoting *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 417 (5th Cir. 2008)). When ruling on a motion for summary judgment, the court views all inferences drawn from the factual rec-

[13] The federal defendants do not specify which precise provisions, in their view, injure the plaintiffs and which do not.

ord "in the light most favorable to the non-moving parties below." *Trent v. Wade*, 776 F.3d 368, 373 n.1 (5th Cir. 2015).

III.

We first must consider whether there is a live "[c]ase" or "[c]ontroversy" before us on appeal, as Article III of the U.S. Constitution requires. U.S. Const. art. III, § 1. A case or controversy does not exist unless the person asking the court for a decision—in this case, asking us to decide whether the district court's judgment was correct—has standing, which requires a showing of "injury, causation, and redressability." *Sierra Club v. Babbitt*, 995 F.2d 571, 574 (5th Cir. 1993). When "standing to appeal is at issue, appellants must demonstrate some injury from the judgment below." *Id.* at 575 (emphasis omitted).

We conclude, as all parties agree, that there is a case or controversy before us on appeal. Two groups of parties appealed from the district court's judgment: the federal defendants, and the intervenor-defendant states.[14] There is a case or controversy before us because both of these groups have their own independent standing to appeal.[15]

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[14] The U.S. House of Representatives, also a party in this case, intervened in our court after the intervenor-defendant states and the federal government had filed notices of appeal.

[15] Even if only one of these parties had standing to appeal, that would be enough to sustain the court's jurisdiction. An intervenor needs standing only "in the absence of the party on whose side the intervenor intervened." *Sierra Club*, 995 F.2d at 574 (alteration omitted) (quoting *Diamond v. Charles*, 476 U.S. 54, 68 (1986)); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977) (exercising jurisdiction because "at least one" plaintiff had standing to sue).

The federal defendants have standing to appeal. The instant case is on all fours with the Supreme Court's decision in *United States v. Windsor*, 570 U.S. 744 (2013). In that case, the executive branch of the federal government declined to defend a federal statute that did not allow the surviving spouse of a same-sex couple to receive a spousal tax deduction. *Id.* at 749–53. The district court ruled that the statute was unconstitutional and ordered the executive branch to issue a tax refund to the surviving spouse. *Id.* at 754–55. The executive branch agreed with the district court's legal conclusion, but it appealed the judgment and continued to enforce the statute by withholding the tax refund until a final judicial resolution. *Id.* at 757–58.

The Supreme Court ruled that "the United States retain[ed] a stake sufficient to support Article III jurisdiction." *Id.* at 757. That stake was the tax refund, which the federal government refused to pay. This threat of payment of money from the Treasury constituted "a real and immediate economic injury" to the federal government, which was sufficient for standing purposes. *Id.* at 757–58 (quoting *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 599 (2007) (plurality opinion)). As the Court explained, "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 also Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019) (concluding that there was a justiciable controversy 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"); *INS v. Chadha*, 462 U.S. 919, 939 (1983) (holding that there was "adequate

Art. III adverseness" because the executive branch determined that a federal statute was unconstitutional and refused to defend it but simultaneously continued to abide by it).

The instant case is similar. Though the plaintiffs and the federal defendants are in almost complete agreement on the merits of the case, the government continues to enforce the entire Act. The federal government has made no indication that it will begin dismantling any part of the ACA in the absence of a final court order. Just as in *Windsor*, then, effectuating the district court's order would require the federal government to take actions that it would not take "but for the court's order." *Windsor*, 570 U.S. at 758. And just as in *Windsor*, the federal defendants stand to suffer financially if the district court's judgment is affirmed.[16] As just one example, the district court's judgment declares the Act's Medicare reimbursement schedules unlawful, which, if given effect, would require Medicare to reimburse healthcare providers at higher rates. *See, e.g.*, 42 U.S.C. § 1395ww(b)(3)(B)(xi)–(xii). Therefore, just as in *Windsor*, an appellate decision here will "have real meaning." 570 U.S. at 758 (quoting *Chadha*, 462 U.S. at 939).[17]

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[16] The dissenting Justices in *Windsor* objected to the *Windsor* majority's approach to standing. Justice Scalia, for example, said that this approach to standing "would have been unrecognizable to those who wrote and ratified our national charter." *Windsor*, 570 U.S. at 779 (Scalia, J., dissenting). We are bound by the *Windsor* majority opinion.

[17] Just as in *Windsor*, moreover, principles of prudential standing weigh in favor of exercising jurisdiction despite the government's alignment with the plaintiffs. Just like the intervenors in *Windsor*, the intervenor-defendant states and the U.S. House both put on a "sharp adversarial presentation of the issues." *Id.* at 761.

The intervenor-defendant states also have standing to appeal. While a party's mere "status as an intervenor below . . . does not confer standing," *Diamond v. Charles*, 476 U.S. 54, 68 (1986), intervenors may appeal if they can demonstrate injury from the district court's judgment. *Sierra Club*, 995 F.2d at 574; *see also Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019); *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 737 (5th Cir. 2016). The intervenor-defendant states have made this showing because the district court's judgment, if ultimately given effect, would: (1) strip these states of funding that they receive under the ACA; and (2) threaten to hamstring these states in possible future litigation because of the district court judgment's potentially preclusive effect.[18]

First, the intervenor-defendant states receive significant funding from the ACA, which would be discontinued if we affirmed the district court's judgment declaring the entire Act unconstitutional. "[F]inancial loss as a result of" a district court's judgment is an injury sufficient to support standing to appeal. *United States v. Fletcher ex rel. Fletcher*, 805 F.3d 596, 602 (5th Cir. 2015). In their supplemental briefing, the intervenor-defendant states identify a few examples of the funding sources they would lose under the district court's judgment. Evidence in the record shows that eliminating the Act's Medicaid expansion provisions

[18] At first glance, it may not be entirely clear how a mere partial summary judgment on the issuance of a declaratory judgment would aggrieve anyone. But at oral argument, all parties agreed that the district court's partial summary judgment would have binding effect. Indeed, this is partly why the district court issued a stay. The district court acknowledged that the intervenor-defendant states would be prejudiced by the judgment, which means that the district court understood it to be binding.

alone would cost the original sixteen intervening state defendants and the District of Columbia a total of more than $418 billion in the next decade. *See* 42 U.S.C. §§ 1396a(a)(10)(A)(i)(VIII), (e)(14)(I)(i), 1396d(y)(1). Moreover, the Act's Community First Choice Option program gives states funding to care for the disabled and elderly at home or in their communities instead of in institutions. *See* 42 U.S.C. § 1396n(k). Record evidence shows that eliminating this program would cost California $400 million in 2020, and that Oregon and Connecticut have already received $432.1 million under this program. This evidence is more than enough to show that the intervenor-defendant states would suffer financially if the district court's judgment is given effect, an injury sufficient to confer standing to appeal. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019).

The district court's judgment, if given effect, also threatens to injure the intervenor-defendant states with the judgment's potentially preclusive effect in future litigation. We have held that "[a] party may be aggrieved by a district court decision that adversely affects its legal rights or position vis-à-vis other parties in the case or other potential litigants." *Leonard v. Nationwide Mut. Ins.*, 499 F.3d 419, 428 (5th Cir. 2007) (quoting *Custer v. Sweeney*, 89 F.3d 1156, 1164 (4th Cir. 1996)). If the federal defendants began unwinding the ACA, either in reliance on the district court's judgment or on their own, the district court's judgment would potentially estop the intervenor-defendant states from challenging that action in court. This case thus stands in contrast to the cases in which there was no chance whatsoever of a preclusive effect. *See Klamath Strategic Inv. Fund ex rel. St. Croix Ventures v. United States*, 568 F.3d 537, 546 (5th Cir. 2009) (holding that there was no threatened injury

from potential estoppel from the appealed-from judgment because that judgment was interlocutory, not final, and therefore could not estop the appealing party).

Finally, we examine the standing of the U.S. House of Representatives, which intervened after the case had been appealed. The Supreme Court's recent decision in *Virginia House of Delegates v. Bethune-Hill* calls the House's standing to intervene into doubt. 139 S. Ct. at 1953 ("This Court has 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."). However, we need not resolve the question of the House's standing. "Article III does not require intervenors to independently possess standing" when a party already in the lawsuit has standing and seeks the same "ultimate relief" as the intervenor. *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998). That is the case here: the intervenor-defendant states have standing to appeal, and the House seeks the same relief as those states. We accordingly pretermit the issue of whether the House has standing to intervene.

IV.

We now turn to the issue of whether any of the plaintiffs had Article III standing to bring this case at the time they brought the lawsuit. To be a case or controversy under Article III, the plaintiffs must satisfy the same three requirements listed above. First, a plaintiff must have suffered an "injury in fact"—a violation of a legally protected interest that is "concrete and particularized," as well as "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Second, that

injury must be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Id.* (alterations in original) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)). Third, it must be "likely"—not merely "speculative"—that the injury will be "redressed by a favorable decision." *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

The instant case has two groups of plaintiffs: the individual plaintiffs and the state plaintiffs. Only one plaintiff need succeed because "one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."[19] *Texas v. United States (DAPA)*, 809 F.3d 134, 151 (5th Cir. 2015) (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)).[20] The individual plaintiffs and the state plaintiffs allege different injuries. We evaluate each in turn and conclude that both the individual plaintiffs and the state plaintiffs have standing.

A.

The standing issues presented by the individual plaintiffs are not novel. The Supreme Court faced a similar situation when it decided *NFIB* in 2012. At oral argument in that case, Justice Kagan asked Gregory Katsas, representing NFIB, whether he thought "a person who is subject to the [individual] mandate but not subject to the [shared responsibility payment] would have standing." Transcript of Oral Argument

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[19] For an academic critique of this approach, *see* Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 Duke L. J. 481 (2017).

[20] We refer to this 2015 case as "*DAPA*"—after Deferred Action for Parents of Americans, the policy at issue there—to prevent confusion with the present case of the same name.

at 68, *Dep't of Health and Human Servs. v. Florida*, 567 U.S. 519 (2012) (No. 11-398). Mr. Katsas replied, "Yes, I think that person would, because that person is injured by compliance with the mandate." *Id.* Mr. Katsas explained, "the injury—when that person is subject to the mandate, that person is required to purchase health insurance. That's a forced acquisition of an unwanted good. It's a classic pocketbook injury." *Id.* at 68–69.

In 2012, this questioning made sense because neither the individual mandate nor the shared responsibility payment would be assessed for another two years. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 244 (2012) (requiring insurance coverage "for each month beginning after 2013" and applying the shared responsibility payment for any failure to purchase insurance "during any calendar year beginning after 2013"). It was thus certainly imminent that the private plaintiffs would be subject to the individual mandate, which applies to everyone, but not certain that they would be subject to the shared responsibility payment, which exempts certain people. 26 U.S.C. § 5000A(e) (prescribing that "[n]o penalty shall be imposed" on certain groups of people).[21] The distinction was important because a plaintiff "must demonstrate standing for each claim he seeks to press." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). To bring a claim against the individual mandate, therefore, the plaintiffs needed to show injury *from the individual mandate*—not from the shared responsibility payment.

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[21] For the full list of exemptions, *see supra* note 4.

Accordingly, the district court in *NFIB* ruled that the private plaintiffs were injured by the ACA "because of the financial expense [they would] definitively incur under the Act in 2014," and the private plaintiffs' need "to take investigatory steps and make financial arrangements now to ensure compliance then." *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1271 (N.D. Fla. 2011), *aff'd in part and rev'd in part*, 648 F.3d 1235 (11th Cir. 2011), *aff'd in part and rev'd in part*, 567 U.S. 519 (2012). The record evidence in that case supported this conclusion. Mary Brown, one of the private plaintiffs in that case, for example, had declared that "to comply with the individual insurance mandate, and well in advance of 2014, I must now investigate whether and how to rearrange my personal finance affairs." Appendix of Exhibits in Support of Plaintiffs' Motion for Summary Judgment, *Florida v. U.S. Dep't of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT (N.D. Fla. Nov. 10, 2010), ECF No. 80-6. At the Eleventh Circuit, all parties agreed that Mary Brown had standing. *Florida ex rel. Atty. Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1243 (11th Cir. 2011), *aff'd in part and rev'd in part*, 567 U.S. 519 (2012) ("Defendants do not dispute that plaintiff Brown's challenge to the minimum coverage provision is justiciable."). Congress could have reasonably contemplated people like Mary Brown. As Mr. Katsas explained at oral argument in the Supreme Court, "Congress reasonably could think that at least some people will follow the law precisely because it is the law." Transcript of Oral Argument at 67, *Dep't of Health & Human Servs. v. Florida*, 567 U.S. 519 (2012) (No. 11-398).

The district court in the instant case followed a similar approach with regard to the individual plaintiffs' standing.[22] It concluded that because the individual plaintiffs are the object of the individual mandate, which requires them to purchase health insurance that they do not want, those plaintiffs have demonstrated two types of "injury in fact": (1) the financial injury of buying that insurance; and (2) the "increased regulatory burden" that the individual mandate imposes. In concluding that these injuries were caused by the individual mandate, the court made specific fact findings that both Nantz and Hurley purchased insurance solely because they are "obligated to comply with the . . . individual mandate." The district court made these findings based on Nantz's and Hurley's declarations, which the intervenor-defendant states never challenged. Because the undisputed evidence showed that the individual mandate caused these injuries, the district court reasoned that a favorable judgment would redress both injuries, allowing the individual plaintiffs to forgo purchasing health insurance and freeing them "from what they essentially allege to be arbitrary governance."

We agree with the district court. The Supreme Court has held that when a lawsuit challenges "the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether" the plaintiffs are themselves the "object[s] of the action (or forgone action) at issue." *Lujan*, 504 U.S. at 561; *see also Texas v. EEOC*, 933 F.3d 433, 446

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[22] No party initially questioned the plaintiffs' standing in the district court. An amicus brief raised the issue, and the intervenor-defendant states addressed it at oral argument.

(5th Cir. 2019). "Whether someone is in fact an object of a regulation is a flexible inquiry rooted in common sense." *EEOC*, 933 F.3d at 446 (quoting *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 265 (5th Cir. 2015)). If a plaintiff is indeed the object of a regulation, "there is ordinarily little question that the action or inaction has caused [the plaintiff] injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561–62.

It is undisputed that Hurley and Nantz are the objects of the individual mandate and that they have purchased insurance in order to comply with that mandate. Record evidence supports these conclusions. In his declaration in the district court, Nantz stated, "I continue to maintain minimum essential health coverage because I am obligated." Similarly, Hurley averred in his declaration that he is "obligated to comply with the ACA's individual mandate." They both explain in their declarations that they "value compliance with [their] legal obligations" and bought insurance because they "believe that following the law is the right thing to do." Accordingly, the district court expressly found that Hurley and Nantz bought health insurance because they are obligated to, and we must defer to that factual finding. The evidentiary basis for this injury is even stronger than it was in *NFIB*. In the instant case, the individual mandate has already gone into effect, compelling Nantz and Hurley to purchase insurance *now* as opposed to two years in the future.

The intervenor-defendant states fail to point to any evidence contradicting these declarations, and they did not challenge this evidence in the district court. In

fact, some of the evidence these parties rely on actually supports the conclusion that Nantz and Hurley purchased insurance to comply with the individual mandate. The intervenor-defendant states acknowledge a 2017 report from the Congressional Budget Office indicating that "a small number of people" would continue to buy insurance without a penalty "solely because" of a desire to comply with the law. Cong. Budget Office, *Repealing the Individual Health Insurance Mandate: An Updated Estimate* 1 (Nov. 2017). This report is at least somewhat consistent with a 2008 Congressional Budget Office report, relied on by the state plaintiffs, that "[m]any individuals" subject to the mandate, but not the shared responsibility payment, will obtain coverage to comply with the mandate "because they believe in abiding by the nation's laws." Cong. Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 53 (Dec. 2008). Whether this group of law-abiding citizens includes "many individuals" or "a small number of people," Nantz and Hurley have undisputed evidence showing that they are a part of this group.

In this context, being required to buy something that you otherwise would not want is clearly within the scope of what counts as a "legally cognizable injury." "Economic injury" of this sort is "a quintessential injury upon which to base standing." *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006); *see also Vt. Agency of Nat. Res. v. United States*, 529 U.S. 765, 772–77 (1998) (finding Article III injury from financial harm); *Clinton v. New York*, 524 U.S. 417, 432 (1998) (same); *Sierra Club v. Morton*, 405 U.S. 727, 733–34 (1972) (same); *DAPA*, 809 F.3d at 155 (same). In *Benkiser*, for example, we held that a political party would suffer an injury in fact because it would need to "expend additional funds" in order to

comply with the challenged regulation. 459 F.3d at 586. In the instant case, the undisputed record evidence shows that the individual plaintiffs have spent "additional funds" to comply with the statutory provision that they challenge on constitutional grounds.

This injury, moreover, is "actual," not merely a speculative fear about future harm that may or may not happen. *Lujan*, 504 U.S. at 560. The record shows that, at the time of the complaint, Hurley and Nantz held health insurance, spending money every month that they did not want to spend. Nantz reports that his monthly premium is $266.56, and Hurley says his is $1,081.70. The injury is also "concrete" because it involves the real expenditure of those funds. *See Barlow v. Collins*, 397 U.S. 159, 162–63, 164 (1970) (finding a concrete injury when a regulation caused economic harm from lost profit).

Causation and redressability "flow naturally" from this concrete, particularized injury. *Contender Farms*, 779 F.3d at 266. The evidence in the record from Hurley's and Nantz's declarations show that they would not have purchased health insurance but for the individual mandate, and the intervenor-defendant states have no evidence to the contrary. A judgment declaring that the individual mandate exceeds Congress' powers under the Constitution would allow Hurley and Nantz to forgo the purchase of health insurance that they do not want or need. They could purchase health insurance below the "minimum essential coverage" threshold, or even decide not to purchase any health insurance at all.

The intervenor-defendant states make several arguments against this straightforward injury, and all of them come up short. They first argue that there is no legally cognizable injury because there is no longer

any penalty for failing to comply. In one sense, this argument misses the point. The threat of a penalty that Hurley and Nantz would face under the pre-2017 version of the statute is one potential form of injury, but it is far from the only one. We have held that the costs of compliance can constitute an injury just as much as the injuries from failing to comply. *See, e.g.*, *Benkiser*, 459 F.3d at 586. Thus, in this instance, it is this injury—the time and money spent complying with the statute, not the penalty for failing to do so—that constitutes the plaintiffs' injury.

But the intervenor-defendant states also argue that even the costs of compliance cannot count as an injury in fact if there is no consequence for failing to comply. The individual mandate's compulsion cannot inflict a cognizable injury, they say, because it is not a compulsion at all. Because the enforcement mechanism has been removed, the U.S. House contends, it is now merely a suggestion, at most. We recently rejected this argument in *Texas v. EEOC*, when the Equal Employment Opportunity Commission tried to argue that Texas could not challenge its allegedly non-final administrative guidance because "the Guidance does not compel Texas to do anything." 933 F.3d at 448. We concluded that it would "strain credulity to find that an agency action targeting current 'unlawful' discrimination among state employers—and declaring presumptively unlawful the very hiring practices employed by state agencies—does not require action immediately enough to constitute an injury-in-fact."[23]

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[23] The dissenting opinion states that Texas had standing in *Texas v. EEOC* because of the "consequences for disobeying the [challenged] guidance—including the possibility that the Attorney General would enforce Title VII against it." This depiction of

Id. The individual mandate is no different. Just like the agency guidance, the individual mandate targets as "unlawful" the decision to go without health insurance.

The dissenting opinion grounds its discussion of the issue in the Supreme Court's decision in *Poe v. Ullman*, 367 U.S. 497 (1961). There, the Supreme Court rejected a challenge to Connecticut's criminal prohibition on contraception. The dissenting opinion states that if there was no standing in *Ullman*, then there cannot be standing here. The dissenting opinion seems to treat *Ullman* as part of the "pre-enforcement challenge" line of cases in which the Supreme Court analyzed claims of injury based on future enforcement to determine whether the future enforcement was sufficiently imminent. *Ullman*, however, is not cited in the seminal Supreme Court cases of that line. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–61 (2014); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392–93 (1988); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967). More importantly, as we have explained, this

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Texas v. EEOC ignores that opinion's emphasis on the fact that Texas was "the object of the Guidance." 933 F.3d at 446; *see also id.* ("If, in a suit 'challenging the legality of government action,' 'the plaintiff is himself an object of the action . . . there is ordinarily little question that the action or inaction has caused him injury . . . .'" (quoting *Lujan*, 504 U.S. at 561–62)). As explained above, the individual plaintiffs in this case are the objects of the individual mandate.

case is not a pre-enforcement challenge because the plaintiffs have already incurred a financial injury.[24]

The plurality opinion in *Ullman* said there was insufficient adversity between the parties because there was overwhelming evidence—eighty years' worth of no enforcement of the statute—of "tacit agreement" between prosecutors and the public not to enforce the anti-contraceptive laws that the plaintiffs challenged. 367 U.S. at 507–08. As a result, the Court held that the lawsuit before it was "not such an adversary case as will be reviewed here." *Id.* The fifth, controlling vote in that case—Justice Brennan, who concurred in the judgment—emphasized that this adverseness was lacking because of the case's "skimpy record," devoid of evidence that the "individuals [were] truly caught in an inescapable dilemma." *Id.* at 509 (Brennan, J., concurring).

By contrast, as documented above, the record in the instant case contains undisputed evidence that Nantz and Hurley feel compelled by the individual mandate

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[24] The dissenting opinion also relies on *City of Austin v. Paxton*, No. 18-50646, ___ F.3d ____, 2019 WL 6520769 (5th Cir. Dec. 4, 2019). That reliance is confusing because *City of Austin* is an *Ex parte Young* case, not a standing case. For the *Ex parte Young* exception to Eleventh Amendment sovereign immunity to apply, the state official sued "must have 'some connection with enforcement of the challenged act.'" *Id.* at *2 (alteration omitted) (quoting *Ex parte Young*, 209 U.S. 123, 157 (1908)). In *City of Austin*, the City's claims against the Texas Attorney General failed because the City failed to show the requisite connection to enforcement under *Ex parte Young*. Of course, because this is a lawsuit against the federal government, neither the Eleventh Amendment nor *Ex parte Young* applies. Moreover, even if *City of Austin* had been a pre-enforcement challenge standing case, it would still be irrelevant because this case is not a pre-enforcement challenge.

to buy insurance and that they bought insurance solely for that reason. Especially in light of the fact that the individual mandate lacks a similar eighty-year history of nonenforcement, Nantz and Hurley have gone much further in demonstrating that they are caught in the "inescapable dilemma" that the *Ullman* plaintiffs were not.

The intervenor-defendant states also argue that there is no causation between the individual mandate and Hurley and Nantz's purchase of insurance because Hurley and Nantz exercised a voluntary "choice" to purchase insurance. Because Nantz and Hurley would face no consequence if they went without insurance, the intervenor-defendant states argue that their purchase of insurance is not fairly traceable to the federal defendants. Instead, they claim that Nantz and Hurley impermissibly attempt to "manufacture standing merely by inflicting harm on themselves." *Glass v. Paxton*, 900 F.3d 233, 239 (5th Cir. 2018) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013)).

This argument fails, however, because it conflates the merits of the case with the threshold inquiry of standing. The argument assumes that 26 U.S.C. § 5000A presents not a legal command to purchase insurance, but an option between purchasing insurance and doing nothing. Because this option exists, the argument goes, any injury arising from Hurley's and Nantz's decisions to buy insurance instead of doing nothing (the other putative option) is entirely self-inflicted. This, however, is a merits question that can be reached only after determining the threshold issue of whether plaintiffs have standing.

Texas v. EEOC makes clear that courts cannot fuse the standing inquiry into the merits in this way.

There, in addition to the injury described above from the Guidance's rebuke of Texas's employment practices as "unlawful," Texas claimed it was injured by the EEOC's curtailing of Texas's procedural right to notice and comment before being subject to a regulation. *EEOC*, 933 F.3d at 447. In rejecting the suggestion that Texas was not truly injured because the EEOC had not in fact violated the Administrative Procedure Act's notice-and-comment rules, we held that "[w]e assume, for purposes of the standing analysis, that Texas is correct on the merits of its claim that the Guidance was promulgated in violation of the APA." *Id.* (citing *Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir. 2012)); *see also Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (treating constitutional standing and finality as distinct inquiries).

Indeed, allowing a consideration of the merits as part of a jurisdictional inquiry would conflict with the Supreme Court's express decision in *Steel Co v. Citizens for a Better Environment* to not abandon "two centuries of jurisprudence affirming the necessity of determining jurisdiction before proceeding to the merits." 523 U.S. 83, 98 (1998). That case presented both the question of Article III standing and the merits question of whether the relevant statute authorized lawsuits for purely past violations. *Id.* at 86. The Court rejected any "attempt to convert the merits issue . . . into a jurisdictional one." *Id.* at 93. The Court further rejected the "doctrine of hypothetical jurisdiction," under which certain courts of appeals had "proceed[ed] immediately to the merits question, despite jurisdictional objections" in certain circumstances. *Id.* at 93–94. As the district court correctly noted, that is exactly what the appellants ask this court to do. They urge us to "skip ahead to the merits to determine § 5000A(a) is non-binding and therefore

constitutional and then revert to the standing analysis to use its merits determination to conclude there was no standing to reach the merits in the first place."

Moreover, even if we were to consider the merits as part of our jurisdictional inquiry, it would not make a difference in this case. Because we conclude in Part IV of this opinion that the individual mandate is best read as a command to purchase insurance (and an unconstitutional one at that), rather than as an option between buying insurance or doing nothing, the individual plaintiffs would have standing even if we considered the merits.[25]

B.

We next consider whether the eighteen state plaintiffs have standing, and we conclude that they do.[26] The state plaintiffs allege that the ACA causes them both a fiscal injury as employers and a sovereign injury "because it prevents them from applying their own laws and policies governing their own healthcare markets." State Plaintiffs' Br. at 25. In *DAPA*, we determined that the state of Texas was entitled to special solicitude because it was "exercising a procedural right created by Congress and protecting a 'quasi-sov-

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[25] Even if the individual plaintiffs did not have standing, this case could still proceed because the state plaintiffs have standing. *DAPA*, 809 F.3d at 151 (holding that only one plaintiff needs standing for the court to exercise jurisdiction). "This circuit follows the rule that alternative holdings are binding precedent and not obiter dictum." *Id.* at 178 n.158 (quoting *United States v. Potts*, 644 F.3d 233, 237 n.3 (5th Cir. 2011)).

[26] Likewise, even if the state plaintiffs did not have standing, this case could still proceed because the individual plaintiffs have standing. *DAPA*, 809 F.3d at 151 (holding that only one plaintiff needs standing for the court to exercise jurisdiction).

ereign' interest." *DAPA*, 809 F.3d at 162 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007)); *see also id.* at 154–55. Because the state plaintiffs in this case have suffered fiscal injuries as employers, we need not address special solicitude or the alleged sovereign injuries.

Employers, including the state plaintiffs, are required by the ACA to issue forms verifying which employees are covered by minimum essential coverage and therefore do not need to pay the shared responsibility payment. *See* 26 U.S.C. § 6055(a) ("Every person who provides minimum essential coverage to an individual during a calendar year shall, at such time as the Secretary may prescribe, make a return described in subsection (b)."); 26 U.S.C. § 6056(a) ("Every applicable large employer [that meets certain statutory requirements] shall . . . make a return described in subsection (b)."). These provisions have led to Form 1095-B and 1095-C statements that employees receive from their employers around tax time, which include a series of check boxes indicating the months that employees had health coverage that complies with the ACA. State Plaintiffs' Br. at 23. These legally required reporting practices exist on top of state employers' own in-house administrative systems for managing and tracking their employees' health insurance coverage.

The record is replete with evidence that the individual mandate itself has increased the cost of printing and processing these forms and of updating the state employers' in-house management systems. For example, Thomas Steckel, the director of the Division of Employee Benefits within the South Dakota Bureau of Human Resources, submitted a declaration documenting the administrative costs that the individual

mandate has imposed by way of these reporting requirements. He said, "[t]he individual mandate caused significant administrative burdens and expenses to program our IT system to track and report ACA eligible employees and complete mandatory IRS Form 1095 annual reports." Steckel noted specifically that "the individual mandate caused . . . $100,000.00 [in] ongoing costs" for Form 1095-C administration alone. The dissenting opinion discards this evidence as conclusory. But as even counsel for the intervenor-defendant states admitted at oral argument, nobody challenged this evidence as conclusory in the district court or in the appellate court.[27] Oral Argument at 5:12.

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[27] The reason why is obvious: the evidence is not conclusory. This is bread-and-butter summary judgment practice, not, as the dissenting opinion contends, any "new summary-judgment rule." Of course, a properly-included affidavit must be based on personal knowledge, and conclusory facts and statements on information and belief cannot be utilized. *See* Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure, § 2738 (4th ed. 2019). The Steckel affidavit easily satisfies this standard: it is a detailed 8-page declaration. Steckel attested, under penalty of perjury, that he is "responsible for developing and implementing the State's health plan for state employees" and that he is "particularly familiar with changes in costs, plans, and policies related to the enactment of the ACA because of my role as the Director of the Division [of Employee Benefits]." He estimates the financial costs the individual mandate has caused in nine different categories, including ongoing costs of $10,400 for review of denied appeals, ongoing costs of $100,000 for Form 1095-C administration, and a one-time cost of $3,302,942 as a Transitional Reinsurance Program fee. For other costs, such as the pre-existing conditions prohibition and the expanded eligibility for adult dependent children to age 26, he conceded that he was "unable to accurately estimate the ongoing costs of this mandate." A determination of standing is supported by the administration of

South Dakota is far from the only state that has been harmed from the financial cost of the reporting requirements that the individual mandate aggravates. Judith Muck, the Executive Director of the Missouri Consolidated Health Care Plan, reported that Missouri's costs for preparing 1095-B forms, along with 1094-B forms, are projected to be $47,300 in fiscal year 2019 and $49,200 in fiscal year 2020. Similarly, Teresa MacCartney, the Chief Financial Officer of the State of Georgia and the Director of the Georgia Governor's Office of Planning and Budget, reported that Georgia's overall cost of compliance with the ACA's reporting requirements "is an estimated net $3.6 million to date." MacCartney also reported that after the ACA's implementation, Georgia's Department of Community Health "experienced increased enrollment of individuals already eligible for Medicaid benefits under pre-ACA eligibility standards." This enrollment increase required the Department to enhance its management systems, which was "very costly." Blaise Duran, who is the Manager for Underwriting, Data Analysis and Reporting for the Employees Retirement System of Texas, further documented Texas' costs of the reporting requirements. He declared that the Texas Employees Group Benefits Program "has made administrative process changes in connection with its ACA compliance, such as those related to the provision

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Form 1095-C, the CBO's prediction that some individuals will continue to purchase insurance in the absence of a shared responsibility payment, the fact that two such individuals are before this court, and the Supreme Court's observation that "third parties will likely react in predictable ways." *Department of Commerce*, 139 S. Ct. at 2566.

of Form 1095-Bs to plan participants and the Internal Revenue Service."[28]

The intervenor-defendant states and the U.S. House have not challenged the state plaintiffs' evidence or presented any evidence to the contrary. Instead, they argue that the reporting requirements set forth in Sections 6055(a) and 6056(a) "are separate from the mandate and serve independent purposes." U.S. House Reply Br. at 19. Therefore, they claim, "any resulting injury is thus neither traceable to Section 5000A nor redressable by its invalidation." U.S. House Reply Br. at 19. But this misreads the undisputed evidence in the record. The individual mandate commands individuals to get insurance. Every time an individual gets that insurance through a state employer, the state employer must send the individual a form certifying that he or she is covered and otherwise process that information through in-house management systems.[29] Thus, the reporting requirements in

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[28] This list is not exhaustive. For instance, Arlene Larson, Manager of Federal Health Programs and Policy for Wisconsin Employee Trust Funds, declared that the state expended funds by "hir[ing] a vendor to issue 343 Form 1095-Cs" in 2017. And Mike Michael, Director of the Kansas State Employee Health Plan, averred that reporting for Form 1094 and 1095 cost the state $43,138 in 2017 and $38,048 in 2018. No record evidence indicates that these reporting requirements have been eliminated. Moreover, the "standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008).

[29] Relying on this injury, therefore, does not run afoul of *Nat'l Fed. of the Blind of Texas v. Abbott*, 647 F.3d 202 (5th Cir. 2011). That case prevents plaintiffs from claiming injury based on provisions whose enforcement would be enjoined only if they are inseverable from an unconstitutional provision that does not harm

Sections 6055(a) and 6056(a) flow from the individual mandate set forth in Section 5000A(a).

These costs to the state plaintiffs are well-established.[30] Moreover, the continuing nature of these fiscal injuries is consistent with Fifth Circuit and Supreme Court precedent.

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the plaintiff. *Id.* at 210–11. The state plaintiffs' injuries stem from the increased administrative costs created by the individual mandate itself, not from other provisions. To be sure, those costs are created in part by the individual mandate's practical *interaction* with other ACA provisions, like the reporting requirements. But this is no different from the injuries in *DAPA*, where the challenged action interacted with Texas's driver's license regulations. It is also no different from *Department of Commerce*, where the challenged census question interacted with constitutional rules tying political representation to a state's population.

[30] The dissenting opinion, citing no authority, contends that the state plaintiffs need evidence that at least one specific "employee enrolled in one of state plaintiffs' health insurance programs solely because of the unenforceable coverage requirement." We have already explained why the uncontested affidavits suffice. We note, moreover, that the *DAPA* court found that Texas had standing because "it would incur significant costs in issuing driver's licenses to DAPA beneficiaries"—without requiring that Texas first show that it had issued a specific license to a specific illegal alien because of DAPA. Finally, the dissenting opinion's rule would create a split with our sister circuits. *See Massachusetts v. United States Dep't of Health & Human Servs.*, 923 F.3d 209, 225 (1st Cir. 2019) ("[Massachusetts] need not point to a specific person who will be harmed in order to establish standing in situations like this."); *California v. Azar*, 911 F.3d 558, 572 (9th Cir. 2018), *cert. denied sub nom. Little Sisters of the Poor Jeanne Jugan Residence v. California*, 139 S. Ct. 2716 (2019) ("Appellants fault the states for failing to identify a specific woman likely to lose coverage. Such identification is not necessary to establish standing."); *Pennsylvania v. President United States*, 930 F.3d 543, 564 (3d Cir. 2019), *as amended* (July 18, 2019) ("The Government faults the States for failing to identify a specific woman who

In *DAPA*, we held that the state of Texas had standing to challenge the federal government's DAPA program because it stood to "have a major effect on the states' fisc." *Id.* at 152. This was because, if DAPA were permitted to go into effect, it would have "enable[d] at least 500,000 illegal aliens in Texas" to satisfy Texas's requirements that the Department of Public Safety "'shall issue' a license to a qualified applicant," including noncitizens who present "documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States." *Id.* at 155 (quoting Tex. Transp. Code §§ 521.142(a), 521.181). Evidence in the record showed that Texas, which subsidizes its licenses, would "lose a minimum of $130.89 on each one it issued to a DAPA beneficiary." *Id.* Even a "modest estimate" of predictable third-party behavior would rack up costs of "several million dollars." *Id.*

The Supreme Court recently applied a similar analysis in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). In that case, a group of state and local governments sued to prevent the federal government from including a question about citizenship status on the 2020 census. *Id.* at 2563. The Supreme Court held that these plaintiffs had standing because they met their burden "of showing that third parties will likely react in predictable ways to the citizenship question." *Id.* at 2566. The census question would likely lead to "noncitizen households responding . . . at lower rates than other groups, which in turn would cause them to be undercounted." *Id.* at 2565. This undercounting of

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will be affected by the Final Rules, but the States need not define injury with such a demanding level of particularity to establish standing.").

third parties would injure the state and local governments by "diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources." *Id.*

In both *DAPA* and *Department of Commerce*, the state plaintiffs demonstrated injury by showing that the challenged law would cause third parties to behave in predictable ways, which would inflict a financial injury on the states. The instant case is no different. The individual mandate commands people to ensure that they have minimum health insurance coverage. That predictably causes more people to buy insurance, which increases the administrative costs of the states to report, manage, and track the insurance coverage of their employees and Medicaid recipients.[31]

V.

Having concluded that both groups of plaintiffs have standing to bring this lawsuit, we must next determine whether the individual mandate is a constitutional exercise of congressional power. We conclude that it is not. We first discuss the Supreme Court's holding in *NFIB*, and then we explain why, under that

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[31] The dissenting opinion contends that our opinion is inconsistent because we rely on *Department of Commerce*, in which the Court found that some individuals will predictably violate the law, in explaining why some individuals will predictably "follow the law regardless of the incentives." In a large group, there will predictably be some individuals in each category. Even the dissenting opinion accepts the Congressional Budget Office's projection that some people will buy insurance solely because of a desire to comply with the law. *See* Cong. Budget Office, *Repealing the Individual Health Insurance Mandate: An Updated Estimate* 1 (Nov. 2017).

holding, the individual mandate is no longer constitutional.

A.

The *NFIB* opinion was extremely fractured. In that case, Chief Justice Roberts wrote an opinion addressing several issues. Parts of that opinion garnered a majority of votes and served as the opinion of the Court.[32] In relevant part, Part III-A of the Chief Justice's opinion, joined by no other Justice, observed that "[t]he most straightforward reading of the [individual] mandate is that it commands individuals to purchase insurance," and that, using that reading of the statute, the individual mandate is not a valid exercise of Congress' power under the Interstate Commerce Clause. *NFIB*, 567 U.S. at 562, 546–61 (Roberts, C.J.). The Constitution, he explained, "gave Congress the power to *regulate* commerce, not to *compel* it." *Id.* at 555 (Roberts, C.J.). For similar reasons,

[32] As a general overview, Chief Justice Roberts's opinion functioned in the following way. In Part III-A, Chief Justice Roberts said that the individual mandate was most naturally read as a command to buy insurance, which could not be sustained under either the Interstate Commerce Clause or the Necessary and Proper Clause. Though no Justice joined this part of the opinion, the four dissenting Justices—Justices Scalia, Kennedy, Thomas, and Alito—agreed with Part III-A in a separate opinion. In Part III-B, the Chief Justice wrote that even though the most natural reading of the individual mandate was unconstitutional, the Court still needed to determine whether it was "fairly possible" to read the provision in a way that saved it from being unconstitutional. In Part III-C, the Chief Justice—joined by Justices Ginsburg, Breyer, Kagan, and Sotomayor—concluded that the provision could be construed as constitutional by reading the individual mandate, in conjunction with the shared responsibility payment, as a legitimate exercise of Congress' taxing power. This last part of the opinion supported the Court's ultimate judgment: that the individual mandate was constitutional as saved.

the Chief Justice concluded that this command to purchase insurance could not be sustained under the Constitution's Necessary and Proper Clause. *Id.* The individual mandate was not "proper" because it expanded federal power, "vest[ing] Congress with the extraordinary ability to create the necessary predicate to the exercise of" its Interstate Commerce Clause powers. *Id.* at 560.

Though no other Justices joined this part of the Chief Justice's opinion, the "joint dissent"—joined by Justices Scalia, Kennedy, Thomas, and Alito—reached the same conclusions on the Interstate Commerce Clause and Necessary and Proper Clause questions. *Id.* at 650–60 (joint dissent). A majority of the court, therefore, concluded that the individual mandate is not constitutional under either the Interstate Commerce Clause or the Necessary and Proper Clause.

This limited reading of the Interstate Commerce Clause—and, by extension, of the Necessary and Proper Clause—was necessary to preserving "the country [that] the Framers of our Constitution envisioned." *Id.* at 554 (Roberts, C.J.). As Chief Justice Roberts observed, if the individual mandate were a proper use of the power to regulate interstate commerce, that power would "justify a mandatory purchase to solve almost any problem." *Id.* at 553 (Roberts, C.J.). If Congress can compel the purchase of health insurance today, it can, for example, micromanage Americans' day-to-day nutrition choices tomorrow. *Id.* (Roberts, C.J.); *see also id.* at 558 (Roberts, C.J.) (reasoning that, under an expansive view of the Commerce Clause, nothing would stop the federal government from compelling the purchase of broccoli).

An expansive reading of the Interstate Commerce Clause would be foreign to the Framers, who saw the clause as "an addition which few oppose[d] and from which no apprehensions [were] entertained." *Id.* at 554 (Roberts, C.J.) (quoting The Federalist No. 45, at 293 (J. Madison) (C. Rossiter ed., 1961)). Elevating Congress' power to "regulate commerce . . . among the several states," U.S. Const. art. I, § 8, cl. 3, to a power to *create* commerce among the several states would make a Leviathan of the federal government, "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." *NFIB*, 567 U.S. at 554 (Roberts, C.J.) (quoting The Federalist No. 48, at 309 (J. Madison) (C. Rossiter ed., 1961)). Justice Scalia, writing for the joint dissenters, similarly noted that the more expansive reading of the Interstate Commerce Clause would render that provision a "font of unlimited power," *id.* at 653 (joint dissent), or, in the words of Alexander Hamilton, a "hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane," *id.* (quoting The Federalist No. 33, at 202 (C. Rossiter ed., 1961)).

In Part III-B, again joined by no other Justice, Chief Justice Roberts concluded that because the individual mandate found no constitutional footing in the Interstate Commerce or Necessary and Proper Clauses, the Supreme Court was obligated to consider the federal government's argument that, as an exercise in constitutional avoidance, the mandate could be read not as a command but as an *option* to purchase insurance or pay a tax. This "option" interpretation of the statute could save the statute from being unconstitutional, as it would be justified under Congress' taxing power. *Id.* at 561–63 (Roberts, C.J.); *see also id.* at 562 (Roberts, C.J.) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to

it which should involve a violation, however unintentional, of the constitution.") (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448–49 (1830)); *see also id.* at 563 (Roberts, C.J.) ("The question is not whether that is the most natural interpretation of the mandate, but only whether it is a 'fairly possible' one.") (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

In Part III-C, the Chief Justice—writing for a majority of the Court, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan—undertook that inquiry of determining whether it was "fairly possible" to read the individual mandate as an option and thereby save its constitutionality. *See id.* at 563–74 (majority opinion). Chief Justice Roberts reasoned that the individual mandate could be read in conjunction with the shared responsibility payment in order to save the individual mandate from unconstitutionality. Read together with the shared responsibility payment, the entire statutory provision could be read as a legitimate exercise of Congress' taxing power for four reasons.

First and most fundamentally, the shared-responsibility payment "yield[ed] the essential feature of any tax: It produce[d] at least some revenue for the Government." *Id.* at 564. Second, the shared-responsibility payment was "paid into the Treasury by taxpayers when they file their tax returns." *Id.* at 563 (alternations and internal quotation marks omitted). Third, the amount owed under the ACA was "determined by such familiar factors as taxable income, number of dependents, and joint filing status." *Id.* Fourth and finally, "[t]he requirement to pay [was] found in the Internal Revenue Code and enforced by the IRS, which . . . collect[ed] it in the same manner as taxes." *Id.* at 563–64 (internal quotation marks omitted).

Because of these four attributes of the shared responsibility payment, the Court reasoned that "[t]he Federal Government does have the power to impose a tax on those without health insurance." *Id.* at 575. The Court concluded that "[s]ection 5000A is therefore constitutional, because it can reasonably be read as a tax."[33] *Id.* We agree with the dissenting opinion that "this case begins and ought to end" with *NFIB*.

B.

Now that the shared responsibility payment amount is set at zero,[34] the provision's saving construction is no longer available. The four central attributes that once saved the statute because it could be read as a tax no longer exist. Most fundamentally, the provision no longer yields the "essential feature of any tax" because it does not produce "at least some

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[33] Seven Justices—Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan—agreed that the Act's Medicaid-expansion provisions unconstitutionally coerced states into compliance. *NFIB*, 567 U.S. at 575–85 (plurality opinion); *id.* at 671–89 (joint dissent). But, in light of a severability clause, Part IV–B of the Chief Justice's opinion concluded that the unconstitutional portion of the Medicaid provisions could be severed. *Id.* at 585–88 (plurality opinion). Meanwhile, Justice Ginsburg, joined by Justice Sotomayor, disagreed that the Act's mandatory Medicaid expansion was unconstitutional. *Id.* at 633 (Ginsburg, J., concurring in the judgment in part, and dissenting in part). Those two Justices concurred in the judgment with respect to the Chief Justice's conclusion that the unconstitutional provisions could be severed from the remainder of the Act. *Id.* at 645–46 (Ginsburg, J., concurring in the judgment in part, and dissenting in part). The four dissenting Justices concluded that the Act's Medicaid-expansion provisions were unconstitutionally coercive and rejected the relief of allowing states to opt into Medicaid expansion. *Id.* at 671–90 (joint dissent).

[34] 26 U.S.C. §§ 5000A(c)(2)(B)(iii), (c)(3)(A).

revenue for the Government." *Id.* at 564. Because the provision no longer produces revenue, it necessarily lacks the three other characteristics that once rendered the provision a tax. The shared-responsibility payment is no longer "paid into the Treasury by taxpayer[s] when they file their tax returns" because the payment is no longer paid by anyone. *Id.* at 563 (alteration in original and internal quotation marks omitted). The payment amount is no longer "determined by such familiar factors as taxable income, number of dependents, and joint filing status." *Id.* The amount is zero for everyone, without regard to any of these factors. The IRS no longer collects the payment "in the same manner as taxes" because the IRS cannot collect it at all. *Id.* at 563–64 (internal quotation marks omitted).

Because these four critical attributes are now missing from the shared responsibility payment, it is, in the words of the state plaintiffs, "no longer 'fairly possible' to save the mandate's constitutionality under Congress' taxing power." State Plaintiffs' Br. at 32. The proper application of *NFIB* to the new version of the statute is to interpret it according to what Chief Justice Roberts—and four other Justices of the Court—said was the "most straightforward" reading of that provision: a command to purchase insurance. *Id.* at 562 (Roberts, C.J.). As the district court properly observed, "the only reading available is the most natural one." Under that reading, the individual mandate is unconstitutional because, under *NFIB*, it finds no constitutional footing in either the Interstate Commerce Clause or the Necessary and Proper Clause. *Id.* at 546–61 (Roberts, C.J.); *id.* at 650–60 (joint dissent).

The intervenor-defendant states have several arguments against this conclusion, all of which fail. They first argue that the saving construction of the individual mandate, interpreting the provision as an option to buy insurance or pay a tax, is still "fairly possible." As the individual plaintiffs point out, the Court interpreted the individual mandate as an option only because doing so would save it from being unconstitutional. Accordingly, the intervenor-defendant states must show that the "option" would still be a constitutional exercise of Congress' taxing power. To make that showing, the intervenor-defendant states reject the plaintiffs' attempt to read a "some revenue" requirement into the Constitution's Taxing and Spending Clause, arguing instead for a potential-to-produce-revenue requirement. The individual mandate, they say, is still set out in the Internal Revenue Code. It still provides a "statutory structure through which" Congress could eventually tax people for failing to buy insurance. It still includes references to taxable income, number of dependents, and joint filing status. 26 U.S.C. §§ 5000A(b)(3), (c)(2), (c)(4). Further, it still does not apply to individuals who pay no federal income taxes. 26 U.S.C. § 5000A(e)(2).

The intervenor-defendant states have little support for this reading of the Taxing and Spending Clause. For starters, *NFIB* could not be clearer that the "produc[tion]" of "at least some revenue for the Government"—not the potential to produce that revenue—is "the *essential* feature of any tax." 567 U.S. at 564 (majority opinion) (emphasis added). As the district court observed, when determining whether a statute is a tax, the actual production of revenue is "not indicative, not common—[but] essential."

The intervenor-defendant states also find no support in *United States v. Ardoin*, 19 F.3d 177, 179–80 (5th Cir. 1994). In that unusual case, Congress had imposed a tax on machine guns, but subsequently outlawed machine guns altogether, which prompted the relevant agency to stop collecting the tax. *Id.* at 179–80. The defendant was convicted not only for possessing a machine gun but also for failing to pay the tax, which remained on the books. *Id.* at 178. The court upheld the conviction on the basis that the tax law at issue could "be upheld on the preserved, but unused, power to tax or on the power to regulate interstate commerce." *Id.* at 180. But the taxing power was "preserved" in *Ardoin* because it was non-revenue-producing only in practice whereas the "tax" here is actually $0.00 as written on the books.[35] *See* Fed. Defendants' Br. at 32. Expanding *Ardoin* to apply here would, as the federal defendants point out, puzzlingly allow Congress to "prohibit conduct that exceeds its commerce power through a two-step process of first taxing it and then eliminating the tax while retaining the prohibition." Fed. Defendants' Br. at 32.

The intervenor-defendant states argue further that the individual mandate does not even need constitutional justification because it is merely a suggestion, not binding legislative action. The individual mandate, they contend, is no different from the Flag Code, which, though entered into the pages of the U.S. Code,

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[35] This distinction also disposes of the intervenor-defendant states' concern about "cast[ing] constitutional doubt on taxes with delayed start dates or that Congress has temporarily suspended for periods of time." Intervenor-Defendant States' Br. at 43. In none of the examples the intervenor-defendant states cite did the statute purport to levy a "tax" of $0.00.

"was not intended to proscribe conduct." *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1573 (11th Cir. 1993) (analyzing 36 U.S.C. §§ 174–76). This argument is just a repackaged version of their argument that the individual mandate can still be read as an option. But, as the state plaintiffs, the individual plaintiffs, and the federal defendants point out, the Supreme Court has already held that the "most straightforward" reading of the individual mandate—which emphatically demands that individuals "shall" buy insurance, 26 U.S.C. § 5000A(a)—is as a command to purchase health insurance. The Court then concluded that that command lacked constitutional justification. The zeroing out of the shared responsibility payment does not render the provision any less of a command. Quite the opposite: Chief Justice Roberts concluded that the greater-than-zero shared responsibility payment actually converted the individual mandate into an option. *NFIB*, 567 U.S. at 563–64 (majority opinion). Now that the shared responsibility payment has been zeroed out, the only logical conclusion under *NFIB* is to read the individual mandate as a command, quite unlike the Flag Code. It is an individual *mandate*, not an individual suggestion.

Moreover, it is not true that when the Court adopts a limiting construction to avoid constitutional questions, that construction controls as to all applications of the statute, regardless of whether the original constitutional implications are present. The case on which the U.S. House relies involved different applications of an identical statute to different facts. *Clark v. Martinez*, 543 U.S. 371, 380 (2005) (rejecting the argument that "the constitutional concerns that influenced" a previous interpretation of a provision of the Immigration and Nationality Act were "not present

for" the aliens at issue in that case). This case is readily distinguishable because the four characteristics that made the previous interpretation possible—the production of revenue and other tax-like features—have now been legislatively removed. The limiting construction is no longer available as a matter of statutory interpretation. The interpretation must accordingly change to comport with what five Justices of the Supreme Court have said is the "most straightforward reading" of that interpretation.[36]

The dissenting opinion justifies its continued reliance on the saving construction—even though it is no longer applicable—by citing *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401 (2015). This approach fares no better. The dissenting opinion quotes *Kimble* to say that "in whatever way reasoned," the Court's interpretation "effectively become[s] part of the statutory scheme, subject . . . to congressional change." *Id.* at 2409. The dissenting opinion correctly acknowledges that the individual mandate was never changed. But what did change was the provision that actually mattered: the shared responsibility payment. When it was set above zero, it could be saved as a tax, even

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[36] Contrary to the dissenting opinion's suggestion, a saving construction is no longer available. The canon of constitutional avoidance applies only "when statutory language is susceptible of multiple interpretations." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). In *NFIB*, § 5000A was amenable to two possible interpretations. It was either "a command to buy insurance" or "a tax." *NFIB,* 567 U.S. at 574 (Roberts, C.J.). After Congress zeroed out the shared responsibility payment, one of those possible interpretations fell away. What was then the "most straightforward reading" is now the only available reading: it is a "command to buy insurance" and "the Commerce Clause does not authorize such a command." *Id.*

though five justices agreed this was an unnatural reading. It would be puzzling if Congress could change a statute at will, entirely insulated from constitutional infirmity, just because the Court had previously used constitutional avoidance to save a previous version of the statute.

The intervenor-defendant states argue furthermore that the individual mandate can now be constitutional under the Interstate Commerce Clause because it does not *compel* anyone into commerce. This is again a repackaged version of their argument that the individual mandate is an option even without a revenue-generating shared responsibility payment, an argument that, as the state plaintiffs point out, the Supreme Court has already rejected. This argument, as the district court observed, is also logically inconsistent. If the individual mandate no longer truly compels anything, then it can hardly be said to be a "regulat[ion]" of interstate commerce. In the words of the district court, the intervenor-defendant states "hope to have their cake and eat it too."[37]

Finally, we would be remiss if we did not engage with the dissenting opinion's contention that § 5000A is not an exercise of legislative power. This would likely come as a shock to the legislature that drafted it, the president who signed it, and the voters who celebrated or lamented it. It is not surprising that the

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[37] Any argument that the individual mandate can now be sustained under the Necessary and Proper Clause fails for the same reasons. The individual mandate now must be read as a command, and five Justices in *NFIB* already rejected the argument that such a command could be sustained under the Necessary and Proper Clause. *NFIB*, 567 U.S. at 561 (Roberts, C.J.); *id.* at 654–55 (joint dissent).

dissenting opinion can cite no case in which a federal court deems a duly enacted statute *not* an exercise of legislative power, much less a statute that clearly commands that an individual "shall" do something.[38] The dissenting opinion is inconsistent on this point: it argues that the provision's status as an exercise of legislative power fluctuates according to the amount of the shared responsibility payment while simultaneously contending that "if the text of the coverage requirement has not changed, its meaning could not have changed either." Our decision breaks no new ground. We simply observe that § 5000A was originally cognizable as either a command or a tax. Today, it is only cognizable as a command. It has always been an exercise of legislative power.

* * *

In *NFIB*, the individual mandate—most naturally read as a command to purchase insurance—was saved from unconstitutionality because it could be read together with the shared responsibility payment as an option to purchase insurance or pay a tax. It could be read this way because the shared responsibility payment produced revenue. It no longer does so. Therefore, the most straightforward reading applies: the

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[38] The dissenting opinion's theory of the "law that does nothing" results in some bizarre metaphysical conclusions. The ACA was signed into law in 2010. No one questions that when it was signed, § 5000A was an exercise of legislative power. Yet today, the dissenting opinion asserts, § 5000A is not an exercise of legislative power. So did Congress exercise legislative power in 2010, as seen from 2015? As seen from 2018? Does § 5000A ontologically re-emerge should a future Congress restore the shared responsibility payment? Perhaps, like Schrödinger's cat, § 5000A exists in both states simultaneously. The dissenting opinion does not say. Our approach requires no such quantum musings.

mandate is a command. Using that meaning, the individual mandate is unconstitutional.

VI.

Having concluded that the individual mandate is unconstitutional, we must next determine whether, or how much of, the rest of the ACA is severable from that constitutional defect. On this question, we remand to the district court to undertake two tasks: to explain with more precision what provisions of the post-2017 ACA are indeed inseverable from the individual mandate; and to consider the federal defendants' newly-suggested relief of enjoining the enforcement only of those provisions that injure the plaintiffs or declaring the Act unconstitutional only as to the plaintiff states and the two individual plaintiffs. We address each issue in turn.

A.

The Supreme Court has said that the "standard for determining the severability of an unconstitutional provision is well established." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). Unless it is "evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)).

This inquiry into counterfactual Congressional intent has been crystallized into a "two-part . . . framework." *NFIB*, 567 U.S. at 692 (joint dissent). First, if a court holds a statutory provision unconstitutional, it then determines whether the now-truncated statute will operate in "a manner consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685 (emphasis

omitted). This first step asks whether the constitutional provisions—standing on their own, without the unconstitutional provisions—are "fully operative as a law," not whether they would simply "operate in some coherent way" not designed by Congress. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010) (quoting *New York v. United States*, 505 U.S. 144, 186 (1992)); *NFIB*, 567 U.S. at 692 (joint dissent). Second, even if the remaining provisions can operate as Congress designed them to, the court must determine if Congress would have enacted the remaining provisions without the unconstitutional portion. If Congress would not have done so, then those provisions must be deemed inseverable. *Alaska Airlines*, 480 U.S. at 685 ("[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted."); *Free Enter. Fund*, 561 U.S. at 509 ("[N]othing in the statute's text or historical context makes it evident that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will." (internal quotation marks omitted)).

Severability doctrine places courts between a rock and a hard place. On the one hand, courts strive to be faithful agents of Congress,[39] which often means refusing to create a hole in a statute in a way that creates legislation Congress never would have agreed to or passed. *See Murphy*, 138 S. Ct. at 1482 ("[Courts] cannot rewrite a statute and give it an effect altogether different from that sought by the measure

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[39] *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J. L. & Pub. Pol'y 61, 63 (1994) ("[Courts] are supposed to be faithful agents, not independent principals.").

viewed as a whole." (quoting *R.R. Ret. Bd. v. Alton R.R.*, 295 U.S. 330, 362 (1935))). On the other hand, courts often try to abide by the medical practitioner's maxim of "first, do no harm," aiming "to limit the solution to the problem" by "refrain[ing] from invalidating more of the statute than is necessary." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006); *Collins v. Mnuchin*, 938 F.3d 553, 592 (5th Cir. 2019) (en banc) (Haynes, J.) (severing unconstitutional removal restriction from remainder of Federal Housing Finance Agency's enabling statute).[40] In fact, courts have a "duty" to "maintain the act in so far as it is valid" if it "contains unobjectionable provisions separable from those found to be unconstitutional." *Alaska Airlines*, 480 U.S. at 684 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)).

The Supreme Court emphasizes this duty so strongly that commentators have identified "a presumption [of severability] implicit in the Court's" severability jurisprudence. Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1950 n.28 (1997); *see also* Brian Charles Lea, *Situational Severability*, 103 Va. L. Rev. 735, 744 (2017) ("[C]ourts assume that a legislature intends for any unlawful part of its handiwork to be severable from all lawful parts in the absence of indicia of a contrary intention."). This presumption is strongest when Congress includes a severability clause in the statutory text; however, "[i]n the absence of a severability clause . . . Congress's silence is just that—silence—and does not raise a presumption against severability." *Alaska Airlines*, 480 U.S. at 686.

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[40] Judge Haynes wrote the opinion of the court as to the question of remedy. *See Collins*, 938 F.3d at 591.

Nevertheless, the meticulous analysis required by severability doctrine defies reliance on presumptions or generalities. The Supreme Court's latest venture into severability territory, *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), provides an example. There, the Court held that the entirety of the Professional and Amateur Sports Protection Act was unconstitutional because one of its provisions—authorizing private sports gambling—violated the anti-commandeering doctrine. *Id.* at 1484. Justice Alito's majority opinion separately explored each of the other operative provisions in the act, reasoning that all of the act's provisions were "obviously meant to work together" and be "deployed in tandem." *Id.* at 1483. Because Congress would not have wanted the otherwise-valid provisions "to stand alone," the Court declined to sever them. *Id.* This conclusion prompted a dissent from Justice Ginsburg, who characterized the majority as "wield[ing] an ax . . . instead of using a scalpel to trim the statute" and reiterated that "the Court ordinarily engages in a salvage rather than a demolition operation." *Id.* at 1489–90 (Ginsburg, J., dissenting).

These *Murphy* opinions draw attention to one difficulty inherent in severability analysis: selecting the right tool for the job. Justice Thomas' concurring opinion goes further, providing two reasons why navigating between the Scylla of poking small but critical holes in complex, carefully crafted legislative bargains and the Charybdis of invalidating more duly enacted legislation than necessary stands "in tension with traditional limits on judicial authority." *Murphy*, 138 S. Ct. at 1485 (Thomas, J., concurring). "[T]he judicial power is, fundamentally, the power to render judgments in individual cases," and severability doc-

trine threatens to violate that vital separation-of-powers principle in more than one way. *Id.* (Thomas, J., concurring).

First, severability doctrine requires "a nebulous inquiry into hypothetical congressional intent," as opposed to the usual judicial bread-and-butter of "determin[ing] what a statute means." *Id.* at 1486 (Thomas, J., concurring) (quoting *United States v. Booker*, 543 U.S. 220 at 321 n.7 (2005) (Thomas, J., dissenting in part)). Because "Congress typically does not pass statutes with the expectation that some part will later be deemed unconstitutional," *id.* at 1487, this requirement often leaves courts to exercise their imagination or "intuitions regarding what the legislature would have desired had it considered the severability issue." Lea, *supra*, at 747. This, in turn, "enmeshes the judiciary in making policy choices" the Constitution reserves for the legislature, David H. Gans, *Severability as Judicial Lawmaking*, 76 Geo. Wash. L. Rev. 639, 663 (2008), providing unelected judicial officers with cover to simply implement their own policy preferences.

Second, severability doctrine forces courts to "weigh in on statutory provisions that no party has standing to challenge, bringing courts dangerously close to issuing advisory opinions." *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring); *see also* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 936 (2018) ("The federal courts have no authority to erase a duly enacted law from the statute books, [but can only] decline to enforce a statute in a particular case or controversy."[41]). As Justice Thomas

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[41] If that is true, then courts are speaking loosely when they state that they are "invalidating" or "striking down" a law.

points out, when Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is," he justified that assertion by explaining that "[t]hose who apply [a] rule to particular cases, must of necessity expound and interpret that rule." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Yet severability doctrine directs courts to go beyond the necessary—that is, the application of a particular statutory provision to a particular case—to consider the viability of other provisions without even "ask[ing] whether the plaintiff has standing to challenge those other provisions." *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring). "[S]everability doctrine is thus an unexplained exception to the normal rules of standing, as well as the separation-of-powers principles that those rules protect." *Id.*

Severability analysis is at its most demanding in the context of sprawling (and amended) statutory schemes like the one at issue here. The ACA's framework of economic regulations and incentives spans over 900 pages of legislative text and is divided into ten titles. Most of the provisions directly regulating health insurance, including the one challenged in this case, are found in Titles I and II. *See, e.g.*, 26 U.S.C. § 5000A(a) (individual mandate); 42 U.S.C. § 300gg-14(a) (requiring insurers offering family plans to cover adult children until age 26), §§ 18031–18044 (creating health insurance exchanges). The other titles generally amend Medicare (Title III), fund preventative healthcare programs (Title IV), seek to expand the supply of healthcare workers (Title V), enact anti-fraud requirements for Medicare/Medicaid facilities (Title VI), establish or expand drug regulations (Title VII), create a voluntary long-term care insurance

program (Title VIII), address taxation (Title IX), and improve health care for Native Americans (Title X[42]).

The plaintiffs group this host of provisions into three categories for ease of reference. State Plaintiffs' Br. at 38. The first category includes the three core ACA provisions the Supreme Court has called "closely intertwined": the individual mandate, 26 U.S.C. § 5000A(a), the guaranteed-issue requirement, 42 U.S.C. §§ 300gg, 300gg-1, and the community-rating requirement, 42 U.S.C.§ 300gg-4. *King*, 135 S. Ct. at 2487. The second category includes the remaining "[m]ajor provisions of the Affordable Care Act," *NFIB*, 567 U.S. at 697 (joint dissent), namely other provisions dealing with "insurance regulations and taxes," "reductions in federal reimbursements to hospitals and other Medicare spending reductions," the insurance "exchanges and their federal subsidies," and "the employer responsibility assessment." *See, e.g.*, 25 U.S.C. § 4980H; 26 U.S.C. § 36B; 42 U.S.C. §§ 1395ww, 18021–22. The third category includes a variety of minor provisions, for example taxes on certain medical devices or provisions requiring the display of nutritional content at restaurants. *See, e.g.*, 21 U.S.C. § 343(q)(5)(H); 26 U.S.C. § 4191(a).

Moreover, Congress has made a number of substantive amendments to the ACA, revising the statute in 2010, 2011, 2014, 2017, and 2018. *See, e.g.*, Medicare and Medicaid Extenders Act of 2010, Pub. L. No. 111-309, 124 Stat. 3285 (2010) (modifying tax credit scale and Medicaid requirements); Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat. 38 (2011) (repealing program that required some employers to provide

[42] Title X also includes a number of miscellaneous provisions relating to the other titles.

some employees with vouchers for purchasing insurance); Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (2015) (repealing requirement that employers with more than 200 employees enroll new full-time employees in health insurance and continue coverage for current employees). Most of these amendments occurred prior to the 2017 legislation eliminating the shared responsibility payment, but some are more recent. *See, e.g.*, Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64 (2018) (repealing Independent Payment Advisory Board).

In summary, then, this issue involves a challenging legal doctrine applied to an extensive, complex, and oft-amended statutory scheme. All together, these observations highlight the need for a careful, granular approach to carrying out the inherently difficult task of severability analysis in the specific context of this case. We are not persuaded that the approach to the severability question set out in the district court opinion satisfies that need. The district court opinion does not explain with precision how particular portions of the ACA as it exists post-2017 rise or fall on the constitutionality of the individual mandate. Instead, the opinion focuses on the 2010 Congress' labeling of the individual mandate as "essential" to its goal of "creating effective health insurance markets," 42 U.S.C. § 18091(2)(I), and then proceeds to designate the entire ACA inseverable. In using this approach, the opinion does not address the ACA's provisions with specificity, nor does it discuss how the individual mandate fits within the post-2017 regulatory scheme of the ACA.

The district court opinion begins by addressing the 2010 version of the ACA. Starting with the text of the ACA, the district court opinion points out that the

2010 Congress incorporated into the text its view that "the absence of the [individual mandate] would undercut Federal regulation of the health insurance market." 42 U.S.C. § 18091(2)(H). The district court opinion notes that the 2010 Congress devised the individual mandate, "together with the other provisions" of the ACA, to "add millions of new customers to the health insurance market." 42 U.S.C. § 18091(2)(C). In this way, the 2010 Congress sought to "minimize th[e] adverse selection" that might otherwise occur if healthy individuals "wait[ed] to purchase health insurance until they needed care," 42 U.S.C. § 18091(2)(I)—a strategic choice that would otherwise be available given the ACA's guaranteed-issue and community-rating provisions. According to the district court opinion: because the 2010 Congress found the individuate mandate "essential" to this plan to reshape health insurance markets, the individual mandate is inseverable from the rest of the ACA "[o]n the unambiguous enacted text alone."

The district court opinion also addresses ACA caselaw. Citing the Supreme Court's decisions in *NFIB* and *King*, the district court opinion states that "[a]ll nine Justices . . . agreed the Individual Mandate is inseverable from at least the pre-existing-condition provisions." *See NFIB*, 567 U.S. at 548 (Roberts, C.J.), 596–98 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ.), 695–96 (joint dissent of Scalia, Kennedy, Thomas, and Alito, JJ.); *King*, 135 S. Ct. at 2487 (stating that the individual mandate is "closely intertwined" with the guaranteed-issue and community-rating provisions). As to the ACA's other provisions, the district court opinion notes that the only group of Justices who fully considered whether the other major and minor provisions were severable was the joint dissent in *NFIB*—and those Justices would have

held that "invalidation of the ACA's major provisions requires the Court to invalidate the ACA's other provisions." *NFIB*, 567 U.S. at 704 (joint dissent).

Beyond these points, the district court opinion states that its "conclusion would only be reinforced" if it "parse[d] the ACA's provisions one by one." The district court opinion arrives at this conclusion by reasoning that declaring only the individual mandate unlawful would disrupt the Act's careful balance of "shared responsibility." The district court opinion lists a few examples of how it would expect this to happen with regard to the ACA's major provisions. First, the district court opinion reasons that "the Individual Mandate reduces the financial risk forced upon insurance companies and their customers by the ACA's major regulations and taxes." If the individual mandate fell and the regulations and taxes did not, insurance companies would suffer a burden without enjoying a countervailing benefit—"a choice no Congress made and one contrary to the text." Second, if a court were to declare just the individual mandate and the protections for preexisting conditions unlawful—but not the subsidies for health insurance—then the Act would be transformed into "a law that subsidizes the kinds of discriminatory products Congress sought to abolish at, presumably, the re-inflated prices it sought to suppress." Third, Congress never intended "a duty on employers, *see* 26 U.S.C. § 4980H, to cover the skyrocketing insurance premium costs" that would "inevitably result from removing" the individual mandate. Fourth, because "the Medicaid-expansion provisions were designed to serve and assist fulfillment of the Individual Mandate," removing the individual mandate would remove the need for that expansion.

As to the ACA's minor provisions, the district court opinion states that it is "impossible to know which minor provisions Congress would have passed absent the Individual Mandate," and that such an inquiry involves too much "legislative guesswork." Relying on the 2010 Congress' labeling of the individual mandate as "essential," the district court opinion ultimately determines that there is "no reason to believe that Congress would have enacted" the minor provisions independently. The district court opinion similarly disclaims the ability to divine the intent of the 2017 Congress—which had zeroed out the shared responsibility payment but left the rest of the ACA untouched—labeling such an inquiry "a fool's errand." To the extent it analyzed the intent of the 2017 Congress, the district court opinion determines that Congress' failure to repeal the individual mandate shows that it "knew that provision is essential to the ACA." In sum, the district court opinion concludes that the entire ACA is inseverable from the individual mandate.

The plaintiffs urge affirmance for essentially the same reasons stated in the district court opinion.[43] As to the guaranteed-issue and community-rating provisions, they rely primarily on the 2010 Congress' express findings linking those provisions to the individual mandate. State Plaintiffs' Br. at 39–44; Individual Plaintiffs' Br. at 47–48. The 2010 Congress found that, without the individual mandate, "many individuals would wait to purchase health insurance until they needed care," creating an "adverse selection" problem. 42 U.S.C. § 18091(2)(I); *see also id.* (finding that the individual mandate is "essential to creating

[43] The individual plaintiffs adopt the state plaintiffs' severability arguments by reference. *See* Fed. R. App. P. 28(i).

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"). As to the remaining major and some of the minor provisions, the plaintiffs rely primarily on the joint dissent in *NFIB* for the proposition that leaving these provisions standing would "undermine Congress' scheme of shared responsibility," throwing off the balance interlocking insurance market reforms set out in the ACA. 567 U.S. at 698 (joint dissent) (internal quotation marks omitted); State Plaintiffs' Br. at 44–49. As for the most minor provisions, they argue that these were "mere adjuncts" of the more important provisions and would not have been independently enacted. State Plaintiffs' Br. at 50.

On appeal, the federal defendants agree with the plaintiffs that the entirety of the ACA is inseverable from the individual mandate. Fed. Defendants' Br. at 36–49. This marks a significant change in litigation position, as the federal defendants had previously submitted to the district court that only the guaranteed-issue and community-rating provisions were inseverable. And that is not the only new argument the federal defendants make on appeal. For the first time on appeal, the federal defendants argue that the remedy in this case should be limited to enjoining enforcement of the ACA only to the extent it harms the plaintiffs. *See* Fed. Defendants' Br. at 26–29 (arguing that the individual "plaintiffs do not have standing to seek relief against provisions of the ACA that do not in any way affect them"); Fed. Defendants' Supp. Br. at 10 ("[T]he 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.").

The intervenor-defendant states, meanwhile, argue that *every* provision of the ACA is severable from the individual mandate. They argue that the 2017 Congress' decision not to repeal or otherwise undermine any other provision of the ACA shows that it intended the rest of the ACA to remain operative—and that the court should not focus on the intent of the 2010 Congress. Intervenor-Defendant States' Br. at 34–35, 43. They point to the statements of several legislators in the 2017 Congress that seem to evince an assumption that other parts of the ACA would not be altered,[44] and to Congress' knowledge of reports highlighting the severe consequences a total invalidation of the ACA would have. Intervenor-Defendant States' Br. at 40. Finally, they argue that the passage of time since the ACA's enactment has shown that the individual mandate is not all that crucial after all, and they provide examples of ACA provisions they say have

[44] Although we decline to opine on the merits of the parties' arguments at this juncture, we caution against relying on individual statements by legislators to determine the meaning of the law. "[L]egislative history is not the law." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018); *see also Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 626 n.9 (5th Cir. 2013) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material.") (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 392–93 (2012) ("Each member voting for the bill has a slightly different reason for doing so. There is no single set of intentions shared by all . . . [y]et a majority has undeniably agreed on the final language that passes into law . . . and that is the sole means by which the assembly has the authority to make law."). And even among legislative history devotees, "floor statements by individual legislators rank among the least illuminating forms." *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017).

nothing to do with insurance markets or became operative years before the individual mandate took effect. Intervenor-Defendant States' Br. at 45.

Although we understand and share the district court's general disinclination to engage in what it refers to as "legislative guesswork"—and what a Supreme Court Justice has described as "a nebulous inquiry into hypothetical congressional intent," *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring) (quoting *Booker*, 543 U.S. at 321 n.7 (Thomas, J., dissenting in part))—we nevertheless conclude that the severability analysis in the district court opinion is incomplete in two ways.

First, the opinion gives relatively little attention to the intent of the 2017 Congress, which appears in the analysis only as an afterthought despite the fact that the 2017 Congress had the benefit of hindsight over the 2010 Congress: it was able to observe the ACA's actual implementation. Although the district court opinion states that burdening insurance companies with taxes and regulations without giving them the benefit of compelling the purchase of their product is "a choice no Congress made," it only links this observation to the 2010 Congress. It does not explain its statement that the 2017 Congress' failure to repeal the individual mandate is evidence of an understanding that no part of the ACA could survive without it.

Second, the district court opinion does not do the necessary legwork of parsing through the over 900 pages of the post-2017 ACA, explaining how particular segments are inextricably linked to the individual mandate. The opinion lists a few examples of major provisions and cogently explains their link to the individual mandate, at least as it existed in 2010. For example, the opinion discusses the individual

mandate's interplay with the guaranteed- issue and community-rating provisions—all of which are found in Title I of the ACA—analyzing how Congress intended those provisions to work and how they might be expected to work without the individual mandate. But in order to strike the delicate balance that severability analysis requires, the district court must undertake a similar inquiry for each segment of the post-2017 law that it ultimately declares unlawful—and it has not done so. Instead, the district court opinion focuses on the 2010 Congress' designation of the individual mandate as "essential to creating effective health insurance markets" and intention that, for at least one set of legislative goals, the individual mandate was intended to work "together with the other provisions" of the ACA. *E.g.*, 42 U.S.C. § 18091(2)(I). On this basis, and on the views of the dissenting Justices in *NFIB* addressing the ACA as it stood in 2012, the district court opinion renders the entire ACA inoperative. More is needed to justify the district court's remedy.

Take, for example, the ACA provisions in Title IV requiring certain chain restaurants to disclose to consumers nutritional information like "the number of calories contained in the standard menu item." Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4206, 124 Stat. 119, 573–74 (2012) (codified at 21 U.S.C. § 343). Or consider the provisions in Title X establishing the level of scienter necessary to be convicted of healthcare fraud. Patient Protection and Affordable Care Act § 10606, 124 Stat. 119, 1006–09, (codified at 18 U.S.C. § 1347). Without more detailed analysis from the district court opinion, it is unclear how provisions like these—which certainly do not directly regulate the health insurance marketplace—were intended to work "together" with the individual

mandate. Similarly, the district court opinion's assertion that "most of the minor provisions" of the ACA "are mere adjuncts of" or "aids to the[] effective execution" of the project of the individual mandate is not supported by the actual analysis in the district court opinion, which does not dive into those provisions. Finally, some insurance-related reforms became law years before the effective date of the individual mandate; the district court opinion does not explain how provisions like these are inextricably linked to the individual mandate. *See, e.g.*, 42 U.S.C. §§ 300gg-11, 300gg-14(a). Whatever the solution to the problem of "legislative guesswork" the district court opinion identifies in severability doctrine as it currently stands, it must include a careful parsing of the statutory scheme at issue to address questions like these.

We have long "require[d] that a district court explain its reasons for granting a motion for summary judgment in sufficient detail for us to determine whether the court correctly applied the appropriate legal test." *Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 644 (5th Cir. 1992). This is because we have "little opportunity for effective review" when the district court opinion leaves some reasoning "vague" or "unsaid." *Myers v. Gulf Oil Corp.*, 731 F.2d 281, 284 (1984). "In such cases, we have not hesitated to remand . . . ." *Id.* In this case, the analysis the district court opinion provides is substantial and far exceeds the sort of cursory reasoning that normally prompts us to remand. Yet, the vast, wide-ranging statutory scheme at issue in this case also far exceeds the comparatively small number of provisions at issue in other severability cases, *see, e.g.*, *Chadha*, 462 U.S. at 931–35 (considering whether 8 U.S.C. § 244(c)(2) could be severed

from the rest of § 244)—especially cases in which entire legislative acts are determined to be inseverable, *see, e.g.*, *Murphy*, 138 S. Ct. at 1481–84 (considering whether part of 28 U.S.C. § 3702(1) could be severed from §§ 3701–04).

Moreover, the Supreme Court has remanded in the severability context upon a determination that additional analysis was necessary. In *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), the Supreme Court took up the issue of what relief was appropriate upon a determination that a New Hampshire provision requiring parental notification prior to abortion was unconstitutional in some applications. *Id.* at 328–32. The Supreme Court determined that, although the district court's choice to use "the most blunt remedy"—total inseverability—was "understandable" under its own precedent, more analysis was needed to determine "whether New Hampshire's legislature intended the statute to be susceptible to" severability. *Id.* at 330–31. As a result, the Supreme Court remanded for "lower courts to determine legislative intent in the first instance." *Id.*

We do the same here, directing the district court to employ a finer-toothed comb on remand and conduct a more searching inquiry into which provisions of the ACA Congress intended to be inseverable from the individual mandate. We do not hold forth on just how fine-toothed that comb should be—the district court may use its best judgment to determine how best to break the ACA down into constituent groupings, segments, or provisions to be analyzed. Nor do we make any comment on whether the district court should take into account the government's new posture on appeal or what the ultimate outcome of the severability

analysis should be.[45] Although "we cannot affirm the order as it is presently supported," we do not suggest what result will be merited "[a]fter a more thorough inquiry." *Unger v. Amedisys Inc.*, 401 F.3d 316, 325 (5th Cir. 2005). We only note that the inquiry must be made, and that the district court—which has many tools at its disposal—is best positioned to determine in the first instance whether the ACA "remains 'fully operative as a law'" and whether it is evident from "the statute's text or historical context" that Congress would have preferred no ACA at all to an ACA without the individual mandate. *Free Enter. Fund*, 561 U.S. at 509 (quoting *New York*, 505 U.S. at 186).

It may still be that none of the ACA is severable from the individual mandate, even after this inquiry is concluded. It may be that all of the ACA is severable from the individual mandate. It may also be that some of the ACA is severable from the individual mandate, and some is not.[46] But it is no small thing for unelected, life-tenured judges to declare duly enacted legislation passed by the elected representatives of the

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[45] The district court should also consider this court's recent severability analysis in *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019) (en banc). That opinion was issued after both the district court's decision and the oral argument here.

[46] For an explanation of some, but certainly not all, of the potential conclusions with regard to severability, *see* Josh Blackman, *Undone: The New Constitutional Challenge to Obamacare*, 23 Tex. Rev. L. & Pol. 1, 28–51 (2018) (stating that the district court could halt the enforcement of just the individual mandate, halt the enforcement of the entire Act, or halt the enforcement of the community-rating and guaranteed-issue provisions along with the individual mandate, for example). The district court could also issue a declaratory judgment without enjoining any government official.

American people unconstitutional. The rule of law demands a careful, precise explanation of whether the provisions of the ACA are affected by the unconstitutionality of the individual mandate as it exists today.

B.

Remand is appropriate in this case for a second reason: so that the district court may consider the federal defendants' new arguments as to the proper scope of relief in this case. The relief the plaintiffs sought in the district court was a universal nationwide injunction: an order that totally "enjoin[ed] Defendants from enforcing the Affordable Care Act and its associated regulations." Before the district court, the federal defendants urged entry of a declaratory judgment stating that the guaranteed-issue and community-rating provisions—at that time, the only provisions the federal defendants argued were inseverable—were "invalid[ated]" by the zeroing out of the shared responsibility payment. This would be "sufficient relief against the Government," the federal defendants argued, because a declaratory judgment would "operate[] in a similar manner as an injunction" against the federal government, which would be "presumed to comply with the law" once the court provides "a definitive interpretation of the statute."

Ultimately, of course, the district court opinion determined that no ACA provision was severable and resulted in a judgment declaring the entire ACA "invalid." On appeal, the federal defendants first changed their litigation position to agree that no ACA provision was severable. Now they have changed their litigation position to argue that relief in this case should be tailored to enjoin enforcement of the ACA in only the plaintiff states—and not just that, but that

the declaratory judgment should only reach ACA provisions that injure the plaintiffs. They argue that the Supreme Court has made clear that "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018); *see also Printz v. United States*, 521 U.S. 898, 935 (1997) (reasoning that the Court has "no business answering" questions dealing with enforcement of provisions that "burden . . . no plaintiff"); *see also Murphy*, 138 S. Ct. at 1485–86 (Thomas, J., concurring). This argument came as a surprise to the plaintiffs, who explained at oral argument that they saw the government's new position as a possible "bait and switch." The federal defendants admitted at oral argument that they had raised the scope-of-relief issue on appeal "for the first time," but argued that it was necessary to address, as it went to the district court's Article III jurisdiction. The federal defendants therefore suggested that it "would be appropriate to remand to consider the scope of the judgment."

The court agrees that remand is appropriate for the district court to consider these new arguments in the first instance. The district court did not have the benefit of considering them when it crafted the relief now on appeal.[47] On remand, the district court—which is in a far better position than this court to determine which ACA provisions actually injure the plaintiffs—may consider the federal defendants' position on the proper relief to be afforded. As part of this inquiry, the district court may consider whether the federal defendants' arguments were timely raised, and whether

[47] The consideration of limited relief may affect the intervenors as well. The district court is better suited to resolving these issues in the first instance.

limiting the remedy in this case is supported by Supreme Court precedent. Once again, we place no thumb on the scale as to the ultimate outcome; the district court is free to weigh the federal defendants' changed arguments as it sees fit.

VII.

For these reasons, the judgment of the district court is AFFIRMED in part and VACATED in part. We REMAND for proceedings consistent with this opinion.

KING, Circuit Judge, dissenting:

Any American can choose not to purchase health insurance without legal consequence. Before January 1, 2018, individuals had to choose between complying with the Affordable Care Act's coverage requirement or making a payment to the IRS. For better or worse, Congress has now set that payment at $0. Without any enforcement mechanism to speak of, questions about the legality of the individual "mandate" are purely academic, and people can purchase insurance—or not—as they please. No more need be said; it has long been settled that the federal courts deal in cases and controversies, not academic curiosities.

The majority sees things differently and today holds that an unenforceable law is also unconstitutional. If the majority had stopped there, I would be confident its extrajurisdictional musings would ultimately prove harmless. What does it matter if the coverage requirement is unenforceable by congressional design or constitutional demand? Either way, that law does not do anything or bind anyone.

But again, the majority disagrees. It feels bound to ask whether Congress would want the rest of the Affordable Care Act to remain in force now that the coverage requirement is unenforceable. Answering that question should be easy, since Congress removed the coverage requirement's only enforcement mechanism but left the rest of the Affordable Care Act in place. It is difficult to imagine a plainer indication that Congress considered the coverage requirement entirely dispensable and, hence, severable. And yet, the majority is unwilling to resolve the severability issue. Instead, it merely identifies serious flaws in the district court's analysis and remands for a do-over, which will

unnecessarily prolong this litigation and the concomitant uncertainty over the future of the healthcare sector.

I would vacate the district court's order because none of the plaintiffs have standing to challenge the coverage requirement. And although I would not reach the merits or remedial issues, if I did, I would conclude that the coverage requirement is constitutional, albeit unenforceable, and entirely severable from the remainder of the Affordable Care Act.

I.

To my mind, this case begins and ought to end with the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). In that case, the Court held that the coverage requirement would be unconstitutional if it were a legal command, because neither the Commerce Clause nor the Necessary and Proper Clause allows Congress to compel individuals to engage in commerce by purchasing health insurance. *See NFIB*, 567 U.S. at 552, 560 (opinion of Roberts, C.J.); *id.* at 652-53 (joint dissent). The Court concluded, however, that the coverage requirement was constitutional, because—notwithstanding the most natural reading of the provision's text— the coverage requirement was not *actually* a legal command to purchase insurance.

Instead, according to the *NFIB* Court, the coverage requirement "leaves an individual with a lawful choice to do or not do a certain act," i.e., purchase health insurance. *Id.* at 574 (Roberts, C.J., majority opinion). All that is required, under this reading, is "a payment to the IRS" if one chooses not to purchase health insurance. *Id.* at 567. Beyond this shared-responsibility

payment, there are no further "negative legal consequences to not buying health insurance," and individuals who forgo insurance do not violate the law as long as they make the required payment. *Id.* at 567. "Those subject to the [coverage requirement] may lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes. The only thing they may not lawfully do is not buy health insurance and not pay the resulting tax." *Id.* at 574 n.11. Forcing individuals to make that choice was constitutional, per *NFIB*, because Congress could "impose a tax on not obtaining health insurance" by exercising its enumerated power to lay and collect taxes, duties, imposts, and excises. *Id.* at 570.

Contrary to the suggestion of the majority, which I address specifically *infra* at Part III, Congress did not alter the coverage requirement's operation when it amended the ACA in 2017. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 ("TCJA"). All the TCJA did, with respect to healthcare, was change the amount of the shared-responsibility payment to zero dollars. Thus, despite textual appearances, the post-TCJA coverage requirement does nothing more than require individuals to pay zero dollars to the IRS if they do not purchase health insurance, which is to say it does nothing at all.

This insight, that the coverage requirement now does nothing, should be the end of this case. Nobody has standing to challenge a law that does nothing. When Congress does nothing, no matter the form that nothing takes, it does not exceed its enumerated powers. And since courts do not change anything when they invalidate a law that does nothing, every other

law retains, or at least should retain, its full force and effect.

II.

But as the majority goes well past *NFIB*, I respond. To begin, I emphasize the importance of the rule that a plaintiff must have standing to invoke a federal court's power. This is not an anachronism lingering from some era in which empty formalities abounded in legal practice. Quite the opposite: "[T]he requirement that a claimant have 'standing is an essential and unchanging part of the case-or-controversy requirement of Article III.'" *Davis v. FEC*, 554 U.S. 724, 733 (2008) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) ("Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" (quoting U.S. Const. art. III, § 2)). And "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (alteration in original) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006)); *accord Raines v. Byrd*, 521 U.S. 811, 818 (1997).

The Constitution's case-or-controversy requirement reflects the Framers' view of the judiciary's place among the coequal branches of the federal government: to fulfill "the traditional role of Anglo–American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). Strict adherence to the case-or-controversy requirement—and to standing in

particular—thus "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper*, 568 U.S. at 408; *see also Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) ("This fundamental limitation preserves the 'tripartite structure' of our Federal Government, prevents the Federal Judiciary from 'intrud[ing] upon the powers given to the other branches,' and 'confines the federal courts to a properly judicial role.'" (alteration in original) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016))). Thus, "federal courts may exercise power only 'in the last resort, and as a necessity,' and only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.'" *Allen v. Wright*, 468 U.S. 737, 752 (1984) (alteration in original) (citation omitted) (first quoting *Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892); then quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)), *abrogated on other grounds*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). And needless to say, a federal court must conduct an "especially rigorous" standing inquiry "when reaching the merits of the dispute would force [it] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Amnesty Int'l*, 568 U.S. at 408 (quoting *Raines*, 521 U.S. at 819-20). "The importance of this precondition should not be underestimated as a means of 'defin[ing] the role assigned to the judiciary in a tripartite allocation of power.'" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 474 (1982) (alteration in original) (quoting *Flast*, 392 U.S. at 95).

The standing doctrine polices this constitutional limit on the judiciary's power "by 'identify[ing] those

disputes which are appropriately resolved through the judicial process.'" *Susan B. Anthony List*, 573 U.S. at 157 (alteration in original) (quoting *Lujan*, 504 U.S. at 560). The party seeking redress in the courts has the burden to establish standing. *See Spokeo*, 136 S. Ct. at 1547. To do so, the plaintiff must show it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan*, 504 U.S. 560). This means the injury must be "personal" to the plaintiff and, although the injury does not need to be "tangible," "it must actually exist." *Id.* at 1548-49.

The plaintiffs' evidentiary burden depends on the stage of the litigation. At each stage, the plaintiffs must demonstrate standing "with the manner and degree of evidence" otherwise required to establish the plaintiffs' merits case. *Lujan*, 504 U.S. at 561. Thus, because this case comes to us on the plaintiffs' own motion for summary judgment, the plaintiffs must conclusively prove all three elements of standing with evidence that "would 'entitle [them] to a directed verdict if the evidence went uncontroverted at trial.'" *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1264-65 (5th Cir. 1991) (quoting *Golden Rule Ins. Co. v. Lease*, 755 F. Supp. 948, 951 (D. Colo. 1991)). If a plaintiff meets its burden, the defendant can nevertheless defeat summary judgment "by merely demonstrating the existence of a genuine dispute of material fact." *Id.* at 1265. In other words, the plaintiffs here must show that, considering the summary-judgment record, all reasonable factfinders would agree that the plaintiffs

demonstrate an injury traceable to the coverage requirement and redressable by a favorable decision. *See Alonso v. Westcoast Corp.*, 920 F.3d 878, 885-86 (5th Cir. 2019).

These general principles alone should make the majority's error apparent. More specific authority illuminates it. I explain first why the majority errs in concluding the individual plaintiffs have standing, then I explain why the majority errs in concluding the state plaintiffs have standing.

A.

The majority concludes that the individual plaintiffs have standing to challenge the coverage requirement in the Patient Protection and Affordable Care Act (the "ACA"), 26 U.S.C. § 5000A(a), [1] because it forces them to purchase health insurance that they would not purchase otherwise. The majority overlooks what will happen if the individual plaintiffs fail to purchase insurance: absolutely nothing. The individual plaintiffs will be no worse off by any conceivable measure if they choose not to purchase health insurance. Thus, whatever injury the individual plaintiffs have incurred by purchasing health insurance is entirely self-inflicted.

A long line of cases establishes that self-inflicted injuries cannot establish standing because a self-inflicted injury, by definition, is not traceable to the challenged action. *See, e.g.*, *Amnesty Int'l*, 568 U.S. at 416 ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves . . . ."); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) ("The injuries

[1] The coverage requirement is sometimes colloquially known as the "individual mandate." For reasons that will become clear, this nickname can be misleading.

to the plaintiffs' fiscs were self-inflicted, resulting from decisions by their respective state legislatures. . . . No State can be heard to complain about damage inflicted by its own hand."); *Zimmerman v. City of Austin*, 881 F.3d 378, 389 (5th Cir.) ("[S]tanding cannot be conferred by a self-inflicted injury."), *cert. denied*, 139 S. Ct. 639 (2018). When a plaintiff chooses to incur an expense, the plaintiff must show that the challenged law forced the plaintiff to incur that expense to avoid some other concrete injury. *See Amnesty Int'l*, 568 U.S. at 415-16 (concluding costs plaintiffs incurred trying to avoid surveillance were self-inflicted because plaintiffs' fear of surveillance was speculative); *Contender Farms, L.L.P. v. USDA*, 779 F.3d 258, 266 (5th Cir. 2015) (finding plaintiff had standing to challenge regulations that required plaintiff to either "take additional measures" to comply with regulation or "face harsher, mandatory penalties" and prosecution). In other words, a plaintiff can show standing if the challenged act placed him between the proverbial rock and hard place. But without showing such a dilemma, a plaintiff "cannot manufacture standing" by expending costs to avoid an otherwise noncognizable injury, which is exactly what the individual plaintiffs did here. *Amnesty Int'l*, 568 U.S. at 416.

The majority brushes off this authority by insisting—without explanation—that labeling the plaintiffs' injuries self-inflicted "assumes" that the coverage requirement does not act as a legal command to purchase insurance, which the majority refuses to question at the standing stage. The majority misunderstands the argument. Even accepting that the coverage requirement acts as a legal command, the individual plaintiffs are still free to disregard that command without legal consequence. Therefore, any

injury they incur by freely choosing to obtain insurance is still self-inflicted.

Nor does it matter that to avoid inflicting injury upon themselves, the plaintiffs would have to violate an unenforceable statute. Plaintiffs may challenge a statute that requires them "to take significant and costly compliance measures *or risk criminal prosecution*." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988) (emphasis added); *see also, e.g.*, *Int'l Tape Mfrs. Ass'n v. Gerstein*, 494 F.2d 25, 28 (5th Cir. 1974) (explaining that standing to challenge a statute requires a "realistic possibility that the challenged statute will be enforced to [the plaintiff's] detriment"). But "[w]hen plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99 (1979) (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)); *see also Poe v. Ullman*, 367 U.S. 497, 507 (1961) (Frankfurter, J., plurality) ("It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting."); *cf. Zimmerman*, 881 F.3d at 389-90 ("[T]o confer standing, allegations of chilled speech or 'self-censorship must arise from a fear of prosecution that is not "imaginary or wholly speculative."'" (quoting *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006))).

Ullman illustrates this principle well.[2] The plaintiffs there sought to challenge Connecticut's criminal prohibition on contraception. *Ullman*, 367 U.S. at 498 (Frankfurter, J., plurality). But in the more than 75 years that the statute had been on the books, only one violation had been prosecuted—and even that was a collusive prosecution brought to challenge the law. *Id.* at 501-02. The Court dismissed the challenge for lack of standing, holding that "[t]he fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication." *Id.* at 508. The Court explained that it could not "be umpire to debates concerning harmless, empty shadows." *Id.*[3]

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[2] The majority dismisses *Ullman* as an adversity case. Nonetheless, as this court and the Supreme Court have repeatedly recognized, *Ullman* grounds its analysis in terms of standing and ripeness. *See, e.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982); *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 (5th Cir. 2008); *Thomes v. Equitable Sav. & Loan Ass'n*, 837 F.2d 1317, 1318 (5th Cir. 1988). In any event, *Ullman* is just one example; other cases demonstrate this concept just as well. *See, e.g.*, *Driehaus*, 573 U.S. at 158-59 ("One recurring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury. . . . [W]e have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent.").

[3] The lead opinion in *Ullman* garnered only a four-judge plurality. But Justice Brennan, who concurred in the judgment, wrote that he "agree[d] that this appeal must be dismissed for failure to present a real and substantial controversy" and that "until the State makes a definite and concrete threat to enforce these laws . . . this Court may not be compelled to exercise its most delicate power of constitutional adjudication." *Ullman*, 367 U.S. at 509 (Brennan, J., concurring in judgment). Accordingly, five Justices

Ullman makes this an easy case. Connecticut's contraception law at least allowed the *possibility* of enforcement, even if it was speculative and unlikely to ever occur. Here, as I cannot say often enough, the coverage requirement *has no enforcement mechanism*. It is impossible for the individual plaintiffs to ever be prosecuted (or face any other consequences) for violating it. In "find[ing] it necessary to pass on" the coverage requirement, the majority "close[s] [its] eyes to reality." *Id.*[4]

The majority does not engage with the lessons of *Ullman* and its progeny. The closest it comes is in its citation to *Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019). That case does not abrogate *Ullman*, *Younger*, *Babbitt*, *American Booksellers*, or *Tape Manufacturers*—nor could it. In *Texas v. EEOC*, Texas challenged EEOC administrative guidance stating that employers who screen out job applicants with criminal records could be held liable for disparate-impact discrimination. *Id.* at 437-38. The EEOC argued that Texas did not have standing to challenge the guidance because the guidance reflected only the EEOC's interpretation of Title VII, and the Attorney General, not the EEOC, has the sole power to enforce Title VII

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agreed that plaintiffs lacked standing absent any real threat of enforcement.

[4] For the same reason, it does not matter that the district court "expressly found" that the individual plaintiffs "are obligated to" purchase health insurance. Even ignoring the conclusory nature of this supposed finding of fact, it is not the abstract obligation that matters; it is the concrete consequences, if any, that follow from a violation of that obligation. And the district court did not find (and there would be no basis for it to find) that the individual plaintiffs would face any consequences.

against states. *See* Brief for Appellants Cross-Appellees at 18-19, *Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019) (No. 18-10638). In rejecting that argument, this court explained that Title VII's enforcement scheme is not so simple. Although the EEOC may not itself bring enforcement actions against states, it may investigate states and refer cases to the Attorney General for enforcement actions. *EEOC,* 933 F.3d at 447. Therefore, "the possibility of investigation by EEOC and referral to the Attorney General for enforcement proceedings if it fails to align its laws and policies with the Guidance" put pressure on Texas to conform to the EEOC's guidance. *Id.*

In other words, even absent a direct threat of a formal enforcement action from the EEOC, Texas faced other consequences for disobeying the guidance—including the possibility that the Attorney General would enforce Title VII against it. In fact, we noted that "[o]ne Texas agency ha[d] already been required to respond to a charge of discrimination filed with EEOC based on its no-felon hiring policy." *Id.* at 447 n.26. The majority here cites no similar concrete consequences that will (or even plausibly could) follow if the plaintiffs violate the coverage requirement.

My conclusion that individual plaintiffs lack standing is only bolstered by a unanimous opinion issued mere weeks ago by a panel that included the author of today's majority opinion. In that case, the court held that Austin, Texas could not use a suit against the Texas Attorney General to challenge a state statute, which the Attorney General was authorized to enforce, that barred the city from enforcing one of its ordinances. *City of Austin v. Paxton*, No. 18-50646, ___ F.3d ___, 2019 WL 6520769, at *6 (5th Cir Dec. 4, 2019). Although the *Paxton* court based its holding on

sovereign immunity, it looked to "our standing jurisprudence," and "note[d] that it's unlikely the City had standing," because it did not show that the Attorney General would likely "inflict 'future harm'" by enforcing the statute against Austin. *Id.* at *6-7. If standing was absent in *Paxton* because enforcement was insufficiently probable, I have no idea why standing should be present in this case, where enforcement of the challenged portion of the ACA is altogether impossible.

In sum, even if the unenforceable coverage requirement must be read as a command to purchase health insurance, it does not harm the individual plaintiffs because they can disregard it without consequence. Binding precedent squarely establishes that plaintiffs may not sue in such circumstances—and with good reason. The great power of the judiciary should not be invoked to disrupt the work of the democratic branches when the plaintiffs can easily avoid injury on their own.[5]

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[5] The majority's suggestion that *NFIB*, 567 U.S. at 552 (opinion of Roberts, C.J.), supports the individual plaintiffs' standing does not warrant above-the-line attention. In short, the *NFIB* Court did not address standing. *See id.* at 530-708. At the time *NFIB* was decided, the coverage requirement was set to take effect with the shared-responsibility payment as an enforcement mechanism. And there is no indication that any of the *NFIB* plaintiffs were exempt from the shared-responsibility payment. Thus, even if the majority seeks to infer from *NFIB* some jurisdictional ruling in violation of the Supreme Court's "repeated[]" command "that the existence of unaddressed jurisdictional defects has no precedential effect," *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996), *NFIB* offers no inferences of value for the majority to draw. Further, counsel's answer to a Justice's hypothetical question does not bind this court.

B.

The majority's conclusion that the state plaintiffs have standing to challenge the coverage requirement fares no better. I would deny the state plaintiffs standing because there is no evidence in the record, much less conclusive evidence, to support the state plaintiffs' alleged injuries.

1.

The majority first concludes that the state plaintiffs have standing because it believes that the coverage requirement increases the number of state employees who enroll in the states' employee healthcare programs. And with more enrollees, the logic goes, the states as employers must file more forms with the IRS at a higher cost to the states.

The majority's biggest mistake is that it ignores the posture of this case: the defendants appeal from the district court's order granting summary judgment *to the plaintiffs*. Accordingly, the state plaintiffs face a tremendous evidentiary burden—they must produce evidence so conclusive of the coverage requirement's effect on their healthcare-administration costs that the evidence "would 'entitle [them] to a directed verdict if the evidence went uncontroverted at trial.'" *Int'l Shortstop*, 939 F.2d at 1264-65 (quoting *Golden Rule Ins.*, 755 F. Supp. at 951).[6] And the state plaintiffs provided

[6] The district court was free to—but did not—make findings of jurisdictional fact, which we would review for clear error. *See Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 494 (5th Cir. 2005). Indeed, the district court did not address the state plaintiffs' standing at all. Thus, for the state plaintiffs to establish standing on their own motion for summary judgment, they must show the summary-judgment evidence is conclusive.

no evidence *at all*, never mind conclusive evidence, to support the dubious notion that even a single state employee enrolled in one of state plaintiffs' health insurance programs solely because of the unenforceable coverage requirement.[7]

The majority relies on affidavits from several of the state plaintiffs' healthcare administrators. But these affidavits only establish that the state plaintiffs incur costs complying with the IRS reporting requirements found in 26 U.S.C. §§ 6055(a) and 6056(a). And as the majority recognizes, these requirements are distinct from the coverage requirement. Accordingly, to trace the state plaintiffs' reporting burden to the coverage requirement, the majority must additionally show that at least some state employees have enrolled in employer-sponsored health insurance solely because of the unenforceable coverage requirement. The majority comes up empty at this step, pointing only to a conclusory statement from a South Dakota human-resources director claiming that the coverage requirement, not §§ 6055(a) and 6056(a), caused South Dakota to incur its reporting expenses. This will not do. *See, e.g.*, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990) ("The object of [summary judgment] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); *Shaboon v.*

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[7] The majority misunderstands my position. *See* Maj. Op. 32 n.31. The state plaintiffs do not need to identify a "specific" person that is likely to enroll, but they still must establish that at least *one* state employee will enroll as a result of the post-TCJA coverage requirement. Otherwise, the state plaintiffs' injuries are not traceable to the provision they challenge and would not be redressed by its elimination.

Duncan, 252 F.3d 722, 737 (5th Cir. 2001) ("[U]nsupported affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment." (alteration in original) (quoting *Orthopedic & Sports Injury Clinic v. Wang Labs., Inc.*, 922 F.2d 220, 225 (5th Cir. 1991))).[8]

Citing *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), the majority argues the state plaintiffs can establish standing by "showing that third parties will likely react in predictable ways" to the coverage requirement. *Id.* at 2566. But the majority

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[8] The majority suggests we must accept this statement as true because the defendants did not "challenge" this evidence. The majority cites no authority for this proposition, and I am at a loss to understand where the majority came up with its challenge rule. I know of nothing in the Federal Rules of Civil Procedure or the caselaw requiring litigants to "challenge" conclusory statements in declarations. On the contrary, courts in this circuit regularly confront and disregard conclusory statements in the summary-judgment record. *See, e.g.*, *Tex. Capital Bank N.A. v. Dall. Roadster, Ltd. (In re Dall. Roadster, Ltd.)*, 846 F.3d 112, 124 (5th Cir. 2017); *Brown v. Mid-Am. Apartments*, 348 F. Supp. 3d 594, 602-03 (W.D. Tex. 2018). The district courts and litigants of this circuit will be surprised to learn about the majority's new summary-judgment rule.

The majority also claims that the statement is not conclusory. But nothing in the affidavit addresses the post-TCJA coverage requirement. The affiant states that his knowledge is "related to the enactment of the ACA," which occurred in 2010. He focuses on "financial costs associated with ACA regulations" and concludes that "South Dakota would be significantly burdened if the ACA remained law." The affidavit does not explain how the post-TCJA coverage requirement harms South Dakota. Such generalities, untethered to the actual law at issue in this appeal, cannot establish standing—especially not at the summary-judgment stage.

fails to explain why state employees who do not want health insurance would nevertheless predictably enroll in health insurance solely because an unenforceable statute, here the coverage requirement, directs them to do so. What the majority fails to mention in its discussion of *Department of Commerce* is that the "predictable" behavior at issue there was individuals "choosing to *violate their legal duty* to respond to the census." *Id.* at 2565 (emphasis added). Thus, *Department of Commerce* shows that people will predictably violate the law when sufficiently incentivized to do so. This directly contradicts the assumption undergirding much of the majority's analysis—that people tend to follow the law regardless of the incentives. And state employees who do not want to enroll in insurance have every incentive to violate the coverage requirement.[9]

2.

The majority similarly argues that the coverage requirement increases the number of individuals enrolled in the state plaintiffs' Medicaid programs. This

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[9] A Congressional Budget Office report released shortly before Congress repealed the shared-responsibility payment further supports this notion. It concluded:

> If the [shared-responsibility payment] was eliminated but the [coverage requirement] itself was not repealed . . . . only a small number of people who enroll in insurance because of the [coverage requirement] under current law would continue to do so solely because of a willingness to comply with the law.

Cong. Budget Office, Repealing the Individual Health Insurance Mandate: An Updated Estimate at 1 (2017) (hereinafter "CBO Report"). On this record, we have been given no reason to believe that any of the state plaintiffs' employees are among this "small number of people." *Id.*

argument fails for the same reason: the state plaintiffs produce no evidence—let alone conclusive evidence—showing that anyone has enrolled in their Medicaid programs solely because of the unenforceable coverage requirement. To this end, the best the majority can scrape up is a statement from Teresa MacCartney, a Georgia budget official, stating that "[a]fter the implementation of the ACA, [Georgia] experienced increased enrollment of individuals already eligible for Medicaid benefits under pre-ACA eligibility standards." The majority's takeaway is that the coverage requirement caused this increase. Maybe so. But MacCartney's statement refers specifically to the coverage requirement at the time of the ACA's enactment, when the coverage requirement interacted with the shared-responsibility payment. This statement provides no insight into how the coverage requirement affects Medicaid rolls after the shared-responsibility payment's repeal. In fact, MacCartney signed her declaration on May 14, 2018, more than seven months before the shared-responsibility payment's repeal went into effect. *See* Budget Fiscal Year, 2018, Pub. L. No. 115-97, § 11081(b), 131 Stat. 2054, 2092 (2017).

Accordingly, the majority's analysis again rests on the necessary assumption that people will obey the coverage requirement regardless of the incentives, in direct contradiction to *Department of Commerce*. And because Medicaid is available to eligible recipients at little to no cost, it is especially unlikely that the unenforceable coverage requirement would play any significant part in anyone's decision to enroll. It belies common sense to conclude that anyone who would otherwise pass on the significant benefits of Medicaid would be motivated to enroll solely because of an unenforceable law.

In sum, the majority cites no actual evidence tying any costs the state plaintiffs have incurred to the unenforceable coverage requirement. The state plaintiffs accordingly cannot show an injury traceable to the coverage requirement, so they do not have standing to challenge the coverage requirement.

III.

I would not reach the merits of this case because, as explained in Part II, I would vacate the district court's order for lack of standing. But as the majority errs on the merits too, I voice my disagreement.

"Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS." *NFIB*, 567 U.S. at 568 (Roberts, C.J., majority opinion). Now that Congress has zeroed out that payment, the coverage requirement affords individuals the same choice individuals have had since the dawn of private health insurance, either purchase insurance or else pay zero dollars. Thus, to my mind, the majority's focus on whether Congress's taxing power or the Necessary and Proper Clause authorizes Congress to pass a $0 tax is a red herring; the real question is whether Congress exceeds its enumerated powers when it passes a law

that does nothing.[10] And of course it does not.[11] Congress exercises its legislative power when it "alter[s] the legal rights, duties and relations of persons." *INS v. Chadha*, 462 U.S. 919, 952 (1983); *cf. id.* ("Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I. Whether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" (citation omitted) (quoting S. Rep. No. 1335, 54th Cong., 2d Sess., 8 (1897))).

Lest the majority mistake my position and end up shadowboxing with "bizarre metaphysical conclusions," "quantum musings," or ersatz inconsistencies, Maj. Op. at 44 & n.40, I need to make something explicit at the outset. The TCJA did not change the text or the *meaning* of the coverage requirement, but it did change the real-world *effects* it produces. Before the TCJA, the two options afforded by the coverage requirement—purchasing insurance or making a shared-responsibility payment—were both burdensome, but Congress could force individuals to choose one of those options by exercising its Taxing Power. Today, the shared-responsibility payment's meaning

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[10] "In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997). The majority would do well if it paused to ask whether it is necessary for a federal court to rule on whether the Constitution authorizes a $0 tax or otherwise prohibits Congress from passing a law that does nothing. The absurdity of these inquiries highlights the severity of the majority's error in finding the plaintiffs have standing to challenge this dead letter.

[11] The majority does not argue otherwise.

has not changed—it still gives individuals the choice to purchase insurance or make a shared-responsibility payment—but the amount of that payment is zero dollars, which means that the coverage requirement now does nothing. The majority's contrary conclusion rests on the premise that the coverage requirement compels individuals to purchase health insurance. With this understanding, the majority says that the coverage requirement does exactly what the Supreme Court said it cannot do: compel participation in commerce. *See NFIB*, 567 U.S. at 552 (opinion of Roberts, C.J.); *id.* at 652-53 (joint dissent). This conclusion follows fine from the premise, but the premise is wrong. Despite its seemingly mandatory language, the coverage requirement does not compel anyone to purchase health insurance.

In *NFIB*, although five Justices agreed that "[t]he most straightforward reading of the [coverage requirement] is that it commands individuals to purchase insurance," *id.* at 562 (opinion of Roberts, C.J.); *accord id.* at 663 (joint dissent), applying the canon of constitutional avoidance, the Court rejected this interpretation. Instead, the Court interpreted the coverage requirement to offer applicable individuals a "lawful choice" between purchasing health insurance and paying the shared-responsibility payment, which the Court interpreted as a valid exercise of Congress's taxing power. *Id.* at 574 (Roberts, C.J., majority opinion). This is a permissible construction, the Court concluded, because "[w]hile the [coverage requirement] clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful." *Id.* at 567-68. The Court observed that "[n]either the [ACA] nor any other law attaches

negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS." *Id.* at 568. And the Court further explained:

> Indeed, it is estimated that four million people each year will choose to pay the IRS rather than buy insurance. We would expect Congress to be troubled by that prospect if such conduct were unlawful. That Congress apparently regards such extensive failure to comply with the [coverage requirement] as tolerable suggests that Congress did not think it was creating four million outlaws.

Id. (citation omitted).

The *NFIB* Court's application of constitutional avoidance as an interpretive tool does not mean that the Court rewrote the statute. Only Congress can do that. Rather, the Court was "choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). "The canon is thus a means of giving effect to congressional intent, not of subverting it." *Id.* at 382. Accordingly, when the Court ruled in *NFIB* that "[t]hose subject to the [coverage requirement] may lawfully forgo health insurance," *NFIB*, 567 U.S. at 574 n.11, that was an authoritative determination regarding what the text of the coverage requirement meant and what Congress intended.

The majority pushes aside *NFIB*'s construction, acting as though the fact that the *NFIB* Court applied the

canon of constitutional avoidance means that its interpretation no longer governs following the repeal of the shared-responsibility payment. But when the Court construes statutes, its "interpretive decisions, *in whatever way reasoned*, effectively become part of the statutory scheme, subject (just like the rest) to congressional change." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (emphasis added). While Congress can change its mind and could have amended the coverage requirement to turn the "lawful choice" described by *NFIB*, 567 U.S. at 574, into an unwavering command, the majority does not suggest that Congress ever made such a choice. Sure, Congress amended the *shared-responsibility payment* in 2017. Yet as the district court went to great lengths to establish and the majority is elsewhere eager to point out, the coverage requirement and the shared-responsibility payment are distinct provisions. *See* Maj. Op. at 19 ("To bring a claim against the [coverage requirement], therefore, the plaintiffs needed to show injury *from the individual mandate*—not from the shared responsibility payment."); *Texas v. United States*, 340 F. Supp. 3d 579, 596 (N.D. Tex. 2018) ("It is critical to clarify something at the outset: the shared-responsibility payment, 26 U.S.C. § 5000A(b), is distinct from the [coverage requirement], *id.* § 5000A(a)."). And Congress did not touch the text of the coverage requirement when it amended the shared-responsibility payment. *See* Budget Fiscal Year, 2018, Pub. L. No. 115-97, § 11081. *Compare* § 5000A(a), *with* 26 U.S.C. § 5000A(a) (2011). At risk of stating the obvious, if the text of the coverage requirement has not changed, its meaning could not have changed either. By "giv[ing] these same words a different meaning," the majority "invent[s] a statute rather than interpret[s] one." *Clark*, 543 U.S. at 378.

The majority is thus left on unsteady ground: amendment by implication, which "will not be presumed unless the legislature's intent is 'clear and manifest.'" *In re Lively*, 717 F.3d 406, 410 (5th Cir. 2013) (quoting *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007)); *see also, e.g.*, *Epic Sys. Corp v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("[I]n approaching a claimed conflict, we come armed with the 'stron[g] presum[ption]' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute." (second and third alterations in original) (quoting *United States v. Fausto*, 484 U.S. 439, 452-53 (1988))). This rule operates with equal force when a judicial construction previously illuminated the meaning of the purportedly amended statute. *See TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017) ("When Congress intends to effect a change of [a statute's earlier judicial interpretation], it ordinarily provides a relatively clear indication of its intent in the text of the amended provision."); *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."); *cf. Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Congress's silence on the matter is thus conclusive.

Yet even if one probes further, it boggles the mind to suggest that Congress intended to turn a non-mandatory provision into a mandatory provision by

doing away with the only means of incentivizing compliance with that provision. Congress quite plainly intended to relieve individuals of the burden the coverage requirement put on them; it did not intend to *increase* that burden. And if it did, it certainly did not make that intent "clear and manifest." *Lively*, 717 F.3d at 410. Moreover, the considerations that led the *NFIB* Court to conclude that Congress did not intend the coverage requirement to impose a legal command to purchase health insurance are even more compelling in the absence of the shared-responsibility payment. Whereas before the only "negative legal consequence[] to not buying health insurance" was the payment of a tax, *NFIB*, 567 U.S. at 567-68, now there are no consequences *at all*. And as the Congressional Budget Office ("CBO") has predicted, without the shared-responsibility payment, most applicable individuals will not maintain health insurance solely for the purpose of obeying the coverage requirement. *See* Cong. Budget Office, Repealing the Individual Health Insurance Mandate: An Updated Estimate at 1 (2017). "That Congress apparently regards such extensive failure to comply with the [coverage requirement] as tolerable suggests that Congress did not think it was creating [millions of] outlaws." *NFIB*, 567 U.S. at 568.

Ergo, when Congress zeroed-out the shared-responsibility payment without amending the coverage requirement, it did not do away with the lawful choice it previously offered applicable individuals; it simply changed the parameters of that choice. Under the old scheme, applicable individuals could lawfully choose between maintaining health insurance and paying a tax. Under the new scheme, applicable individuals can lawfully choose between maintaining health insurance and doing nothing. In other words, the coverage

requirement is a dead letter—it functions as an expression of national policy or words of encouragement, at most. Accordingly, although I would not reach the merits, I would reverse if I did.

IV.

I agree with much of what the majority has to say about the district court's severability ruling. But I fail to understand the logic behind remanding this case for a do-over. Severability is a question of law that this court can review de novo. And the answer here is quite simple—indeed, a severability analysis will rarely be easier. After all, "[o]ne determines what Congress would have done by examining what it did," and Congress declawed the coverage requirement without repealing any other part of the ACA. *Legal Servs. Corp v. Velazquez*, 531 U.S. 533, 560 (2001) (Scalia, J., dissenting); *see also Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006) ("[T]he touchstone for [severability analysis] is legislative intent."). Consequently, little guesswork is needed to determine that Congress believed the ACA could stand in its entirety without the unenforceable coverage requirement.

The majority suggests that remand is necessary because the district court "has many tools at its disposal" and is thus "best positioned to undertake" the severability inquiry. Maj. Op. at 60. It is true that the district court is better able to assess factual issues than appellate judges, because it can hold evidentiary hearings, but I cannot see how that could be relevant, since severability is a question of law that we review de novo. Further, it is not clear what sort of evidence the district court could receive that would be useful when deciding severability questions except perhaps legislative history, a source which the majority derides. *See* Maj. Op.

at 56 n.45 ("[W]e caution against relying on individual statements by legislators to determine the meaning of the law."). When it comes to analyzing the statute's text and historical context, *see id.*, we are just as competent as the district court. There is thus no reason to prolong the uncertainty this litigation has caused to the future of this indubitably significant statute.[12]

A.

Before I address the more specific problems with the district court's inseverability ruling, some background on the ACA is in order. Congress passed the ACA in 2010 to address a growing crisis of Americans living without health insurance. Prior to the ACA, nearly 50 million Americans (about 15 percent of the population at the time) were uninsured. *Florida ex rel. Att'y Gen. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1244 (11th Cir. 2011), *rev'd on other grounds*, *NFIB*, 567 U.S. 519. Although many large employers provided health insurance, coverage was often cost prohibitive for small businesses and consumers seeking insurance through the individual market (i.e., directly instead of through an employer). *See* U.S. Gov't Accountability Office, GAO-12-166R, Health Care Coverage: Job Lock and the Potential Impact of

[12] The majority also suggests that remand is necessary so that the district court can consider remedial issues, raised by the United States for the first time on appeal, regarding the appropriate scope of relief. But such issues are largely moot if, as I believe, the coverage requirement is completely severable from the rest of the ACA. For example, I do not perceive a meaningful difference between a nationwide injunction prohibiting enforcement of the already-unenforceable coverage requirement versus an injunction against enforcement that is limited to the plaintiff states. In any case, this court could—and, in my view, should—resolve the severability issue even if remanding remedial issues is appropriate.

the Patient Protection and Affordable Care Act 3-4 (2011). Moreover, insurance companies could—and regularly would—deny coverage to high-risk consumers, especially those with preexisting medical conditions. *Id.* at 4.

The pre-ACA status quo created numerous economic and social problems. Most obviously, America's uninsured population could not afford spiraling healthcare costs, thus exacerbating health problems, leading to an estimated 45,000 premature deaths annually, Andrew P. Wilper et al., *Health Insurance and Mortality in US Adults*, 99 Am. J. Pub. Health 2289, 2292 (2009), and causing "62 percent of all personal bankruptcies," 42 U.S.C. § 18091(2)(G). The uninsured crisis caused some subtler problems too. For one thing, hospitals would have to absorb the costs of treating uninsured patients and would inevitably pass those costs along to insurance companies, which would then pass them along to consumers. *See* § 18091(2)(F) ("The cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008. To pay for this cost, health care providers pass on the cost to private insurers, which pass on the cost to families."). *See generally* Amicus Br. of HCA Healthcare, Inc. at 9-13. And dependency on employer-based healthcare decreased labor mobility, discouraged entrepreneurship, and kept potential caregivers away from the home. *See* GAO-12-166R, *supra*, at 5-6.

In enacting the ACA, Congress sought to address these and other problems with the national healthcare system by drastically reducing the number of uninsured and underinsured Americans. To achieve this goal, the ACA undertook a series of reforms, most notably to the individual insurance market. *See generally* Patient Protection and Affordable Care Act, Pub.

L. No. 111-148, tit. I, 124 Stat. 119 (2010). Among the ACA's most important (and visible) reforms are two related provisions: guaranteed issue and community rate. *See* 42 U.S.C. §§ 300gg, 300gg-1. The guaranteed-issue provision requires health-insurance providers to accept every individual who applies for coverage, thus preventing insurers from denying coverage based on a consumer's preexisting medical condition. *See* § 300gg-1(a). The community-rate provision prevents insurers from charging a higher rate because of a policyholder's medical condition. *See* § 300gg(a).

Left without some counterbalance, the guaranteed-issue and community-rate provisions threatened to overload insurers' risk pools with high-risk policyholders. Beyond allowing more high-risk consumers to purchase health insurance (as intended), these provisions disincentivized healthy (i.e., low risk) consumers from purchasing health insurance because it allowed them to wait until they developed costly health problems to purchase insurance.[13] This would have caused premiums to skyrocket, exacerbating many of the problems Congress sought to solve. *See generally* Amicus Br. of Blue Cross Blue Shield Ass'n at 3-4. Thus, the ACA included several provisions to incentivize low-risk consumers to purchase health insurance. It offered tax credits to offset much of the cost of health insurance for middle-income consumers. *See* 26 U.S.C. § 36B(b). It created healthcare exchanges to facilitate competition among health plans and to lower transaction costs. *See* 42 U.S.C. §§ 18031, 18041. It limited new enrollments to an open-enrollment period set by the Secretary of Health and Human Services, which mitigates the adverse-selection problem by preventing consumers from purchasing health insurance only

[13] This is known as the adverse-selection problem.

when they need it. *See* § 18031(c)(6). And it included the coverage requirement at issue in this lawsuit. *See* § 5000A(a).

Although the coverage requirement has been among the ACA's best-known provisions, the ACA's reforms to the private insurance market extend well beyond it. As just mentioned, Congress created other mechanisms to achieve the same goal as the coverage requirement: incentivize low-risk consumers to purchase health insurance. The ACA also included other provisions expanding access to the private insurance market, including a requirement that employers with 50 or more employees offer health insurance, *see* 26 U.S.C. § 4980H, and a requirement that health-insurance providers allow young adults to remain on their parents' insurance until they turn 26, *see* 42 U.S.C. § 300gg-14. And it included provisions designed to make health-insurance policies more attractive, such as those directly regulating premiums, *see, e.g.*, *id.* § 300gg-18(b), limiting benefits caps, *see id.* § 300gg-11, and prescribing certain minimum-coverage requirements for health plans, *see, e.g.*, *id.* § 300gg-13. Moreover, the ACA contains countless other provisions that are unrelated to the private insurance market—and many that are only tangentially related to health insurance at all.[14] The following are only some of many possible examples:

- Section 3006, which directs the Secretary of Health and Human Services to "develop a plan to

[14] The ACA contains ten titles. Only the first title focuses on the private insurance industry. The other titles address wide-ranging topics from the "prevention of chronic disease," ACA tit. IV, to the "health care work force," *id.* tit. V.

> implement a value-based purchasing program for payments under the Medicare program . . . for skilled nursing facilities."
>
> - Section 4205, which requires chain restaurants to conspicuously display "the number of calories contained in . . . standard menu item[s]."
> - Section 5204, which creates a student-loan repayment assistance program "to eliminate critical public health workforce shortages in Federal, State, local and tribal public health agencies."
> - Section 6402, which, among other things, strengthens criminal laws prohibiting healthcare fraud.
> - Title III of Part X, which reauthorizes and amends the Indian Health Care Improvement Act, a decades-old statute creating and maintaining the infrastructure for tribal healthcare services.

Given the breadth of the ACA and the importance of the problems that Congress set out to address, it is simply unfathomable to me that Congress hinged the future of the entire statute on the viability of a single, deliberately unenforceable provision.[15]

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[15] I do not mean to suggest that, as a policy matter, Congress chose the best (or even worthwhile) solutions to these problems.

B.

In *Planned Parenthood of Northern New England*, the Court announced the three principles that must guide our severability analysis. "First, we try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Planned Parenthood of N. New Eng.*, 546 U.S. at 329 (alteration in original) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)). "Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from 'rewrit[ing] [a] law to conform it to constitutional requirements' even as we strive to salvage it." *Id.* (first alteration in original) (quoting *Am. Booksellers*, 484 U.S. at 397). "Third, the touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.'" *Id.* at 330 (quoting *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part)).

In accordance with these principles, the Court's cases suggest a two-part inquiry. First, we must ask "whether the law remains 'fully operative' without the invalid provisions." *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018); *see also United States v. Booker*, 543 U.S. 220, 258-59 (2005); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). If so, the remaining provisions are "presumed severable" from the invalid provision. *Chadha*, 462 U.S. at 934 (quoting *Champlin Ref. Co.*

Such matters are beyond my job description, so I express no opinion on them. But the district court should have thought more critically about whether Congress likely intended to leave its chosen solution to a serious problem so vulnerable to judicial invalidation.

v. Corp. Comm'n, 286 U.S. 210, 234 (1932)). This presumption is rebutted only if "the statute's text or historical context makes it 'evident' that Congress, faced with the limitations imposed by the Constitution, would have preferred" no statute over the statute with only the permissible provisions. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010). And as should be clear by now, "the 'normal rule' is 'that partial, rather than facial, invalidation is the required course.'" *Id.* at 508 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)).

1.

The majority has identified the most glaring flaw in the district court's severability analysis: the district court "gives relatively little attention to the intent of the 2017 Congress, which appears in the analysis only as an afterthought." When one takes this fact into account, there can be little doubt as to Congress's intent.

We have unusual insight into Congress's thinking because Congress was given a chance to weigh in on the ACA's future without an effective coverage requirement and it decided the ACA should remain in place. By zeroing out the shared-responsibility payment, the 2017 Congress left the coverage requirement unenforceable. If Congress viewed the coverage requirement as so essential to the rest of the ACA that it intended the entire statute to rise and fall with the coverage requirement, it is inconceivable that Congress would have declawed the coverage requirement as it did. And make no mistake: Congress declawed the coverage requirement. As the CBO found only a month before Congress passed the TCJA, "[i]f the [coverage requirement] penalty was eliminated but the [coverage requirement] itself was not repealed, the results would be very similar to" if the coverage requirement

itself were repealed. 2017 CBO Report, *supra*, at 1. Regardless of lofty civic notions about people who follow the law for the sake of following the law, the objective evidence before Congress was that "only a small number of people" would obey the coverage requirement without the shared-responsibility payment. *Id.*; *cf. Dep't of Commerce*, 139 S. Ct. at 2565-66 (concluding people will "predictabl[y]" "violate their legal duty" when incentivized to do so). Congress accordingly knew that repealing the shared-responsibility payment would have the same essential effect on the ACA's statutory scheme as would repealing the coverage requirement.

Furthermore, as various amici highlight, judicial repeal of the ACA would have potentially devastating effects on the national healthcare system and the economy at large. *See, e.g.*, Amicus Br. of Am.'s Health Ins. Plans (discussing impact on health-insurance industry); Amicus Br. of 35 Counties, Cities, and Towns (discussing impact on municipalities); Amicus Br. of Bipartisan Econ. Scholars (discussing impact on economy); Amicus Br. of Am. Hosp. Ass'n et al. (discussing impact on hospitals). Regardless of whether the ACA is good or bad policy, it is undoubtedly *significant* policy. It is unlikely that Congress would want a statute on which millions of people rely for their healthcare and livelihoods to disappear overnight with the wave of a judicial wand. If Congress wanted to repeal the ACA through the deliberative legislative process, it could have done so. But with the stakes so high, it is difficult to imagine that this is a matter Congress intended to turn over to the judiciary.

2.

A second flaw in the district court's analysis is the great weight it places on the fact that Congress in 2017

did not repeal its statutory findings emphasizing the coverage requirement's importance to the guaranteed-issue and community-rate provisions. *See* 42 U.S.C. § 18091. The district court overread the significance of § 18091. Congress enacted the findings in § 18091 to demonstrate the coverage requirement's role in regulating interstate commerce. When it invokes its commerce power, Congress routinely makes such findings to facilitate judicial review. *See United States v. Morrison*, 529 U.S. 598, 612 (2000) ("While 'Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce,' the existence of such findings may 'enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye.'" (alterations in original) (citation omitted) (quoting *United States v. Lopez*, 514 U.S. 549, 562-63 (1995))). Indeed, § 18091(2), the subsection the district court focused its attention on, is entitled "Effects on the national economy and interstate commerce."

Section 18091 is not an inseverability clause, and nothing in its text suggests that Congress intended to make the coverage requirement inseverable from the remainder of the ACA. If Congress intended to draft an inseverability clause, it knew how to do so. *See* Office of Legislative Counsel, U.S. Senate, Senate Legislative Drafting Manual § 131(b) (1997) (explaining purpose of inseverability clause). *Compare id.* § 131(c) (providing as example of proper form for inseverability clause: "EFFECT OF INVALIDITY ON OTHER PROVISIONS OF ACT.—If section 501, 502, or 503 of the Federal Election Campaign Act of 1971 (as added by this section) or any part of those sections is held to be invalid, all provisions of and amendments made by

this Act shall be invalid"), *with* § 18091(2)(H) ("The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market."). In fact, both the House and the Senate legislative drafting guides suggest that Congress should include an inseverability clause if it wants to make a statute inseverable because "[t]he Supreme Court has made it quite clear that invalid portions of statutes are to be severed 'unless it is evident that the Legislature would not have enacted those provisions which are within its powers, independently of that which is not.'" Office of Legislative Counsel, U.S. House of Representatives, House Legislative Counsel's Manual on Drafting Style § 328 (1995) (quoting *Chadha*, 462 U.S. at 931); *accord* Senate Legislative Drafting Manual, *supra*, at § 131(a). The absence of a genuine inseverability clause should be all but conclusive in assessing the legislature's intent.

Moreover, the argument that § 18091 is meant to signal Congress's intent that the coverage requirement be inseverable proves far too much. Section 18091 discusses the coverage requirement's importance to the entire federal healthcare regulatory scheme, including—along with the ACA—the Public Health Service Act ("PHSA") and the Employee Retirement Income Security Act ("ERISA"). *See* § 18091(2)(H) ("Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), the Public Health Service Act (42 U.S.C. 201 et seq.), and this Act, the Federal Government has a significant role in regulating health insurance. The [coverage] requirement is an essential part of *this larger regulation* of economic activity, and the absence of the requirement would undercut Federal regulation of the health

insurance market." (emphasis added)). It is not suggested that Congress intended a court to strike down the PHSA and ERISA if it found the coverage requirement unconstitutional. This would be especially implausible given the intensity of the debate over the coverage requirement's constitutionality from the get-go. *See NFIB*, 567 U.S. at 540 ("On the day the President signed the [ACA] into law, Florida and 12 other States filed a complaint in the Federal District Court for the Northern District of Florida."). Yet in signaling that the coverage requirement is "an essential part of this larger regulation," Congress did not distinguish between the ACA and these prior statutes. Thus, § 18091 cannot reasonably be read to bear on the coverage requirement's severability.

3.

Another flaw in the district court's analysis is its suggestion that the Supreme Court concluded in *NFIB* and *King v. Burwell*, 135 S. Ct. 2480 (2015), that the coverage requirement is inseverable from the ACA's guaranteed-issue and community-rate provisions. The district court misconstrued these opinions. And even if the district court read them correctly, these opinions address the coverage requirement as enforced by the shared-responsibility payment. They give little valuable insight into the coverage requirement's role in the post-TCJA ACA.

In *NFIB*, only the dissenters addressed the coverage requirement's severability. The district court did not suggest it is bound by a Supreme Court dissent, and of course it is not. The district court instead took language from the other five Justices out of context to conclude that each of them viewed the coverage requirement as inseverable. But none of the language the district court cited addresses severability. *See*

NFIB, 567 U.S. at 547-48 (opinion of Roberts, C.J.) (discussing Government's argument that coverage requirement plays a role in regulating interstate commerce); *id.* at 597 (Ginsburg, J., dissenting in part) (same). Although the Justices' reasoning certainly suggests that they saw the coverage requirement as an important part of the statutory scheme as it existed in 2012, this does not mean the Justices found it "evident" that Congress would have preferred the entire statute to fall without the coverage requirement. *Alaska Airlines*, 480 U.S. at 684.

King likewise contains some helpful commentary about the ACA's original statutory scheme, but it does not discuss severability or otherwise control the severability analysis. The Court ruled in *King* that the ACA's tax credits were available to every eligible consumer regardless of whether the state in which a consumer lived established its own exchange or relied on the federally operated exchange. 135 S. Ct. at 2496. The coverage requirement came up because many more individuals would have been exempt from the shared-responsibility payment if tax credits were not available to them. *Id.* at 2493-95; *see also* § 5000A(e)(1)(A) ("No penalty shall be imposed . . . with respect to . . . [a]ny applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income . . . .").[16] Noting the importance of the tax

[16] Lest there be any confusion, the exemption at issue in *King* exempted individuals otherwise subject to the coverage requirement from the shared-responsibility payment; it did not exempt them from the coverage requirement itself. Exemptions from the shared-responsibility payment are listed in § 5000A(e)(1),

credits and coverage requirement (as enforced by the shared-responsibility payment) to the statutory structure, the Court concluded as a matter of statutory interpretation that Congress did not intend a scheme in which neither tax credits nor the coverage requirement were operating to bring low-risk consumers into the insurance pools. *See King*, 135 S. Ct. at 2492-94 ("The combination of no tax credits and an ineffective coverage requirement could well push a State's individual insurance market into a death spiral. . . . It is implausible that Congress meant the [ACA] to operate in this manner.").

The district court framed *King* as saying that Congress intrinsically tied the community-rate and guaranteed-issue provisions to the coverage requirement, meaning that those provisions must be inseverable from the coverage requirement. But the district court ignored a crucial aspect of the *King* Court's analysis: it explicitly discussed the coverage requirement as enforced by the shared-responsibility payment. *See id.* at 2493 (referring to the coverage requirement as "a requirement that individuals maintain health insurance coverage *or make a payment to the IRS*" (emphasis added)). Indeed, as the Court identified it, the crux of the problem with denying consumers tax credits in federal-exchange states was that doing so would make a large number of individuals unable to afford insurance, thus exempting them from the shared-responsibility payment. *See id.* These widespread exemptions would, in turn, make the coverage requirement "ineffective." *Id. King* thus speaks far more to the shared-responsibility payment's role in the ACA's pre-TCJA

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whereas exemptions from the coverage requirement itself are listed in § 5000A(d).

statutory scheme than it does the coverage requirement's role in the statutory scheme.

Even to the extent the Court in *NFIB* or *King* meant to opine on the coverage requirement's severability, these cases were both decided before the TCJA. They thus give no insight into how the coverage requirement fits into the post-TCJA scheme. Whatever reservations the Court previously harbored about severing the coverage requirement, Congress plainly did not share those concerns when it zeroed out the shared-responsibility payment. Congress either concluded that healthcare markets under the ACA had reached a point of stability at which they no longer needed an effective coverage requirement,[17] or it chose to accept the negative side effects of effectively repealing the coverage requirement as a cost of relieving the burden it placed on applicable individuals. Either way, the legislative considerations have necessarily shifted.

In sum, there was no reason for the district court to conclude that *any* provision in the ACA was inseverable from the coverage requirement. The majority does not necessarily disagree. I thus do not understand its decision to remand when, even on the majority's analysis of the case, it could instead reverse and render a judgment declaring only the coverage requirement unconstitutional.

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[17] *See* CBO Report, *supra*, at 1 (concluding that "[n]ongroup insurance markets would continue to be stable in almost all areas of the country throughout the coming decade" if the coverage requirement were repealed); Amicus Br. of Blue Cross Blue Shield Ass'n at 24-27 (explaining that tax credits and other ACA provisions are driving enough consumers into insurance markets to make the coverage requirement unnecessary).

V.

Limits on judicial power demand special respect in a case like this. For one thing, careless judicial interference has the potential to be especially pernicious when it involves a complex statute like the ACA, which carries such significant implications for the welfare of the economy and the American populace at large. For another, the legitimacy of the judicial branch as a countermajoritarian institution in an otherwise democratic system depends on its ability to operate with restraint—and especially so in a high-profile case such as the one at bar. The district court's opinion is textbook judicial overreach. The majority perpetuates that overreach and, in remanding, ensures that no end for this litigation is in sight.

I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

No. 4:18-cv-00167-O

TEXAS, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA, et al., Defendants,

CALIFORNIA, et al., Intervenors-Defendants.

STAY ORDER AND ADMINISTRATIVE CLOSURE

(Doc. 223) Filed December 31, 2018

The Court has entered a partial judgment on Count I in this case (ECF No. 221). The Court determines the remainder of this case should be **STAYED** pending further orders. The Clerk is therefore **instructed to submit a JS-6 form** to the Administrative Office, removing this case from the statistical records.

Nothing in this Order shall be considered a dismissal or disposition of the remaining clams. The parties are directed to notify the Court upon the conclusion of the appeal of the partial judgment within 14 days of any decision. Should further proceedings in the meantime become necessary or desirable, any party may initiate it by filing an appropriate pleading.

SO ORDERED on this 31st day of December, 2018.

/s/Reed O'Connor
Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:18-cv-00167-O

TEXAS, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,
Defendants,

CALIFORNIA, et al., Intervenors-Defendants.

FINAL JUDGMENT ON COUNT I
(Doc. 221) December 30, 2018

The Court issued its order granting partial summary judgment on Count I of Plaintiffs' Amended Complaint, and has determined that it should be severed from the remaining claims. December 14, 2018 Order, ECF No. 211. In accordance with Federal Rule of Civil Procedure 54(b), the Court therefore **DECLARES** that 26 U.S.C. § 5000A(a) is **UNCONSTITUTIONAL** and **INSEVERABLE** from the remainder of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119-1045 (2010).

SO ORDERED on this **30th** day of **December, 2018.**

/s/Reed O'Connor
Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:18-cv-00167-O

TEXAS, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,
Defendants,

CALIFORNIA, et al., Intervenors-Defendants.

ORDER GRANTING STAY
AND PARTIAL FINAL JUDGMENT
(Doc. 220) December 30, 2018

On December 14, 2018, the Court entered its Order granting partial summary judgment on Count I of the Plaintiffs' Amended Complaint. *See* ECF No. 211. On December 16, 2018, the Court ordered the Parties to meet and confer and, by January 4, 2019, to jointly propose a schedule for resolving the Plaintiffs' remaining claims. *See* ECF No. 212. On December 17, 2018, the Intervenor Defendants moved the Court to clarify that the December 14, 2018 Order is not binding or to enter a stay if the Order is binding and to enter final judgment or certify the Order for immediate appeal. *See* ECF No. 213.

I. BACKGROUND

Plaintiffs are the States of Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah,

West Virginia, Wisconsin, Governor Paul LePage of Maine (the "State Plaintiffs"), and individuals Neill Hurley and John Nantz (the "Individual Plaintiffs" and, collectively with the State Plaintiffs, "Plaintiffs").

Defendants are the United States of America, the United States Department of Health and Human Services ("HHS"), Alex Azar, in his official capacity as Secretary of HHS, the United States Internal Revenue Service (the "IRS"), and David J. Kautter, in his official capacity as Acting Commissioner of Internal Revenue (collectively, the "Federal Defendants").

Finally, the States of California, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia intervened as defendants (collectively, the "Intervenor Defendants").

The Plaintiffs sued the Federal Defendants seeking, among other things, a declaration that the Individual Mandate of the Patient Protection and Affordable Care Act (ACA), Pub. L. 111-148, 124 Stat. 119-1045 (2010), as amended by the Tax Cuts and Jobs Act of 2017 (TCJA), Pub. L. No. 115-97, 131 Stat. 2054 (2017), is unconstitutional and that the remainder of the ACA is inseverable. Am. Compl. 2, ECF No. 27. Their theory is that, because the TCJA eliminated the shared-responsibility tax, the tax-based saving construction developed by the Supreme Court in *National Federation of Independent Businesses v. Sebelius (NFIB*), 567 U.S. 519 (2012), no longer applies. Am. Compl. 2–3, ECF No. 27. Plaintiffs further argue that, as the four joint dissenters reasoned in *NFIB*, the Individual Mandate is inseverable from the rest of the ACA. Pls.' Br. Prelim. Inj. 35, ECF No. 40 (citing

NFIB, 567 U.S. at 691–703 (joint dissent)) [hereinafter "Pls.' Br."].

The Federal Defendants agree the Individual Mandate is unconstitutional and inseverable from the ACA's pre-existing-condition provisions. But they argue all other ACA provisions are severable from the mandate. The Intervenor Defendants argue all of Plaintiffs' claims fail.

The Plaintiffs filed an Application for Preliminary Injunction, (ECF No. 39), on April 26, 2018; the Federal Defendants and the Intervenor Defendants responded, (ECF Nos. 91 and 92), on June 7, 2018; and Plaintiffs replied, (ECF No. 175), on July 5, 2018. Because the Federal Defendants argued a judgment, as opposed to an injunction, was more appropriate, the Court provided notice of its intent to resolve the issues raised by the Application for Preliminary Injunction on summary judgment. *See* July 16, 2018 Order, ECF No. 176 (citing FED. R. CIV. P. 56(f)(3)). The parties responded. *See* ECF Nos. 177–79.

On December 14, 2018, the Court issued its order denying the Plaintiffs' request for a preliminary injunction but granting summary judgment on Count I of the Amended Complaint, finding the Individual Mandate is unconstitutional because it no longer triggers a tax and is inseverable from the remainder of the ACA. *See* Dec. 14, 2018 Order, ECF No. 211. On December 17, 2018, the Intervenor Defendants moved the Court to (1) clarify whether the December 14, 2018 Order is immediately binding on the parties and (2) stay the order or certify it for appeal, as appropriate. *See* Intervenor Defs.' Mot. Stay, ECF No. 213. The Court ordered expedited briefing, *see* ECF No. 215, and the Parties promptly complied, *see* ECF Nos. 216, 217, and 218.

As an initial matter, the Court recognizes the Parties' diligent work on this delicate and complex matter. Counsel have conducted themselves with grace and professionalism, consistently advocating zealously on behalf of their clients with candor and class. And it is no small feat, the Court acknowledges, to prepare such crisp briefing, with so many moving parts, on an expedited basis during the holiday season. For all this, the Court is grateful.

Having reviewed the briefing and applicable law, the Court finds it is most efficient and appropriate to **GRANT** the Intervenor Defendants' request for final judgment on the December 14, 2018 Order granting summary judgment on Count I of the Amended Complaint and to **GRANT** the Intervenor Defendants' request for a stay of that judgment.

II. LEGAL STANDARDS

A. Partial Final Judgment

Federal Rule of Civil Procedure 54(b) provides: "When an action presents more than one claim for relief . . . the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." FED. R. CIV. P. 54(b). This Rule "permits district courts to authorize immediate appeal of dispositive rulings on separate claims in a civil action raising multiple claims." *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 902 (2015). "As both the rule's text and the Supreme Court have made clear, a district court deciding whether to certify a judgment under Rule 54(b) must make two determinations." *Briargrove Shopping Ctr. Joint Venture v. Pilgrim Enterprises, Inc.*, 170 F.3d 536, 539 (5th Cir. 1999) (citation omitted). First, the court must determine that it

is entering judgment on "an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Id.* (citation omitted). Second, the court must determine that no "just reason for delay exists." *Id.* (citation omitted).

B. Stay of Judgment

"The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [the Court's] discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). To determine whether to grant a stay pending appeal courts consider four factors: "(1) whether the stay applicant has made a strong showing that he [or she] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Campaign for S. Equality v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014) (quoting *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014)). But when "evaluating these factors, [the Fifth Circuit] has refused to apply them 'in a rigid . . . [or] mechanical fashion.'" *Id.* (quoting *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983)).

III. ANALYSIS

A. The Court Will Enter Partial Final Judgment

Given the Parties' inquiries about whether the Court's December 14, 2018 Order is final and binding—and the unanimous agreement that the Order should be immediately appealable[1]—the Court finds it

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[1] *See, e.g.*, Intervenor Defs.' Mot. Stay 14, ECF No. 213-1; Fed. Defs.' Resp. 6, ECF No. 216; Pls.' Resp. 5, ECF No. 217.

is most efficient to enter a partial final judgment under Rule 54(b) on the Order and then stay it pending appeal.

The Federal Defendants suggest it would be inappropriate for the Court to enter partial final judgment under Rule 54(b) "because the Amended Complaint presents only one claim for purposes of Rule 54(b)—that the individual mandate is unconstitutional and that it is not severable from the rest of the ACA."[2] They assert that "Counts I through V represent merely alternative theories of relief or different forms of remedy."[3] The Court finds that Counts I through V of the Amended Complaint are not mere redundancies.

Count I, for example, asks for a declaratory judgment that the Individual Mandate is unconstitutional.[4] Count II, however, raises a Due Process Clause claim and asserts that because "Section 5000A's individual mandate is unconstitutional, the rest of the ACA is irrational under Congress's own findings" and that "[t]he ACA lacks a rational basis now that the individual mandate's tax penalty has been repealed."[5] It is true this claim is likely moot if the Court's December 14, 2018 Order is affirmed on appeal; but if the Order is reversed in whole or in part, the Plaintiffs could still seek relief under the theory put forth in Count II. And Count IV, for example, pre-

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[2] Fed. Defs.' Resp. 8, ECF No. 216.

[3] *Id*.

[4] *See* Am. Compl. 28, ECF No. 27.

[5] *Id*. at 30.

sents an APA claim that presupposes the ACA's unconstitutionality but seeks different relief entirely.[6] The claims, in other words, are related but distinct.

Moreover, the Court finds that summary judgment on Count I is an "ultimate disposition of an individual claim." *Pilgrim Enterprises*, 170 F.3d at 539 (citation omitted). By the Court's Order, the Plaintiffs have succeeded on Count I—the entry of summary judgment "dispose[d] of that claim *entirely*." *Monument Mgmt. Ltd. P'ship I v. City of Pearl*, 952 F.2d 883, 885 (5th Cir. 1992) (emphasis in original). And that claim—that the Individual Mandate is unconstitutional—is the Plaintiffs' "*primary* claim." *Id.* (emphasis in original). Plus, for the reasons discussed in the below stay analysis, the Court finds there is "no just reason for delay[ing]" appeal of the December 14, 2018 Order. *See Pilgrim Enterprises*, 170 F.3d at 539.

The Court therefore **GRANTS** the Intervenor Defendants' motion for final judgment on the December 14, 2018 Order, (ECF No. 211), granting summary judgment on Count I of the Amended Complaint and declaring the Individual Mandate unconstitutional and inseverable.

B. The Order is Stayed

The Intervenor Defendants bear the burden of demonstrating that a stay is warranted. *Nken*, 556 U.S. at 433–34. In their briefing, the Intervenor Defendants address all four factors relevant to a district court's analysis of whether to exercise its discretion to grant a stay pending appeal.[7] For the reasons set forth

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[6] *Id.* at 32.

[7] *See* Intervenor Defs.' Mot. Stay 7–14, ECF No. 213-1.

below, the Court finds the Intervenor Defendants cannot carry their burden on the first relevant factor—likelihood of success on the merits. But the Intervenor Defendants prevail on the remaining elements, and the Plaintiffs do not argue otherwise.

1. The Intervenor Defendants Are Unlikely to Succeed

The Intervenor Defendants put forth a very powerful narrative in this case—one they assert the Fifth Circuit is likely to adopt. In truth, the narrative presents a forceful, surface-level appeal. It goes something like this.

The Individual Plaintiffs have no standing because they suffer no injury. After the TCJA, there is no tax penalty for non-compliance with the Individual Mandate. And anyways, the Individual Mandate is purely optional. So, at most, the ACA presents the Individual Plaintiffs with a simple choice between buying ACA-compliant insurance or "paying" a $0 tax. No harm, no foul.

But even if the choice between buying insurance and doing nothing creates standing, the Intervenor Defendants continue, the Individual Mandate is constitutional. It is constitutional as an exercise of Congress's Tax Power because the now-eliminated shared-responsibility payment still satisfies a number of the tax factors discussed in *NFIB*. And even if the Individual Mandate is no longer salvageable as an exercise of the Tax Power, it may now be viewed as a proper exercise of Congress's Interstate Commerce Power because it does not compel anyone to do anything.

Finally, even if the Individual Mandate is unconstitutional, it is severable from the remainder of the ACA. We know that because the 2017 Congress that

passed the TCJA eliminated the shared-responsibility payment but left the rest of the ACA intact.

So stated, this narrative is compelling. But it rests on two crucial premises, without which it falls apart. First, it is premised on a belief that written law is not binding. Second, it is premised on the view that the Supreme Court's reasoning in *NFIB* did not simply craft a saving construction but instead permanently supplanted Congress's intent by altering the very nature of the ACA. In the Court's view, neither of these premises hold and therefore neither does the narrative. The Court therefore finds the Intervenor Defendants are unlikely to succeed on the merits of their appeal for at least the following basic reasons.

a. Standing

The Intervenor Defendants assert that, on appeal, they "are likely to establish that the Individual Plaintiffs do not have standing to maintain this action" because, after January 1, 2019, the Individual Plaintiffs will not be put to a choice "between purchasing minimum essential coverage, on the one hand, and paying the penalty for not doing so, on the other." Intervenor Defs.' Mot. Stay 8, ECF No. 213-1 (citing *Hotze v. Burwell*, 784 F.3d 984, 993 (5th Cir. 2015)). The Court finds it unlikely that the Fifth Circuit will hold the Individual Plaintiffs lack standing to challenge the constitutionality of the Individual Mandate—under *Hotze* or otherwise.

In *Hotze*, the plaintiffs challenged the ACA as unconstitutional under the Origination Clause and the Takings Clause, unlike the Individual Plaintiffs here who, like the plaintiffs in *NFIB*, challenge the Individ-

ual Mandate as beyond Congress's enumerated powers.[8] In deciding the case, the Fifth Circuit did not hold that an individual may challenge the constitutionality of the ACA *only if* the individual pleads that they lack ACA-compliant coverage and are therefore faced with a choice between purchasing insurance or paying a penalty.[9] Instead, it held on the basis of the pleadings before it that the plaintiffs failed to adequately plead that precise dilemma and that doing so would have been "the most straightforward" way to demonstrate standing. *Id.* at 994 ("Accordingly, we hold that Dr. Hotze has failed to demonstrate standing on the most straightforward ground—that is, that the ACA forces him to choose between paying the penalty and purchasing compliant insurance.").

Specifically, Dr. Hotze pleaded that the "ACA compels Plaintiff Hotze and other Texans to pay enormous penalties to the federal government, or else purchase health insurance that is far more expensive and less useful than existing employer-based coverage." Complaint at 1, *Hotze v. Sebelius*, 991 F. Supp. 2d 864 (S.D. Tex. 2014) (No. 4:13-cv-01318).[10] This "purchase or

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[8] *Compare Hotze*, 784 F.3d at 986, *with NFIB*, 567 U.S. at 530–32.

[9] *See Hotze*, 784 F.3d at 993 (noting the distinction in other circuits that "plaintiffs . . . who already have minimum essential coverage *ordinarily* will not have an injury in fact for standing purposes" (emphasis added)).

[10] *See also id.* at 6 ("Plaintiffs will suffer irreparable harm in being compelled to switch to a more expensive government-approved insurance plan that does not cover or reimburse for desired medical services."); *id.* at 6–7 ("Plaintiffs will suffer unrecoverable financial losses from the implementation of ACA, which they will have no practical way of recouping from the federal government or from private, government-approved insurance carriers."); *id.* at 7

penalty" theory of economic injury forced the court to contend with the fact that Dr. Hotze never actually pleaded the facts necessary to support *his own theory of standing*—i.e., that he was put to a concrete choice between the costs of obeying 26 U.S.C. § 5000A(a) or paying the penalty amount set by § 5000A(c).[11] To the contrary, the complaint there suggested Dr. Hotze faced no such dilemma because he was covered by his employer. *See Hotze*, 784 F.3d at 989 ("[T]he complaint at no point clearly alleges that the health-insurance policy that Braidwood already provides to Dr. Hotze fails to satisfy the mandates.").

Hotze, then, is not a broad holding that individuals lack standing to challenge the Individual Mandate's constitutionality unless they first disobey that provision and fail to maintain compliant coverage. To read *Hotze* in such a manner would run headlong into the well-established doctrine that individuals need not first disobey a law to earn standing to challenge it.[12]

("Plaintiffs have already suffered harm by the reduction in market choice for affordable health insurance, as insurance premiums have already increased in the market due to ACA.").

[11] *See Hotze*, 784 F.3d at 994 ("Given the complaint's allegation that Dr. Hotze has an employer-provided health-insurance plan, coupled with the complaint's failure to allege that this plan falls into the narrow category of employer-provided plans that do not constitute 'minimum essential coverage' under § 5000A, we cannot 'reasonably ... infer[ ]' that Dr. Hotze lacks the minimum essential coverage required by the mandate." (citations omitted)).

[12] *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 455 (5th Cir. 2017), *cert. denied*, 139 S. Ct. 408 (2018) ("This argument ignores the well- established principle that a threatened injury may be sufficient to establish standing . . . The Individual Plaintiffs thus need not wait to file suit until PPGC is forced to close its doors to

Instead, *Hotze* is a narrow, fact-specific holding that the plaintiff failed to adequately plead his own purchase-or-penalty theory of standing. *Hotze*, 784 F.3d at 991 ("Thus, although we do not doubt that many have suffered an injury in fact at the hands of the individual mandate, the plaintiffs' complaint *does not adequately allege* that Dr. Hotze is among them." (emphasis added)).

Importantly, the Individual Plaintiffs here chart a different course than Dr. Hotze. Their pleadings clearly allege they are required by the Individual Mandate to *maintain* insurance they do not want to *continue* purchasing—i.e., they are required by a law to continue activity they do not want to engage in—and that this requirement is inherently beyond Congress's enumerated powers. *See* Am. Compl. 5, ECF No. 27 ("Mr. Hurley maintains minimum essential health insurance coverage, which he purchased on the ACA-created exchange."); *id*. at 27 ("In the absence of the ACA, the Individual Plaintiffs would purchase a health-insurance plan different from the ACA-compliant plans that they are currently required to purchase were they afforded the option without the ACA."); *id*. at 28 ("Section 5000A's individual mandate exceeded Congress's enumerated powers by forcing Individual Plaintiffs to maintain ACA-compliant health insurance coverage.").

The Fifth Circuit is therefore likely to find that the Individual Plaintiffs pleaded a sufficient injury in two

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them and all other Medicaid beneficiaries." (citing *Comsat Corp. v. FCC*, 250 F.3d 931, 936 (5th Cir. 2001); *Loa–Herrera v. Trominski*, 231 F.3d 984, 988 (5th Cir. 2000))).

respects.[13] First, unlike the purely theoretical and contradictory allegations in *Hotze*,[14] the Individual Plaintiffs here actually allege a clear and present injury. Indeed, the Individual Plaintiffs put it quite plainly: "In the absence of the ACA, the Individual Plaintiffs would purchase a health-insurance plan different from the ACA-compliant plans that they are currently required to purchase."[15] Compl. 27, ECF No. 27. There is no equivocation, there is no speculation. The Individual Plaintiffs allege they are bound to purchase something they do not want to purchase and that if they were not so bound they would not make the purchase.[16] And whereas Dr. Hotze would face his

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[13] *See, e.g.*, *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2012) (holding the plaintiffs alleged a "sufficient economic *and* constitutional injury" (emphasis in original)).

[14] *See* Complaint at 1–7, *Hotze*, 991 F. Supp. 2d 864 (S.D. Tex. 2014) (No. 4:13-cv-01318).

[15] It is also worth noting that the Fifth Circuit in *Hotze* held that Dr. Hotze failed to adequately plead an injury caused by the *possibility* of being faced with a choice between accepting undesirable health insurance or violating the Individual Mandate only because that injury presupposed the decision of a third party—Dr. Hotze's employer. *See Hotze*, 784 F.3d at 995 ("The existence of Dr. Hotze's alleged injury rests on . . . a third-party decision: Dr. Hotze will be injured by the individual mandate, the plaintiffs say, because, once the employer mandate takes effect, Braidwood may offer him less desirable insurance, which may prompt him to drop his employer-provided insurance, which he will not be able to do without violating the individual mandate. Speculation about a decision made by a third party . . . constitutes an essential link in this chain of causation."). The court therefore left open the possibility that such a choice could constitute sufficient injury if not contingent on a third-party decision. The Individual Plaintiffs allege such an injury here. *See* Am. Compl. 27, ECF No. 27.

[16] *See Doe v. Chao*, 540 U.S. 614, 624–25 (2004) (noting that "an

injury only were his employer to stop providing ACA-compliant coverage, the Individual Plaintiffs here face their alleged injury now—they are being required to continue buying something they do not want.

Second, as discussed in the Court's Order,[17] the Individual Plaintiffs sufficiently allege that they are the direct objects of an unconstitutional exercise of power traceable to the Individual Mandate that will be redressed by a holding that the mandate is invalid.[18] That is to say, the Individual Plaintiffs allege a straightforward constitutional injury: Congress legislated in a way the Constitution does not allow and the

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individual subjected to an adverse effect has injury enough to open the courthouse door"); *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 103 (1998) (noting "the constitutional 'case' or 'controversy' . . . point has always been the same: whether a plaintiff 'personally would benefit in a tangible way from the court's intervention.'" (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975))).

[17] *See* December 14, 2018 Order 16–17, ECF No. 211.

[18] Compl. 26, ECF No. 27 ("The ACA injures Individual Plaintiffs Hurley and Nantz by mandating that they purchase minimum essential health insurance coverage despite the Supreme Court's determination that the requirement is unconstitutional."); *id.* at 27 ("Individual Plaintiffs have an obligation to comply with the individual mandate under the ACA while it remains federal law, despite the provision's unconstitutionality."); *id.* at 5 ("Mr. Hurley is subject to the individual mandate and objects to being required by federal law to comply with it."); *id.* at 6 ("Mr. Nantz is subject to the individual mandate and objects to being required by federal law to comply with it."); *id.* at 27 ("Each of the injuries to Individual Plaintiffs is caused by the Defendants' continued enforcement of the Affordable Care Act, and each of these injuries will be redressed by a declaratory judgment from this Court pronouncing the Affordable Care Act unconstitutional.").

Individual Plaintiffs are the direct object of that legislation. The "alleged violation[] of the Constitution here [is] not immaterial, but form[s], rather, the sole basis of the relief sought." *Bell v. Hood*, 327 U.S. 678, 683 (1946). "And it is established practice for [the Supreme] Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Id.* at 684.

The Individual Plaintiffs' allegation is therefore likely to satisfy the test for constitutional injury on appeal.[19] And to the extent existing constitutional-injury

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[19] *See, e.g.*, *Hudson*, 667 F.3d at 636–37 ("TCA and Time Warner need not prove that they will sustain a quantifiable economic injury. *Cf. Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 588 (1983) (observing that 'the very selection of the press for special treatment threatens the press not only with the current differential treatment, but with the possibility of subsequent differentially more burdensome treatment' and '[t]hus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects'). S.B. 5 subjects the plaintiffs to disparate treatment. . . Because the legislation targets the plaintiffs for exclusion from this benefit provided to similarly situated speakers, TCA and Time Warner have shown constitutional injury sufficient to establish standing."); *Texas Cable & Telecomms. Ass'n v. Hudson*, 265 F. App'x 210, 217–18 (5th Cir. 2008) ("In addition to competitive or economic injury, a constitutional injury also provides standing."); *Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 520 (5th Cir. 2014) (holding plaintiff sufficiently pleaded constitutional injury because he alleged he was "the target of the . . . ordinance restricting where registered child sex offenders, like him, can live"); *Hollis v. Lynch*, 827 F.3d 436, 441–42 (5th Cir. 2016) (holding plaintiff pleaded sufficient constitutional injury by challenging law banning machine guns as infringing Second Amendment rights and then holding the Second Amendment challenge failed

doctrine deals largely with the infringement of enumerated rights, rather than the violation of the Constitution's structural protection of rights, the Court finds it unlikely the Fifth Circuit would rely on such an untenable distinction.[20] The Individual Plaintiffs

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on the merits); *accord Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 664–66 (1993).

[20] *See* U.S. CONST. AMEND. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers . . . As James Madison wrote: 'The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.' . . . This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'" (citations omitted)); *cf Bond v. United States*, 564 U.S. 211, 221 (2011) ("The Framers concluded that allocation of powers between the National Government and the States enhances freedom . . . by protecting the people, from whom all governmental powers are derived."); *id.* ("[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." (quoting *New York v. United States,* 505 U.S. 144, 181 (1992))); *id.* ("Federalism secures the freedom of the individual."); *id.* at 222 ("The structural principles secured by the separation of powers protect the individual as well."); *id.* ("In the precedents of this Court, the claims of individuals . . . have been the principal source of judicial decisions concerning separation of powers and checks and balances."); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 164 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) ("To prevent tyranny and protect individual liberty, the Framers of the Constitution separated the legislative, executive, and judicial powers of the new national government."). *See also* THE FEDERALIST NO. 84 (Alexander Hamilton) ("[W]hy declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press

allege they are subject to a congressional act that inherently exceeds that body's power. And "[i]f the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury"—such as the requirement to purchase an unwanted product—"may object." *Bond*, 564 U.S. at 223.

This raises one final point: The Intervenor Defendants argue the Individual Plaintiffs cannot plead a constitutional injury (or any justiciable injury, for that matter) because the Individual Mandate no longer compels compliance. *See* Intervenor Defs.' Mot. Stay 8, ECF No. 213-1 ("Beginning January 1, 2019, the Individual Plaintiffs will no longer be on the horns of that dilemma; as a result, the Fifth Circuit is likely to hold that they lack standing."). But standing analysis and merits analysis are fundamentally separate inquiries, and this line of attack conflates them.[21] That is, it

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shall not be restrained, when no power is given by which restrictions may be imposed?"); RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION 191 (2016) ("Madison's blasé attitude about the Tenth Amendment was in stark contrast with the imperative he felt to add what eventually became the Ninth Amendment. This provision was needed, he said, to guard against 'one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system, namely, that 'by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration.'" (citations omitted)).

[21] *See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) ("[O]ne must not 'confus[e] weakness on the merits with absence of Article III standing.'" (citing *Davis v. United States*, 131 S.Ct. 2419, 2434 n. 10 (2011); *Warth*, 422 U.S. at 500)); *Steel Co.*, 523 U.S. at 94 (noting the Ninth Circuit's "doctrine of hypothetical jurisdiction" and "declin[ing] to endorse such an approach because it carries the

rests on the premise that written law, like § 5000A(a), is not binding—which is one of the Intervenor Defendants' premiere merits arguments in this case.[22] That the Individual Mandate does nothing is the Intervenor Defendants' leading argument for why the mandate permissibly "regulates" interstate commerce.[23] Putting aside the logical difficulty of that argument, the Supreme Court has made clear that whether a challenged "statute in fact constitutes an abridgment of the plaintiff's" constitutional protections "is, of course, irrelevant to the standing analysis."[24] So, the Fifth Circuit is unlikely to skip ahead to the merits to deter-

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courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers"); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("Our threshold inquiry into standing 'in no way depends on the merits of the [petitioner's] contention' . . . and we thus put aside for now [petitioner's] Eighth Amendment challenge and consider whether he has established the existence of a 'case or controversy.'" (quoting *Warth*, 422 U.S. at 500)); *Bell*, 327 U.S. at 682 ("[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits, and not for a dismissal for want of jurisdiction.").

[22] *See* December 14, 2018 Order 17, ECF No. 211 ("But this argument begs a leading question in this case by assuming the Individual Plaintiffs need not comply with the Individual Mandate.").

[23] *See, e.g.*, Intervenor Defs.' Mot. Stay 9, ECF No. 213-1 ("In *NFIB*, The Supreme Court held that the requirement of maintaining minimum coverage went beyond Congress's powers under the Commerce Clause because it '*compels* individuals' to participate in commerce . . . But once the penalty for failing to maintain coverage is reduced to zero, it will lose its coercive effect." (citation omitted)).

[24] *Meese v. Keene*, 481 U.S. 465, 473 (1987) (citation omitted).

mine § 5000A(a) is non-binding and therefore constitutional and then revert to the standing analysis to use its merits determination to conclude there was no standing to reach the merits in the first place. It is instead likely to hold that the Intervenor Defendants' merits argument that the Individual Plaintiffs need not comply with the law is an inappropriate ground for challenging standing[25]—and likely inappropriate on the merits.

This then brings into focus the proper injury inquiry for the Individual Plaintiffs' constitutional challenge: Do the Individual Plaintiffs sufficiently allege that the Individual Mandate *operates* to injure them? The inquiry is not whether the Individual Plaintiffs are injured if they break the law—i.e., if they *disobey* the Individual Mandate. The Court does not ask whether a plaintiff is injured by a challenged law if

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[25] *See, e.g.*, *Gee*, 862 F.3d at 455 ("LDHH also argues that the Individual Plaintiffs have not and will not sustain any legal injury . . . because the Individual Plaintiffs have a right to choose only a 'qualified' provider, and PPGC is no longer a qualified provider. This contention turns on the sole substantive question before us on appeal, and we decline to allow LDHH to bootstrap this issue into our standing inquiry."); *Duarte*, 759 F.3d at 520 ("The factors the district court found significant may ultimately bear on whether Duarte can show constitutional injury to merit an award of damages or injunctive relief—on which we express no opinion. But the district court improperly relied on these considerations in dismissing the Duartes' constitutional challenge for lack of standing."); *Croft v. Governor of Texas*, 562 F.3d 735, 746 (5th Cir. 2009) ("The ADF *amicus* claims that a moment of silence cannot violate the Establishment Clause, as there is no active religious component. But that is a question to be determined on the merits, which must come after determining whether we have jurisdiction to hear the case.").

they choose to disregard the law they challenge as unconstitutional—the injury arises from following the law as Congress intended. That is the entire point of a constitutional challenge. Were courts to assess whether plaintiffs are injured by *disregarding* allegedly unconstitutional laws, courts would not only be implicitly sanctioning lawlessness but would be foreclosing a large swath of constitutional challenges already entertained by the Supreme Court.[26]

In this regard, the Individual Plaintiffs' alleged injury—the requirement to purchase an unwanted product—is not self-inflicted, it is congressionally inflicted. Congress intended to achieve something through the

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[26] For example, the Supreme Court did not ask in *Clements v. Fashing* whether the officeholders would be injured if they simply *disregarded* the law and did not resign their current offices upon announcing candidacy. 457 U.S. 957, 961–62 (1982) ("We find the uncontested allegations in the complaint sufficient to create an actual case or controversy. The officeholder-appellees have alleged that they have not and will not announce their candidacy for higher judicial office because such action will constitute an automatic resignation of their current offices pursuant to § 65."). And Chief Justice Marshall never asked whether William Marbury would be injured if he *ignored* the law and began serving as a justice of the peace without an official commission from James Madison. *See Marbury v. Madison*, 5 U.S. 137, 137 (1803) ("This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request.").

Individual Mandate, the Individual Plaintiffs allege, that is beyond its constitutional reach. It would be illogical to ask whether the allegedly unconstitutional Individual Mandate injures the Individual Plaintiffs when it is ignored. The answer is obviously "no," but it is also obviously irrelevant. Answering whether the Individual Mandate injures the Plaintiffs by unconstitutionally requiring them to do something requires analyzing what the law requires them to do, not whether the Plaintiffs can get away with not doing it.

In sum, the pleadings satisfy *Hotze* and otherwise sufficiently state a constitutional injury sufficient to meet the Article III requirements of standing. And to the extent an independent, justiciable injury other than regulation by unconstitutional legislation is necessary, the Individual Plaintiffs have alleged that, too—they are required to purchase a product that, in the absence of § 5000A(a), they allege they would not purchase. If the Fifth Circuit has held that an allegation of death to whooping cranes—majestic as they are—is sufficient injury-in-fact to confer standing on an individual,[27] surely it is unlikely to hold that an allegation of unconstitutional coercion is not. And while it may not agree on the merits of that allegation, it may not thereby dismiss it at the threshold. The Court therefore finds the Intervenor Defendants are unlikely to succeed on their standing argument.

b. Merits

The Intervenor Defendants also contend they are likely to succeed on the merits of the Plaintiffs' claims. First, the Intervenor Defendants assert they are likely

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[27] *See Aransas Project v. Shaw*, 775 F.3d 641, 648 (5th Cir. 2014) (per curiam) (holding plaintiff sufficiently "alleged injury (death to cranes and injury to those who enjoy them)").

to succeed in arguing the Individual Mandate "can still be upheld as a lawful exercises of Congress's taxing power" because "Section 5000A will retain most of the features that the Supreme Court pointed to in concluding that it could fairly be construed as a tax" and because "the Fifth Circuit is unlikely to share this Court's view that the production of revenue at all times is the *sine qua non* of a tax." Intervenor Defs.' Mot. Stay 8–9, ECF No. 213-1. They also assert the Fifth Circuit "has upheld the constitutionality of a statute that taxed the making of machine guns, even though federal law had subsequently banned the possession of machine guns, and even though the federal government no longer collected the tax." *Id.* at 9 (*United States v. Ardoin*, 19 F.3d 177, 179–80 (5th Cir. 1994)).

Next, the Intervenor Defendants argue they "are likely to succeed on their alternative theory that, if the minimum coverage provision can no longer be fairly construed as a tax, it no longer violates the Commerce Clause" because "once the penalty for failing to maintain coverage is reduced to zero, it will lose its coercive effect." *Id.* The Intervenor Defendants then insist that, even if the Fifth Circuit holds the Individual Mandate unconstitutional, the court is likely to hold that "the appropriate remedy is to strike the amendment and order that the statute operate the way it did before the amendment was adopted." *Id.* (citing *Frost v. Corp. Comm'n Okla.*, 278 U.S. 515, 525 (1928)). Finally, the Intervenor Defendants argue that, even if they lose on all the above arguments, they "are likely to succeed on their argument" that the Individual Mandate "is severable from the rest of the ACA." *Id.* at 10. This is because the 2017 Congress "zeroed out the penalty for failing to maintain minimum coverage while leaving the rest of the ACA intact." *Id.*

The Court disagrees with each of the Intervenor Defendants' contentions for the reasons set out in the Court's 55 pages of analysis in the December 14, 2018 Order. *See* ECF No. 211. But the Court finds it appropriate to briefly summarize the logic of why the Intervenor Defendants' arguments, though well-made, are ultimately unavailing and unlikely to succeed on appeal.

i. Unconstitutional Under the Tax Power[28]

The Individual Mandate can no longer be saved as an exercise of Congress's Tax Power for the following reasons:

- The Individual Mandate, 26 U.S.C. § 5000A(a), and the shared-responsibility payment, §§ 5000A(b) and (c), are textually and functionally distinct.[29]
- The Supreme Court's decision in *NFIB* recognized this distinction.[30]

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[28] *See* December 14, 2018 Order 19–27, ECF No. 211.

[29] *Id.* at 20–22.

[30] *See id.* at 22 ("*NFIB* does not contravene Congress's intent to separate the Individual Mandate and shared- responsibility penalty. To the extent the Supreme Court held § 5000A could be fairly read as a tax, it reasoned only that the Individual Mandate could be viewed as part and parcel of a provision supported by the Tax Power—not that the Individual Mandate itself was a tax. The Supreme Court stated its 'precedent demonstrate[d] that Congress had the power to impose the exaction in § 5000A under the taxing power'—and § 5000A(b) is the exaction—'and that § 5000A need not be read to do more than impose a tax. That is sufficient to sustain it.'" (quoting *NFIB*, 567 U.S. at 570 (emphasis added))).

- The Supreme Court held the Individual Mandate could be saved under Congress's Tax Power because it triggered the shared-responsibility payment, which could be plausibly read as a tax.[31]
- The Supreme Court held the shared-responsibility payment could be treated as the tax the Individual Mandate triggered based on the following factors: The payment
  - "is paid into the Treasury by 'taxpayer[s]' when they file their tax returns,"
  - "does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold,"
  - "amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status,"
  - "is found in the Internal Revenue Code and enforced by the IRS," and
  - "yields the essential feature of any tax: It produces at least some revenue for the Government."[32]

- In light of the TCJA, § 5000A(b) no longer "looks like a tax in many respects."[33] It now fails at least Factor 1 (no longer paid by taxpayers into the Treasury), Factor 3 (no amount and $0 is

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[31] *Id.* at 23–24.

[32] *NFIB*, 567 U.S. at 563–64.

[33] *Id.* at 563; *see* December 14, 2018 Order 24–25, ECF No. 211.

not determined by familiar factors), Factor 4 (not enforced by the IRS) and, crucially, Factor 5 (no longer yields the "essential feature" of a tax).

- Section 5000A(b) now fails four out of the five factors identified by the Supreme Court as justifying its saving construction, including the one feature the Supreme Court identified as "essential."[34] The mandate therefore no longer triggers a tax.

Accordingly, the Court finds the Fifth Circuit is likely to draw a straight line from the majority's reasoning in *NFIB* and agree that the Individual Mandate cannot be sustained under the saving construction that construed the mandate as triggering a tax.[35]

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[34] The Intervenor Defendants contend that "the Fifth Circuit is unlikely to share this Court's view that the production of revenue at all times is the *sine qua non* of a tax." Intervenor Defs.' Mot. Stay 9. This Court does not have a view on the issue. But the Supreme Court does. *See NFIB*, 567 U.S. at 564 (reasoning that "the essential feature of any tax" is that "[i]t produces at least some revenue for the Government"). And the Court finds that the Fifth Circuit is likely to follow it.

[35] Nothing in *United States v. Ardoin*, 19 F.3d 177 (5th Cir. 1994), alters this analysis. There, the Fifth Circuit held that 26 U.S.C. §§ 5821, 5861(d), (e), (f), (l), 5871, and 5845 remained permissible exercises of Congress's Tax Power even though the provisions taxed an illegal activity and an Executive branch agency refused to accept applications to pay the taxes created by the provisions. *Ardoin*, 19 F.3d at 179–80. The *Ardoin* decision does not abrogate the Supreme Court's holding that the generation of revenue is the essential feature of a tax—and not only because a Fifth Circuit opinion ought not be read to contravene Supreme Court precedent. The two attacks on the constitutionality of the tax provisions in *Ardoin* were that they (1) taxed an activity that was no longer

ii. Unconstitutional Under the Interstate Commerce Power[36]

The Individual Mandate continues to be unsustainable under Congress's Interstate Commerce Power, as the Supreme Court already held, for the following reasons:

- The Supreme Court held the Individual Mandate is unconstitutional under the Interstate Commerce Clause.[37]

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legal and (2) were no longer enforced by the Bureau of Alcohol, Tobacco, and Firearms (ATF). As to the first challenge, the court reasoned that "Congress can tax illegal conduct" so that "[a]lthough it is illegal to possess or manufacture these weapons, one illegally doing so would be required to register them with ATF and pay taxes on them." *Id.* at 180. The illegality of the activity did not render the legislation a nullity. Here, even though applicable individuals are required to purchase ACA-compliant health insurance, if someone disobeyed that requirement they would not be subject to a tax—because it is gone. The Intervenor Defendants make that point repeatedly. As to the second challenge, the court reasoned that, whatever the agency's enforcement decisions, the *legislation* continued to give "ATF . . . the authority to tax now-illegal machineguns . . . Thus, the basis for ATF's authority to regulate— the taxing power—still exists; it is merely not exercised." *Id.* Here, however, the IRS's authority to tax noncompliance is gone. In other words, *Ardoin* confirms that legislative text is the proper object of any analysis of legislative activity—Executive actions do not constitutionalize or de-constitutionalize Legislative actions. And here, Congress itself *legislatively eliminated* the shared-responsibility payment.

[36] *See* December 14, 2018 Order 27–34, ECF No. 211.

[37] *NFIB*, 567 U.S. at 572 (majority).

- The Individual Mandate no longer triggers a tax, so the saving construction crafted in *NFIB* no longer applies.[38]
- Even under the saving construction crafted in *NFIB*, the Individual Mandate was a requirement to act—otherwise, the failure to act would not have triggered a tax.[39]
- All that remains now is a written law with plain text that mandates the Individual Plaintiffs to purchase minimum essential coverage—which the evidence suggests they and others will do.[40]

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[38] *See* Josh Blackman, *Undone: the New Constitutional Challenge to Obamacare*, 23 TEX. REV. L. & POL. (forthcoming 2018) (manuscript at 17) ("Now that the penalty has been zeroed out, and the saving construction cannot hold, we are left with '[t]he *most straightforward reading* of the mandate.' What is that reading? Section 5000A 'commands individuals to purchase insurance.'" (quoting *NFIB*, 567 U.S. at 562)).

[39] *See* December 14, 2018 Order 32–33, ECF No. 211; *accord* Intervenor Defs.' Mot. Stay 9, ECF No. 213- 1 ("In *NFIB*, the Supreme Court held that *the requirement of maintaining minimum coverage* went beyond Congress's powers under the Commerce Clause because it '*compels* individuals' to participate in commerce." (citing *NFIB*, 567 U.S. at 552) (first emphasis added, second emphasis in Motion)). As the Intervenor Defendants recognize, the Supreme Court in *NFIB* did not hold that the *shared-responsibility payment* impermissibly compelled the purchase of health insurance. Instead, the Chief Justice reasoned that "[t]he *individual mandate* . . . compels individuals to *become* active in commerce by purchasing a product." *NFIB*, 567 U.S. at 552 (Roberts, C.J.) (first emphasis added). The elimination of the shared-responsibility payment, but not the Individual Mandate, does not obviate that text-driven reasoning.

[40] *See* December 14, 2018 Order 29–30, ECF No. 211; *accord* Blackman, *supra* note 38, at 12 ("According to a November 8, 2017

- Plain text confirms the Individual Mandate is a mandate.[41] It is entitled, "*Requirement* to maintain minimum essential coverage."[42] It states, "An applicable individual *shall* . . . *ensure* that the individual . . . is covered."[43]
- Five Supreme Court Justices concluded "[t]he most straightforward reading of the mandate is that it commands individuals to purchase insurance. After all, it states that individuals 'shall' maintain health insurance."[44]

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report from CBO and the Joint Committee on Taxation, CBO observed that 'with no penalty at all, only a small number of people who enroll in insurance because of the mandate under current law would continue to do so solely because of a willingness to comply with the law.' The number is no doubt 'small,' but it is not zero. No matter how small this class is, such virtuous individuals do exist. Therefore, a certain number of individuals are *still* affected by a penalty-less mandate. The mandate still has force, even if no penalty accompanies it." (citation omitted)).

[41] *See* December 14, 2018 Order, 30–32, ECF No. 211. *See also United States v. Kaluza*, 780 F.3d 647, 658 (5th Cir. 2015) ("When construing statutes and regulations, we begin with the assumption that the words were meant to express their ordinary meaning." (quoting *Bouchikhi v. Holder,* 676 F.3d 173, 177 (5th Cir.2012))); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 364 (5th Cir. 2009) (en banc) (Jones, J., concurring) ("Proper statutory analysis begins with the plain text of the statute.").

[42] 26 U.S.C. § 5000A(a) (emphasis added).

[43] *Id.* (emphasis added); *see Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (reasoning "'shall' imposes obligations on agencies to act"); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting "shall" indicates an intent to "impose discretionless obligations").

[44] *NFIB*, 567 U.S. at 562 (Roberts, C.J.); *id.* at 662 (joint dissent)

- Surrounding text confirms the Individual Mandate creates an obligation in the absence of the shared-responsibility payment.[45] Section 5000A(e), for example, "did and still does exempt some individuals from the eliminated shared-responsibility payment but not the Individual Mandate." [46] Section 5000A(d) "exempted, and continues to exempt, certain individuals from the Individual Mandate itself."[47]

("In this case, there is simply no way, 'without doing violence to the fair meaning of the words used,' *Grenada County Supervisors v. Brogden,* 112 U.S. 261, 269 (1884), to escape what Congress enacted: a mandate that individuals maintain minimum essential coverage, enforced by a penalty.").

[45] *Id.* at 665 (joint dissent) (noting that "some are exempt from the tax who are not exempt from the mandate—a distinction that would make no sense if the mandate were not a mandate"); *see Doe v. KPMG, LLP*, 398 F.3d 686, 688 (5th Cir. 2005) ("When interpreting a statute, we start with the plain text, and read all parts of the statute together to produce a harmonious whole.").

[46] December 14, 2018 Order 33, ECF No. 211. It is not surprising Congress would subject some individuals to the mandate but not the penalty. Congress's stated goal was to "add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services, and . . . increase the number and share of Americans who are insured." 42 U.S.C. § 18091(2)(C). Congress made a policy decision that some individuals should not be subject to the penalty but should still be bound to satisfy their legal obligation to maintain minimum essential coverage. That policy decision has always been embedded in the ACA's plain text.

[47] December 14, 2018 Order 33, ECF No. 211.

- Reading the Individual Mandate to be anything other than a mandate would twice violate the canon against surplusage by rendering the mandatory words of § 5000A(a) ineffective—i.e., "requirement" and "shall"—and rendering whole provisions of § 5000A ineffective—i.e., §§ 5000A(d) and (e).[48]

- Written law is binding, with or without the specter of an enforcement provision.[49]

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[48] *Id.* at 31; *accord NFIB*, 567 U.S. at 665 (joint dissent).

[49] December 14, 2018 Order 29–30, ECF No. 211. The Intervenor Defendants assert the Plaintiffs are not bound by federal law unless compelled by "force, threats, or overwhelming pressure." *See* Intervenor Defs.' Mot. Stay 9, ECF No. 213-1. In other words, "might makes right." But "might makes right" is incompatible with the concept of a "government of laws, and not of men." *See* John Adams, NOVANGULS ESSAYS NO. 7 (Feb. 6, 1775). And it is incompatible with the concepts of equality and, relatedly, government by consent. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, *deriving their just powers from the consent of the governed*." (emphasis added)). That the binding nature of law is justified by something other than brute force is a first principle of American society and in the very nature of a written Constitution—as well as constitutionally sanctioned statutes. *Cf.* Nicholas A. Dranias, *Consideration As Contract: A Secular Natural Law of Contracts*, 12 TEX. REV. L. & POL. 267, 270–71 (2008) (contrasting those such as John Locke and St. Thomas Aquinas "who viewed law as deriving its justification from natural principles of morality [against] those who viewed law as having, and needing, no justification other than the force that backs it" and noting that "Lockean philosophy provided the theoretical

- The Individual Mandate, § 5000A(a), is federal law—having satisfied the Constitution's bicameralism and presentment requirements—and federal law is *inherently* binding on those within its jurisdiction.[50] Not even the Founders, who were leery of Federal power, argued otherwise.[51]

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substance of the Declaration of Independence, the Federalist Papers, the popularly distributed pamphlets of Thomas Paine, and the Constitution"); *id.* (noting Locke rejected the "pre-philosophical tradition best exemplified by the words of Thrasymachus in Plato's Republic: 'I say that justice is simply what is good for the stronger'"); Hadley Arkes, *The Natural Law Challenge*, 36 HARV. J.L. & PUB. POL'Y 961, 963 (2013) ("He [John Marshall] assumed [in *Gibbons v. Ogden*] that all of his literate readers understood that, before we can carry out a demonstration, certain axioms had to be in place—like the law of contradiction. They were things that had to be grasped, as the saying went, *per se nota* as true in themselves. As Hamilton put it in the Federalist No. 31, there are certain 'primary truths, or first principles, upon which all subsequent reasonings must depend.' They contain, he said, 'an internal evidence which antecedent to all reflection or combination commands the assent of the mind.'" (citations omitted)). In any event, the Intervenor Defendants' view does not comport with *NFIB*'s recognition that the Individual Mandate *itself* is compulsory. *See NFIB*, 567 U.S. at 552 (Roberts, C.J.) ("The *individual mandate* . . . compels individuals to *become* active in commerce by purchasing a product." (first emphasis added)).

[50] *See, e.g.*, U.S. CONST. art. VI. ("[T]he laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby."); *United States v. Grumka*, 728 F.2d 794, 797 (6th Cir. 1984) (per curiam) ("It is the duty of all citizens to obey the law . . . ."); *Montero v. City of Yonkers*, 890 F.3d 386, 396 (2d Cir. 2018) (noting the "obligation as a citizen to obey the law").

[51] *See, e.g.*, THE FEDERALIST NO. 28 (Alexander Hamilton) ("It

- This is as true with respect to the Constitution as it is with respect to the Individual Mandate: Most of the Constitution's provisions are unaccompanied by a penalty—tax or otherwise. Yet time and again courts recognize the Constitution, as written law, is inherently binding.[52]

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merits particular attention in this place, that the laws of the Confederacy as to the enumerated and legitimate objects of its jurisdiction will become the Supreme Law of the land, to the observance of which all officers, legislative, executive, and judicial in each State will be *bound by the sanctity of an oath*." (emphasis added)).

[52] Consider, for example, a suit against the President brought by Intervenor Defendant the District of Columbia alleging violations of the Constitution's Emoluments Clauses. *See* Complaint ¶ 2, *District of Columbia v. Trump*, No. 8:17-cv-01596 (D. Md. June 12, 2017), ECF No. 1. The Foreign Emoluments Clause provides that "no person holding any office of profit or trust under them, *shall*, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state." U.S. CONST. art. I, § 9, cl. 8. (emphasis added). The Domestic Emoluments Clause provides that "[t]he President *shall*, at stated times, receive for his services, a compensation, which *shall* neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them." *Id*. art. II, § 1, cl. 7 (emphasis added). Neither of the clauses includes an enforcement provision—certainly, neither imposes a tax penalty. But both use the word "shall," and both are binding by nature. Intervenor Defendant the District of Columbia understands that basic truth in the context of its suit against the President. There, the District of Columbia asserts, "Applied to President Trump's diverse dealings, the *text and purpose of the clause* speak as one: absent the consent of Congress, private enrichment through the receipt of benefits from foreign governments *is prohibited*." Complaint ¶ 6,

The Individual Mandate no longer triggers a tax and therefore can no longer be read as an exercise of Congress's Tax Power. That being true, the Court finds the Fifth Circuit is unlikely to either disagree with the Supreme Court's *NFIB* holding that the mandate is unsustainable under Congress's Interstate Commerce Power or accept the alternative theory that the mandate, though it regulates interstate conduct, is simply not binding.

iii. *Frost* Is Not Dispositive[53]

Frost does not control or require invalidating Congress's tax bill for the following reasons:

- In *Frost*, the plaintiff challenged the later-in-time legislation.[54] Here, the Plaintiffs do not challenge the later-in-time legislation.[55]

Trump, No. 8:17-cv-01596 (D. Md. June 12, 2017), ECF No. 1 (emphasis added); *accord* Pls.' Opp'n Mot. Dismiss 59, No. 8:17-cv-01596 (D. Md. Nov. 7, 2017) ("Because 'the President is *bound* to abide by the *requirements*' of these Clauses, his *obligation* to comply with them 'is ministerial and *not discretionary*.'" (citation omitted) (emphasis added)). The President is prohibited not by "force, threats, or overwhelming pressure" but by the text and purpose of a provision that states what he shall and "shall not" do. The Individual Mandate is no different.

[53] *See* December 14, 2018 Order 54 n.34, ECF No. 211.

[54] *Frost*, 278 U.S. at 518–19; *see id.* at 519 (pleading that "that *the proviso*, as construed and applied by the commission . . . was invalid as contravening the due process and equal protection of the law clauses of the Fourteenth Amendment" (emphasis added)).

[55] *See* Am. Compl. 28, ECF No. 27 ("Section 5000A's individual mandate exceeds Congress's enumerated powers by forcing Individual Plaintiffs to maintain ACA-compliant health insurance coverage."). To acknowledge what the Plaintiffs claim and do not claim is not to "conclude that a party can plead its way around

- In *Frost*, all parties agreed the earlier-in-time legislation was constitutional—and the Supreme Court *expressly relied on that concession*. [56] Here, the entire case is about the constitutionality of the earlier-in-time legislation.
- In *Frost*, the later-in-time legislation did not render an earlier law unconstitutional—it was *itself* unconstitutional because *it* created disparately treated classes. [57] Here, the later-in-time TCJA is constitutional.
    - Anyways, the later-in-time TCJA does not render the ACA unconstitutional—it

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Frost." Intervenor Defs.' Mot. Stay 10, ECF No. 213-1. It is a recognition of the fundamental rule in district court proceedings that a claim not raised in the complaint is not properly before the court. *Cf. Cutrera v. Bd. Supervisors La. State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005) ("A claim which is not raised in the complaint . . . is not properly before the court."); *Fisher v. Metropolitan Life Ins. Co.*, 895 F.2d 1073, 1078 (5th Cir. 1990) ("As the district court correctly noted, this claim was not raised in [plaintiff's] second amended complaint . . . and, as such, was not properly before the court.").

[56] *Frost*, 278 U.S. at 519 ("Both parties definitely concede the validity of these provisions, and, for present purposes at least, we accept that view."); *id.* at 526 ("Here it is conceded that the statute, before the amendment, was entirely valid.").

[57] *Id.* at 524 (noting the "classification *created by the proviso*" (emphasis added)); *id.* ("*[T]he proviso*, as here construed and applied, baldly creates one rule for a natural person and a different and contrary rule for an artificial person." (emphasis added)); *id.* (reasoning the proviso, not the original law, "produces a classification"); *id.* (reasoning the proviso, not the original law, "is essentially arbitrary"); *id.* at 525 (acknowledging "the inequality created by" the proviso, not the original law).

abrogates the ground on which the Supreme Court concluded the ACA could be saved.[58]

- *Frost* stands only for the proposition that courts may invalidate unconstitutional action and preserve constitutional action; it does not empower the judiciary to construe constitutional action as unconstitutional to preserve unconstitutional action as constitutional.

For these reasons, the Fifth Circuit is unlikely to invalidate Congress's *constitutional* tax law under the guise of *Frost*, a decision that invalidated an *unconstitutional* law. To read *Frost* as empowering courts to invalidate Congress's constitutional legislation to save a judicial opinion that admittedly construed unconstitutional legislation as something other than what Congress intended would go above and beyond any limits on the judicial power yet seen.

iv. Individual Mandate Inseverable[59]

The Individual Mandate is entirely inseverable for the following straightforward reasons:

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[58] *See NFIB*, 567 U.S. at 574–75 (Roberts, C.J.) ("[T]he statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question. And it is only because we have a duty to construe a statute to save it, *if fairly possible*, that § 5000A can be interpreted as a tax. Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction." (emphasis added)).

[59] *See* December 14, 2018 Order 34–55, ECF No. 211.

- The test for severability is congressional intent.[60]
- Congressional intent is expressed through enacted text.[61]

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[60] *See id.* at 35–37; *accord Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) ("The inquiry into whether a statute is severable is essentially an inquiry into legislative intent."); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) ("The more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress." (emphasis in original)); *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality) ("Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability."). *But see R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 362 (1935) (majority) (recognizing "the presumption . . . of an intent that, unless the act operates as an entirety, it shall be wholly ineffective" (citing *Williams v. Standard Oil Co.*, 278 U.S. 235, 242 (1929); *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 184 (1932))).

[61] *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over the meaning of [a provision] begins where all such inquiries must begin: with the language of the statute itself." (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985))); *Kaluza*, 780 F.3d at 658 ("The starting point in discerning congressional intent is the existing statutory text." (quoting *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004))); *Hotze*, 784 F.3d at 997 (noting "the best evidence of Congress's intent is the statutory text" (quoting *NFIB*, 567 U.S. at 544)); *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188, 1190 (5th Cir. 1984) ("Congressional intent and purpose are best determined by an analysis of the language of the statute in question.").

- If the enacted text is unambiguous, no further inquiry is permitted.[62]
- The enacted text is unambiguous: The Individual Mandate is "essential" to the ACA.[63]
    - The Supreme Court relied on the import of this plain text before *and* after the exchanges were created and the Individual Mandate was in effect.[64]

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[62] *Germain*, 503 U.S. at 253–54 ("When the words of a statute are unambiguous, this first canon is also the last: 'judicial inquiry is complete.'"); *Ron Pair*, 489 U.S. at 241 ("[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))).

[63] *See* December 14, 2018 Order 37–41, ECF No. 211.

[64] *See* December 14, 2018 Order 41–46, ECF No. 211; *King v. Burwell*, 135 S. Ct. 2480, 2487 (2015) (citing 42 U.S.C. § 18091(2)(I)); *NFIB*, 567 U.S. at 556 (Roberts, C.J.) ("It is precisely because these individuals, as an actuarial class, incur relatively low health care costs that the mandate helps counter the effect of forcing insurance companies to cover others who impose greater costs than their premiums are allowed to reflect." (citing 42 U.S.C. § 18091(2)(I))); *id.* at 596 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ.) ("A central aim of the ACA is to reduce the number of uninsured U.S. residents . . . The minimum coverage provision advances this objective." (citing 42 U.S.C. §§ 18091(2)(C) and (I))); *id.* at 650 (joint dissent) ("First, the Government submits that § 5000A is 'integral to the Affordable Care Act's insurance reforms' and 'necessary to make effective the Act's core reforms.' . . . Congress included a 'finding' to similar effect in the Act itself." (citations omitted)).

- The past two Administrations have agreed the Individual Mandate is inseverable from the guaranteed-issue and community-rating provisions.[65]
- No Congress—not in 2017, not ever—repealed the Individual Mandate.[66]
- No Congress—not in 2017, not ever—repealed the ACA's Findings.[67]
- The Court cannot rely on the 2017 Congress's elimination of *the shared- responsibility payment* to treat the textually and functionally distinct *Individual Mandate* as implicitly repealed when Congress left the Individual Mandate as enacted text and left in place other text that calls the Individual Mandate—not the functionally distinct shared-responsibility payment—"essential."[68]

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[65] *See* December 14, 2018 Order 42, n.29, ECF No. 211.

[66] *See* 26 U.S.C. § 5000A(a). The 2017 Congress, in passing the TCJA, reduced the shared-responsibility payment to $0. It did not repeal the Individual Mandate.

[67] *See* 42 U.S.C. § 18091. "All told, Congress stated three separate times that the Individual Mandate is essential to the ACA. That is once, twice, three times and plainly. It also stated the absence of the Individual Mandate would 'undercut' its 'regulation of the health insurance market.' Thirteen different times, Congress explained how the Individual Mandate stood as the keystone of the ACA. And six times, Congress explained it was not just the Individual Mandate, but the Individual Mandate 'together with the other provisions' that allowed the ACA to function as Congress intended." December 14, 2018 Order 40, ECF No. 211. The 2017 Congress did not repeal this plain text.

[68] *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("The

- The Constitution's separation of powers prohibits the Court from doing for Congress what Congress tried and failed to do itself.[69]

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intention must be clear and manifest. And in approaching a claimed conflict, we come armed with the strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." (cleaned up)); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 664 (2007) ("The Ninth Circuit's reading of § 7(a)(2) would not only abrogate § 402(b)'s statutory mandate, but also result in the implicit repeal of many additional otherwise categorical statutory commands . . . While the language of § 7(a)(2) does not explicitly repeal any provision of the CWA (or any other statute), reading it for all that it might be worth runs foursquare into our presumption against implied repeals."); *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936) ("The amending act just described"—like the TCJA—"contains no words of repeal; and if it effected a repeal of section 25 of the 1913 act, it did so by implication only. The cardinal rule is that repeals by implication are not favored."); *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring) (noting an "already-powerful presumption against implied repeals"); *United States v. Cavada*, 821 F.2d 1046, 1047 (5th Cir. 1987) ("We say, therefore, that there is a presumption against implicit repeal."); *Victorian v. Miller*, 813 F.2d 718, 721 (5th Cir. 1987).

[69] For example, the House passed H.R. 3762 in 2015 which included a repeal of the Individual Mandate. *See* CONGRESSIONAL RESEARCH SERVICE, LEGISLATIVE ACTIONS IN THE 112TH, 113TH, AND 114TH CONGRESSES TO REPEAL, DEFUND, OR DELAY THE AFFORDABLE CARE ACT 7 (February 7, 2017). But that version of the bill could not garner the necessary votes in the Senate: "Lacking . . . a supermajority in the Senate, the Republicans chose instead to modify the provisions so that they would not violate the Byrd Rule. The Senate version kept the mandates but eliminated the penalties for noncompliance." *Id.* at 8. This is one example of how Congress attempted to, but did not, repeal the mandate. And it is

- Floor statements and policy arguments do not supplant enacted text or allow the Court to construe what Congress did and did not do as what a party asserts Congress *almost* did and did not do.[70]

- Congress included a severability clause for Medicaid Expansion but not for the Individual Mandate, which Congress called "essential."[71]

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a powerful illustration of why the thing Congress *did* do—eliminate the shared-responsibility payment—is not the thing Congress *did not* do—repeal the Individual Mandate. Yet the Intervenor Defendants insist the Court must construe the former as the latter. This is far beyond the Court's power. *See Epic Sys. Corp.*, 138 S. Ct. at 1624 ("[I]t's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them."); *United States v. Goldenberg*, 168 U.S. 95, 102–03 (1897) ("The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator.").

[70] *See, e.g.*, Intervenor Defs.' Resp. 29–30, ECF No. 91 (collecting statements by members of 2017 Congress). "More fundamentally, . . . intentions do not count unless they are enshrined in a text that makes it through the constitutional processes of bicameralism and presentment." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1487 (2018) (Thomas, J., concurring) (citing *Wyeth v. Levine*, 555 U.S. 555, 586–588 (2009) (Thomas, J., concurring in judgment)). But "[b]ecause we have a Government of laws, not of men, we are governed by legislated text, not legislators' intentions—and especially not legislators' hypothetical intentions." *Id.* (cleaned up).

[71] *See* December 14, 2018 Order 40, n.26, ECF No. 211. As noted in the December 14, 2018 Order, the absence of a severability clause is by no means dispositive, but it is certainly of evidentiary value in a situation where one provision—the Individual Mandate—was called "essential" and contained no severability clause

- The 2017 Congress's "decision" to not repeal the remainder of the ACA was not a "decision" that supports an inference of severability intent—it was a consequence of the TCJA being passed as part of the budget and reconciliation process.[72]
- If Congress intends to sever the Individual Mandate from the remainder of the ACA, Congress can sever the Individual Mandate from the remainder of the ACA. The Court cannot do that for Congress.[73]

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while another part of the statute—Medicaid Expansion—was not called "essential," did contain a severability clause, and was expressly held by the Supreme Court to be severable to the extent necessary *due to the severability* clause. *See NFIB*, 567 U.S. at 586 (Roberts, C.J., joined by Breyer and Kagan, JJ.) (noting the Supreme Court was "follow[ing] Congress's explicit textual instruction"); *id.* at 645 (Ginsburg, J., joined by Sotomayor, J.) ("I agree . . . that the Medicaid Act's severability clause determines the appropriate remedy."); *see also id.* at 544 (majority) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally." (citing *Russello v. United States*, 464 U.S. 16, 23 (1983))).

[72] *See* CONGRESSIONAL RESEARCH SERVICE, THE BUDGET RECONCILIATION PROCESS: STAGES OF CONSIDERATION ii (January 4, 2017) ("In adopting a budget resolution, Congress is agreeing upon its budgetary goals for the upcoming fiscal year. Because it is in the form of a concurrent resolution, however, it is not presented to the President or enacted into law. As a consequence, any statutory changes concerning spending or revenues that are necessary to implement these policies must be enacted in separate legislation."). Even if it were appropriate to look beyond the unambiguous text of the ACA, in other words, the 2017 Congress demonstrated *no legislative intent* to leave the ACA intact when it passed the TCJA because the TCJA gave Congress *no legislative choice* on the matter.

[73] *See, e.g.*, *Alton*, 295 U.S. at 362 ("[W]e cannot rewrite a statute

Accordingly, the Fifth Circuit is unlikely to accept the Intervenor Defendants' countertextual severability argument based on extratextual evidence.[74] Policy arguments and countertextual evidence do not change

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and give it an effect altogether different from that sought by the measure viewed as a whole."); *Hill v. Wallace*, 259 U.S. 44, 70 (1922) (severing an inseverable statute would be "legislative work beyond the power and function of the court"); *Oneale v. Thornton*, 10 U.S. 53, 68 (1810) ("Men use a language calculated to express the idea they mean to convey. If the legislature had contemplated various and successive sales, so that any intermediate contract or purchaser was within the view of the lawmaker and intended to be affected by the power of resale given to the commissioners, the words employed would have been essentially different from those actually used.").

[74] The Intervenor Defendants assert, "Nor is the Fifth Circuit likely to conclude that the 2017 Congress demonstrated an intent to unwind the entire ACA by choosing not to repeal Section 5000A(a) or 42 U.S.C. § 18091." Intervenor Defs.' Mot. Stay 10 n.5, ECF No. 213-1. This is a mischaracterization of the Court's reasoning and conclusion. The Court did not conclude "the 2017 Congress demonstrated an intent to unwind the entire ACA"—it concluded exactly the opposite. The Court concluded that, if any intent can be inferred from the 2017 Congress's budget and reconciliation legislation at all, it is that Congress intended to *preserve* the Individual Mandate—which remains on the books—because it understood the mandate was "essential" to the remainder of the ACA. In other words, the enacted text the Court has to work with unequivocally communicates that (1) the Individual Mandate is essential to the ACA functioning as Congress intended, (2) the mandate operates independently of the tax penalty, and (3) the mandate remains on the books. And because courts are better positioned to interpret written law than pick policy, Congress must be the one to repeal the Individual Mandate if that is what it intends to do. It has not.

the text Congress enacted, and "[a]s Justice Kagan recently stated, 'we're all textualists now.'"[75] This reflects a deep-seated respected within the judiciary for its role within the separation of powers: Discerning congressional intent from the end product of a constitutionally mandated process for legislative action. "If the text is sufficiently clear, the text usually controls. The text of the law is the law."[76] And the enacted text could not be clearer as to Congress's intent that the Individual Mandate not be severed from the ACA. To accept the Intervenor Defendants' countertextual argument based on extratextual evidence would represent a breathtaking conception of the judicial power.[77]

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[75] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (reviewing Robert A. Katzmann, JUDGING STATUTES (2014)) (citation omitted). *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005) ("Textualists . . . deny that Congress has a collective will apart from the outcomes of the complex legislative process that conditions its ability to translate raw policy impulses or intentions into finished legislation. For them, intended meaning never emerges unfiltered; it must survive a process that includes committee approval, logrolling, the need for floor time, threatened filibusters, conference committees, veto threats, and the like. For better or worse, only the statutory text navigates all those hurdles. Accordingly, whereas intentionalists believe that legislatures have coherent and identifiable but *unexpressed* policy intentions, textualists believe that the only meaningful collective legislative intentions are those reflected in the *public meaning* of the final statutory text.")

[76] Kavanaugh, *supra* note 75, at 2118.

[77] *See* Transcript of Oral Argument at 36, *NFIB*, 567 U.S. 519 (2012) (No. 11-393) ("JUSTICE KENNEDY: When you say judicial restraint, you are echoing the earlier premise that it increases the judicial power if the judiciary strikes down other provisions of the Act. I suggest to you it might be quite the opposite. We would be exercising the judicial power if one Act was—

2. The Equities Favor a Stay

As to the remaining elements of the stay analysis, the Intervenor Defendants assert "[t]he equities . . . tip overwhelmingly in favor of a stay." Intervenor Defs.' Mot. Stay 11, ECF No. 213-1. To this point, the Intervenor Defendants catalog the real-life impact the Court's December 14, 2018 Order is likely to have in the absence of time for lawmakers to respond. *See id.* at 13 ("Suddenly declaring [the ACA] void would cause chaos for patients, providers, insurance carriers, and the federal and state governments."). Meanwhile, the Intervenor Defendants point out, "since open enrollment in Texas for 2019 has concluded, the Individual Plaintiffs have already purchased (or declined to purchase) ACA-compliant insurance for 2019. In other words, the Court's decision cannot affect the choices that they have already made for next year." *Id.* at 12.

The Plaintiffs suggest certifying the Order for appeal and therefore do not brief the stay analysis; instead, they "leave to the Court's discretion whether [a stay] may be appropriate under these unique Circumstances." Pls.' Resp. 5–6, ECF No. 216. The Federal Defendants "do not object to Intervenor-Defendants' request that the Court stay enforcement of the Order pending appeal, given the potential for disruption to the healthcare markets if immediate implementation were required." Fed. Defs.' Resp. 10–11, ECF No. 216. "Indeed, the ACA has now been in effect for several years," the Federal Defendants continue, "and it is in

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one provision was stricken and the others remained to impose a risk on insurance companies that Congress had never intended. By reason of this Court, we would have a new regime that Congress did not provide for, did not consider. That, it seems to me can be argued at least to be a more extreme exercise of judicial power than to strike- than striking the whole.").

the parties' and the public's interest that appellate review be exhausted before the Federal Defendants begin implementing the Court's judgment." *Id.* at 11.

The Intervenor Defendants' arguments on the equities of a stay are well-taken. And the Plaintiffs' and Federal Defendants' agreement, or lack of disagreement, that a stay is warranted for those reasons is telling. The Court therefore **GRANTS** the Intervenor Defendants' request for a stay of the Rule 54(b) Final Judgment on the December 14, 2018 Order.

IV. CONCLUSION

"The American rule of law . . . depends on neutral, impartial judges who say what the law is, not what the law should be."[78] And courts must refrain from resolving policy disputes, relying instead on *text*-based decisions. The more courts step into breaches for Congress, the more courts will be called upon to step into breaches for Congress. That would represent a fundamental shift in the Constitution's careful balancing of powers—not only on the Judiciary-Legislature plane, but also on the citizen-government plane. If the judicial power encompasses ignoring unambiguous enacted text—the text citizens read to know what their representatives have done—to approximate what a judge believes Congress meant to do, *but did not*, then policymaking lies in the hands of unelected judges and Congress may transfer politically unwinnable issues to the bench. This the Constitution does not allow. This the Supreme Court does not allow. And for those reasons, the Court finds it is powerless to read the ACA as the Intervenor Defendants request and believes the Fifth Circuit is unlikely to disagree.

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[78] Kavanaugh, *supra* note 75, at 2119.

But because many everyday Americans would otherwise face great uncertainty during the pendency of appeal, the Court finds that the December 14, 2018 Order declaring the Individual Mandate unconstitutional and inseverable should be stayed. Accordingly, the Court **ORDERS** that the December 14, 2018 Order, (ECF No. 211), and the Partial Final Judgment severing Count I and finalizing that Order—which will issue by separate order—be stayed during the pendency of the Order's appeal.

SO ORDERED on this **30th** day **of December, 2018.**

/s/Reed O'Connor
Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

No. 4:18-cv-00167-O

TEXAS, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA, et al., Defendants,

CALIFORNIA, et al., Intervenors-Defendants.

MEMORANDUM OPINION AND ORDER

(Doc. 211) Filed December 14, 2018

The United States healthcare system touches millions of lives in a daily and deeply personal way. Health-insurance policy is therefore a politically charged affair—inflaming emotions and testing civility. But Article III courts, the Supreme Court has confirmed, are not tasked with, nor are they suited to, policymaking.[1] Instead, courts resolve discrete cases and controversies. And sometimes, a court must determine whether the Constitution grants Congress the power it asserts and what results if it does not. If a party shows that a policymaker exceeded the authority granted it by the Constitution, the fruit of that unauthorized action cannot stand.

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[1] *See Nat'l Fed'n of Indep. Businesses v. Sebelius (NFIB)*, 567 U.S. 519, 530–38 (2012) (noting the wisdom of legislative policy is entrusted to the Nation's elected leaders).

Here, the Plaintiffs allege that, following passage of the Tax Cuts and Jobs Act of 2017 (TCJA), the Individual Mandate in the Patient Protection and Affordable Care Act (ACA) is unconstitutional. They say it is no longer fairly readable as an exercise of Congress's Tax Power and continues to be unsustainable under the Interstate Commerce Clause. They further urge that, if they are correct, the balance of the ACA is untenable as inseverable from the Invalid Mandate.

Resolution of these claims rests at the intersection of the ACA, the Supreme Court's decision in *NFIB*, and the TCJA. In *NFIB*, the Supreme Court held the Individual Mandate was unconstitutional under the Interstate Commerce Clause but could fairly be read as an exercise of Congress's Tax Power because it triggered a tax. The TCJA eliminated that tax. The Supreme Court's reasoning in *NFIB*—buttressed by other binding precedent and plain text—thus compels the conclusion that the Individual Mandate may no longer be upheld under the Tax Power. And because the Individual Mandate continues to mandate the purchase of health insurance, it remains unsustainable under the Interstate Commerce Clause—as the Supreme Court already held.

Finally, Congress stated many times unequivocally—through enacted text signed by the President—that the Individual Mandate is "essential" to the ACA. And this essentiality, the ACA's text makes clear, means the mandate must work "together with the other provisions" for the Act to function as intended. All nine Justices to review the ACA acknowledged this text and Congress's manifest intent to establish the Individual Mandate as the ACA's "essential" provision. The current and previous Administrations have

recognized that, too. Because rewriting the ACA without its "essential" feature is beyond the power of an Article III court, the Court thus adheres to Congress's textually expressed intent and binding Supreme Court precedent to find the Individual Mandate is inseverable from the ACA's remaining provisions.

Construing the Plaintiffs' Application for Preliminary Injunction, (ECF No. 39), as a motion for partial summary judgment, the Court therefore **DENIES** Plaintiffs' request for an injunction but **GRANTS** summary judgment on Count I of the Amended Complaint. *See* FED. R. CIV. P. 56(f); July 16, 2018 Order, ECF No. 176.

I. BACKGROUND

More than any factual developments, the background to this case involves the nuances of the ACA, *NFIB*, and the *TCJA*, which the Court traces below.

A. The ACA

The ACA became law on March 23, 2010. *See* Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119-1045 (2010). Congress intended the ACA to achieve "near-universal" health-insurance coverage and to "lower health insurance premiums" through the "creation of effective health insurance markets" and new statutory requirements for individuals and insurance companies. *See, e.g.*, 42 U.S.C. §§ 18091(2)(D), (2)(F), and (2)(I). It pursued these goals through a carefully balanced restructuring of the Nation's health-insurance ecosystem.

For starters, the ACA established a "[r]equirement to maintain minimum essential coverage"—commonly known as the "Individual Mandate." 26 U.S.C. § 5000A(a). To compel compliance with the Individual

Mandate, Congress imposed a tax penalty on individuals who were subject to the requirement but chose to disobey it. *Id.* § 5000A(b). The ACA labeled this penalty the "[s]hared responsibility payment." It was originally to be assessed at either $695.00 or a 2.5 percent share of a family's household income—whichever was greater. *Id.* § 5000A(c).

From the start, Congress exempted some individuals from Individual Mandate. For example: those qualifying for a "[r]eligious exemption[]," *id.* § 5000A(d)(2)(A); "member[s] of a health care sharing ministry," *id.* § 5000(d)(2)(B); individuals who are "not . . . citizen[s] or national[s] of the United States . . . or alien[s] lawfully present in the United States," *id.* § 5000A(d)(3); and "[i]ncarcerated individuals," *id.* § 5000A(d)(4). At the same time, Congress exempted five categories of individuals from the shared-responsibility payment but not the Individual Mandate. *See id.* § 5000A(e). This means several classes of individuals are obligated by § 5000A(a) to obtain minimum-essential coverage but are not subject to the tax penalty for failure to do so.[2]

Congress also wanted to ensure affordable health insurance for those with pre-existing conditions. *See* 42 U.S.C. § 18091(2)(I) ("By significantly increasing health insurance coverage, the [Individual Mandate],

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[2] These classes included "[i]ndividuals who cannot afford coverage," *id.* § 5000A(e)(1); taxpayers with income "less than 100 percent of the poverty line for the size of the family involved," *id.* § 5000A(e)(2); members of an Indian tribe, *id.* § 5000A(e)(3); individuals experiencing "short coverage gaps" in health insurance, *id.* § 5000A(e)(4); and individuals who have received a "hardship" exemption from the Secretary of Health and Human Services, *id.* § 5000A(e)(5).

together with the other provisions of this Act, will minimize . . . adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums . . . [and] creat[e] 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."). Congress therefore required insurers to cover high-risk individuals via the "guaranteed-issue" and "community-rating" provisions. The guaranteed-issue provision requires insurers to "accept every employer and individual in the State that applies for . . . coverage." *Id.* § 300gg-1. The community-rating provision prohibits insurers from charging higher rates to individuals based on age, sex, health status, or other factors. *Id.* § 300gg-4.

The ACA includes many other integral regulations and taxes as well. These include, among other things, an excise tax on high-cost insurance plans, 26 U.S.C. § 4980I; the elimination of coverage limits, 42 U.S.C. § 300gg-11; and a provision allowing dependent children to remain on their parents' insurance until age 26, *id.* § 300gg-14(a). The ACA also implemented an employer mandate and an employer-responsibility assessment. These provisions require employers with at least fifty full-time employees to pay the federal government a penalty if they fail to provide their employees with ACA-compliant health-plan options. *See* 26 U.S.C. § 4980H.

But just as Congress funneled nearly all Americans into health-insurance coverage on the one hand—through the Individual Mandate and employer mandate, e.g.—it also significantly reduced reimbursements to hospitals by more than $200 billion over ten

years on the other. 42 U.S.C. §§ 1395ww(b)(3)(B)(xi)–(xii), 1395ww(q), 1395ww(r), and 1396r-4(f)(7).

Notably, several ACA provisions are tied to another signature reform—the creation and subsidization of health-insurance exchanges. *See id.* §§ 18031–44. Through these and other provisions, the ACA allocated billions of federal dollars to subsidize the purchase of health insurance through government-run exchanges. Plus, the ACA expanded the scope of Medicaid, adding millions of people to the eligibility roster. *See id.* § 1396a(a)(10)(A)(i)(VIII).

The ACA also lays out hundreds of minor provisions, spanning the Act's 900-plus pages of legislative text, that complement the above-mentioned major provisions and others.

B. *NFIB*

After the ACA took effect, states, individuals, and businesses challenged its constitutionality in federal courts across the country.[3] One of those cases reached the Supreme Court in 2012. *See NFIB*, 567 U.S. at 519. In *NFIB*, twenty-six states, along with several individuals and an organization of independent businesses, challenged the ACA's Individual Mandate and Medicaid expansion as exceeding Congress's enumerated powers. In short, the Supreme Court held the Individual Mandate was beyond Congress's Interstate Commerce Power but salvageable under its Tax Power.

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[3] In the interest of brevity, a full history of the lower-court decisions leading up to *NFIB* is not included here. But legal scholars have documented that history to help explain this complex statutory scheme and the Supreme Court's decision in 2012. *See, e.g.*, JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 79–158 (2013) [hereinafter "BLACKMAN"].

The decision was highly splintered and warrants explanation.

1. Chief Justice Roberts

Chief Justice Roberts authored a lengthy opinion considering several issues. *See id.* at 530–89. Only certain parts of that opinion garnered a majority of votes or otherwise reached a conclusion agreed to by a majority of the Supreme Court. Here are the pertinent parts.

In **Part III-A**, Chief Justice Roberts concluded the Individual Mandate is not a valid exercise of Congress's power under the Interstate Commerce Clause. *Id.* at 546–61 (Roberts, C.J.). The Government argued the Individual Mandate could be sustained under the Interstate Commerce Clause because individual decisions to not buy health insurance collectively "ha[ve] a substantial and deleterious effect on interstate commerce." *Id.* at 548–49 (citing Brief for United States). It also asserted insurance reforms without a mandate would create cost-shifting problems whereby insurers would increase premiums to cover the costs of high-risk individuals. *Id.* at 547–48.

The Chief Justice disagreed and held the Interstate Commerce Clause authorizes regulating "activity," not inactivity. *Id.* at 553. He warned the Government's theory would "extend[] the sphere of [Congress's] activity and draw[] all power into its impetuous vortex." *Id.* at 554 (quoting THE FEDERALIST NO. 48, at 309 (James Madison)). "The Framers gave Congress the power to *regulate* commerce," he reasoned, "not to *compel* it." *Id.* at 555 (emphasis in original).

Though no other Justice joined this part of the Chief Justice's opinion, the "joint dissent"— consisting

of Justices Scalia, Kennedy, Thomas, and Alito—reached the same conclusion on the Interstate Commerce Clause question. *Id.* at 657 (joint dissent). Accordingly, a majority of the Supreme Court found the Individual Mandate is unconstitutional under the Interstate Commerce Clause,[4] and even the four Justices not reaching that conclusion recognized it as the holding of the Court. *See id.* at 572 (majority) ("The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity.").

In **Part III-B**, the Chief Justice concluded that, because the Individual Mandate is impermissible under the Interstate Commerce Clause, the Supreme Court was obligated to entertain the Government's argument that the mandate could be upheld under the Tax Power. *Id.* at 561–63 (Roberts, C.J.). He noted that "[t]he most straightforward reading of the mandate is that it commands individuals to purchase insurance." *Id.* at 562. "But, for the reasons explained above, the Commerce Clause does not give Congress that power." *Id.*

In **Part III-C**, the Chief Justice wrote a majority opinion, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, holding that 26 U.S.C. § 5000A—including the Individual Mandate and the shared-responsibility payment—was a constitutional exercise of Congress's Tax Power. *Id.* at 563–74 (majority). The Supreme Court's analysis in this section focused more on the shared-responsibility payment than on the Individual Mandate. *See, e.g.*, *id.* at 563 ("The exaction

[4] The same five Justices also found that the Individual Mandate could not be upheld as an essential component of the ACA's insurance reforms under the Necessary and Proper Clause. *Id.* at 560 (Roberts, C.J.); *id.* at 654–55 (joint dissent).

the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The '[s]hared responsibility payment,' as the statute entitles it, is paid into the Treasury . . . ."); *id.* at 566 ("The same analysis here suggests that the shared responsibility payment may for constitutional purposes be considered a tax."); *id.* at 568 (reasoning "the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance"); *id.* at 569 ("Our precedent demonstrates that Congress had the power to impose the *exaction* in § 5000A under the taxing power." (emphasis added)).

The Supreme Court's conclusion that § 5000A constituted a constitutional exercise of Congress's Tax Power turned on several factors. First, the shared-responsibility payment "is paid into the Treasury by taxpayers when they file their tax returns." *Id.* at 563 (cleaned up). Second, the amount owed under the ACA "is determined by such familiar factors as taxable income, number of dependents, and joint filing status." *Id.* (citing 26 U.S.C. §§ 5000A(b)(3), (c)(2), (c)(4)). And "[t]he requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which . . . must assess and collect it 'in the same manner as taxes.'" *Id.* at 563–64. Third and finally, the shared-responsibility payment "yields the *essential* feature of any tax: It produces at least some revenue for the Government." *Id.* at 564 (citing *United States v. Kahriger*, 345 U.S. 22, 28 n.4 (1953)) (emphasis added). On these bases, the Supreme Court held, "The Federal Government does have the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read as a tax." *Id.* at 575.

Finally, in **Part IV**, Chief Justice Roberts was joined by Justices Breyer and Kagan in concluding that the ACA's Medicaid-expansion provisions unconstitutionally coerced States into compliance—but given the existence of a severability clause, the unconstitutional portion of the Medicaid provisions could be severed. *Id.* at 575–88 (Roberts, C.J., joined by Breyer and Kagan, JJ.). While Justice Ginsburg, joined by Justice Sotomayor, disagreed that the ACA's mandatory Medicaid expansion was unconstitutionally coercive, *see id.* at 624–45 (Ginsburg, J., joined by Sotomayor, J.), she agreed with the Chief Justice's conclusion—*only* because the Chief Justice found the expansion unconstitutional—that the offending provisions could be severed from the remainder of the Act, *see id.* at 645 ("But in view of THE CHIEF JUSTICE's disposition, I agree with him that the Medicaid Act's severability clause determines the appropriate remedy.").

2. Joint Dissent

Justices Scalia, Kennedy, Thomas, and Alito agreed with the Chief Justice that the Individual Mandate exceeds Congress's powers under the Interstate Commerce and Necessary and Proper Clauses, but they concluded § 5000A could not be characterized as a tax.[5] *Id.* at 652–57 (joint dissent). The joint dissent noted that Congress rejected an earlier version of the ACA that "imposed a tax instead of a requirement-with-penalty" and reasoned that characterizing § 5000A, including the Individual Mandate, as a tax

[5] The joint dissent also agreed the ACA's Medicaid expansion exceeded "Congress' power to attach conditions to federal grants to the States." *NFIB*, 567 U.S. at 671.

was therefore contrary to congressional intent. *Id.* at 669 (citations omitted).

Because the joint dissenters concluded the Individual Mandate and the Medicaid expansion were unconstitutional, they—and only they—addressed whether "all other provisions of the Act must fall as well." *Id.* at 691. The dissenters noted that the ACA "was passed to enable affordable, 'near universal' health insurance coverage." *Id.* at 694 (citing 42 U.S.C. § 18091(2)(D)). And to effectuate this goal, the ACA "consists of mandates and other requirements; comprehensive regulation and penalties; some undoubted taxes; and increases in some governmental expenditures, decreases in others." *Id.* The dissenters then asked whether this "closely interrelated" scheme could "function in a coherent way and as Congress would have intended, even when the major provisions establishing the Individual Mandate and Medicaid Expansion are themselves invalid." *Id.* at 691, 694. They opined it could not.

In passing the ACA, the dissenters noted, Congress understood the fiscal concerns surrounding healthcare reform and engineered a system whereby "it did not intend to impose the inevitable costs on any one industry or group of individuals." *Id.* at 694. The dissenters reasoned the ACA "attempts to achieve near-universal health insurance coverage by spreading its costs to individuals, insurers, governments, hospitals, and employers—while, at the same time, offsetting significant portions of those costs with new benefits to each group." *Id.* at 695. In a nutshell:

> the Federal Government bears the burden of paying billions for the new entitlements mandated by the Medicaid Expansion and federal subsidies for insurance purchases on the exchanges; but it benefits from reductions in the

> reimbursements it pays to hospitals. Hospitals lose those reimbursements; but they benefit from the decrease in uncompensated care, for under the insurance regulations it is easier for individuals with pre-existing conditions to purchase coverage that increases payments to hospitals. Insurance companies bear new costs imposed by a collection of insurance regulations and taxes, including "guaranteed issue" and "community rating" requirements to give coverage regardless of the insured's pre-existing conditions; but the insurers benefit from the new, healthy purchasers who are forced by the Individual Mandate to buy the insurers' product and from the new low-income Medicaid recipients who will enroll in insurance companies' Medicaid-funded managed care programs. In summary, the Individual Mandate and Medicaid Expansion offset insurance regulations and taxes, which offset reduced reimbursements to hospitals, which offset increases in federal spending.

Id. at 695–96. "In summary, the Individual Mandate and Medicaid Expansion offset insurance regulations and taxes, which offset reduced reimbursements to hospitals, which offset increases in federal spending." *Id.* at 696. And Congress intended the Individual Mandate and Medicaid Expansion to work *together* with the rest of the ACA. *Id.* (citing 42 U.S.C. §§ 18091(2)(C), (2)(E), (2)(F), (2)(G), (2)(I), (2)(J)).

Next, the joint dissenters detailed the ACA's major provisions. They concluded, given the above, that these provisions—insurance regulations and taxes; hospital-reimbursement reductions and other reductions in Medicare expenditures; health-insurance exchanges and their federal subsidies; and the employer-responsibility assessment—are all inseverable from

the Individual Mandate. *See id.* at 697–703. They concluded the same with respect to the ACA's minor provisions. *See, e.g.*, *id.* at 704 ("if the major provision were unconstitutional, Congress would not have passed the minor one"). In sum, the joint dissenters would have declared the ACA "invalid in its entirety." *Id.* at 707.

C. The TCJA

On December 22, 2017, the Tax Cuts and Jobs Act of 2017 was signed into law. *See* Pub. L. No. 115-97, 131 Stat. 2054 (2017). Congress passed the TCJA through budget reconciliation, "an expedited procedure [for] considering legislation that would bring existing spending, revenue, and debt limit laws into compliance with the current fiscal priorities established in the annual budget resolution." Megan S. Lynch & James V. Saturno, *The Budget Reconciliation Process: Stages of Consideration*, at 1, CONGRESSIONAL RESEARCH SERVICE (Jan. 4, 2017). Budget reconciliation limits congressional action to fiscal matters.

In the TCJA, Congress reduced the ACA's shared-responsibility payment to zero, effective January 1, 2019. *See* TCJA § 11081. Congress took no other action pertaining to the ACA. Nor could it. The reconciliation process limited Congress to doing exactly what it did: reducing taxes. *See* Fed. Defs.' Resp. 16 n.4, ECF No. 92 ("Although Congress was able to revoke the tax penalty, it could not have revoked the guaranteed-issue or community-rating provisions through reconciliation."); Sept. 5, 2018 Hr'g Tr. at 36:7–12 (Intervenor Defendants) [hereinafter "Hr'g Tr."] ("Congress did not repeal any part of the ACA, including the shared responsibility payment. In fact, it could not do so through the budget reconciliation procedures it used.").

II. PROCEDURAL BACKGROUND

Plaintiffs are the States of Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, Governor Paul LePage of Maine (the "State Plaintiffs"), and individuals Neill Hurley and John Nantz (the "Individual Plaintiffs" and, collectively with the State Plaintiffs, "Plaintiffs").

Defendants are the United States of America, the United States Department of Health and Human Services ("HHS"), Alex Azar, in his official capacity as Secretary of HHS, the United States Internal Revenue Service (the "IRS"), and David J. Kautter, in his official capacity as Acting Commissioner of Internal Revenue (collectively, the "Federal Defendants").

Finally, the States of California, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia intervened as defendants (collectively, the "Intervenor Defendants").

The Plaintiffs sued the Federal Defendants seeking, among other things, a declaration that the Individual Mandate, as amended by the TCJA, is unconstitutional and that the remainder of the ACA is inseverable. Am. Compl. 2, ECF No. 27. Their theory is that, because the TCJA eliminated the shared-responsibility tax payment, the tax-based saving construction developed in *NFIB* no longer applies. *Id.* at 2–3. Plaintiffs further argue that, as the four joint dissenters reasoned in *NFIB*, the Individual Mandate is inseverable from the rest of the ACA. Pls.' Br. Prelim.

Inj. 35, ECF No. 40 (citing *NFIB*, 567 U.S. at 691–703 (joint dissent)) [hereinafter "Pls.' Br."].

The Federal Defendants agree the Individual Mandate is unconstitutional and inseverable from the ACA's pre-existing-condition provisions. But they argue all other ACA provisions are severable from the mandate. The Intervenor Defendants argue all the Plaintiffs' claims fail.

The Plaintiffs filed an Application for Preliminary Injunction, (ECF No. 39), on April 26, 2018; the Federal Defendants and the Intervenor Defendants responded, (ECF Nos. 91 and 92), on June 7, 2018; and Plaintiffs replied, (ECF No. 175), on July 5, 2018. Because the Federal Defendants argued a judgment, as opposed to an injunction, was more appropriate, the Court provided notice of its intent to resolve the issues in this case on summary judgment. *See* July 16, 2018 Order, ECF No. 176 (citing FED. R. CIV. P. 56(f)(3)). The parties responded. *See* ECF Nos. 177–79.

The Plaintiffs argued they desire a preliminary injunction but are unopposed to "*simultaneously* considering Plaintiffs' application as a motion for partial summary judgment on the constitutionality of the ACA's mandate." *See* Pls.' Resp. July 16, 2018 Order, ECF No. 181 (emphasis in original). The Intervenor Defendants opposed converting the preliminary-injunction briefing to a summary-judgment ruling because they wished to more fully brief issues such as Article III standing, the Interstate Commerce Clause, and the scope of injunctive relief. Intervenor Defs.' Resp. July 16, 2018 Order 2, ECF No. 182. At the hearing, the Federal Defendants requested the Court "to defer any ruling until after the close of the open enrollment period which is in mid December, [as] that

would ensure that there is no disruption to the open enrollment period." Hr'g Tr. at 30:15–18.

The Court finds the Intervenor Defendants adequately briefed and argued at the September 5, 2018 hearing the standing and Interstate Commerce Clause issues. The Court therefore construes the application as a motion for partial summary judgment.

III. LEGAL STANDARDS

A. Article III Standing

"Every party that comes before a federal court must establish that it has standing to pursue its claims." *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473 (5th Cir. 2013). Standing doctrine is rooted in the Constitution's grant of judicial power to adjudicate cases or controversies. "The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

"The doctrine of standing asks 'whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.'" *Cibolo Waste*, 718 F.3d at 473 (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004)). Standing has both constitutional and prudential components. *See id.* (quoting *Elk Grove*, 542 U.S. at 11) (stating standing "contain[s] two strands: Article III standing . . . and prudential standing"). The "irreducible constitutional minimum" of Article III standing consists of three elements. *Spokeo*, 135 S. Ct. at 1547; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The plaintiff must have (1) suffered an injury in fact (2) that is fairly traceable to the challenged conduct of the de-

fendant and (3) that is likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 560–61. It is not necessary for all plaintiffs to demonstrate Article III standing. Rather, "one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Texas v. United States*, 809 F.3d 134, 151 (5th Cir. 2015) (quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)).

"Prudential standing requirements exist in addition to 'the immutable requirements of Article III,' . . . as an integral part of 'judicial self-government.'" *ACORN v. Fowler*, 178 F.3d 350, 362 (5th Cir. 1999) (quoting *Lujan*, 504 U.S. at 560). "The goal of this self-governance is to determine whether the plaintiff 'is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial power.'" *Id.* (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8 (1986)). The Supreme Court has observed that prudential standing encompasses "at least three broad principles," including "the general prohibition on a litigant's raising another person's legal rights . . . ." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014); *Cibolo Waste*, 718 F.3d at 474 (quoting *Elk Grove*, 542 U.S. at 12).

As the parties invoking jurisdiction, the Plaintiffs must show the requirements of standing are satisfied. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

B. Summary Judgment

Summary judgment is proper when the pleadings and evidence show "that there is no genuine dispute as to any material fact and the movant is entitled to

judgment as a matter of law." FED. R. CIV. P. 56(a). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The movant makes a showing that there is no genuine issue of material fact by informing the court of the basis of its motion and by identifying the portions of the record that reveal there are no genuine material-fact issues. *See* FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

When reviewing the evidence on a motion for summary judgment, the court must resolve all reasonable doubts and inferences in the light most favorable to the non-movant. *See Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988). The court cannot make a credibility determination in light of conflicting evidence or competing inferences. *Anderson*, 477 U.S. at 255. And if there appears to be some support for the disputed allegations, such that "reasonable minds could differ as to the import of the evidence," the court must deny the motion for summary judgment. *Id.* at 250.

IV. ANALYSIS

The Court's analysis involves three separate inquiries and conclusions. First, the Court finds the Parties satisfy the applicable standing requirements. Second, the Court finds the Individual Mandate can no longer be fairly read as an exercise of Congress's Tax Power and is still impermissible under the Interstate Commerce Clause—meaning the Individual Mandate is unconstitutional. Third, the Court finds the Individual Mandate is essential to and inseverable from the remainder of the ACA.

A. Article III Standing

No party initially challenged the Plaintiffs' standing. But amici raised the issue[6] and the Intervenor Defendants addressed it at oral argument. *See, e.g.*, Hr'g Tr. at 52–58; 64–68. And because Article III standing is a requirement of subject-matter jurisdiction, it cannot be waived. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) ("The federal courts are under an independent obligation to examine their own jurisdiction.").

The Individual Plaintiffs, who are citizens and residents of the State of Texas, challenge the Individual Mandate as an unconstitutional requirement to purchase ACA-compliant health insurance. They argue they are injured by the "obligation to comply with the individual mandate . . . despite the provision's unconstitutionality." Am. Compl. ¶ 43, ECF No. 27. Injury-in-fact must be both particularized and concrete, not conjectural or hypothetical. *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). For an injury to be particularized, it "must affect the plaintiff in a personal and individual way." *Id.* Under *Lujan*, a concrete and particularized injury generally exists if the "plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that

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[6] The American Medical Association filed an amicus brief that argued the Individual Plaintiffs lack standing because they "seek to leverage their own voluntary decisions to purchase minimum essential coverage into cognizable injuries-in-fact" and therefore impermissibly base standing on a self-inflicted injury. *See* Br. of the Am. Med. Ass'n et al. 7, ECF No. 113. The Association also challenged the State Plaintiffs' standing, arguing their alleged injury is too attenuated and speculative to support standing. *See id.* at 11–12.

a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561–62. The question of "whether someone is in fact an object of a regulation is a flexible inquiry rooted in common sense" and "underlies all three elements of standing." *Contender Farms, LLP v. USDA*, 779 F.3d 258, 264, 266 (5th Cir. 2015).

In *Contender Farms*, a company and its principal, McGartland, challenged a regulation under the Horse Protection Act that required certain entities to suspend horse trainers who engaged in "soring." *Id.* at 262. The Fifth Circuit analyzed whether the plaintiffs had standing to challenge the regulation and the scope of the agency's rulemaking authority. Applying a "commonsense approach to the facts in [the] case," the court held first that the plaintiffs were the object of the challenged regulation because the regulation "target[ed] participants in Tennessee walking horse events like Contender Farms and McGartland." *Id.* at 265. Second, the court determined the regulation amounted to an increased regulatory burden because it subjected the plaintiffs to "harsher, mandatory penalties" for violation of the soring rules—it also required competitors to "take additional measures to avoid even the appearance of soring." *Id.* at 266. Because "[a]n increased regulatory burden typically satisfies the injury in fact requirement," and because the Fifth Circuit found that causation and redressability naturally flowed from the type of injury alleged, the plaintiffs satisfied Article III standing. *Id.*

Here, the Individual Plaintiffs are the object of the Individual Mandate. It requires them to purchase and maintain certain health-insurance coverage. *See* 26 U.S.C. § 5000A(a); *see also* Pls.' App. Supp. Prelim. Inj., Ex. A (Nantz Decl.) ¶ 15, ECF No. 41 ("I am obli-

gated to comply with the [ACA's] individual mandate"); Pls.' App. Supp. Prelim. Inj., Ex. B (Hurley Decl.) ¶ 15, ECF No. 41 ("I continue to maintain minimum essential health coverage because I am obligated . . . ."). *Cf. Lujan*, 504 U.S. at 561–62; *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2012).

The American Medical Association argues the Individual Plaintiffs have created their own financial injury because they can choose not to comply with the Individual Mandate and, beginning in January 2019, no penalty will be assessed against them. *See* Br. Am. Med. Ass'n 8–9, ECF No. 113; Hr'g Tr. at 37:9–16. But this argument begs a leading question in this case by assuming the Individual Plaintiffs need not comply with the Individual Mandate. Moreover, a showing of economic injury is not required.

In warning lower courts not to conflate the "actual-injury inquiry with the underlying merits" of a claim, the Fifth Circuit recognizes that standing can be established where a plaintiff alleges that a federal statute or regulation "deters the exercise of his constitutional rights." *Duarte*, 759 F.3d at 520. Here, the Individual Plaintiffs allege just that. They claim "Section 5000A's individual mandate exceeded Congress's enumerated powers by forcing Individual Plaintiffs to maintain ACA-compliant health insurance coverage." Am. Compl. ¶ 49, ECF No. 27. Intervenor Defendants, meanwhile, contend the Individual Mandate remains a constitutional exercise of Congress's tax or regulatory authority. As a result, the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt v. United*

Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (quoting *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 93 (1945)). The Individual Plaintiffs have therefore sufficiently alleged an injury in fact that sits at the center of a live controversy.

"Causation and redressability then flow naturally from" the injury created by the Individual Mandate. *Contender Farms*, 779 F.3d at 266. Without it, the Individual Plaintiffs would not be required to maintain health-insurance coverage and would not be subject to an increased regulatory burden. A favorable decision for the Plaintiffs—a declaration that the Individual Mandate is unconstitutional—would redress the alleged injury. The Individual Plaintiffs, for example, would be free to forego purchasing health insurance altogether or to otherwise purchase health insurance below the "minimum essential coverage" better suited to their health and financial realities. At a minimum, they would be freed from what they essentially allege to be arbitrary governance.

The Court finds the Individual Plaintiffs have standing to challenge the constitutionality of the Individual Mandate.[7] And because the Individual Plaintiffs have standing, the case-or-controversy requirement is met. *See Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) ("Because we find

[7] The Court does not analyze whether the Individual Plaintiffs have prudential standing to bring their claims because "prudential standing (unlike Article III standing) is not jurisdictional, meaning that prudential standing has been forfeited" and is not properly before the court, if, like here, no party contests it. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 181 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

California has standing, we do not consider the standing of the other plaintiffs."); *Rumsfeld*, 547 U.S. at 53 n.2.

B. The Individual Mandate

With standing satisfied, the Court "must . . . determine whether the Constitution grants Congress powers it now asserts, but which many States and individuals believe it does not possess." *NFIB*, 567 U.S. at 534 (Roberts, C.J.). The Court recalls the principles undergirding *NFIB*. Namely, "deference in matters of policy cannot . . . become abdication in matters of law." *Id.* at 538. This means "respect for Congress's policy judgments . . . can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed." *Id.* "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." *Id.* (quoting Chief Justice John Marshall, *A Friend of the Constitution No. V*, Alexandria Gazette, July 5, 1819, *reprinted in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 190–91 (G. Gunther ed. 1969)). "And there can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits." *Id.* (citing *Marbury v. Madison*, 5 U.S. 137, 175–76 (1803)).

The question of constitutionality is straightforward: Is the Individual Mandate a constitutional exercise of Congress's enumerated powers when the shared-responsibility payment is zero? Because the Supreme Court upheld the Individual Mandate under Congress's Tax Power, the Court will begin there before proceeding to an Interstate Commerce Clause

analysis. The Court finds that both plain text and Supreme Court precedent dictate that the Individual Mandate is unconstitutional under either provision.

1. Congress's Tax Power

In *NFIB*, the Supreme Court held 26 U.S.C. § 5000A to be a constitutional exercise of Congress's Tax Power. *Id.* at 570 (majority) ("Our precedent demonstrates that Congress had the power to impose the exaction in § 5000A under the taxing power, and that § 5000A need not be read to do more than impose a tax. That is sufficient to sustain it."). That power authorizes Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. Previously, the shared-responsibility provision, 26 U.S.C. § 5000A(b), imposed an "exaction" for failure to obey the Individual Mandate, *id.* § 5000A(a). The question here is whether an eliminated shared-responsibility exaction continues to justify construing the Individual Mandate as an exercise of Congress's Tax Power to implement § 5000A.

The Plaintiffs and Federal Defendants say "no." Pls.' Br. 26, ECF No. 40; Fed. Defs.' Resp. 11, ECF No. 92. The Intervenor Defendants, on the other hand, argue § 5000A can still fairly be read as a tax because it continues to satisfy the tax factors discussed in *NFIB*, including that previous shared-responsibility payments will make their way into the treasury for years to come. Intervenor Defs.' Resp. 16–22, ECF No. 91.

a. Sections 5000A(a) and (b) Are Distinct

It is critical to clarify something at the outset: the shared-responsibility payment, 26 U.S.C. § 5000A(b), is distinct from the Individual Mandate, *id.*

§ 5000A(a). For one thing, the latter is in subsection (a) while the former is in subsection (b).[8] And the Plaintiffs challenge only the Individual Mandate, not the shared-responsibility penalty, as unconstitutional. *See, e.g.*, Am. Compl. ¶ 49, ECF No. 27 ("Section 5000A's *individual mandate* exceeds Congress's enumerated powers . . . ." (emphasis added)); *id.* ("the individual mandate cannot be upheld under any other provision of the Constitution"); *id.* at ¶¶ 55–56 ("[A]fter Congress amended Section 5000A, it is no longer possible to interpret this statute as a tax enacted pursuant to a valid exercise of Congress's constitutional power to tax. Rather, the only reading available is the most natural one; Section 5000A contains a stand-alone legal mandate . . . Accordingly, Section 5000A's *individual mandate* is unconstitutional." (emphasis added)). The Court cannot ignore that the Individual Mandate, § 5000A(a), is separate and distinct from the shared-responsibility penalty, § 5000A(b).[9]

Other ACA text and functionality demand §§ 5000A(a) and (b) not be lumped together, too. Most obviously, Congress exempted some individuals from the shared-responsibility penalty *but not the Individual Mandate*. *See* 26 U.S.C. § 5000A(e). For example, § 5000A(e)(1) provides that "[i]ndividuals who cannot afford coverage" are exempt from the penalty, but not the mandate. *Id.* § 5000A(e)(1). "Members of Indian

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[8] Subsection (c) sets the amount of the shared-responsibility payment erected in subsection (b), *see id.* § 5000A(c), and it is the subsection set at zero per cent by the TCJA, *see* TCJA § 11081(a).

[9] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174–79 (2012) (Surplusage Canon) [hereinafter "READING LAW"].

tribes" are also subject to the mandate but not the penalty. *See id.* § 5000A(e)(3). Congress could not possibly have intended the mandate and penalty to be treated as one when it treated them as two.[10]

Congress's codified ACA findings support the distinction as well. As the Plaintiffs argue, those "findings identify the individual mandate itself—'[t]he *requirement*' to purchase health insurance"—while "making no mention of the separate tax penalty that attaches to some individuals' failure to comply with the mandate." Pls.' Br. 8–9, ECF No. 40 (citation omitted) (emphasis in Plaintiffs' Brief). The Court agrees the findings highlight that Congress believed that, "if there were no *requirement*"—i.e., no Individual Mandate—"many individuals would wait to purchase health insurance until they needed care." 42 U.S.C. § 18091(2)(I) (emphasis added). That is the belief it acted on and on which it formed its intent.[11]

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[10] Federal agencies recognize this as well. *See, e.g.*, CENTERS FOR MEDICARE & MEDICAID SERVICES, ONE PAGER – INDIAN EXEMPTION, https://marketplace.cms.gov/technical-assistance-resources/exemption-indian-health-care-provider.pdf (last visited December 2018) ("Under the Affordable Care Act, everyone who can afford to is now required by law to have health coverage . . . However, those who can't afford coverage or meet other conditions may qualify for [a shared-responsibility-payment] exemption.").

[11] *See also* CONGRESSIONAL BUDGET OFFICE, KEY ISSUES IN ANALYZING MAJOR HEALTH INSURANCE PROPOSALS 53 (Dec. 2008), *available at* https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/12-18-keyissues.pdf (December 2008) ("[S]ome compliance is generally observed, even when there is little or no enforcement of mandates. Compliance, then, is probably affected by an individual's personal values and by social norms. Many individuals and employers would comply with a mandate, even in the absence of penalties, because they believe in abiding by the nation's laws.").

The 2010 Congress therefore intended the mandate and penalty to be distinct. The 2017 Congress solidified that intent. Section 11081 of the TCJA is entitled "Elimination of shared responsibility payment for individuals failing to maintain minimum essential coverage." TCJA § 11081. This section amends 26 U.S.C. § 5000A(c)—the provision setting the amount of the shared-responsibility penalty, *id.* § 5000A(b)—to "[e]liminat[e]" the existing payment and replace it with "Zero percent" and "$0." TCJA § 11081(a). It does not eliminate the Individual Mandate. So, just as the 2010 Congress subjected *some* individuals to the Individual Mandate but no shared-responsibility payment, the 2017 Congress subjected *all* applicable individuals to the Individual Mandate but no shared-responsibility payment. Congress never intended the two things to be one.

As described below, the Supreme Court's Tax Power analysis in *NFIB* proceeded along these lines—recognizing the Individual Mandate as separate and distinct from the shared-responsibility penalty. This distinction is critical to the Court's remaining legal analysis.

b. Section 5000A(a) Can No Longer Be Sustained as an Exercise of Congress's Tax Power

NFIB does not contravene Congress's intent to separate the Individual Mandate and shared-responsibility penalty. To the extent the Supreme Court held § 5000A could be fairly read as a tax, it reasoned only that the Individual Mandate could be viewed as part and parcel of a provision supported by the Tax Power—not that the Individual Mandate *itself* was a tax.

The Supreme Court stated its "precedent demonstrate[d] that Congress had the power to impose the *exaction* in § 5000A under the taxing power"—and § 5000A(b) is the exaction—"and that § 5000A need not be read to do more than impose a tax. That is sufficient to sustain it." *NFIB*, 567 U.S. at 570 (emphasis added). In other words, it was only because of the totally distinct shared-responsibility payment, or exaction, that the Supreme Court could construe § 5000A as a tax provision. As the Government argued at the time, and as Chief Justice Roberts recognized, that meant "the mandate [could] be regarded as establishing a condition—not owning health insurance—that *triggers a tax*." *Id.* at 563 (Roberts, C.J.) (emphasis added).

Put plainly, because Congress had the power to enact the shared-responsibility exaction, § 5000A(b), under the Tax Power, it was fairly possible to read the Individual Mandate, § 5000A(a), as a functional part of that tax also enacted under Congress's Tax Power. Therefore, § 5000A *as a whole* could be viewed as an exercise of Congress's Tax Power.

The majority's analysis compels this conclusion.[12] In its very first breath under Part III-C, the majority reasoned:

> The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The "[s]hared responsibility payment," as the statute entitles it, is paid into the Treasury by "taxpayer[s]" when they file their tax returns. 26 U.S.C.

[12] *Accord* Intervenor Defs.' Resp. 17, ECF No. 91 ("In *NFIB*, the Supreme Court explained that the *shared responsibility payment* 'looks like' a tax in several respects." (emphasis added)).

> § 5000A(b). It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. § 5000A(e)(2). For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status. §§ 5000A(b)(3), (c)(2), (c)(4). The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which—as we previously explained—must assess and collect it "in the same manner as taxes."

NFIB, 567 U.S. at 563–64 (majority) (final citation to ACA omitted). The Supreme Court's baseline analysis thus turned on the following: the *exaction* looks like a tax; it is *paid* into the treasury; it does not apply to individuals who pay no federal income taxes; familiar tax factors are applied to folks who owe *the payment*; and the requirement *to pay* is in the revenue code. *Id.* Only one of those factors applies to the Individual Mandate, § 5000A(a): it is in the Internal Revenue Code. But the Individual Mandate is not in § 5000A(b), is not called the shared-responsibility payment, is not an exaction, is not paid into the Treasury or otherwise a payment, does not exclude those who pay no federal taxes for income reasons, and is not determined by familiar tax factors. Section 5000A(b) is all those things.

Crucially, after assessing § 5000A(b) against the factors above, the Supreme Court concluded § 5000A "yields the essential feature of any tax: It produces at least some revenue for the Government." *Id.* at 564 (citing *United States v. Kahriger*, 345 U.S. 22, 28 n. 4 (1953)).

The Supreme Court thus identified three basic criteria to conclude § 5000A could be viewed as an exercise of the Tax Power: (1) a payment is paid into the

Treasury, (2) the payment amount is determined with reference to income and other familiar factors, and (3) the payment produces revenue for the Government. *Id.* at 563–64. In their brief, the Intervenor Defendants urge the "shared responsibility payment continues to maintain these tax-like characteristics." Intervenor Defs.' Resp. 18, ECF No. 91. But at the hearing, they seemed to concede § 5000A will no longer meet the first and second criteria starting January 1, 2019. *See* Hr'g Tr. at 70:10–16; 70:23–25. They instead focus on the third factor, contending the "production of revenue at all times is not a constitutional requirement for a lawful tax." Intervenor Defs.' Resp. 18, ECF No. 91.

But the Intervenor Defendants downplay the Supreme Court's most crucial conclusion: § 5000A "yield[ed] the *essential* feature of any tax: It produce[d] at least some revenue for the Government." *NFIB*, 567 U.S. at 564 (emphasis added); *accord Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 841 (1995) ("A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government." (citation omitted)). Not indicative, not common—essential.[13] Thus, the bottom line is the Individual Mandate was buoyed by Congress's Tax Power only because it "trigger[ed]" a provision that "produce[d] at least some revenue for the Government." And it was high tide when the Supreme Court decided *NFIB* because the shared-

[13] *See Essential*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 777 (1986) (defining as "of or relating to an essence"; "having or realizing in itself the essence of its kind"; and "necessary, indispensable"); *see also* BLACK'S LAW DICTIONARY (10th ed. 2014) ("1. Of, relating to, or involving the essence or intrinsic nature of something. 2. Of the utmost importance; basic and necessary.").

responsibility payment was still a payment. But with the TCJA, the tide has gone out. Section 5000A no longer contains an exaction.

The Intervenor Defendants argue that "[e]ven if Plaintiffs were correct that a constitutionally-valid tax must produce revenue at all times"—a condition the Supreme Court called essential—"it will be years before the shared responsibility payment ceases to do so." Intervenor Defs.' Resp. 21, ECF No. 91. They contend that, due to the frequency of late payments and deferrals, the government will continue to receive revenue from 2018 shared-responsibility payments "until 2020 or beyond." *Id*.

Intervenor Defendants cite no authority for the proposition that the relevant timeframe to analyze tax revenue is the tax year in which it is remunerated. Plaintiffs reply that "the revenue Intervenor-Defendants identify is attributable to tax year 2018." Pls.' Reply 8 n.9, ECF No. 175.

It is a well-accepted practice that tax revenue is attributable to the tax year in which it is assessed, not the one in which it is paid. *See, e.g., NFIB*, 567 U.S. at 563 ("the payment is expected to raise about $4 billion *per year* by 2017") (emphasis added); CONGRESSIONAL BUDGET OFFICE, ANALYSIS OF MAJOR HEALTH CARE LEGISLATION ENACTED IN MARCH 2010, at 14 (Mar. 30, 2011) (analyzing *by fiscal year* estimated budgetary effects of ACA tax credits and revenue from excise taxes). When individuals file tax returns in April 2019, for example, the taxes they pay and the returns they receive will affect the government's 2018 tax-year revenue. The same holds true even if individuals receive deferrals or make late payments in the months and years thereafter. And at any rate, because the TCJA

eliminated the shared-responsibility payment "beginning after December 31, 2018," that provision no longer *produces* revenue for the Government—present tense—and any future monies that come in will be because the provision once *produced* revenue for the Government—past tense. So, it is true the shared-responsibility payment once had the essential feature of any tax. But it no longer does.

Finally, the Intervenor Defendants point to three examples of Congress delaying or suspending taxes within the ACA: the Cadillac Tax, the Medical Device Tax, and the Health Insurance Providers Fee. Intervenor Defs.' Resp. 18– 20. Drawing on these examples, the Intervenor Defenders argue "[t]he shared responsibility payment has not been rendered unconstitutional merely because it will be $0 in 2019." *Id.* at 18.

As an initial matter, suspending or delaying a tax is not equivalent to eliminating it. And the TCJA does not suspend collection of the shared-responsibility payment, it eliminates it. *See* TCJA § 11081 ("Elimination of shared responsibility payment for individuals failing to maintain minimum essential coverage."). Put differently, until a change in law, there is no shared-responsibility payment. True, Congress may reinstate the payment in the future. But that would be a change in law. The Court cannot rule on a hypothetical counterfactual. It may only "say what the law is," not what it someday could be. *Marbury*, 5 U.S. at 177.

But at a more fundamental level, the Intervenor Defendants' argument demonstrates they misapprehend the Plaintiffs' basic position. The Intervenor Defendants assert: "The *shared responsibility payment* has not been rendered unconstitutional merely because it will be $0 in 2019." Intervenor Defs.' Resp. 18, ECF No. 91 (emphasis added). The Plaintiffs do not

argue that; they argue the *Individual Mandate* is unconstitutional. And as the Court has explained, the text of the ACA and TCJA, as well as the Supreme Court's reasoning in *NFIB*, all hinge on an understanding that the Individual Mandate and the shared-responsibility payment are two very different creatures. The saving construction in *NFIB* was available only because § 5000A(a) triggered a tax.[14] And § 5000A(b) was a tax because it produced some revenue for the Government. *Sozinsky v. United States*, 300 U.S. 506, 513–14 (1937); *United States v. Ross*, 458 F.2d 1144, 1145 (5th Cir. 1972) ("The test of validity is whether on its face the tax operates as a revenue generating measure and the attendant regulations are in aid of a revenue purpose.").

Under the law as it now stands, the Individual Mandate no longer "triggers a tax" beginning in 2019. So long as the shared-responsibility payment is zero, the saving construction articulated in *NFIB* is inapplicable and the Individual Mandate cannot be upheld under Congress's Tax Power. *See NFIB*, 567 U.S. at 574 ("Congress's authority under the Taxing power is

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[14] This distinction also explains why the Cadillac Tax, the Medical Device Tax, and the Health Insurance Providers Fee are all inapposite. Even if, for example, Congress had eliminated the payment under Medical Device Tax—which it did not—the analogy would not hold for the fact pattern before the Court. Instead, to make the Medical Device Tax analogous, it would need to contain a provision requiring all applicable individuals to purchase medical devices. And it would also need to contain a separate provision taxing any applicable individual who did not purchase medical devices. Then, if Congress delayed or suspended the tax under that scheme, the Medical Device Tax would be at least usefully analogous. But the Medical Device Tax does not tax inactivity and is therefore unhelpful here.

limited to requiring an individual to *pay money* into the Federal Treasury, no more." (emphasis added)).

2. Congress's Interstate Commerce Power

Because the Individual Mandate can no longer be read as an exercise of Congress's Tax Power, the Court takes up the Intervenor Defendants' argument that the mandate is now sustainable under the Interstate Commerce Clause.

The Constitution grants Congress the power to "regulate Commerce . . . among the several States." U.S. CONST. art. 1, § 8, cl. 3. Before *NFIB*, the Supreme Court had never considered whether Congress's power to regulate interstate commerce allowed it to compel citizens into commerce—i.e., to regulate *inactivity*. 567 U.S. at 647 (joint dissent) (identifying issue of first impression). As outlined above, the Supreme Court concluded it does not. It therefore held the Individual Mandate could not be sustained under the Interstate Commerce Clause. *See id*. at 572 (majority).

The Plaintiffs argue this issue is decided because the Supreme Court already concluded in *NFIB* that the Individual Mandate cannot be upheld under the Interstate Commerce Clause. Pls.' Br. 22, ECF No. 40.[15] The Intervenor Defendants respond that the Individual Mandate "may now be sustained under the

[15] The Federal Defendants did not separately brief the Interstate Commerce Clause issue but agree with the Plaintiffs. *See* Fed. Defs.' Resp. 11, ECF No. 92 ("[O]nce the associated financial penalty is gone, the 'tax' saving construction will no longer be fairly possible and thus the individual mandate will be unconstitutional. As a majority of the Supreme Court held in *NFIB*, '[t]he Federal Government does not have the power to order people to buy health insurance. Section 5000A would therefore be unconstitutional if read as a command.'" (citations omitted)).

Commerce Clause" because "with a tax of zero dollars, there is no compulsion." Intervenor Defs.' Resp. 18 n.17, ECF No. 91. They argue the constitutional problem identified in *NFIB*—Congress "*compelling* the purchase of insurance"—is no longer a problem because a tax of zero dollars imposes no legal consequence on individuals who do not comply with the Individual Mandate. *Id.* (emphasis in original); *see also* Hr'g Tr. at 37:9–25, 66:14–68:7.

The Individual Mandate provides: "An applicable individual shall . . . ensure that the individual . . . is covered under minimum essential coverage . . . ." 26 U.S.C. § 5000A(a). The Intervenor Defendants argue the provision "gives the individuals the same choice they've always had—to either purchase insurance or pay the tax." Hr'g Tr. at 67:17–19. But the Intervenor Defendants' position is logically self-defeating and contrary to the evidence in this case, the language of the ACA, and Fifth Circuit and Supreme Court precedent.

a. The Intervenor Defendants' Position Is Logically Inconsistent

At the threshold, the Intervenor Defendants hope to have their cake and eat it too by arguing the Individual Mandate does absolutely nothing but regulates interstate commerce. That is, they first say the Individual Mandate "does not compel anyone to purchase insurance." Hr'g Tr. at 37:12. Yet they ask the Court to find the provision "regulate[s] Commerce . . . among the several States." U.S. CONST. art. 1, § 8, cl. 3. The Intervenor Defendants' theory, then, is that Congress regulates interstate commerce when it regulates nothing at all. But to "regulate" is "to govern or direct according to rule" and to "bring under the control of law

or constituted authority." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1913 (1986). Accepting Intervenor Defendants' theory that the Individual Mandate does nothing thus requires finding that it is not an exercise of Congress's Interstate Commerce Power. *Cf. Gibbons v. Ogden*, 22 U.S. 1, 189–90 (1824) ("Commerce . . . is *regulated* by *prescribing rules* . . . ." (emphasis added)).

b. The Intervenor Defendants' Position Contradicts the Evidence

Despite the Intervenor Defendants' logical gymnastics, the undisputed evidence in this case suggests the Individual Mandate fixes an obligation. The Individual Plaintiffs assert they feel compelled to comply with the law. Pls.' App. Supp. Prelim. Inj., Ex. A (Nantz Decl.) ¶ 15, ECF No. 41 ("I value compliance with my legal obligations . . . [t]he repeal of the associated health insurance tax penalty did not relieve me of the requirement to purchase health insurance"); Pls.' App. Supp. Prelim. Inj., Ex. B (Hurley Decl.) ¶ 15, ECF No. 41 ("I continue to maintain minimum essential health coverage because I am obligated to comply with the [ACA's] individual mandate"). This should come as no surprise. "It is the attribute of law, of course, that it binds; it states a rule that will be regarded as compulsory for all who come within its jurisdiction." HADLEY ARKES, FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE 11 (1986). Law therefore has an enormous influence on social norms and individual conduct in society. *See* CONGRESSIONAL BUDGET OFFICE, KEY ISSUES IN ANALYZING MAJOR HEALTH INSURANCE PROPOSALS at 53 (Dec. 2008) (noting compliance "is generally observed, even when there is little or no enforcement"). That is the point.

Undoubtedly, now that the shared-responsibility payment has been eliminated, more individuals will choose not to comply with the Individual Mandate. *See* CONGRESSIONAL BUDGET OFFICE, REPEALING THE INDIVIDUAL HEALTH INSURANCE MANDATE: AN UPDATED ESTIMATE at 1 (Nov. 8, 2017). And that is likely to undermine Congress's intent in passing the ACA: Near-universal healthcare and reduced healthcare costs. *See id.* But the fact that many individuals will no longer feel bound by the Individual Mandate does not change either that some individuals will feel so bound—such as the Individual Plaintiffs here—or that the Individual Mandate is still law.

c. The Intervenor Defendants' Position Is Contrary to Text and Binding Precedent

And therein lies the rub. The Individual Mandate is law. 26 U.S.C. § 5000A(a). To be precise, the "*[r]equirement* to maintain minimum essential coverage" is still law. *Id.* § 5000A(a) (emphasis added). As the Intervenor Defendants concede, Congress "deliberately left the rest of the ACA untouched"—*including* the Individual Mandate. Hr'g Tr. at 40:12–13.

That the Individual Mandate persists, the Court must conclude, is no mistake. "[I]t is no more the court's function to revise by subtraction than by addition." READING LAW, *supra* note 9, at 174. The surplusage canon holds that, while "[s]ometimes lawyers will seek to have a crucially important word ignored," courts must "avoid a reading that renders some words altogether redundant" or "pointless." *Id.* at 174, 176. And this is just as true when parties "argue that an entire provision should be ignored." *Id.* at 175; *see also Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) ("We resist a reading . . . that would render superfluous an entire provision . . . .").

To accept the Intervenor Defendants' argument that the Individual Mandate does nothing would be doubly sinful under the canon against surplusage—it would require ignoring both the mandatory words of the provision and the function of the provision itself. As to the words of the provision, it is entitled, "Requirement to maintain minimum essential coverage," and provides that "[a]n applicable individual shall . . . ensure" that she or he is covered under an appropriate plan. 26 U.S.C. § 5000A(a). These words must be interpreted according to their plain meaning. *See United States v. Yeatts*, 639 F.2d 1186, 1189 (5th Cir. 1981) ("A basic canon of statutory construction is that words should be interpreted as taking their ordinary and plain meaning." (citing *Perrin v. United States*, 444 U.S. 37, 42 (1980))); READING LAW, *supra* note 9, at 69.

The words "requirement" and "shall" are both mandatory. Webster's defines "requirement" as "something required," "something wanted or needed," and "something called for or demanded." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1929 (1986). And it provides the following as the non-archaic meaning of "shall": "used to express a command or exhortation." *Id.* at 2085. But a plethora of binding caselaw already establishes that there is nothing permissive about a Congressionally enacted requirement that properly[16] employs the verbiage "shall." *See, e.g.*, *Fed. Express*

[16] There are some instances where drafters improperly use the word "shall" as part of a negative command. For example, "Neither party *shall* claim reimbursement for its expenses from the other party." READING LAW, *supra* note 9, at 113. In such an instance, "shall" means something more akin to the traditionally permissive "may." But § 5000A(a) is not a negative command. And "[w]hen drafters use *shall* . . . correctly"—as in § 5000A(a)—"the traditional rule holds"—i.e., "that *shall* is mandatory." *Id.* at 112.

Corp. v. Holowecki, 552 U.S. 389, 399 (2008) (reasoning "'shall' imposes obligations on agencies to act"); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting "shall" indicates an intent to "impose discretionless obligations"); *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 WL 1744422, at *8 (N.D. Tex. Apr. 23, 2013), *aff'd sub nom. Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015) ("Congress's use of the word 'shall' . . . imposes a mandatory obligation").

This is precisely why Chief Justice Roberts, in explaining his road to the *NFIB* majority, noted that the Individual Mandate "reads more naturally as a command to buy insurance." *NFIB*, 567 U.S. at 574 (Roberts, C.J.). Indeed, the Chief Justice reasoned that he "would uphold it as a command if the Constitution allowed it." *Id.* But because courts "have a duty to construe a statute to save it, if fairly possible," *id.*, and because "§ 5000A [could] be interpreted as a tax" at the time, *id.*, the Chief Justice construed the Individual Mandate "as establishing a condition . . . that triggers a tax," *id.* at 563. In other words, to the extent the majority construed the Individual Mandate as something other than a standalone mandate, it did so only because it was possible to construe the provision as triggering a tax. That "fundamental construct," as the Intervenor Defendants call it, *see* Hr'g Tr. at 66:15, was just that—a construct. And in light of this Court's finding on the Tax Power today, the construct no longer holds.

But even under the *NFIB* construct, the Individual Mandate created an obligation.[17] As the majority

[17] *Cf.* READING LAW, *supra* note 9, at 63 (Presumption Against Ineffectiveness).

noted, "the individual mandate clearly aims to induce the purchase of health insurance."[18] *NFIB*, 567 U.S. at 567 (majority). It continued, "Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS." *Id.* at 568. And the Government agreed at the time, "if someone chooses to pay rather than obtain health insurance, they have fully complied with the law." *Id.*

The logic of the *NFIB* construct is that an individual can comply with the law after disobeying the Individual Mandate only by paying the shared-responsibility payment. "The only thing they may not lawfully do is not buy health insurance and not pay the resulting tax." *Id.* at 574 n.11. But this means the Individual Mandate is no more optional than the tax.

If an individual can satisfy the law only by satisfying either Condition 1 (the Individual Mandate) or Condition 2 (the tax), then both conditions are equally optional and mandatory. To state it differently, under the *NFIB* construct, failing Condition 1 no more triggers Condition 2 than failing Condition 2 triggers Condition 1. So, an individual who disobeys the Individual Mandate can satisfy the law only by paying a tax, but an individual who disregards the tax can satisfy the law only by obeying the Individual Mandate. And only in a world where the Individual Mandate were truly

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[18] That conduct-inducing characteristic is what led five Justices to conclude the Individual Mandate was unsustainable under the Interstate Commerce Clause. *See NFIB*, 567 U.S. at 552 (Roberts, C.J.) ("The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce . . . ."); *id.* at 649 (joint dissent) ("To be sure, purchasing insurance is 'Commerce'; but one does not regulate commerce that does not exist by compelling its existence.").

non-binding could an individual disobey the Individual Mandate and forego the tax. But under the *NFIB* majority's construct, that is not the case. That is because logic demands that the Individual Mandate was never—pardon the oxymoron—a non-binding law.

The remainder of the ACA proves that, too. As noted above, § 5000A(e), did and still does exempt some individuals from the eliminated shared-responsibility payment but not the Individual Mandate—"a distinction that would make no sense if the mandate were not a mandate." *Id.* at 665 (joint dissent). What is more, Congress exempted, and continues to exempt, certain individuals from the Individual Mandate itself. *See* 26 U.S.C. § 5000A(d)(1). Why would Congress exempt individuals from a mandate that is not mandatory? To ask is to answer.

At least five Justices agreed the Individual Mandate reads more naturally as a command to buy health insurance than as a tax,[19] and those five Justices agreed the mandate could not pass muster under the Interstate Commerce Clause. Given that the Individual Mandate no longer "triggers a tax," the Court finds the Individual Mandate now serves as a standalone command that continues to be unconstitutional under the Interstate Commerce Clause.

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[19] Justices Ginsburg, Breyer, Kagan, and Sotomayor seemingly took no position on this construction but instead reasoned that the Individual Mandate was constitutional even it were construed as a command. *See, e.g.*, *NFIB*, 567 U.S. at 610 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ.) ("Requiring individuals to obtain insurance unquestionably regulates the interstate health-insurance and health-care markets, both of them in existence well before the enactment of the ACA.").

* * *

The Court today finds the Individual Mandate is no longer fairly readable as an exercise of Congress's Tax Power and continues to be unsustainable under Congress's Interstate Commerce Power. The Court therefore finds the Individual Mandate, unmoored from a tax, is unconstitutional and **GRANTS** Plaintiffs' claim for declaratory relief as to Count I of the Amended Complaint.

C. Severability

Since the Individual Mandate is unconstitutional, the next question is whether that provision is severable from the rest of the ACA. The Plaintiffs and the Federal Defendants agree, based on the text of 42 U.S.C. § 18091 and all the opinions in *NFIB*, that the guaranteed-issue and community-rating provisions of the ACA are inseverable from the Individual Mandate. *See* Pls.' Br. 30–35, ECF No. 40; Fed. Defs.' Resp. 13–16, ECF No. 92; Pls.' Reply 9, ECF No. 175. The Plaintiffs, however, argue the Individual Mandate is inseverable from the entire ACA, pointing again to § 18091 and *NFIB*. Pls.' Br. 27–40, ECF No. 40. The Intervenor Defendants first argue the Individual Mandate is severable from all provisions in the ACA. Intervenor Defs.' Resp. 28–33, ECF No. 91. But they also specifically urge that the guaranteed-issue and community-rating provisions are severable from the Individual Mandate. *Id.* at 33–43.

Notably, the parties dispute which Congress's intent controls—the 2010 Congress that passed the ACA or the 2017 Congress that passed the TCJA. *See* Pls.' Reply 14, ECF No. 175 (arguing the intent of the 2010 Congress controls); Intervenor Defs.' Resp. 28–30,

ECF No. 91 (contending the intent of the 2017 Congress controls); Hr'g Tr. at 43–44. This is a bit of a red herring because, applying the relevant standards, the Court finds both Congresses manifested the same intent: The Individual Mandate is inseverable from the entire ACA.

Because the story begins with the 2010 Congress, the Court begins there as well, analyzing both plain text and Supreme Court precedent. But first, a word about severability doctrine.

1. Severability Doctrine

The doctrine of severability is rooted in the separation of powers. *See Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329–30 (2006); *Regan v. Time, Inc.*, 468 U.S. 641, 652–53 (1984) (plurality opinion). The Supreme Court has therefore frequently severed unconstitutional provisions from constitutional ones.[20] This practice reflects a judicial duty to "try to limit the solution to the problem." *Ayotte*, 546 U.S. at 328. In other words, "a court should refrain from invalidating more of the statute than is necessary." *Regan*, 468 U.S. at 652.

Severability, however, is possible only where "an act of Congress contains unobjectionable provisions *separable* from those found to be unconstitutional." *Id.*

[20] *See, e.g.*, *Chadha*, 462 U.S. at 931–35 (severing the legislative-veto provision from the remainder of the Immigration and Nationality Act); *Alaska Airlines*, 480 U.S. at 684–97 (holding the legislative-veto provision severable from the remainder of the Airline Deregulation Act of 1978); *New York v. United States*, 505 U.S. at 186–87 (holding the take provision severable from the remainder of the Low-Level Radioactive Waste Policy Amendments Act of 1985); *Buckley v. Valeo*, 424 U.S. 1, 108–09 (1976) (holding campaign expenditure limits severable from other provisions in the Federal Election Campaign Act of 1971).

(quoting *El Paso & Ne. R. Co. v. Gutierrez*, 215 U.S. 87, 96 (1909)) (emphasis added). Were a court to overplay deference to sever an inseverable statute, it would embrace the very evil the doctrine is designed to deter. *See, e.g.*, *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 362 (1935) ("[W]e cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole."). Put bluntly, severing an inseverable statute "is legislative work beyond the power and function of the court." *Hill v. Wallace*, 259 U.S. 44, 70 (1922). For that reason, the Supreme Court has also readily held whole statutes unconstitutional due to an inseverable part.[21]

In light of these background principles, the test for severability is often stated as follows: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."[22]

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[21] *See, e.g.*, *Wallace*, 259 U.S. at 70 ("Section 4 with its penalty to secure compliance with the regulations of Boards of Trade is so interwoven with those regulations that they cannot be separated. None of them can stand."); *Alton*, 295 U.S. at 362 ("[W]e are confirmed by the petitioners' argument that, as to some of the features we hold unenforceable, it is 'unthinkable' and 'impossible' that the Congress would have created the compulsory pension system without them. They so affect the dominant aim of the whole statute as to carry it down with them."). *See also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) (applying "the severability standard for statutes" to an Executive Order and holding "it is clear that President Taylor intended the 1850 order to stand or fall as a whole").

[22] This statement of the rule represents something of a departure from the Supreme Court's reasoning in other decisions that there is a "presumption . . . of an intent that, unless the act operates as an entirety, it shall be wholly ineffective." *Alton*, 295 U.S. at 362

Alaska Airlines, 480 U.S. at 684. Even under this statement of the rule, "[t]he inquiry into whether a statute is severable is essentially an inquiry into legislative intent." *Mille Lacs*, 526 U.S. at 191.[23] It "requires judges to determine what Congress would have intended had it known that part of its statute was unconstitutional." *Murphy*, 138 S. Ct. at 1486–87 (Thomas, J., concurring). And consistent with the separation of powers, "enacted text is the best indicator of intent." *Nixon v. United States*, 506 U.S. 224, 232 (1993); *cf. United States v. Maturino*, 887 F.3d 716, 723 (5th Cir. 2018) ("Text is the alpha and the omega of the interpretive process.").

So, a court's severability analysis begins with a bread-and-butter exercise: parsing a provision's text and gleaning the ordinary meaning. *See Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring) ("Because courts cannot take a blue pencil to statutes, the severability doctrine must be an exercise in statutory interpretation."). If the text reflects Congress's intent that an unconstitutional provision not be severed—i.e., if "it is evident" Congress "would not have enacted those provisions which are within its power, independently of that which is not," *Alaska Airlines*, 480 U.S. at 684—the analysis ends. The provision is inseverable.

If the text does not reflect a clear legislative intent, however, the court must ask whether the constitutional provisions, severed from the unconstitutional

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(citing *Wallace*, 259 U.S. at 70). But even as stated in *Alton*, the crux of the inquiry is Congressional "intent."

[23] *See Murphy v. Nat'l Collegiate Athletic Ass'n,*, 138 S. Ct. 1461, 1485–87 (2018) (Thomas, J. concurring) (discussing the problems with applying the modern severability doctrine as a remedy rather than an exercise in statutory interpretation).

one, would remain "fully operative as a law." *Free Enterprise*, 561 U.S. at 509 (citing *New York*, 505 U.S. at 186; *Alaska Airlines*, 480 U.S. at 684). This is because "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently." *Alaska Airlines*, 480 U.S. at 684. Here too the touchstone is intent.

Applying these standards, the Court finds the 2010 Congress expressed through plain text an unambiguous intent that the Individual Mandate not be severed from the ACA. Supreme Court precedent supports that finding. And in passing the TCJA through the reconciliation process, the 2017 Congress further entrenched the intent manifested by the 2010 Congress.

2. The Intent of the 2010 Congress

The Intervenor Defendants contend that, "even if it were proper to consider the legislative intent of the 2010 Congress that passed the minimum coverage provision in its original . . . form— and to graft that intent onto a statutory amendment passed by a different Congress—that would still be of no assistance to Plaintiffs." Intervenor Defs.' Resp. 30, ECF No. 91. They first briefly point to the fact that several ACA provisions went into effect before the Individual Mandate. *Id.* at 31–32. They then argue that, "[i]n light of the ACA's numerous stand-alone provisions addressing a vast array of diverse topics, it is not remotely 'evident' that Congress would want the extraordinary disruption that would be caused by" a finding of inseverability. *Id.* at 32–33. Finally, the Intervenor Defendants devote ten pages to explaining why the Individual Mandate is specifically severable from the guaranteed-issue and community-rating provisions,

arguing Congress intended to end discriminatory underwriting practices and that Congress's findings are irrelevant as they focused on an adverse-selection problem that no longer exists. *Id.* at 33–43.

a. The ACA's Plain Text

"[T]he touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature." *Ayotte*, 546 U.S. at 330 (citation and quotation marks omitted). And if it is "the well-established rule that the plain language of the enacted text is the best indicator of intent," *Nixon*, 506 U.S. at 232, then the intent of the 2010 Congress could not be clearer. Congress codified its intent plainly in 42 U.S.C. § 18091, "Requirement to maintain minimum essential coverage; findings." Those findings are not mere legislative history—they are enacted text that underwent the Constitution's requirements of bicameralism and presentment; agreed to by both houses of Congress and signed into law by President Obama. *See INS v. Chadha*, 462 U.S. 919, 951 (1983) (noting "the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions" and "[i]t emerges clearly that the prescription for legislative action . . . represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure").

The findings state Congress intended to "significantly increas[e] healthcare coverage," "lower health insurance premiums," ensure that "improved health insurance products that are guaranteed issue," and ensure that such health insurance products "do not exclude coverage of pre-existing conditions." 42 U.S.C.

§ 18091(2)(I). And Congress intended to achieve those goals in a very specific way. Congress knew that "[i]n the absence of the requirement,[24] some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers." *Id.* § 18091(2)(A). So, Congress designed "[t]he requirement, *together* with the other provisions of this Act" to "add millions of new customers to the health insurance market." *Id.* § 18091(2)(C) (emphasis added).

"The requirement," Congress intended, would "achieve[] near-universal coverage"—a major goal of the ACA—"by building upon and strengthening the private employer-based health insurance system." *Id.* § 18091(2)(D). Congress believed this would work because "[i]n Massachusetts, a similar requirement ha[d] strengthened private employer-based coverage." *Id.* Moreover, Congress stated "the requirement, together with the other provisions of this Act, will significantly reduce [the] economic cost" caused by uninsured individuals. *Id.* § 18091(2)(E). Congress also intended the Individual Mandate to achieve another stated goal: "By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums." *Id.* § 18091(2)(F). And "the requirement, together with the other provisions of this Act," Congress stated, "will improve financial security for families." *Id.* § 18091(2)(G).

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[24] In § 18091, the Individual Mandate is "referred to as the 'requirement.'" *Id.* § 18091(1).

If there were any lingering doubt Congress intended the Individual Mandate to be inseverable, Congress removed it: "The requirement is an *essential* part of this larger regulation of economic activity, and *the absence of the requirement would undercut Federal regulation* of the health insurance market." *Id.* § 18091(2)(H) (emphasis added). That is because, "if there were no requirement, many individuals would wait to purchase health insurance until they needed care." *Id.* §18091(2)(I). And that would undermine the entire project. So, Congress intended "the requirement, together with the other provisions of this Act," to "minimize this adverse selection and broaden the health insurance risk pool . . . which will lower health insurance premiums." *Id.* In other words, "[t]he requirement 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." *Id.* (emphasis added).

Congress closed by adding that it intended "the requirement, together with the other provisions," to "significantly reduce administrative costs and lower health insurance premiums." *Id.* § 18091(2)(J). "The requirement is *essential*," Congress reiterated, "to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs." *Id.* (emphasis added).

All told, Congress stated three separate times that the Individual Mandate is *essential* to the ACA.[25] That is once, twice, three times and plainly. It also stated

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[25] *See supra* note 13 (defining "essential" as, among other imperatives, "the essence of its kind," "indispensable," and "[o]f the utmost importance; basic and necessary") (citations omitted).

the absence of the Individual Mandate would "undercut" its "regulation of the health insurance market." Thirteen different times, Congress explained how the Individual Mandate stood as the keystone of the ACA. And six times, Congress explained it was not just the Individual Mandate, but the Individual Mandate "together with the other provisions" that allowed the ACA to function as Congress intended.

As the Supreme Court has repeatedly explained, "The best evidence of congressional intent . . . is the statutory text that Congress enacted."[26] *Marx v. Gen.*

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[26] It is also instructive to consider what text Congress did not enact. In *NFIB*, the Supreme Court held that the unconstitutional portions of the ACA's Medicaid-expansion provisions could be severed from the constitutional portions because Congress included a severability clause. *See NFIB*, 567 U.S. at 585–86 (Roberts, C.J., joined by Breyer and Kagan, JJ.); *id.* at 645 (Ginsburg, J., joined by Sotomayor, J.). In severing the unconstitutional portions of the Medicaid-expansion provisions, the Supreme Court was "follow[ing] Congress's explicit textual instruction." *Id.* at 586 (Roberts, C.J., joined by Breyer and Kagan, JJ.); *accord id.* at 645 (Ginsburg, J., joined by Sotomayor, J.) ("I agree . . . that the Medicaid Act's *severability clause* determines the appropriate remedy." (emphasis added)). The Supreme Court's Medicaid-severability analysis in *NFIB* thus supports this Court's finding of Individual Mandate inseverability in two ways. First, it confirms the Court must foremost look to Congress's "explicit textual instruction"—here, that the mandate is "essential" to the ACA. *See* 42 U.S.C. § 18091(2). Second, it confirms Congress knew exactly how to signal its intent that an offending ACA provision be severed from non-offending provisions—i.e., through enacted text. *Cf. Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))). Yet Congress sent up

Revenue Corp., 568 U.S. 371, 392 n.4 (2013) (citing *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991)).[27] On the issue of severability, the text of the ACA is unequivocal. Virtually every subsection of 42 U.S.C.§ 18091 is teeming with Congress's intent that the Individual Mandate be inseverable—because it is *essential*—from the entire ACA—because it must work *together* with the other provisions.

On the unambiguous enacted text alone, the Court finds the Individual Mandate is inseverable from the Act to which it is essential.[28]

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no such signals anywhere in the ACA with respect to the Individual Mandate. While not dispositive, the lack of a severability clause covering the Individual Mandate is therefore not only consistent with Congress's repeated statements that the Individual Mandate is "essential" to the ACA but also probative of Congress's intent on its own terms.

[27] *See also EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188, 1190 (5th Cir. 1984) (noting severability requires "the court [to] inquire into whether Congress would have enacted the remainder of the statute in the absence of the invalid provision" and reasoning "Congressional intent and purpose are best determined by an analysis of the language of the statute in question").

[28] *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (reasoning statutory construction "ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent" (cleaned up)); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241–42 (1989); *Rubin v. United States*, 449 U.S. 424, 430 (1981); *United States v. Goldenberg*, 168 U.S. 95, 102–03

b. The Supreme Court's ACA Decisions

While the ACA's plain text alone justifies finding complete inseverability, this text-based conclusion is further compelled by two separate Supreme Court decisions. All nine Justices to address the issue, for example, agreed the Individual Mandate is inseverable from at least the pre-existing-condition provisions.[29] In *NFIB*, Chief Justice Roberts explained "Congress addressed the problem of those who cannot obtain insurance coverage because of preexisting conditions or other health issues . . . through the [ACA's] 'guaranteed-issue' and 'community-rating' provisions." *NFIB*, 567 U.S. at 547–48 (Roberts, C.J.). But these "reforms

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(1897); and *Oneale v. Thornton*, 6 Cranch 53, 68 (1810))).

[29] The Federal Defendants here are consistent in taking the same position the previous administration took during the *NFIB* litigation. *See* Br. for Resp. (Severability) at 45, *NFIB,* 567 U.S. 519 (No. 11-393) ("Congress's findings establish that the guaranteed-issue and community-rating provisions are inseverable from the minimum coverage provision."); *id*. at 11; *see also* Memorandum from Att'y Gen. Jefferson B. Sessions III for Speaker Paul Ryan (June 7, 2018) (on file with the Dep't of Justice) (noting that, "[i]n *NFIB*, the Department previously argued that if Section 5000A(a) is unconstitutional, it is severable from the ACA's other provisions, except" the guaranteed-issue and community-rating provisions). Also notable is that many of the Intervenor Defendants appeared as amici in *NFIB* and expressly declined to challenge the Government's concession that the community-rating and guaranteed-issue provisions were inseverable from the Individual Mandate. *See* Br. for California et al. as Amici Curiae Supporting Respondents at 3 n.2, *NFIB*, 567 U.S. 519 (No. 11-393) ("Respondents have conceded that the guaranteed issue and community rating provisions that go into effect in 2014 should be invalidated if the Court concludes the minimum coverage provision is unconstitutional. Amici States do not seek to challenge this concession."). But that was then, and this is now.

sharply exacerbate [the] problem" of healthy individuals foregoing health insurance. *Id.* at 548. "The reforms also threaten to impose massive new costs on insurers," the Chief Justice continued. *Id.* "The individual mandate was Congress's solution to these problems. By requiring that individuals purchase health insurance, the mandate prevents cost shifting . . . [and] allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept." *Id.* The Individual Mandate, the Chief Justice thus explained, was the fulcrum on which the macro-level trade-offs pivoted.

Justice Ginsburg, joined by Justices Breyer, Kagan, and Sotomayor, agreed. She wrote: "To make its chosen approach work . . . Congress *had* to use some new tools, *including a requirement* that most individuals obtain private health insurance coverage." *Id.* at 596 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ.) (citing 26 U.S.C.§ 5000A) (emphasis added). She elaborated: "To ensure that individuals with medical histories have access to affordable insurance, Congress devised a three-part solution." *Id.* at 597. Part one: guaranteed issue. *Id.* Part two: community rating. *Id.* "But these two provisions, Congress comprehended, *could not work* effectively unless individuals were given a powerful incentive to obtain insurance." *Id.* (emphasis added). Congress drew this lesson from the "disastrous" results of seven different states that experienced "skyrocketing insurance premium costs, reductions in individuals with coverage, and reductions in insurance products and providers" after "enact[ing] guaranteed-issue and community-rating laws without requiring universal acquisition of insurance coverage." *Id.* at 597–98 (citations and quotation marks omitted).

Based on these lessons, "Congress comprehended that guaranteed-issue and community-rating laws *alone will not work*." *Id.* at 598 (emphasis added). So, taking a cue from Massachusetts, "Congress passed the minimum coverage provision as a *key component* of the ACA." *Id.* at 599 (emphasis added). As did the Chief Justice, then, Justices Ginsburg, Breyer, Kagan, and Sotomayor all understood what Congress understood: Without the Individual Mandate, the guaranteed-issue and community-rating provisions "could not work."

Make that nine Justices. As the joint dissent explained, "Insurance companies bear new costs imposed by a collection of insurance regulations and taxes, including 'guaranteed issue' and 'community rating' requirements to give coverage regardless of the insured's pre-existing conditions." *Id.* at 695 (joint dissent). But, keeping with the careful balance described by the other Justices, "the insurers benefit from the new, healthy purchasers who are forced by the Individual Mandate to buy the insurers' product and from the new low-income Medicaid recipients who will enroll in insurance companies' Medicaid-funded managed care programs." *Id.* at 695–96. Because the Supreme Court held the ACA's Medicaid Expansion could not be compulsory, *see id.* at 575–85 (Roberts, C.J.), the Court's finding today that the Individual Mandate is unconstitutional means both components the joint dissenters found to be inseverable from the pre-existing-conditions provisions have now fallen.

In *King v. Burwell*, the Supreme Court reaffirmed many of the Justices' severability conclusions from *NFIB*. *See* 135 S. Ct. 2480, 2485–87 (2015). There, a six-Justice majority recounted the history of several

states attempting to expand health-insurance coverage without implementing a mandate—an experiment that repeatedly "led to an economic 'death spiral.'" *Id.* at 2486. It then explained what all nine Justices in *NFIB* expressed: the guaranteed-issue provision, the community-rating provision, and the Individual Mandate "are closely intertwined." *Id.* at 2487. And citing directly to Congress's findings for support,[30] the Supreme Court stated unequivocally: "Congress found that the guaranteed issue and community rating requirements *would not work* without the coverage requirement." *Id.* (citing 42 U.S.C. § 18091(2)(I)) (emphasis added).

So, after *King*, the Government[31] and all nine Justices had agreed that *at least* the guaranteed-issue and community-rating provisions "could not work" without the Individual Mandate.[32] And all of them cited Congress's findings in reaching that conclusion.

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[30] As noted above, the Intervenor Defendants argue Congress's ACA findings are no longer relevant to severability because they addressed only how the ACA would be *created*, not how it would work. *See* Intervenor Defs,' Resp. 39–43, ECF No. 91. But the Supreme Court relied on those findings in 2015—after the ACA was up and running—when deciding *King*. *See* 135 S. Ct. at 2487.

[31] *See* Randy Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 614–21 (2010) (detailing the Government's position leading up to the *NFIB* litigation that the Individual Mandate was constitutional under the Interstate Commerce Clause because it was "essential" to "a broader regulatory scheme").

[32] The Intervenor Defendants nearly agree. *See* Intervenor Defs,' Resp. 37, ECF No. 91 ("To be sure, Congress intended that the requirement to purchase health insurance, along with the com-

But the reasoning in the above opinions also confirms the Individual Mandate is inseverable from the *entirety* of the ACA. *See, e.g.*, *King*, 135 S. Ct. at 2486 (noting the successful Massachusetts model used by Congress relied not only on a mandate but instead on "[t]he combination of these three reforms—insurance market regulations, a coverage mandate, *and tax credits*" (emphasis added)). Notably, the joint dissent in *NFIB* was the only block of Justices to fully consider severability because it was the only block of Justices to find the Individual Mandate unconstitutional—which is now the controlling framework. And they explained why the Individual Mandate was inseverable from the ACA as a whole. That explanation is consistent with the reasoning offered in the Chief Justice's opinion and in Justice Ginsburg's opinion.

The joint dissent first detailed how "[t]he whole design of the [ACA] is to balance the costs and benefits affecting each set of regulated parties." *Id*. at 694; *accord id*. at 548 (Roberts, C.J.) (noting "the mandate prevents cost shifting"); *id*. at 593 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ.) (noting Congress wanted to address "[t]hose with health insurance subsidiz[ing] the medical care of those without it"). To that end, "individuals are required to obtain health insurance"; insurers must "sell them insurance regardless of . . . pre-existing conditions and . . . comply with a host of other regulations . . . [and] pay new taxes"; "States are expected to expand Medicaid eligibility and to create regulated marketplaces"; "[s]ome persons who cannot afford insurance are provided it through the Medicaid Expansion, and others are aided

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munity-rating and guaranteed-issue provisions, would work together harmoniously to increase the number of insured Americans and lower premiums.").

in their purchase of insurance through federal subsidies"; "[t]he Federal Government's increased spending is offset by new taxes and cuts in other federal expenditures"; and certain employers "must either provide employees with adequate health benefits or pay a financial exaction." *Id.* at 694–95 (joint dissent) (citations omitted). "In short," the joint dissent explained, "the Act attempts to achieve near-universal health insurance coverage by spreading its costs to individuals, insurers, governments, hospitals, and employers—while, at the same time, offsetting significant portions of those costs with new benefits to each group." *Id.* at 695; *accord id.* at 596 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ.) ("A central aim of the ACA is to reduce the number of uninsured U.S. residents . . . The minimum coverage provision advances this objective." (citing 42 U.S.C. §§ 18091(2)(C) and (I))). Congress, in other words, "did not intend to impose the inevitable costs on any one industry or group of individuals." *Id.* at 694 (joint dissent); *accord id.* at 548 (Roberts, C.J.) (noting "the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses" which "allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept").

As the joint dissent concluded, "the Act's major provisions are interdependent." *Id.* at 696 (joint dissent). Indeed, the ACA "refers to these interdependencies as 'shared responsibility.'" *Id.* (citations omitted). And the joint dissent cited Congress's findings to buttress its conclusion on the Individual Mandate's complete inseverability, noting that "[i]n at least six places, the Act describes the Individual Mandate as working 'together with the other provisions of this Act.'" *Id.* (citing 42 U.S.C. §§ 18091(2)(C), (E), (F), (G), (I), and (J)).

The joint dissent further noted that the ACA "calls the Individual Mandate 'an essential part' of federal regulation of health insurance and warns that 'the absence of the requirement would undercut Federal regulation of the health insurance market.'" *Id.* (citing 42 U.S.C. § 18091(2)(H)).

"In sum, Congress passed the minimum coverage provision *as a key component of the ACA*." *Id.* at 599 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ.) (emphasis added); *accord id.* at 539 (majority) ("This case concerns constitutional challenges to two *key provisions*, commonly referred to as the individual mandate and the Medicaid expansion." (emphasis added)). Not a key component of the guaranteed-issue and community-rating provisions, but of the ACA. The Supreme Court's only reasoning on the topic thus supports what the text says: The Individual Mandate is essential to the ACA.

c. The Individual Mandate is Inseverable from the Entire ACA

The ACA's text and the Supreme Court's decisions in *NFIB* and *King* thus make clear the Individual Mandate is inseverable from the ACA. As Justice Ginsburg explained, "Congress could have taken over the health-insurance market by establishing a tax-and-spend federal program like Social Security." *Id.* at 595 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ.). But it did not. "Instead of going this route, Congress enacted the ACA . . . To make its chosen approach work, however, Congress had to use . . . a requirement that most individuals obtain private health insurance coverage." *Id.* (citing 26 U.S.C. § 5000A). That requirement—the Individual Mandate—was *essential* to the ACA's architecture. Congress intended it to place the Act's myriad parts in

perfect tension. Without it, Congress and the Supreme Court have stated, that architectural design fails. "Without a mandate, premiums would skyrocket. The guaranteed issue and community rating provisions, in the absence of the individual mandate, would create an unsustainable death spiral of costs, thus crippling the entire law." BLACKMAN, *supra* note 3, at 147; *accord NFIB*, 567 U.S. at 597 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ.) (noting the mandate was essential to staving off "skyrocketing insurance premium costs"). Congress simply never intended failure.

Yet the parties focus on particular provisions. It is like watching a slow game of Jenga, each party poking at a different provision to see if the ACA falls. Meanwhile, Congress was explicit: The Individual Mandate is *essential* to the ACA, and that essentiality requires the mandate to work *together* with the Act's other provisions. *See* 42 U.S.C. § 18091. If the "other provisions" were severed and preserved, they would no longer be working *together* with the mandate and therefore no longer working as Congress intended. On that basis alone, the Court must find the Individual Mandate inseverable from the ACA. To find otherwise would be to introduce an entirely new regulatory scheme never intended by Congress or signed by the President. And the Court "cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." *Murphy*, 138 S. Ct. at 1482 (quoting *Alton*, 295 U.S. at 362).

Even if the Court preferred to ignore the clear text of § 18091 and parse the ACA's provisions one by one, the text- and precedent-based conclusion would only be reinforced: Upholding the ACA in the absence of the Individual Mandate would change the "effect" of the

ACA "as a whole." *See Alton*, 295 U.S. at 362. For example, the Individual Mandate reduces the financial risk forced upon insurance companies and their customers by the ACA's major regulations and taxes. *See* 42 U.S.C. §§ 18091(2)(C), (I). If the regulations and taxes were severed from the Individual Mandate, insurance companies would face billions of dollars in ACA-imposed regulatory and tax costs without the benefit of an expanded risk pool and customer base—a choice no Congress made and one contrary to the text. *See NFIB*, 567 U.S. at 698 (joint dissent); 42 U.S.C. § 18091(2)(C) and (I). Similarly, the ACA "reduce[d] payments by the Federal Government to hospitals by more than $200 billion over 10 years." *NFIB*, 567 U.S. at 699 (joint dissent). Without the Individual Mandate (or forced Medicaid expansion), hospitals would encounter massive losses due to providing uncompensated care. *See* BLACKMAN, *supra* note 3, at 2–4 (discussing the free-rider and cost-shifting problems in healthcare). This would, as Plaintiffs argue, "distort the ACA's design of 'shared responsibility.'" Pls.' Br. 36, ECF No. 40 (citing *NFIB*, 567 U.S. at 699 (joint dissent)).

The story is the same with respect to the ACA's other major provisions, too. The ACA allocates billions of dollars in subsidies to help individuals purchase a government-designed health-insurance product on exchanges established by the States (or the federal government). *See, e.g.*, 26 U.S.C. § 36B; 42 U.S.C. § 18071. But if the Individual Mandate falls, and especially if the pre-existing-condition provisions fall, upholding the subsidies and exchanges would transform the ACA into a law that subsidizes the kinds of discriminatory products Congress sought to abolish at, presumably, the re-inflated prices it sought to suppress. *Cf. Williams v. Standard Oil Co. of Louisiana,* 278 U.S. 235,

244 (1929), *overruled in part on other grounds by Olsen v. Nebraska ex rel. W. Reference & Bond Ass'n*, 313 U.S. 236 (1941) ("The taxes imposed by section 10 are solely for the purpose of defraying the expenses of the division of motors and motor fuels, and since the functions of that division practically come to an end with the failure of the price-fixing features of the law, it is unreasonable to suppose that the Legislature would be willing to authorize the collection of a fund for a use which no longer exists.").

Nor did Congress ever contemplate, never mind intend, a duty on employers, *see* 26 U.S.C. § 4980H, to cover the "skyrocketing insurance premium costs" of their employees that would inevitably result from removing "a key component of the ACA." (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ.). And the Medicaid-expansion provisions were designed to serve and assist fulfillment of the Individual Mandate and offset reduced hospital reimbursements by aiding "low-income individuals who are simply not able to obtain insurance." *Id.* at 685 (joint dissent).

The result is no different with respect to the ACA's minor provisions. For example, the Intervenor Defendants assert that, "[i]n addition to protecting consumers with preexisting medical conditions, Congress also enacted the guaranteed-issue and community-rating provisions to reduce administrative costs and lower premiums." Intervenor Defs.' Resp. 35, ECF No. 91; *see also id.* at 34 ("Congress independently sought to end discriminatory underwriting practices and to lower administrative costs."). But Congress stated explicitly that the Individual Mandate "is *essential* to creating effective health insurance markets that *do not require underwriting* and *eliminate its associated*

administrative costs." 42 U.S.C. § 18091(2)(J) (emphasis added). At any rate, to the extent most of the minor provisions "are mere adjuncts of the" now-unconstitutional Individual Mandate and nonmandatory Medicaid expansion, "or mere aids to their effective execution," if the Individual Mandate "be stricken down as invalid" then "the existence of the [minor provisions] becomes without object." *Williams*, 278 U.S. at 243.

Perhaps it is impossible to know which minor provisions Congress would have passed absent the Individual Mandate. But the level of legislative guesswork entailed in reconstructing the ACA's innumerable trade-offs without the one feature Congress called "essential" is plainly beyond the judicial power. *See Alton*, 295 U.S. at 362; *Wallace*, 259 U.S. at 70. And there is every reason to believe Congress would not have enacted the ACA absent the Individual Mandate—given the Act's text as interpreted by the Supreme Court—but "no reason to believe that Congress would have enacted [the minor provisions] independently." *NFIB,* 567 U.S. at 705 (joint dissent).

In sum, the Individual Mandate "is so interwoven with [the ACA's] regulations that they cannot be separated. None of them can stand." *Wallace*, 259 U.S. at 70.

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Neither the ACA's text nor Supreme Court precedent leave any doubt. The 2010 Congress never intended the ACA "to impose massive new costs on insurers" while allowing widespread "cost shifting." *Id*. at 548 (Roberts, C.J.). It never intended the ACA to go on without the signature provision that everyone knew would "make its chosen approach work"—the

signature provision Congress "had to use." *Id.* at 596 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ.). It never agreed to a law that would lead to "disastrous" results like "skyrocketing insurance premium costs, reductions in individuals with coverage, and reductions in insurance products and providers." *Id.* at 597–98 (citations and quotation marks omitted). And Congress never intended to excise "a key component of the ACA." *Id.* at 599.

Historical context confirms Congress would not have enacted the ACA absent the constitutional infirmities.[33] *See Free Enterprise*, 561 U.S. at 509 (considering "the statute's text" and "historical context"). Every state's attempt to do so failed miserably. *See King*, 135 S. Ct. at 2485–86. To leave the ACA in place without the Individual Mandate—or, even more drastically, to leave it in place without either the Individual Mandate or the provisions covering pre-existing conditions as the Federal Defendants suggest—would thus be wildly inconsistent "with Congress' basic objectives in enacting the statute." *Booker,* 543 U.S. at 259 (citing *Regan*, 468 U.S. at 653).

This tells the Court all it needs to know. Based on unambiguous text, Supreme Court guidance, and historical context, the Court finds "it is evident that the Legislature would not have enacted" the ACA "independently of" the Individual Mandate. *Alaska Airlines*, 480 U.S. at 684. That is to say, Congress "would not have enacted those provisions which are within its power, independently of [those] which [are] not." *Murphy*, 138 S. Ct. at 1482 (quoting *Alaska Airlines*, 480

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[33] *See, id.* ("In coupling the minimum coverage provision with guaranteed-issue and community-rating prescriptions, Congress followed Massachusetts' lead.").

U.S. at 684). "Though this inquiry can sometimes be elusive, the answer here seems clear." *Free Enterprise*, 561 U.S. at 509 (cleaned up). Congress intended the Individual Mandate to serve as the keystone, the linchpin of the ACA. That is a conclusion the Court can reach without marching through every nook and cranny of the ACA's 900-plus pages because Congress plainly told the public when it wrote the ACA that "[t]he minimum coverage provision is . . . an 'essential par[t] of a larger regulation of economic activity'" and "without the provision, 'the regulatory scheme [w]ould be undercut.'" *NFIB*, 567 U.S. at 619 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ.) (quoting but not citing Congress's findings in 42 U.S.C. § 18091).

In the face of overwhelming textual and Supreme Court clarity, the Court finds "it is 'unthinkable' and 'impossible' that the Congress would have created the" ACA's delicately balanced regulatory scheme without the Individual Mandate. *Alton*, 295 U.S. at 362. The Individual Mandate "so affect[s] the dominant aim of the whole statute as to carry it down with" it. *Id*. To find otherwise would "rewrite [the ACA] and give it an effect altogether different from that sought by the measure viewed as a whole." *Alton*, 295 U.S. at 362. Employing such a strained view of severance would be tantamount to "legislative work beyond the power and function of the court." *Wallace*, 259 U.S. at 70.

3. The Intent of the 2017 Congress

Looking for any severability-related intent in the 2017 Congress is a fool's errand because the 2017 "Congress did not repeal any part of the ACA, including the shared responsibility payment. In fact, it could not do so through the budget reconciliation procedures

that it used." Hr'g Tr. at 36:7–10 (Intervenor Defendants); *accord id.* at 98:1–3 (Federal Defendants) ("The only thing that we know for sure about Congress' intent in 2017 . . . is that Congress wanted to pass a tax cut."). So, asking what the 2017 Congress intended with respect to the ACA qua the ACA is unhelpful. There is no answer.

But suppose it is true the intent of the TCJA-enacting Congress of 2017 controls severability rather than the intent of the ACA-enacting Congress of 2010. The Intervenor Defendants argue the Court should infer that, by eliminating the shared-responsibility payment while leaving the rest of the ACA intact, the 2017 Congress intended to preserve the balance of the ACA. Intervenor Defs.' Resp. 28–30, ECF No. 91; Hr'g Tr. at 42:10–11 ("The 2017 Congress that amended § 5000A(c) deliberately left the rest of the ACA intact . . . .").

But consider what Congress did *not* do in 2017—or ever. First and foremost, it did not repeal the Individual Mandate. As the Court described in great detail, *see supra* Part IV.B.1.a, the shared-responsibility payment is not the Individual Mandate. That matters. The Individual Mandate, not the shared-responsibility payment, is "essential" to the ACA. *See* 42 U.S.C. § 18091. And the 2017 Congress did not repeal it. *Accord* Hr'g Tr. at 42:10–11 (Intervenor Defendants) ("The 2017 Congress that amended § 5000A(c) deliberately left the rest of the ACA intact . . . ."). So, at best, searching the 2017 Congress's legislation for severability-related intent would create an inference that the 2017 Congress, like the 2010 Congress, intended to preserve the Individual Mandate because the 2017 Congress, like the 2010 Congress, knew that provision

is essential to the ACA. Intervenor Defendants' argument that the 2017 Congress manifested an intent of severability is therefore unavailing. Indeed, one would have to take the incorrect view that the shared-responsibility payment *is* the Individual Mandate to accept the argument that the 2017 Congress, by eliminating the *payment*, intended to sever the *Individual Mandate.*

Secondly, the 2017 Congress did not repeal 42 U.S.C. § 18091, which every Supreme Court Justice to review the ACA cited and which definitively establishes Congress's intent that the Individual Mandate be "an essential part of" its "regulation of the health insurance market." 42 U.S.C. § 18091(2)(H); *see generally supra* Part IV.C.1.a. Finally, given the 2017 Congress repealed neither the Individual Mandate nor § 18091, the 2017 Congress did nothing to repudiate or otherwise supersede the Supreme Court's *NFIB* and *King* opinions detailing the Individual Mandate's essentiality to the ACA.

The Intervenor Defendants thus ask the Court to infer a severability-related intent from a Congress that did not and could not amend the ACA and that therefore did not and could not repeal the Individual Mandate or the enacted text stating the mandate is "essential" to the whole scheme when working "together with the other provisions." They then ask the Court "to graft that intent" onto the Congress that *did* pass the ACA, that *did* employ the Individual Mandate as the keystone, and that *did* memorialize its intent through enacted text stating the Individual Mandate is essential.

The Court finds the 2017 Congress had no intent with respect to the Individual Mandate's severability. But even if it did, the Court would find that "here we

know exactly what Congress intended based on what Congress actually did." Hr'g Tr. at 42:8–10 (Intervenor Defendants). If the 2017 Congress had any relevant intent, it was to preserve § 18091 and to preserve the Individual Mandate, which the 2017 Congress must have agreed was essential to the ACA.

4. Severability Conclusion[34]

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[34] The Intervenor Defendants also argue the Court should forego a traditional severability analysis and instead remedy the harm to Plaintiffs by striking TCJA § 11081. Intervenor Defs.' Resp. 22–24, ECF No. 91. For this, the Intervenor Defendants rely on *Frost v. Corporation Commission of Oklahoma*, a case in which the Supreme Court held that "when a *valid* statute is amended and the *amendment is unconstitutional*, the amendment 'is a nullity and, therefore, powerless to work any change in the existing statute . . . .'" 278 U.S. 515, 525–27 (1928) (citation omitted) (emphasis added). *Frost* is inapposite. There, the Appellant challenged the amendment, not the original statute, on equal-protection grounds and won. *Id.* at 517, 523–24. The Supreme Court held the amendment to be "a nullity," not because it rendered the original statute unconstitutional but because it was unconstitutional itself. *Id.* at 526 (reasoning that because "the *amendment* is void for unconstitutionality, it cannot be given" "its practical effect [which] would be to repeal *by implication* the requirement of the existing statute in respect of public necessity" (emphasis added)). The original statute therefore was permitted to "stand as the only valid expression of legislative intent." *Id.* at 527. But here, the Plaintiffs challenge the original statute, not the TCJA. Nor would it make sense for them to challenge the TCJA—Congress has plenary power to lay and repeal taxes, as the Intervenor Defendants argue. *See, e.g.*, Intervener Defs.' Resp. 19, ECF No. 91 ("In light of the broad taxing power afforded by the Constitution, it is not unusual for Congress to enact taxes with delayed effective dates . . . ."); *accord* Pls.' Reply 13–14, ECF No. 175 (citing *Brushaber v. Union Pac. R.R. Co.,* 240 U.S. 1, 12 (1916)); Hr'g Tr. at 72:23–24. Plus, the TCJA repeals nothing "by implication." And at any rate, *Frost* is not a license for courts to

In some ways, the question before the Court involves the intent of both the 2010 and 2017 Congresses. The former enacted the ACA. The latter sawed off the last leg it stood on. But however one slices it, the following is clear: The 2010 Congress memorialized that it knew the Individual Mandate was the ACA keystone, *see* 42 U.S.C. § 18091; the Supreme Court stated repeatedly that it knew Congress knew that, *see, e.g.*, *NFIB*, 567 U.S. at 547 (Roberts, C.J.) (citing 42 U.S.C. § 18091(2)(F)); *King*, 135 S. Ct. at 2487 (citing 42 U.S.C. § 18091(2)(I)); and knowing the Supreme Court knew what the 2010 Congress had known, the 2017 Congress did not repeal the Individual Mandate and did not repeal § 18091.

"The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787." *Chadha*, 462 U.S. at 946 (quoting *Buckley*, 424 U.S. at 124). For that reason, the Court respects Congress's

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reach out and hold unchallenged constitutional acts unconstitutional as a remedial safety valve. *See* Josh Blackman, *Undone: the New Constitutional Challenge to Obamacare*, 23 TEX. REV. L. & POL. (forthcoming 2018) (manuscript at 35–36) ("*Frost*'s bite is not available in *Texas v. United States* for a simple reason. Because of how Texas structured its challenge, the district court is presented with a narrower menu of options with respect to severability. No one—not the Plaintiffs, not the Intervenors—has challenged the constitutionality of the TCJA. Federal courts lack a roving license to flip through the U.S. Code with a red pencil to void one statute in order to save another. Invalidating the 2017 tax cut is simply not an option in the Texas litigation because it has not been challenged." (citations omitted)). To the extent *Frost* is relevant here, it stands only for the proposition that a court should hold unconstitutional acts invalid and constitutional ones valid. The unconstitutional act in this case is the Individual Mandate, not the TCJA.

plain language. And here, "[t]he language is plain. There is no room for construction, unless it be as to the effect of the Constitution." *In re Trade-Mark Cases*, 100 U.S. 82, 99 (1879). "To limit this statute in the manner now asked for," therefore "would be to make a new law, not to enforce an old one. This is no part of [the Court's] duty." *Id.*

The Court finds the Individual Mandate "is essential to" and inseverable from "the other provisions of" the ACA.

V. CONCLUSION

For the reasons stated above, the Court grants Plaintiffs partial summary judgment and declares the Individual Mandate, 26 U.S.C. § 5000A(a), **UNCONSTITUTIONAL.** Further, the Court declares the remaining provisions of the ACA, Pub. L. 111-148, are **INSEVERABLE** and therefore **INVALID**. The Court **GRANTS** Plaintiffs' claim for declaratory relief in Count I of the Amended Complaint.

SO ORDERED on this **14th** day of **December, 2018.**

/s/ Reed O'Connor
Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX F

1. U.S. Const. art. I § 8, cl. 1 provides:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

2. U.S. Const. art. I § 8, cl. 3 provides:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

3. 26 U.S.C. § 5000A provides:

(a) Requirement to maintain minimum essential coverage.—An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

(b) Shared responsibility payment.—

(1) In general.—If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).

(2) Inclusion with return.—Any penalty imposed by this section with respect to any month shall

be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

(3) Payment of penalty.--If an individual with respect to whom a penalty is imposed by this section for any month–

(A) is a dependent (as defined in section 152) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

(B) files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

(c) Amount of penalty.—

(1) In general.—The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of—

(A) the sum of the monthly penalty amounts determined under paragraph (2) for months in the taxable year during which 1 or more such failures occurred, or

(B) an amount equal to the national average premium for qualified health plans which have a bronze level of coverage, provide coverage for the applicable family size involved, and are offered through Exchanges for plan years beginning in the calendar year with or within which the taxable year ends.

(2) Monthly penalty amounts.—For purposes of paragraph (1)(A), the monthly penalty amount with respect to any taxpayer for any month during which any failure described in subsection (b)(1) occurred is an amount equal to 1 /12 of the greater of the following amounts:

(A) Flat dollar amount.—An amount equal to the lesser of—

(i) the sum of the applicable dollar amounts for all individuals with respect to whom such failure occurred during such month, or

(ii) 300 percent of the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

(B) Percentage of income.—An amount equal to the following percentage of the excess of the taxpayer's household income for the taxable year over the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer for the taxable year:

(i) 1.0 percent for taxable years beginning in 2014.

(ii) 2.0 percent for taxable years beginning in 2015.

(iii) Zero percent for taxable years beginning after 2015.

(3) Applicable dollar amount.—For purposes of paragraph (1)—

(A) In general.—Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $0.

(B) Phase in.—The applicable dollar amount is $95 for 2014 and $325 for 2015.

(C) Special rule for individuals under age 18.—If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for

the month shall be equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.

[**(D) Repealed.** Pub.L. 115-97, Title I, § 11081(a)(2)(B), Dec. 22, 2017, 131 Stat. 2092]

(4) Terms relating to income and families.—For purposes of this section—

(A) Family size.—The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year.

(B) Household income.—The term "household income" means, with respect to any taxpayer for any taxable year, an amount equal to the sum of—

(i) the modified adjusted gross income of the taxpayer, plus

(ii) the aggregate modified adjusted gross incomes of all other individuals who--

(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

(II) were required to file a return of tax imposed by section 1 for the taxable year.

(C) Modified adjusted gross income.—The term "modified adjusted gross income" means adjusted gross income increased by—

(i) any amount excluded from gross income under section 911, and

(ii) any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax.

[**(D) Repealed.** Pub.L. 111-152, Title I, § 1002(b)(1), Mar. 30, 2010, 124 Stat. 1032]

(d) Applicable individual.—For purposes of this section—

(1) In general.—The term "applicable individual" means, with respect to any month, an individual other than an individual described in paragraph (2), (3), or (4).

(2) Religious exemptions.—

(A) Religious conscience exemptions.—

(i) In general.—Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act which certifies that—

(I) such individual is a member of a recognized religious sect or division thereof which is described in section 1402(g) (1), and is adherent of established tenets or teachings of such sect or division as described in such section; or

(II) such individual is a member of a religious sect or division thereof which is not described in section 1402(g)(1), who relies solely on a religious method of healing, and for whom the acceptance of medical health services would be inconsistent with the religious beliefs of the individual.

(ii) Special rules.—

(I) Medical health services defined.—For purposes of this subparagraph, the term "medical

health services" does not include routine dental, vision and hearing services, midwifery services, vaccinations, necessary medical services provided to children, services required by law or by a third party, and such other services as the Secretary of Health and Human Services may provide in implementing section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act.

(II) Attestation required.—Clause (i)(II) shall apply to an individual for months in a taxable year only if the information provided by the individual under section 1411(b)(5)(A) of such Act includes an attestation that the individual has not received medical health services during the preceding taxable year.

(B) Health care sharing ministry.—

(i) In general.—Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

(ii) Health care sharing ministry.—The term "health care sharing ministry" means an organization—

(I) which is described in section 501(c)(3) and is exempt from taxation under section 501(a),

(II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,

(III) members of which retain membership even after they develop a medical condition,

(IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999,

and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and

(V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

(3) Individuals not lawfully present.—Such term shall not include an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.

(4) Incarcerated individuals.—Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

(e) Exemptions.—No penalty shall be imposed under subsection (a) with respect to—

(1) Individuals who cannot afford coverage.—

(A) In general.—Any applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act. For purposes of applying this subparagraph, the taxpayer's household income shall be increased by any exclusion from gross income for any portion of the required contribution made through a salary reduction arrangement.

(B) Required contribution.—For purposes of this paragraph, the term "required contribution" means—

(i) in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-employer-sponsored plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage, or

(ii) in the case of an individual eligible only to purchase minimum essential coverage described in subsection (f)(1) (C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified health plan through the Exchange), reduced by the amount of the credit allowable under section 36B for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

(C) Special rules for individuals related to employees.—For purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination under subparagraph (A) shall be made by reference to required contribution of the employee.

(D) Indexing.—In the case of plan years beginning in any calendar year after 2014, subparagraph (A) shall be applied by substituting for "8 percent" the percentage the Secretary of Health and Human Services determines reflects the excess of the

rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period.

(2) Taxpayers with income below filing threshold.—Any applicable individual for any month during a calendar year if the individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act is less than the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer.

(3) Members of Indian tribes.—Any applicable individual for any month during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6)).

(4) Months during short coverage gaps.—

(A) In general.— Any month the last day of which occurred during a period in which the applicable individual was not covered by minimum essential coverage for a continuous period of less than 3 months.

(B) Special rules.—For purposes of applying this paragraph—

(i) the length of a continuous period shall be determined without regard to the calendar years in which months in such period occur,

(ii) if a continuous period is greater than the period allowed under subparagraph (A), no exception shall be provided under this paragraph for any month in the period, and

(iii) if there is more than 1 continuous period described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph shall only apply to months in the first of such periods.

The Secretary shall prescribe rules for the collection of the penalty imposed by this section in cases where continuous periods include months in more than 1 taxable year.

(5) Hardships.—Any applicable individual who for any month is determined by the Secretary of Health and Human Services under section 1311(d)(4)(H) to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

(f) Minimum essential coverage.—For purposes of this section—

(1) In general.—The term "minimum essential coverage" means any of the following:

(A) Government sponsored programs.—Coverage under—

(i) the Medicare program under part A of title XVIII of the Social Security Act,

(ii) the Medicaid program under title XIX of the Social Security Act,

(iii) the CHIP program under title XXI of the Social Security Act or under a qualified CHIP look-alike program (as defined in section 2107(g) of the Social Security Act),

(iv) medical coverage under chapter 55 of title 10, United States Code, including coverage under the TRICARE program.

(v) a health care program under chapter 17 or 18 of title 38, United States Code, as determined by the Secretary of Veterans Affairs, in coordination with the Secretary of Health and Human Services and the Secretary,

(vi) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers); or

(vii) the Nonappropriated Fund Health Benefits Program of the Department of Defense, established under section 349 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337; 10 U.S.C. 1587 note).

(B) Employer-sponsored plan.—Coverage under an eligible employer-sponsored plan.

(C) Plans in the individual market.—Coverage under a health plan offered in the individual market within a State.

(D) Grandfathered health plan.—Coverage under a grandfathered health plan.

(E) Other coverage.—Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health and Human Services, in coordination with the Secretary, recognizes for purposes of this subsection.

(2) Eligible employer-sponsored plan.—The term "eligible employer-sponsored plan" means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is—

(A) a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act), or

(B) any other plan or coverage offered in the small or large group market within a State.

Such term shall include a grandfathered health plan described in paragraph (1)(D) offered in a group market.

(3) Excepted benefits not treated as minimum essential coverage.—The term "minimum essential coverage" shall not include health insurance coverage which consists of coverage of excepted benefits—

(A) described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act; or

(B) described in paragraph (2), (3), or (4) of such subsection if the benefits are provided under a separate policy, certificate, or contract of insurance.

(4) Individuals residing outside United States or residents of territories.—Any applicable individual shall be treated as having minimum essential coverage for any month—

(A) if such month occurs during any period described in subparagraph (A) or (B) of section 911(d)(1) which is applicable to the individual, or

(B) if such individual is a bona fide resident of any possession of the United States (as determined under section 937(a)) for such month.

(5) Insurance-related terms.—Any term used in this section which is also used in title I of the Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

(g) Administration and procedure.—

(1) In general.—The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as

an assessable penalty under subchapter B of chapter 68.

(2) Special rules.—Notwithstanding any other provision of law—

(A) Waiver of criminal penalties.—In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

(B) Limitations on liens and levies.—The Secretary shall not—

(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

(ii) levy on any such property with respect to such failure.

No. _____

IN THE
Supreme Court of the United States

THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON, ANDY BESHEAR, THE GOVERNOR OF KENTUCKY, AND THE DISTRICT OF COLUMBIA,

Petitioners,

V.

THE STATE OF TEXAS, *et al.*,

Respondents.

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

MOTION TO EXPEDITE CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI AND TO EXPEDITE CONSIDERATION OF THIS MOTION

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January 3, 2020

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The States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Massachusetts, Michigan, Minnesota (by and through its Department of Commerce), Nevada, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington, Andy Beshear, the Governor of Kentucky, and the District of Columbia hereby move, pursuant to Supreme Court Rule 21, for expedited consideration of the petition for a writ of certiorari, filed today, to the United States Court of Appeals for the Fifth Circuit. Because of the practical importance of the questions presented for review and the pressing need for their swift resolution by this Court, petitioners respectfully request that the Court consider the petition on an expedited schedule described below and, if the Court grants the petition, that it set an expedited merits briefing and oral argument schedule so that it may decide the case this Term. Petitioners also hereby move for expedited consideration of this motion.[1]

STATEMENT

1. The Patient Protection and Affordable Care Act (ACA) affects the health and well-being of every American and has transformed our Nation's healthcare system. One of its hundreds of provisions is 26 U.S.C. § 5000A. As originally enacted, that provision required most Americans either to maintain a minimum level of healthcare coverage or to pay a specified amount to the Internal Revenue

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[1] Petitioners understand that the U.S. House of Representatives, which intervened in the court of appeals to defend the Affordable Care Act, is also filing a petition for a writ of certiorari seeking review of the Fifth Circuit's decision, and that it is similarly moving to expedite the Court's consideration of its petition.

Service. This Court upheld that provision as an exercise of Congress's taxing power, affording individuals a "lawful choice" between buying insurance or paying the tax. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574 (2012) (*NFIB*). In 2017, Congress amended Section 5000A to set at zero the amount of the tax imposed on those who choose not to maintain healthcare coverage—thus rendering the minimum coverage provision effectively unenforceable. *See* Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017). At the same time, Congress left every other provision of the ACA in place.

2. Two months after Congress voted to reduce Section 5000A's alternative tax to zero, the plaintiffs here—two private citizens and a group of States—filed suit. Pet. App. 10a. They argued that, in light of this Court's holding in *NFIB* and the 2017 amendment, Section 5000A could no longer be construed as a tax, and that Section 5000A(a) was now an unconstitutional stand-alone command to buy health insurance. *Id.* at 10a-11a. They also argued that Section 5000A(a) could not be severed from any other part of the ACA. *Id.* at 11a. In the district court, the federal defendants agreed that the minimum coverage provision was now unconstitutional, and that it could not be severed from the ACA's guaranteed-issue, pre-existing exclusion ban, and community-rating requirements. *Id.* But they argued that it could be severed from the remainder of the Act. *Id.* Sixteen States and the District of Columbia intervened to defend the ACA. *Id.*

On December 14, 2018, the district court granted partial summary judgment and entered declaratory relief in the plaintiffs' favor. Pet. App. 11a-12a; 163a-231a.

It held that (1) the individual plaintiffs had standing, *id.* at 184a; (2) setting the alternative tax amount specified in Section 5000A(c) at zero transformed Section 5000A(a) into an unconstitutional command to purchase health insurance, *id.* at 189a-196a, 203a-204a; and (3) Section 5000A(a) could not be severed from the remainder of the ACA, which must therefore be invalidated in its entirety, *id.* at 231a. In a separate order, the district court entered a partial final judgment under Federal Rule of Civil Procedure 54(b) but stayed the effect of that judgment pending appeal. *Id.* at 114a, 162a.[2]

On December 18, 2019, a divided panel of the Fifth Circuit affirmed in part and vacated in part. Pet. App. 1a-113a. The panel majority agreed with the district court that the individual plaintiffs have standing to challenge Section 5000A(a) and further held that the state plaintiffs have standing. *Id.* at 29a-39a. The majority also affirmed the district court's conclusion that Section 5000A(a) must now be interpreted as an unconstitutional "command to purchase insurance," in light of Congress's decision to reduce the amount of the alternative tax to zero. *Id.* at 45a. But it vacated the district court's judgment as to severability, concluding that the district court's analysis on that point was "incomplete." *Id.* at 65a; *see id.* at 52a-

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[2] After the notices of appeal were filed, the U.S. House of Representatives and the States of Colorado, Iowa, Michigan, and Nevada successfully moved to intervene in the appeal to defend the ACA. Pet. App. 12a & n.12. On the day the appellants' opening briefs were due, the federal defendants submitted a letter to the Fifth Circuit indicating that the Department of Justice had "determined that the district court's judgment should be affirmed" in its entirety. C.A. Dkt. No. 514887530 (Mar. 25, 2019).

70a. It remanded with directions to "conduct a more searching inquiry into which provisions of the ACA Congress intended to be inseverable from the individual mandate." *Id.* at 68a.[3]

Judge King dissented. Pet. App. 73a-113a. She would have held that no plaintiff had standing, *id.* at 76a-85a, and that the minimum coverage provision remains "constitutional, albeit unenforceable," *id.* at 74a; *see also id.* at 91a-98a. While she agreed that there were "serious flaws" in the district court's severability analysis, *id.* at 73a, she believed remand was unnecessary, *id.* at 98a. In her view, the severability analysis in this case is "easy": by removing Section 5000A's "only enforcement mechanism" and leaving the rest of the ACA in place, Congress "plain[ly] indicat[ed] that [it] considered the coverage requirement entirely dispensable and, hence, severable." *Id.* at 73a.

ARGUMENT

1. Expedited consideration of the petition for a writ of certiorari is warranted. As explained in the petition (at 16-19), the lower courts' actions have created uncertainty about the future of the entire Affordable Care Act, and that uncertainty threatens adverse consequences for our Nation's healthcare system, including for patients, doctors, insurers, and state and local governments.

The district court held that the minimum coverage provision in Section 5000A(a) is inseverable from every other provision of the ACA, Pet. App. 231a—a

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[3] The panel majority also instructed the district court to consider the federal defendants' new arguments about the proper scope of relief. Pet. App. 70a-72a.

law that spans "10 titles [and] over 900 pages" and regulates a fifth of the Nation's economy. *NFIB*, 567 U.S. at 538-539; *see also* D.Ct. Dkt. 91-2 at 164.[4] As the federal respondents recognized below, the district court's decision contributed to "uncertainty in the healthcare sector" and in "other areas affected by the Affordable Care Act." C.A. Dkt. 514906506 at 3 (Apr. 8, 2019). The court of appeals exacerbated that uncertainty when it affirmed the district court's holdings as to standing and the merits but remanded for a protracted inquiry into the severability question—while noting that "[i]t may still be that none of the ACA is severable from the individual mandate, even after this inquiry is concluded." Pet. App. 69a. The remand directed by the court of appeals would undoubtedly "prolong this litigation and the concomitant uncertainty over the future of the healthcare sector." *Id.* at 74a (King, J., dissenting).

That uncertainty is especially problematic because a wide range of fiscal, regulatory, commercial, and individual decisions hinge on provisions of the ACA. Each year, millions of Americans make life-changing decisions about whether to move, change jobs, start a family, or care for an elderly parent in reliance on the ACA's patient protections and the greater access to affordable healthcare coverage it provides.[5] States and local governments rely on the availability of tens of billions of dollars that the Act directs to them each year when setting their budgets, a

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[4] Citations to "D.Ct. Dkt." are to the docket in N.D. Tex. Case No. 4:18-cv-167-O.

[5] *See* Amicus Br. of Small Bus. Majority Found., C.A. Dkt. No. 514895946 (Apr. 1, 2019); Amicus Br. of Nat'l Women's Law Center, *et al.*, C.A. Dkt. No. 514897602 (Apr. 1, 2019); D.Ct. Dkt. 91-1 at 13-22.

process that can take months or even years. *See* C.A. Dkt. No. 514820298 at 21-22, 28-32 (Feb. 1, 2019) (declarations of health policy experts and government health officials in support of state petitioners' motion to expedite appeal).[6] State regulators begin working with insurers to set health insurance premiums long before those premium amounts take effect. *Id.* at 17, 25, 37. And when insurers want to develop and market an innovative product or change the way their service-provider networks are designed, their planning can start up to 24 months in advance. *Id.* at 25; *see also* Amicus Br. of America's Health Ins. Plans, C.A. Dkt. No. 514896554 at 14 (Apr. 1, 2019) ("health insurance providers . . . require significant lead time to develop strategies and offerings").

Prolonged uncertainty about whether or to what extent important provisions of the ACA might be invalidated substantially complicates these and other important choices. That uncertainty has already led some States to begin planning for the possibility that the entire ACA might be declared invalid, and to examine additional measures that might be necessary to stabilize their healthcare markets in that event. C.A. Dkt. No. 514820298 at 32-33, 36 (Feb. 1, 2019). The shadow cast by the decisions below may also negatively affect the health insurance market in future years by, for example, causing insurers to increase premiums or withdraw from the

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[6] *See also* D.Ct. Dkt. 91-1 at 33-66 (States that intervened in the district court would lose $608.5 billion in federal Medicaid and Marketplace spending between 2019 and 2028 if district court's decision were affirmed); Amicus Br. of Counties and Cities, C.A. Dkt. No. 514897439 at 20-22 (describing healthcare funding as a complex multi-year process between federal, state, and local governments).

Exchanges altogether. *See, e.g.*, *id.* at 16-17, 20, 26, 32-33, 36-37; D.Ct. Dkt. 91-1 at 8-13.

As the federal respondents argued below, the "[p]rompt resolution of this case will help reduce [the] uncertainty in the healthcare sector" that has resulted from this litigation. C.A. Dkt. 514906506 at 3 (Apr. 8, 2019). Were the Court to consider and grant the petition and hear argument in the ordinary course, however, there is little chance that it would resolve this dispute for at least another year. In the meantime, participants in our healthcare system would have to make critical choices—indeed, life-changing ones—without knowing whether important provisions of the ACA will be invalidated. By expediting its consideration of the petition and resolving the case this Term, this Court would allay that uncertainty and improve confidence in the markets about the future of the healthcare sector.

2. In light of the practical importance of this Court deciding this case before the end of the current Term, petitioners respectfully move for expedited consideration of the petition. Petitioners propose that amici curiae be directed to file briefs in support of the petition by January 17, 2020 and that respondents be directed to file responses to the petition by February 3, 2020, 31 days from the filing of the petition, with any amicus curiae briefs in support of respondents due on the same day. Petitioners hereby waive the 14-day waiting period for reply briefs under Rule 15.5, which would allow for the petition to be distributed on February 5, 2020 and considered at the Court's February 21, 2020 conference. If the Court adopted that schedule, petitioners would file their reply briefs in support of the petition by

February 12, 2020. If the Court grants the petition at the February 21 conference, petitioners further request that oral argument be held on April 29, 2020 or at a special sitting in May 2020.

Alternatively, if the Court prefers to consider the petition at its January 24, 2020 conference to facilitate the completion of plenary review this Term, petitioners propose that amici curiae supporting petitioners be directed to file their briefs by January 15, 2020; that respondents be directed to file responses to the petition by January 21, 2020; and that amici curiae supporting respondents be directed to file their briefs by January 21, 2020. If the Court adopted that schedule, petitioners would file their reply briefs by noon eastern time on January 23, 2020. If the Court grants the petition at the January 24 conference, petitioners further request that oral argument be held on April 29, 2020.

3. If the Court grants the petition at either the January 24 or February 21 conference, petitioners respectfully request that the Court set an expedited merits briefing schedule.

Should the Court grant the petition on February 21 and set the case for oral argument in April, petitioners would propose the following schedule:

March 16, 2020	Petitioners' opening briefs due
April 6, 2020	Respondents' briefs due
April 20, 2020	Petitioners' reply briefs due

Should the Court grant the petition on February 21 and set the case for oral argument at a special sitting in May, petitioners would propose the following schedule:

March 20, 2020	Petitioners' opening briefs due
April 20, 2020	Respondents' briefs due
May 8, 2020	Petitioners' reply briefs due

Should the Court grant the petition on January 24, 2020 and set the case for oral argument in April, petitioners would propose the following schedule:

February 24, 2020	Petitioners' opening briefs due
March 23, 2020	Respondents' briefs due
April 17, 2020	Petitioners' reply briefs due

4. Petitioners also move for expedited consideration of this motion, so that the Court may consider it at the January 10, 2020 conference. Petitioners respectfully request that the Court direct respondents to respond to this motion by January 7, 2020.

5. Petitioners have conferred with counsel for the respondents and asked for their positions on the relief requested in this motion, including the request for expedited consideration of this motion. Counsel for the state respondents and counsel for the individual respondents stated that they were opposed to all of the relief requested in the motion. Counsel for the federal respondents did not respond with their position in time for it to be included in this motion.

CONCLUSION

For the reasons stated, petitioners respectfully request that the Court expedite consideration of this motion, expedite consideration of the petition for a writ of certiorari based on either of the schedules proposed above, and, if the Court grants the petition, set an expedited schedule for merits briefing and oral argument that enables the Court to hear and decide the case this Term.

Respectfully submitted,

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No. _____

THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON, ANDY BESHEAR, THE GOVERNOR OF KENTUCKY, AND THE DISTRICT OF COLUMBIA,
Petitioners,

v.

THE STATE OF TEXAS, *et al.*,
Respondents.

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that on January 3, 2020, one (1) copy of the MOTION TO EXPEDITE CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI AND TO EXPEDITE CONSIDERATION OF THIS MOTION in the above-captioned case were served, as required by U.S. Supreme Court Rules 21.3 and 29.5(c), on the following:

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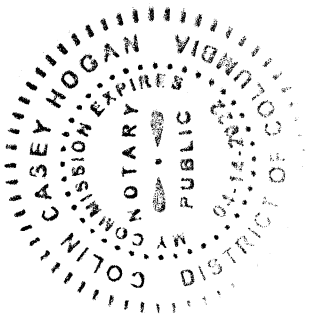
My commission expires April 14, 2022.



No. 19-10011

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF WISCONSIN; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA, STATE OF MISSISSIPPI, by and through Governor Phil Bryant; STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF NORTH DAKOTA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TENNESSEE; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF ARKANSAS; NEILL HURLEY; JOHN NANTZ,

Plaintiffs – Appellees

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; ALEX AZAR, II, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF INTERNAL REVENUE; CHARLES P. RETTIG, in his Official Capacity as Commissioner of Internal Revenue,

Defendants – Appellants

STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF KENTUCKY; STATE OF MASSACHUSETTS; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT, STATE OF VIRGINIA; STATE OF WASHINGTON; STATE OF MINNESOTA,

Intervenor Defendants – Appellants

On Appeal from the United States District Court
for the Northern District of Texas
No. 4:18-cv-167-O
Hon. Reed O'Connor, Judge

STATE DEFENDANTS' OPENING BRIEF

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March 25, 2019

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CERTIFICATE OF INTERESTED PERSONS

Because the state defendants are governmental entities, a certificate of interested parties is not required. 5th Cir. R. 28.2.1.

s/ Samuel P. Siegel
Samuel P. Siegel

STATEMENT REGARDING ORAL ARGUMENT

This appeal concerns a constitutional challenge to the Patient Protection and Affordable Care Act of 2010. The decision below declared one provision of that Act, as amended, unconstitutional, and held that the unconstitutional provision could not be severed from the remainder of the Act. That ruling, if implemented, would seriously disrupt the nation's healthcare system. Oral argument is therefore appropriate in this case.

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INTRODUCTION

The Patient Protection and Affordable Care Act of 2010 transformed the nation's healthcare system. Because of the ACA, more than 20 million Americans have access to high-quality, affordable healthcare coverage; tens of millions of others cannot be denied coverage because of pre-existing conditions; the growth in healthcare costs has slowed; States and hospitals have realized substantial savings; and the health of millions of Americans has improved. The Act's reforms are woven into nearly every aspect of our healthcare system and, indeed, the broader economy.

The ACA has also been controversial. Congress considered repealing or substantially revising the Act several times between 2010 and 2017. It rejected all but a few minor changes. Lawsuits also challenged a number of the Act's provisions, including the requirement in the original law that individuals maintain a minimum level of healthcare coverage or pay a tax. Addressing that issue, the Supreme Court held that the Commerce Clause did not give Congress the power to enact an enforceable, stand-alone mandate requiring individuals to purchase health insurance. But it construed the relevant provision of the ACA, 26 U.S.C. § 5000A, as affording individuals a "lawful choice" between buying insurance or paying a tax, and upheld the provision as an exercise of Congress's taxing power. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574 (2012) (*NFIB*).

After the change in presidential administrations in 2017, Congress again considered several bills that would have repealed major provisions of the Act. As before, the 2017 Congress ultimately decided not to disturb most of the ACA. It did, however, make one change: it amended Section 5000A to set at zero the amount of the tax imposed on those who choose not to maintain healthcare coverage. Legislators who supported that amendment emphasized that it did not affect any other provision of the Act.

The plaintiffs in this case—two individuals and several States—argue that the 2017 amendment critically changes the application of *NFIB*, turning the remaining minimum coverage provision into a stand-alone command to buy insurance and making it unconstitutional. The district court held that the individual plaintiffs had standing to make that argument, and then accepted it. It went on to hold that the minimum coverage provision could not be severed from any other provision of the ACA, and declared the entire Act invalid.

That judgment is unsound in all respects. Congress's 2017 amendment sets at zero the amount of the tax that *NFIB* holds an individual may lawfully choose to pay as an alternative to maintaining healthcare coverage. The individual plaintiffs do not have standing to challenge the resulting law, because they suffer no legal harm from the existence of a provision that offers them a lawful choice between buying insurance or doing nothing. And the States (whose standing the district

court did not address) cannot step into that void on appeal, because in the court below they failed to provide any evidence to support a finding of actual (or even potential) financial harm.

In any event, the minimum coverage provision remains constitutional. With the amount of the alternative tax set to zero, Section 5000A no longer compels any individual to maintain healthcare coverage—or to take any other action. At most, the remaining provision is a precatory encouragement to buy health insurance, which poses no constitutional problem. And even if that provision were now invalid, it would be severable from the rest of the Act. When Congress amended Section 5000A in 2017, it chose to make the minimum coverage provision effectively unenforceable—while leaving every other part of the ACA in place. If zeroing-out that provision's alternative tax creates a constitutional problem, then it is evident what Congress would have wanted the remedy to be: a judicial order declaring the minimum coverage provision unenforceable, and nothing more.

JURISDICTION

The district court had jurisdiction over this case under 28 U.S.C. § 1331, because it raises a federal constitutional challenge to a federal statute. On December 30, 2018, the district court entered partial final judgment on Count I of the plaintiffs' amended complaint under Federal Rule of Civil Procedure 54(b). ROA.2784-2785. The state defendants filed their notice of appeal on January 3,

2019, ROA.2787-2788, and the federal defendants filed their notice of appeal on January 4, 2019, ROA.2844-2845. This Court has jurisdiction under 28 U.S.C. § 1291. *See United States v. Phillips*, 303 F.3d 548, 550 (5th Cir. 2002).

STATEMENT OF ISSUES

1. Whether the plaintiffs in this case have demonstrated Article III standing to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act of 2010, 26 U.S.C. § 5000A(a), now that Congress has set the amount of the tax imposed for not maintaining coverage at zero dollars.

2. Whether the minimum coverage provision remains constitutional now that there is no legal consequence for not maintaining coverage.

3. If reducing the tax to zero makes the minimum coverage provision unconstitutional, whether that provision is severable from the rest of the ACA.

STATEMENT OF THE CASE

A. The Affordable Care Act

The Affordable Care Act is landmark legislation that has transformed the nation's healthcare system. Adopted in 2010, the Act aimed to increase the number of Americans with healthcare coverage, lower the cost of healthcare, and improve families' well-being. *See NFIB*, 567 U.S. at 538. It affects every level of government and most aspects of an industry that accounts for nearly one-fifth of the nation's economy. ROA.1523.

Among other important reforms, the ACA strengthens consumer protections in the private health insurance market. *See generally* ROA.1130-1133, 1213-1215. It bars insurance companies from denying individuals coverage because of their health status (the "guaranteed-issue" requirement), refusing to cover pre-existing health conditions, or charging individuals with health issues higher premiums than healthy individuals (the "community-rating" requirement). *See* 42 U.S.C. §§ 300gg, 300gg-1 (guaranteed-issue), 300gg-3 (pre-existing conditions), 300gg-4 (community-rating).[1] Because of these protections, the 133 million Americans with pre-existing conditions—which include cancer, asthma, high blood pressure, diabetes, and pregnancy, *see* ROA.1278-1284—cannot be denied coverage or charged more because of their health status. ROA.1131, 1149-1183, 1210. The ACA also requires insurers to allow young adults to stay on their parents' health insurance plans until age 26, 42 U.S.C. § 300gg-14; prohibits them from imposing lifetime or annual limits on the value of benefits provided to any individual, *id.* § 300gg-11; and mandates that the plans they offer cover ten "essential health benefits," including emergency services, prescription drugs, and maternity and newborn care, *id.* § 18022.

[1] References to the guaranteed-issue requirement often include the requirement to cover pre-existing conditions.

In addition, the ACA expands access to healthcare coverage, through two key reforms. *See generally* ROA.1133-1139. First, it increases the number of people eligible for healthcare coverage through Medicaid. Adopted in 1965, Medicaid offers federal funding to States to assist certain vulnerable populations—pregnant women, children, and needy families among them—in obtaining medical care. *NFIB*, 567 U.S. at 541 (citing 42 U.S.C. § 1396a(a)(10)). The ACA expands the program by "increas[ing] the number of individuals the States must cover" to include childless adults with incomes up to 138 percent of the federal poverty line. *Id.* at 542; *see also* 42 U.S.C. §§ 1396a(a)(10)(A)(i)(VIII), 1396a(e)(14)(I)(i). And it obligates the federal government to cover most of the cost of the expansion. *See* 42 U.S.C. § 1396d(y)(1) (federal government will cover 93 percent of cost of expansion in 2019 and 90 percent in later years).

The ACA originally required each State to expand its Medicaid program or risk losing "all of its federal Medicaid funds." *NFIB*, 567 U.S. at 542. In *NFIB*, however, the Supreme Court held that under the Spending Clause, Congress could not threaten States that declined to expand Medicaid with such a substantial loss of federal funds. *Id.* at 575-585 (plurality opinion); *id.* at 671-689 (joint dissent).[2] But the Court also allowed those States that wanted to accept Medicaid expansion

[2] This brief refers to Part IV of Chief Justice Roberts's opinion in *NFIB*, 567 U.S. at 575-588, which Justices Breyer and Kagan joined, as the plurality opinion.

funds to do so, *see id.* at 585-586 (plurality opinion); *id* at 645-646 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); and 36 States and the District of Columbia had expanded their Medicaid programs as of February 2019.[3] In 2016, nearly 12 million individuals received healthcare coverage because of the expansion of Medicaid. ROA.365-366.[4] That number rose to over 12.5 million people in 2017.[5]

The ACA also expanded access to healthcare by making a series of reforms in the individual health insurance market that made healthcare more affordable. *See generally King v. Burwell*, 135 S. Ct. 2480, 2485-2487 (2015); ROA.1133-1136.[6] Insurers that offer health insurance in the individual market must comply with the community-rating and guaranteed-issue requirements. *King*, 135 S. Ct. at 2486. But the ACA originally included three additional measures designed to strengthen

[3] *See* Kaiser Family Found., *Status of State Action on the Medicaid Expansion Decision*, https://tinyurl.com/y6uw6rhy (last visited Mar. 24, 2019).

[4] More than half of these newly-eligible Medicaid recipients reside in States that are defendants in this case, while 1.3 million of them reside in States that are plaintiffs. ROA.351, 1160-1182, 1188-1190, 1206, 1239, 1242-1243, 1493-1495, 1498-1499, 1509-1510, 1521-1523, 1540-1541.

[5] *See* Kaiser Family Found., *Medicaid Expansion Enrollment*, https://tinyurl.com/yxtpxpbn (last visited Mar. 24, 2019).

[6] While most Americans receive healthcare coverage through their employers or government programs (such as Medicaid), about 20.5 million are covered through plans purchased directly from insurers in the "individual" or "nongroup" market. *See* Kaiser Family Found., *Health Insurance Coverage of the Total Population*, https://tinyurl.com/y8q9m8q4 (last visited Mar. 24, 2019).

coverage in the individual market. *Id.* at 2485-2487. First, it adopted the provision at issue in this case, 26 U.S.C. § 5000A, which "generally require[d] individuals to maintain health insurance coverage or make a payment to the IRS." *King*, 135 S. Ct. at 2486; *see also infra* 12-13 (describing Section 5000A). Second, the ACA made health insurance more affordable by providing billions of dollars of subsidies in the form of refundable tax credits to low- and middle-income Americans. *King*, 135 S. Ct. at 2487 (citing 26 U.S.C. § 36B, 42 U.S.C. §§ 18081, 18082). Third, it created government-run health insurance marketplaces (known as Exchanges) that allow consumers "to compare and purchase insurance plans." *Id.* at 2485, 2487; *see also* 42 U.S.C. § 18031.[7] In 2017, 10.3 million people received coverage through the Exchanges, with over eight million receiving tax credits to help them pay their premiums. ROA.353-354, 1134.

The ACA made several other changes to the nation's healthcare system as well. It reformed the way Medicare payments are made, encouraging healthcare providers to deliver higher quality and less expensive care. ROA.1140-1142,

[7] States may establish their own Exchanges, or use the federal government's Exchange. *King*, 135 S. Ct. at 2482; *see also* 42 U.S.C. §§ 18031, 18041. Eleven States—nine of which are defendants in this appeal—and the District of Columbia operate their own Exchanges, while 28 rely on federally-facilitated Exchanges and 11 partner with the federal government to run "hybrid" or partnership Exchanges. ROA.1133-1134.

1146-1147, 1226-1227; *see also* 42 U.S.C. § 1395ww.[8] It created the Prevention and Public Health Fund, which has funded state and local community responses to emerging public health risks like flu outbreaks and the opioid epidemic. ROA.1144, 1147; *see also* 42 U.S.C. §§ 280h-5, 280k, 280k-1, 280k-2, 280k-3, 294e-1, 299b-33, 299b-34, 300u-13, 300u-14, 1396a. It made funds available to States to strengthen their Medicaid programs through initiatives like the Community First Choice Option, which allows States to pay for in-home and community-based care for persons with disabilities. ROA.1139; 42 U.S.C. § 1396n(k). And it invested billions of dollars in local community health programs. ROA.1144-1146.

Through these reforms, the ACA has achieved many of the goals that Congress set when it adopted the legislation. ROA.1216-1218. Less than three years after the Act's major reforms took effect in January 2014, the nation's uninsured rate had dropped by 43 percent. ROA.1126; *see also* ROA.365-366, 1136-1137, 1216. An estimated 125,000 fewer patients have died from conditions acquired in hospitals, thanks in part to an ACA-funded program. ROA.1128.

[8] Medicare is "a comprehensive insurance program designed to provide health insurance benefits for individuals 65 and over, as well as for certain others who come within its terms." *United Seniors Ass'n, Inc. v. Shalala*, 182 F.3d 965, 967 (D.C. Cir. 1999).

Nearly 9.5 million fewer Americans reported having problems paying medical bills in March 2015 than in September 2013; and in the six years following passage of the Act, healthcare costs grew at a slower rate than during any comparable period since data collection began in 1959. ROA.1128-1129, 1217-1218. Uncompensated care costs—the value of healthcare services provided to individuals either unable or unwilling to pay—fell by a quarter between 2013 and 2015 nationwide, and by nearly half in States that expanded Medicaid. ROA.1129-1130, 1218. And the ACA has had broader economic effects, including generating budget savings for States and reducing "job lock" by freeing workers to change jobs or stay home to care for a loved one without fear of losing their healthcare coverage. ROA.1129-1130.

B. Attempts at Repeal

Despite its successes, the ACA has been the subject of passionate and extended political debate. Between 2010 and 2016, Congress considered several bills to repeal, defund, delay, or otherwise amend the ACA—including legislation that would have repealed the entire Act. *See* Redhead & Kinzer, Cong. Research Serv., *Legislative Actions in the 112th, 113th, and the 114th Congresses to Repeal, Defund, or Delay the Affordable Care Act* at 1 (Feb. 7, 2017).[9] Except for a few

[9] *Available at* https://fas.org/sgp/crs/misc/R43289.pdf.

modest changes that attracted bipartisan support, those efforts failed. *Id.*; *see also id.* at 10-22.

After the change in presidential administrations in 2017, opponents renewed their efforts to repeal many of the ACA's most important reforms. *See generally* Roubein, *Timeline: The GOP's Failed Effort to Repeal Obamacare*, The Hill, Sept. 26, 2017.[10] In March 2017, House leaders pulled a bill, scheduled for a floor vote, that would have repealed many the ACA's core provisions and made several other significant changes. *Id.* Two months later, the House approved a revised version of that bill. *Id.* In July, the Senate voted on three separate bills that likewise would have repealed major provisions of the Act. *See* Parlapiano, et al., *How Each Senator Voted on Obamacare Repeal Proposals*, N.Y. Times, July 28, 2017.[11] Each vote failed. *Id.* In September, several Senators introduced another bill that would have repealed several of the Act's most important provisions; but Senate leaders ultimately chose not to bring that bill to the floor for a vote. *See*

[10] *Available at* https://thehill.com/policy/healthcare/other/352587-timeline-the-gop-effort-to-repeal-and-replace-obamacare. *See also* Kaiser Family Found., *Compare Proposals to Replace the Affordable Care Act*, https://www.kff.org/interactive/proposals-to-replace-the-affordable-care-act/ (last visited Mar. 24, 2019) (detailing bills considered by the House and Senate in 2017).

[11] *Available at* https://www.nytimes.com/interactive/2017/07/25/us/politics/senate-votes-repeal-obamacare.html.

Kaplan & Pear, *Senate Republicans Say They Will Not Vote on Health Bill*, N.Y. Times, Sept. 26, 2017.[12]

C. Court Challenges

The ACA has also generated numerous lawsuits, including several that reached the Supreme Court. *See NFIB*, 567 U.S. 519; *King*, 135 S. Ct. 2480. That Court's decision in *NFIB* is especially relevant here. Among other things, *NFIB* addressed the constitutionality of 26 U.S.C. § 5000A. As originally enacted, that section first provided that all "applicable individual[s] shall" ensure that they are "covered under minimum essential coverage." 26 U.S.C. § 5000A(a); *see also id.* § 5000A(f) (defining "minimum essential coverage"). Any "taxpayer" who did not obtain such coverage was required to make a "shared responsibility payment" in the amount specified in Section 5000A(c). *Id.* § 5000A(b). The specified "amount of the penalty" was the lesser of a dollar amount or a specified percentage of income, which varied depending on the relevant taxable year. *Id.* § 5000A(c) (2010) (amended 2017). With shifting majorities, the Court in *NFIB* upheld the ACA's requirement that individuals either maintain healthcare coverage or make a

[12] *Available at* https://www.nytimes.com/2017/09/26/us/politics/mcconnell-obamacare-repeal-graham-cassidy-trump.html.

payment to the IRS. 567 U.S. at 530-531, 574, 588; *id.* at 589 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).[13]

Chief Justice Roberts, writing for himself, concluded that if Section 5000A were construed to impose an enforceable, stand-alone requirement that individuals purchase health insurance, then it exceeded Congress's Commerce Clause powers. *NFIB*, 567 U.S. at 547-558 (Roberts, C.J.)[14] While recognizing that "Congress has broad authority under the Clause," the Chief Justice reasoned that Congress could not "rely on that power to compel individuals not engaged in commerce to purchase an unwanted product." *Id.* at 549, 552 (Roberts, C.J.). The Commerce Clause, he concluded, gave Congress the power to "'*regulate* Commerce,'" not to

[13] As noted above, a majority also held that Congress could not "coerce[]" States to expand their Medicaid programs. *NFIB*, 567 U.S. at 575-585 (plurality opinion); *id.* at 671-689 (joint dissent). A different majority held that the federal government could offer Medicaid expansion funds to those States that chose to accept them, and that the Medicaid expansion program was severable from the rest of the ACA. *Id.* at 585-586 (plurality opinion); *id.* at 645-646 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[14] As the district court noted, although "no other Justice joined this part of the Chief Justice's opinion, the 'joint dissent'—consisting of Justices Scalia, Kennedy, Thomas, and Alito—reached the same conclusion" on the Commerce Clause question. ROA.2616 (citing *NFIB*, 567 U.S. at 657 (joint dissent)). The same five Justices also held that an enforceable minimum coverage requirement could not be sustained under the Necessary and Proper Clause. *Id.* (citing *NFIB*, 567 U.S. at 560 (Roberts, C.J.); *id*. at 654-655 (joint dissent)). Like the district court, this brief uses the parenthetical (Roberts, C.J.) when referring to portions of the Chief Justice's opinion that were not formally joined by any other justice.

require individuals to "*become* active in commerce by purchasing a product." *Id.* at 550, 552 (Roberts, C.J.).

In another part of his opinion, however, the Chief Justice, now writing for a Court majority, held that Section 5000A as a whole could be upheld as a valid exercise of Congress's power to "'lay and collect Taxes.'" *NFIB*, 567 U.S. at 561, 574.[15] Read in isolation, the "most straightforward" understanding of Section 5000A(a) was that it "command[ed] individuals to purchase insurance." *Id.* at 562 (Roberts, C.J.). But that was not the only way to interpret Section 5000A as a whole; rather, it was "'fairly possible'" to read that provision as imposing "a tax hike on certain taxpayers who do not have health insurance." *Id.* at 563 (Roberts, C.J.). The Court pointed to several features of Section 5000A, including that it "yield[ed] the essential feature of any tax: It produces at least some revenue for the government." *Id.* at 563-564.[16] The Court also noted that Section 5000A did

[15] Four justices joined Part III-C of the Chief Justice's opinion, which upheld Section 5000A under Congress's taxing powers. *See NFIB*, 567 U.S. at 589 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). But they did not formally join Parts III-B and III-D of that opinion, which discuss the interpretation of Section 5000A and Congress's taxing power. *Id.*

[16] The Court also observed that the alternative tax imposed by Section 5000A(b)-(c) was "paid into the Treasury by 'taxpayers' when they file their tax returns"; did not apply to individuals whose household income was less than the filing threshold in the Internal Revenue Code; was determined by reference to "such familiar factors as taxable income, number of dependents, and joint filing status"; and was "found in the Internal Revenue Code and enforced by the IRS." *NFIB*, 567 U.S. at 563-564.

not impose any criminal sanction on individuals who did not maintain healthcare coverage; instead, the only "negative legal consequence[]" for not obtaining such coverage was the requirement to make a "payment to the IRS." *Id.* at 568, 573. Accordingly, the Court concluded that Section 5000A as a whole was not a command to purchase insurance, but instead offered individuals a "lawful choice" between forgoing health insurance and paying higher taxes, or buying health insurance and paying lower taxes. *Id.* at 573-574 & n.11.

Justices Scalia, Kennedy, Thomas, and Alito authored a joint dissent in which they concluded that Section 5000A's minimum coverage provision could not be sustained either under the Commerce Clause or as an exercise of Congress's taxing power. *NFIB*, 567 U.S. at 646-669. The joint dissent also would have held that the Medicaid expansion exceeded Congress's authority under the Spending Clause, *id.* at 671-689; and that that the minimum coverage provision and the Medicaid expansion could not be severed from the rest of the ACA, *id.* at 691-706. The joint dissent reasoned that without the invalid provisions, the ACA would impose "unexpected burdens on patients, the health-care community, and the federal budget," thereby disrupting the "ACA's design of 'shared responsibility.'" *Id*. at 697-698. In light of that observation, the joint dissent would have held that none of the Act's "major provisions"—including the consumer protections and the

ACA's provisions establishing Exchanges and providing subsidies—could survive the invalidation of Section 5000A and the Medicaid expansion. *Id.* at 697-703.[17]

D. The 2017 Amendment

While Congress repeatedly declined to repeal or substantially revise most of the ACA, it did make one change to the law in December 2017. As part of the Tax Cuts and Jobs Act, Congress reduced to zero the amount of the tax imposed by Section 5000A(b)-(c), which *NFIB* had recognized individuals could pay as a lawful alternative to maintaining the healthcare coverage otherwise called for by Section 5000A(a). Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017). The reduction was scheduled to take effect on January 1, 2019. *Id.*

Shortly before Congress adopted this amendment, the Congressional Budget Office issued a report estimating the effects of setting Section 5000A's alternative tax at zero—thus leaving the minimum coverage provision effectively unenforceable. Cong. Budget Office, *Repealing the Individual Health Insurance Mandate: An Updated Estimate* (Nov. 2017).[18] The report informed Congress that "nongroup insurance markets would continue to be stable in almost all areas of the

[17] The joint dissent reached a similar conclusion with respect to the ACA's "minor provisions," including break requirements for nursing mothers and the mandate that chain restaurants display the nutritional content of their food. 567 U.S. at 704-706.

[18] *Available at* https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53300-individualmandate.pdf.

country throughout the coming decade." *Id.* at 1. And members of Congress who voted for the amendment emphasized that Congress was not making any other change to the ACA. Echoing several of his colleagues, for example, Senator Pat Toomey of Pennsylvania explained that Congress was not "chang[ing] any of the subsidies. They are all available to anyone who wants to participate. We don't change the rules. We don't change eligibility. We don't change anything else." 163 Cong. Rec. S7672 (daily ed. Dec. 1, 2017).

E. This Litigation

Two months after Congress voted to reduce Section 5000A's alternative tax to zero, the plaintiffs here—two private citizens and 19 States—filed suit. ROA.34, 68, 503.[19] They argued that, in light of the holding in *NFIB* and the 2017 amendment, the remaining minimum coverage provision was unconstitutional, and that it could not be severed from the rest of the ACA. ROA.503-536. The plaintiffs sought preliminary and permanent relief enjoining the federal defendants from enforcing any provision of the ACA or its associated regulations. ROA.535,

[19] This Court dismissed former Governor LePage from this appeal on February 26, 2019. *See* Doc. No. 514852018. On March 21, 2019, the State of Wisconsin moved to be dismissed from this appeal. *See* Doc. No. 514882751.

565-633. On the other side, 16 States and the District of Columbia intervened to defend the ACA. ROA.220-256, 946-952.[20]

The state defendants opposed the plaintiffs' motion for preliminary relief in its entirety. ROA.1051-1117. The federal defendants agreed that "immediate relief" was not warranted, because the reduction in Section 5000A's alternative tax amount would not take effect until January 1, 2019. ROA.1581. But they agreed with the plaintiffs that once the alternative tax was reduced to zero the remaining minimum coverage provision would be unconstitutional, and that it could not be severed from the ACA's guaranteed-issue and community-rating requirements. ROA.1562-1563, 1570-1577. Unlike the plaintiffs, however, the federal defendants contended that those three provisions could be severed from the rest of the ACA. ROA.1563, 1577-1580. The federal defendants urged the district court to construe the plaintiffs' motion for a preliminary injunction as a request for partial summary judgment and to declare the ACA's minimum coverage, community-rating, and guaranteed-issue provisions invalid. ROA.1581.[21]

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[20] On February 14, 2019, this Court allowed the U.S. House of Representatives and the States of Colorado, Iowa, Michigan, and Nevada to intervene on appeal. *See* Doc. Nos. 514836052, 514836075.

[21] In response to the federal defendants' suggestion, the district court ordered the parties to file "any additional information they wish[ed] to present in opposition to considering these issues on summary judgment." ROA.2501. The state defendants explained that they wished to brief additional arguments if the court intended to

On December 14, 2018, the district court denied the motion for a preliminary injunction but granted partial summary judgment. ROA.2612. It held that (1) the individual plaintiffs had standing, ROA.2625-2629, (2) setting the alternative tax amount at zero made the remaining minimum coverage provision unconstitutional, ROA.2629-2644, and (3) the unconstitutional provision could not be severed from the remainder of the ACA, which must therefore be invalidated in its entirety, ROA.2644-2665. With respect to the constitutional question, the district court concluded that Section 5000A as a whole could no longer be construed as an exercise of Congress's taxing power, principally because it would no longer "'produce[] at least some revenue for the Government.'" ROA.2635 (alteration changed). Instead, the court construed Section 5000A(a) as now constituting a "standalone command" to purchase health insurance. ROA.2644. Based on that construction, the court held that the provision exceeded Congress's power under the Commerce Clause. ROA.2637-2644.

With respect to severability, the district court asked primarily whether the 2010 Congress that originally enacted the ACA would have adopted the rest of the

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convert the motion for preliminary relief into one for summary judgment. ROA.2528-2531. The district court did not afford them that opportunity. The plaintiffs reiterated their request for preliminary relief, but did not oppose the court "*also* and *simultaneously* considering" their motion as one for partial summary judgment. ROA.2521-2522.

ACA, had it known that it could not include an enforceable minimum coverage provision. ROA.2647-2662. In concluding that it would not have done so, the court relied heavily on legislative findings that the 2010 Congress adopted as part of the ACA. ROA.2648-2651 (citing 42 U.S.C. § 18091). The district court also cited the Supreme Court's decisions in *NFIB* and *King*, particularly portions explaining why the 2010 Congress included the minimum coverage provision in the original Act. ROA.2651-2654. The district court concluded that "all nine Justices to address the issue" agreed that the minimum coverage provision was "inseverable from at least the pre-existing condition provisions." ROA.2651-2652. The court then adopted the *NFIB* joint dissent's analysis in concluding that the 2010 Congress would not have adopted any other provision of the ACA without an enforceable requirement to maintain healthcare coverage. ROA.2654-2662.

The district court also briefly addressed the intent of the 2017 Congress. ROA.2662-2664. It concluded that that Congress had "no intent" with respect to the severability of the minimum coverage provision. ROA.2664. But it also reasoned that if the 2017 Congress had considered the issue it "must have agreed" that the minimum coverage provision was "essential to the ACA" because it only reduced the alternative tax amount specified by Section 5000A(c) to zero, it did not repeal Section 5000A(a) or the 2010 Congress's findings, and it did not "repudiate

or otherwise supersede" the Supreme Court's decisions in *NFIB* and *King*. ROA.2663-2664.

In a separate order, the district court entered a partial final judgment under Federal Rule of Civil Procedure 54(b) but stayed the effect of that judgment pending appeal. ROA.2755-2785.[22] The state and federal defendants filed separate timely notices of appeal. ROA.2787-2788, 2844-2845.

SUMMARY OF ARGUMENT

1. The plaintiffs have not established standing on the record in this case. The individual plaintiffs contend that Section 5000A(a) harms them because it requires them to purchase health insurance. But in *NFIB*, the Supreme Court held that Section 5000A as a whole must be read as offering affected individuals a choice between maintaining healthcare coverage or paying a tax of a specified amount. Now that Congress has reduced that amount to zero, the individual plaintiffs need not do anything to comply with the law. A statutory provision that gives individuals a choice between purchasing health insurance and doing nothing does not impose any legal harm.

The state plaintiffs allege that Section 5000A will cost them money. While fiscal harm imposed by a federal statute can of course be a basis for state standing,

[22] The district court also stayed all further proceedings in that court pending the outcome of this appeal. ROA.2786.

in this case the States have not substantiated their position with any evidence that Section 5000A actually has increased or likely will increase their costs. They speculate that some of their residents will enroll in their Medicaid or Children's Health Insurance Program (CHIP) based on a mistaken belief that the amended Section 5000A requires individuals to maintain healthcare coverage. But in the absence of supporting evidence, that conjecture is insufficient to establish standing.

2. The minimum coverage provision remains constitutional now that Congress has reduced the amount of the alternative tax to zero. The district court held that Section 5000A(a) must be read as a freestanding "command" to buy health insurance. Again, however, the Supreme Court reached a different conclusion in *NFIB*, construing Section 5000A as offering a choice between buying insurance and paying a tax. *See* 567 U.S. at 574. And when Congress amended Section 5000A in 2017, the only change it made was to reduce the amount of the alternative tax to zero.

That change does not make Section 5000A(a) unconstitutional. With the amount of the tax set at zero, the remaining minimum coverage provision becomes simply precatory—precisely as the amending Congress intended. It is no more constitutionally objectionable than the "sense of the Congress" resolutions that Congress often adopts. Alternatively, Section 5000A as a whole may still be fairly read as a lawful exercise of Congress's taxing powers. Although it will not

produce current revenue so long as the amount of the alternative tax is set to zero, under the circumstances here that hardly requires striking the statutory framework from the books. *See United States v. Ardoin*, 19 F.3d 177, 179-180 (5th Cir. 1994) (recognizing "preserved, but unused, power to tax"). Under either analysis, the district court erred in concluding that the 2017 amendment reducing Section 5000A's alternative tax to zero had the effect of changing the result in *NFIB* and rendering the minimum coverage provision unconstitutional.

3. If, however, the minimum coverage provision is now unconstitutional, then under the circumstances of this case it is readily severable from the rest of the ACA. Severability analysis is a question of congressional intent; it asks what the Congress that crafted a provision would have wanted the remedy to be, had it known of the court's later constitutional ruling. Here, Congress changed the tax amount imposed by Section 5000A(b)-(c) to zero, so that there is no longer any legal or practical consequence for choosing not to maintain healthcare coverage. If that change has the effect of rendering the remaining minimum coverage provision in Section 5000A(a) unconstitutional (for any period during which the tax remains set at zero), it seems self-evident what remedy best comports with congressional intent. A judicial order precluding any legal enforcement of Section 5000A(a) while the alternative tax remains set at zero would, as a practical matter, leave matters precisely as Congress itself arranged them.

In contrast, there is no basis for concluding that Congress would have preferred a "remedial" order invalidating not only the minimum coverage provision—which Congress had decided not to enforce anyway—but the rest of the ACA as well. Any such order would strip existing healthcare coverage from millions of Americans. Popular provisions such as the guaranteed-issue, community-rating, and young-adult coverage reforms would be abolished. Millions of jobs would be lost. That result would be contrary to every indication of congressional intent. It would be inconsistent with the special budget procedure through which Congress acted, which allows only certain kinds of legislative changes. And it would make a mockery of the dramatic votes in which the same Congress rejected earlier efforts to repeal or substantially revise the ACA.

In concluding differently, the district court focused on whether the 2010 Congress that created the ACA would have wanted the rest of the Act to stand without the minimum coverage provision. The court's analysis of Congress's intent in 2010 is flawed; but in any event it addresses the wrong question. The 2010 Congress adopted a minimum coverage provision enforced by imposing a tax on those who chose not to maintain healthcare coverage. If *NFIB* had held that statute unconstitutional, the Supreme Court would have had to decide whether the 2010 Congress would have wanted the rest of the Act to stand without it. The 2017 Congress expressly decided to zero-out the alternative tax, thus making the

minimum coverage provision effectively *un*enforceable, while leaving the rest of the Act intact. It is the intent of that Congress, with respect to the version of ACA that it created, that matters for purposes of this case. And the 2017 Congress's intent is evident from what it did: eliminating any legal consequence for not maintaining minimum healthcare coverage, while preserving every other provision of the Act.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Magee v. Reed*, 912 F.3d 820, 822 (5th Cir. 2019).

ARGUMENT

I. THE PLAINTIFFS DO NOT HAVE STANDING

The plaintiffs have not carried their burden of establishing standing to challenge the minimum coverage provision. The individual plaintiffs allege that Section 5000A(a) injures them because they "value compliance with [their] legal obligations," and the only way to comply with that provision is by maintaining "minimum essential health insurance coverage." ROA.637, 641. But that subsection must be understood in light of the statutory construction adopted by *NFIB*, which held that Section 5000A as a whole allows individuals to choose between maintaining minimum coverage (Section 5000A(a)) or paying a tax in a particular amount (Section 5000A(b)-(c)). *See* 567 U.S. at 574 & n.11. Before 2019, a person could violate Section 5000A by "not buy[ing] health insurance and

not pay[ing] the resulting tax." *Id.* at 574 n.11. But now that Congress has reduced the amount of the tax to zero, the individual plaintiffs do not need to do anything to comply with the law. A statute that offers plaintiffs a choice between purchasing insurance or doing nothing does not impose any legally cognizable harm. *Cf. Crane v. Johnson*, 783 F.3d 244, 253 (5th Cir. 2015) ("[V]iolation of one's oath alone is an insufficient injury to support standing.").

The state plaintiffs allege that Section 5000A will cost them money. A fiscal injury caused by a federal statute can of course be a basis for state standing. *See, e.g.*, *Texas v. United States*, 787 F.3d 733, 752-53 (5th Cir. 2015) (standing based on state driver's license costs of $130.89 for each of up to "500,000 potential beneficiaries"). But allegations of financial injury that are "purely speculative" and unsupported by any "concrete evidence that [the State's] costs ha[ve] increased or will increase" are not sufficient to establish Article III standing. *Crane*, 783 F.3d at 252; *see also id.* (no standing where State asserted it would incur costs "provid[ing] social benefits to illegal immigrants" but "submitted no evidence" supporting that assertion). The state plaintiffs' theory of standing in this case—which the district court did not address (ROA.2628-2629)—involves the same kind of unsupported speculation that this Court viewed as insufficient in *Crane*. They assert that they will spend more on their Medicaid and Children's Health Insurance Program (CHIP) because some of their residents will enroll in those programs

based on a mistaken belief that Section 5000A requires them to maintain healthcare coverage. ROA.623. But that theory rests entirely on conjecture: The state plaintiffs did not introduce any evidence to support it. In the absence of such support, the States' argument is insufficient to establish standing.

II. THE MINIMUM COVERAGE PROVISION REMAINS CONSTITUTIONAL

In holding the minimum coverage provision unconstitutional, the district court interpreted Section 5000A(a) as imposing "a standalone command" to purchase health insurance. ROA.2644; *see also* ROA.2640-2644 (noting that the title of subsection (a) describes a "[r]equirement" and the text uses the word "shall"). As discussed, above, however, the Supreme Court had the same provision before it in *NFIB*, and construed it differently. *See supra* 14-15, 25-26. While recognizing that Section 5000A(a) might "more naturally" be read "as a command to buy insurance," the Court adopted a reasonable contrary interpretation as a means of saving the statute from constitutional infirmity. *NFIB*, 567 U.S. at 574 (Roberts, C.J.). Under that construction, Section 5000A as a whole "establish[es] a condition—not owning health insurance—that triggers a tax." *Id.* at 563 (Roberts, C.J.); *see id.* at 574 & n.11. Section 5000A(a) does not "order people to buy health insurance" (which would have violated the Commerce Clause); instead, interpreted along with the other provisions in Section 5000A, it

"impose[s] a tax on those without health insurance" (consistent with Congress's taxing power). *Id.* at 575 (Roberts, C.J.).

When Congress amended Section 5000A in 2017, the only change it made was to modify subsection (c) by reducing the amount of this alternative tax to zero. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017). After that amendment, individuals may freely choose between having health insurance and not having health insurance, without paying any tax if they make the latter choice. In light of the construction adopted in *NFIB* and the 2017 amendment, Section 5000A(a) is now simply precatory. It may encourage Americans to buy health insurance, but it imposes no legal obligation to do so.

That change did not make Section 5000A(a) unconstitutional. Stripped of any consequence for non-compliance, the provision is no more constitutionally problematic than the "sense of the Congress" resolutions of the sort that Congress frequently adopts, which are equivalent to "non-binding, legislative dicta." *Yang v. Cal. Dep't of Soc. Servs.*, 183 F.3d 953, 958 & n.3, 961-962 (9th Cir. 1999); *see Monahan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 994-995 (1st Cir. 1992) (similar); *cf.* 4 U.S.C. § 8 ("No disrespect should be shown to the flag of the

United States of America; the flag should not be dipped to any person or thing.").[23] There can be no concern that Section 5000A(a) violates the Commerce Clause by "compel[ling] individuals not engaged in commerce to purchase an unwanted product," *NFIB*, 567 U.S. at 549 (Roberts, C.J.), now that Congress has eliminated any form of compulsion.[24]

Moreover, as *NFIB* recognized, courts "have a duty to construe a statute to save it, if fairly possible." 567 U.S. at 574 (Roberts, C.J.). And even after the 2017 amendment, Section 5000A may, if necessary, be fairly interpreted as a lawful exercise of Congress's taxing powers (albeit one whose practical effects have at least temporarily been suspended). Section 5000A is still set out in the Internal Revenue Code; it still provides a statutory structure through which "taxpayer[s]" could at some point be directed to pay a tax for choosing not to maintain minimum healthcare coverage, 26 U.S.C. § 5000A(b); it still includes references to taxable income, number of dependents, and joint filing status, *id.*

[23] Other examples of this kind of statute include 42 U.S.C. § 1751, which declares it the policy of Congress to "encourage the domestic consumption of nutritious agricultural commodities," and 22 U.S.C. § 7674, a sense of Congress provision encouraging businesses to provide assistance to sub-Saharan African countries to prevent and reduce the incidence of HIV/AIDS.

[24] Of course, Congress may not adopt even precatory provisions that violate one of the Constitution's express prohibitions. *See, e.g.*, U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion."). But the amended Section 5000A does not contravene any such prohibition.

§ 5000A(b)(3), (c)(2), (c)(4); and by its terms, it remains inapplicable to individuals who do not pay federal income taxes, *id.* § 5000A(e)(2). *Compare NFIB*, 567 U.S. at 563.

The district court concluded that, with the amount of the tax reduced to zero, Section 5000A could no longer be construed as an exercise of the taxing power. ROA.2637. It relied primarily on the fact that Section 5000A no longer "'produce[s] at least some revenue'" for the federal government. ROA.2634-2635; *see also* ROA.2634 (after 2017 amendment, Section 5000A does not cause payment "into the Treasury" and payment amount is not "determined with reference to income and other familiar factors"); *NFIB*, 567 U.S. at 563-564. But while a potential to generate revenue at some point is an essential feature of a tax, *see NFIB*, 567 U.S. at 564, a statute does not need to produce revenue at all times to be sustained as an exercise of Congress's taxing powers. In *United States v. Ardoin*, 19 F.3d 177, 179-180 (5th Cir. 1994), for example, the defendant was convicted for failing to pay a tax on the manufacture of machineguns—even though Congress had made it illegal to possess machineguns and the federal government had stopped collecting the tax years before the defendant was indicted. This Court upheld the tax as a lawful exercise of Congress's "preserved, but unused, power to tax." *Id.* *Ardoin* forecloses any argument that Section 5000A

must generate revenue at all times to remain a valid exercise of Congress's taxing power. ROA.2635.[25]

The district court's contrary rule would yield troubling consequences extending beyond the circumstances of this case. A strict "revenue production" requirement could cast constitutional doubt on taxes with delayed start dates or that Congress has temporarily suspended for periods of time, both of which are common. For example, the ACA imposed a 40 percent excise tax on employer-sponsored healthcare plans with premiums above specified thresholds, but provided that this "Cadillac Tax" would not take effect until 2013, and Congress later delayed the effective date of that tax until 2021.[26] Similarly, the Medical Device Tax (which imposed a 2.3 percent excise tax on medical devices) was adopted in 2010; did not become effective until the end of 2012; was collected

[25] While the federal government theoretically retained the ability to collect the machinegun tax at issue in *Ardoin* (as the district court noted in attempting to distinguish the case, *see* ROA.2772-2773 n.35), *Ardoin* stands squarely for the principle that a provision may be upheld as a lawful exercise of Congress's taxing power even if it is not currently producing any revenue. Congress of course retains the option of increasing (from zero) the amount of the alternative tax sustained in *NFIB* at some point. In the meantime, there is nothing unconstitutional about leaving in place the statutory structure that would make it easiest to take that step at a future time.

[26] *See* 26 U.S.C. § 4980I; Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 9001, 124 Stat. 119, 853; Act of Jan. 22, 2018, Pub. L. No. 115-120, § 4002, 132 Stat. 28, 38.

from 2013 through 2015; and was suspended by Congress from 2016 through 2019.[27] Congress also routinely imposes taxes to discourage a particular activity. *See, e.g.*, *NFIB*, 567 U.S. at 567; *United States v. Sanchez*, 340 U.S. 42, 44 (1950). If successful, this type of measure "deters the activity taxed" such that "the revenue obtained is negligible"—or even nonexistent—but the "statute does not cease to be a valid tax measure" as a result. *Minor v. United States*, 396 U.S. 87, 98 n.13 (1969). Under the district court's logic, however, a delayed or suspended tax would apparently be "unconstitutional" until it took or went back into effect; and a tax that succeeded in completely eliminating an undesirable activity would apparently become unconstitutional in the following year.

The Supreme Court has admonished that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *NFIB*, 567 U.S. at 563 (Roberts, C.J.) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). The amended Section 5000A can reasonably be construed as encouraging (but not requiring) the purchase of health insurance, or as an exercise of the taxing power where Congress has temporarily decided to suspend collection. Section 5000A(a)

[27] *See* 26 U.S.C. § 4191; Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1404, 124 Stat. 1029, 1064-1065; Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 174, 129 Stat. 2242, 3071-3072; Act of January 22, 2018, Pub. L. No. 115-120, § 4001, 132 Stat. 28, 38.

need not—and therefore must not—be interpreted "as a standalone command that [is] unconstitutional under the Interstate Commerce Clause." ROA.2644.

III. IF THE MINIMUM COVERAGE PROVISION IS NOW UNCONSTITUTIONAL, IT IS SEVERABLE FROM THE REST OF THE ACA

The district court held that when Congress reduced to zero the amount of the alternative tax provided for in 26 U.S.C. § 5000A(b)-(c), the minimum coverage provision in 26 U.S.C. § 5000A(a) became not only unenforceable but unconstitutional. The court then held that Section 5000A(a) could not be severed from the rest of the ACA—a 974-page Act that enacted or amended hundreds of provisions spread across the United States Code. The resulting "remedial" order would invalidate the guaranteed-issue and community-rating reforms, the Medicaid expansion that now covers more than 12 million Americans, tax credits that have made health insurance affordable for eight million others, the provision that allows young adults to stay on their parents' health insurance plans until age 26, and scores of other programs and protections. That result has no basis in the law.

1. When a court concludes that a statute is unconstitutional, it generally tries "to limit the solution to the problem." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328 (2006). That approach reflects "[t]hree interrelated principles." *Id.* at 329. First, courts "try not to nullify more of a legislature's work than is necessary," because a "'ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Id.* Second, mindful of their limited

"constitutional mandate and institutional competence," courts refrain from rewriting laws "even as [they] strive to salvage [them]." *Id.* Third, "the touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.'" *Id.* at 330.

Consistent with these principles, when a court holds one part of a statute unconstitutional, it will generally "sever its problematic portions while leaving the remainder intact." *Ayotte*, 546 U.S. at 329. That is the appropriate course "unless it is evident that [Congress] would not have enacted" the valid provisions "independently of that which is invalid." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010) (brackets and quotation marks omitted); *see also Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1482 (2018) (to hold that provisions are not severable, "it must be evident that Congress would not have enacted those provisions which are within its power, independently of those which are not") (brackets and quotation marks omitted).

2. Here, the intent inquiry is straightforward. If Section 5000A(a) is now viewed as an unconstitutional command to purchase health insurance, it is one that the 2017 Congress plainly intended to make unenforceable. By reducing the amount of the alternative tax imposed by Section 5000A(b)-(c) to zero, Congress eliminated the only potential consequence for choosing not to maintain healthcare coverage. At the same time, it left every other provision of the ACA in place. In

these unique circumstances, there is no need to hypothesize about whether Congress "would have preferred" to preserve the rest of the ACA if it had known that the minimum coverage provision could not be enforced. *Free Enter.*, 561 U.S. at 509. That is the exact situation that the 2017 Congress itself created. In other words, in this case we already know—for certain—that Congress would "have preferred what is left" of the ACA to "no [Act] at all." *Ayotte*, 546 U.S. at 330; *see also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 560 (Scalia, J., dissenting) ("One determines what Congress would have done by examining what it did.").

Unsurprisingly, other standard indicia of severability yield the same result. The ACA is "fully operative" without an enforceable requirement to maintain healthcare coverage. *Free Enter.*, 561 U.S. at 509 (quotation marks omitted).[28] The ACA will function in exactly the manner that the 2017 Congress envisioned

[28] Some courts have treated this inquiry as a proxy for legislative intent. *See New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1233 n.10 (10th Cir. 2017). Some justices and judges have concluded that it is a separate step in the severability analysis (while recognizing that the two questions are closely related). *See NFIB*, 567 U.S. at 691-694 (joint dissent); *see also PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 199 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting). Under either view, the result here is the same.

whether or not this Court declares Section 5000A(a) unconstitutional. In either event, no one will pay a tax for not maintaining healthcare coverage.

The circumstances surrounding the 2017 amendment provide additional evidence that Congress would not have wanted to completely invalidate the ACA, had it known that reducing Section 5000A(b)-(c)'s tax to zero would make 5000A(a) unconstitutional. By the time of that amendment, Congress was well aware of the far-reaching consequences that would result from making major changes to the ACA. Over twelve million Americans were receiving healthcare coverage through the ACA's expansion of Medicaid, and eight million others were using ACA-funded tax credits to purchase insurance through the Act's Exchanges. ROA.365-366, 1134; *see also supra* 7 & n.5. The ACA forbade insurers from denying coverage to the 133 million Americans with pre-existing conditions and from charging them more because of their health status. ROA.1131, 1149-1183, 1210. Young adults were allowed to stay on their parents' insurance plans through age 26, 42 U.S.C. § 300gg-14; and insurers could not cap the total value of services provided to individuals over the course of a lifetime, *id.* § 300gg-11. States and local communities were also receiving billions of dollars each year through the ACA, which they used to expand access to healthcare and fight emerging public health threats such as the opioid epidemic. ROA.1144-1147, 1151-1183.

At the same time, a series of reports issued by the Congressional Budget Office and others had underscored for Congress how harmful it would be to dismantle the ACA. *See generally* ROA.1147-1183, 1224-1227. For example, even partially repealing the Act would have left 32 million more people without healthcare coverage by 2026. Cong. Budget Office, *Cost Estimate: H.R. 1628, Obamacare Repeal Reconciliation Act of 2017* (July 19, 2017).[29] Premiums in the individual market would have doubled over the same period. *Id.* Undoing the ACA's reforms also would have seriously undermined public health. In Pennsylvania, for example, rescinding just the Medicaid expansion and tax-credit provisions would have resulted in 3,425 premature deaths each year. Stier, Pennsylvania Budget and Policy Ctr., *Devastation, Death, and Deficits: The Impact of ACA Repeal on Pennsylvania* at 1 (Jan. 19, 2017).[30] Medicare's ability to make payments to Medicare Advantage plans—through which 19 million seniors receive healthcare—would have been called into question, because of the ACA's reforms to that payment system. ROA.1146-1147, 1226-1227. Uncompensated care costs would have increased by more than a trillion dollars

[29] *Available at* https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/52939-hr1628amendment.pdf.

[30] *Available at* https://pennbpc.org/sites/pennbpc.org/files/Impact_of_ACA_Repeal_Final.pdf.

over the course of a decade, stressing financial markets, state budgets, and hospitals. Blumberg, et al., Urban Inst., *Implications of Partial Repeal of the ACA Through Reconciliation* at 2 (Dec. 2016).[31] And about 2.6 million jobs would have been lost as a result of abolishing just the Medicaid expansion and tax-credit provisions. Ku, et al., The Commonwealth Fund, *Repealing Federal Health Reform: Economic and Employment Consequences for States* at 4 (Jan. 2017).[32]

There is no reason to believe that Congress would have chosen to incur these and similar costs as a preferred remedy in this case. On the contrary, there is every indication that it wanted to preserve the rest of the ACA when it reduced the amount of the tax imposed by Section 5000A(b)-(c) to zero. Indeed, a full repeal of the Act was not even an option under the procedural mechanism that Congress used to make that change. The 2017 Congress amend Section 5000A through budget reconciliation, a specialized procedure that allows the Senate to consider certain tax, spending, and debt-limit legislation on an expedited basis, but which may not be used to pass laws unrelated to reducing the deficit. *See* Heniff, Cong.

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[31] *Available at* https://www.urban.org/sites/default/files/publication/86236/2001013-the-implications-of-partial-repeal-of-the-aca-through-reconciliation_1.pdf.

[32] *Available at* https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_issue_brief_2017_jan_ku_aca_repeal_job_loss_1924_ku_repealing_federal_hlt_reform_ib.pdf.

Research Serv., *The Budget Reconciliation Process: The Senate's "Byrd Rule*" at 1 (Nov. 22, 2016).[33] Several provisions of the ACA could not have been repealed using this mechanism. *See* U.S. Senate, S. Comm. on the Budget, *Background on the Byrd Rule Decisions from the Senate Budget Committee Minority Staff*.[34] Thus, even if it were remotely plausible that the 2017 Congress would have preferred repealing the entire ACA to eliminating just the minimum coverage provision, under the procedural circumstances of this case that choice was not even on the table.

Moreover, by the time the 2017 Congress voted to reduce Section 5000A's alternative tax to zero, it had considered and rejected—sometimes in close and dramatic votes—several bills that would have repealed major provisions of the ACA. *See supra* 11-12 (recounting the 2017 Congress's efforts to change the ACA). And members of Congress who voted to zero-out the tax—thus rendering the minimum coverage provision unenforceable—repeatedly disclaimed any intent to affect any other provision of the Act. For example:

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[33] *Available at* https://fas.org/sgp/crs/misc/RL30862.pdf. *See also* 2 U.S.C. § 644 (provisions are "extraneous" if they produce changes in outlays or revenues "which are merely incidental to the non-budgetary components of the provision").

[34] *Available at* https://www.budget.senate.gov/imo/media/doc/Background%20on%20Byrd%20Rule%20decisions_7.21%5B1%5D.pdf. *See also* Pear, *Senate Rules Entangle Bid to Repeal Health Care Law*, N.Y. Times, Nov. 12, 2015, https://www.nytimes.com/2015/11/13/us/senate-rules-entangle-bid-to-repeal-health-care-law.html.

- Senator Orrin Hatch, Chairman of the Senate Finance Committee, explained that "repealing the tax does not take anyone's health insurance away. . . . The bill does nothing to alter Title I of [the ACA], which includes all of the insurance mandates and requirements related to preexisting conditions and essential health benefits." *Continuation of the Open Executive Session to Consider an Original Bill Entitled the Tax Cuts and Jobs Act Before the S. Comm. on Fin.*, U.S. Senate, 115th Cong., Nov. 15, 2017, at 106, 286.

- Senator Shelley Moore Capito emphasized that "[n]o one is being forced off of Medicaid or a private health insurance plan . . . . By eliminating the individual mandate, we are simply stopping penalizing and taxing people who either cannot afford or decide not to buy health insurance plans." 163 Cong. Rec. S7383 (daily ed. Nov. 29, 2017).

- Senator Tim Scott told his colleagues that the 2017 tax act "take[s] nothing at all away from anyone who needs a subsidy, anyone who wants to continue their coverage—it does not have a single letter in there about preexisting conditions or any actual health feature." 163 Cong. Rec. S7666 (daily ed. Dec. 1, 2017).

Under these circumstances, the district court's remedial order, invalidating the entire ACA, goes far beyond what the record, the law, or logic could support. *Cf. Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes").

If a remedy is needed in this case, the one that best comports with congressional intent would be a judicial order mirroring what Congress itself did: eliminating any enforcement of the minimum coverage provision, but not more. Such an order would "nullify [no] more of [the] legislature's work than necessary," "limit the solution to the problem," and respect Congress's wishes. *Ayotte*, 546 U.S. at 328-329. An alternative would be to invalidate the amendment that created

the constitutional infirmity (Section 11081 of the 2017 tax act), restore the alternative tax set by Section 5000A(c) to its original amount, and preserve the ACA as sustained in *NFIB*. *See Frost v. Corp. Comm'n of State of Okla.*, 278 U.S. 515, 526-527 (1929) (where amendment rendered previously valid statute unconstitutional, Court held that amendment was a "nullity" and original statute "must stand as the only valid expression of the legislative intent"); *cf. Truax v. Corrigan*, 257 U.S. 312, 341-342 (1921).[35] Of course, that approach would resurrect a tax that the political branches decided to reduce to zero. But even that anomalous result would do far less violence to congressional intent than the sweeping remedy adopted by the district court.

3. The district court arrived at the wrong remedy in part because it focused on the "intent manifested by the 2010 Congress" as to whether Section 5000A(a) could be severed from the rest of the ACA. ROA.2647. The court reasoned that it was "the intent of the ACA-enacting Congress" that "control[led]," ROA.2662, apparently because "the test for severability is often stated" as whether "the Legislature would . . . have enacted those provisions which are within its power,

[35] *See also Med. Ctr. Pharmacy v. Mukasey*, 536 F.3d 383, 401 (5th Cir. 2008) (if an act of amendment is invalid, "the act is *void ab initio*, and it is as though Congress has not acted at all").

independently of that which is not," ROA.2646 (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)).

Even on its own terms, the district court's analysis of congressional intent is flawed. The 2010 Congress did not express any "unambiguous intent" that the minimum coverage provision in Section 5000A(a) "not be severed" from the rest of the ACA. ROA.2647. Indeed, the "lion's share" of the Act has "nothing to do with private insurance, much less the mandate that individuals buy insurance." *Florida ex rel. Atty. Gen. v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235, 1322 (11th Cir. 2011), *aff'd in part, rev'd in part on other grounds by NFIB*, 567 U.S. 519. It is perhaps a closer question whether the 2010 Congress would have adopted the guaranteed-issue and community-rating requirements without an enforceable minimum coverage provision. *See id.* at 1323. But even with respect to those reforms, the answer is not "*evident.*" *Id.* at 1327. That is true even though Congress "found" that the minimum coverage provision was "an essential part" of its "regulation of the health insurance market." ROA. 2649 (quoting 42 U.S.C. § 18091(2)(H)). That finding was made to support a conclusion that the provision was "commercial and economic in nature, and substantially affect[ed] interstate commerce." 42 U.S.C. § 18091(1). As the Eleventh Circuit concluded, language "respecting Congress's constitutional authority does not govern, and is not

particularly relevant to, the different question of severability." *Florida ex rel. Atty. Gen.*, 648 F.3d at 1326.

In any event, the intent of the 2010 Congress is not the question here. Where a court strikes down part of a statute that has not changed since it was first adopted, the severability inquiry focuses on the intent of the enacting Congress. *See, e.g.*, *Free Enter.*, 561 U. S. 508-510. But that is not the relevant inquiry where the original statutory structure is held to be constitutional, and then a later Congress amends the law in a way that turns out to make a particular provision constitutionally infirm. In that situation, it makes no sense to ask what the original Congress would have preferred as a remedy had it known what the later Congress would do. The question is the intent of the amending Congress. In some cases, the answer might in theory be that if Congress knew it could not change the law in the way it wanted, it would have repealed the entire law. More commonly, it will be that the amending Congress would, as usual, want a court to be as circumspect as possible in crafting a narrow response to the particular problem that has been identified. The latter course is the correct one here.

The district court's brief analysis of the intent of the 2017 Congress relied principally on the fact that Congress did not repeal the minimum coverage provision (26 U.S.C. § 5000A(a)), or the jurisdictional finding from 2010 that the provision was an "essential part" of Congress's "regulation of the health insurance

market" (42 U.S.C. § 18091(2)(H)). *See* ROA.2662-2663. But the lack of any change to those provisions is not evidence that the 2017 Congress had "no intent" with respect to severability, should its decision to zero-out Section 5000A(b)-(c)'s alternative tax render the minimum coverage provision unconstitutional. ROA.2664. Still less does it show any affirmative intent on the part of that Congress that the minimum coverage provision "not be severed" from the entire rest of the ACA. ROA.2647. On the contrary, as discussed above, the evidence of congressional intent is plain from what the 2017 Congress actually did to the statute. It reduced the tax amount to zero, thus rendering the coverage provision unenforceable, but made no change to any of the Act's many other provisions. *See supra* 34-35. That is powerful evidence that the remedy that the 2017 Congress would have wanted in this case is one that, in all but the most formal sense, preserves the law precisely as that Congress left it.

Similarly, Congress's failure to "repudiate or otherwise supersede" the Supreme Court's decisions in *NFIB* and *King v. Burwell*, 135 S. Ct. 2480 (2015), does not show that it implicitly endorsed the view that the minimum coverage provision was indispensable to the rest of the ACA. ROA.2663. Those decisions recount the considerations that led the *2010* Congress, in the course of setting up the ACA system in the first instance, to adopt a tax as a means of enforcing the minimum coverage requirement. *See, e.g.*, *NFIB*, 567 U.S. at 547-548 (Roberts,

C.J.); *King*, 135 S. Ct. at 2485-2487. The 2017 Congress made a different choice, in light of different circumstances.

Indeed, by 2017, years of experience with the ACA had shown Congress that the individual insurance markets could now be "fully operative" without imposing any legal consequence on those who did not maintain healthcare coverage. *Free Enter.*, 561 U.S. at 509 (quotation marks omitted). According to the current Administration's Council of Economic Advisers, for example, "the common argument that the individual mandate is valuable is misguided." Council of Economic Advisers, *Deregulating Health Insurance Markets: Value to Market Participants* at 5 (Feb. 2019) ("CEA Report").[36] The ACA includes "large . . . premium subsidies," which are "far more important" to the proper functioning of the individual markets. *Id.* And the same message was delivered to the 2017 Congress shortly before it amended the ACA. In a November 2017 report, the Congressional Budget Office concluded that the individual "insurance markets would continue to be stable in almost all areas of the country throughout the coming decade" even if the "individual mandate penalty" were eliminated. Cong. Budget Office, *Repealing the Individual Health Insurance Mandate: An Updated*

[36] *Available at* https://www.whitehouse.gov/wp-content/uploads/2019/02/Deregulating-Health-Insurance-Markets-FINAL.pdf.

Estimate at 1 (Nov. 2017).[37] So when Congress decided to zero-out the alternative tax amount in Section 5000A, it had no intention of condemning the individual markets to "failure." ROA.2657. Instead, having decided repeatedly *not* to repeal major components of the ACA, it adopted a policy change that kept in place the Act's subsidies, guaranteed-issue, and community-rating reforms, Medicaid expansion, Medicare reforms, and myriad other provisions, while reducing one perceived regulatory burden by setting the tax on those who chose to forgo healthcare coverage at zero. *See also* CEA Report at 9 (tax "not needed to support the guaranteed issue of community-rated health insurance to all consumers, including those with preexisting conditions," because the "ACA premium subsidies stabilize the exchanges").

* * *

There is, of course, no need to reach the question of severability in this case. A provision that offers individuals a choice between buying health insurance and suffering no legal consequences for not doing so neither imposes any legal injury

[37] *Available at* https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53300-individualmandate.pdf. *See also* Cong. Budget Office, *Options for Reducing the Deficit: 2017 to 2016* at 227 (Dec. 2016), *available at* https://www.cbo.gov/system/files?file=2018-09/52142-budgetoptions2.pdf (adverse selection problem created by repeal of individual mandate would be "mitigated" by premium subsidies, which "would greatly reduce the effect of premium increases on coverage among subsidized enrollees")

nor violates the Constitution. But even if it did, under the circumstances of this case the only appropriate remedy would be the one that Congress itself effectively selected: making that provision—and only that provision—unenforceable.

CONCLUSION

The district court's judgment should be reversed.

Dated: March 25, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,841 words, according to the count of Microsoft Word. I further certify that this brief complies with typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in Microsoft Word using 14-point Times New Roman font.

Dated: March 25, 2019

/s Samuel P. Siegel
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CERTIFICATE OF SERVICE

I certify that on March 25, 2019, I electronically filed the forgoing document with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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