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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