NOS. 19-840, 19-1019

In the Supreme Court of the United States

CALIFORNIA, ET AL., *Petitioners*
V.
TEXAS, ET AL., *Respondents*.

TEXAS, ET AL., *Petitioners,*
V.
CALIFORNIA, ET AL., *Respondents.*

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

RESPONSE AND REPLY BRIEF FOR THE UNITED STATES HOUSE OF REPRESENTATIVES AS RESPONDENT SUPPORTING PETITIONERS

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INTRODUCTION

The weakness of respondents' legal arguments confirms that this case, at bottom, is a challenge to the "wisdom of the Affordable Care Act" and not its lawfulness. See *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 588 (2012) (*NFIB*).

Respondents' case is founded on a rendition of Section 5000A that bears little connection to reality. When Congress amended that provision in 2017 to reduce to zero the tax consequence of failing to maintain insurance, it was commonly understood that Congress had effectively repealed the ACA's so-called "individual mandate." President Trump described the amendment in precisely those terms when he signed it into law[1] and continues to do so.[2] The Speaker of the House, the Senate Majority Leader, and other congressional proponents described the 2017 amendment in the same way. See Dorf-Lederman Amici Br. 13-18; Health Care Policy Scholars Amici Br. 15-17. Congressional supporters also stressed that the amendment would have no effect on the remaining provisions of the Act—which would continue to bar discrimination against people with pre-existing conditions, offer subsidies to make insurance affordable, provide Medicaid benefits to millions of Americans, and much more. House Br. 42. Respondents have failed to identify a single contemporaneous statement by anyone in Congress or the Executive Branch articulating a different view.

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[1] Remarks by President Trump at Signing of H.R. 1, Tax Cuts and Jobs Bill Act, and H.R. 1370 (Dec. 22, 2017), https://perma.cc/74LE-L492.

[2] Donald J. Trump, Twitter (June 27, 2020), https://twitter.com/realDonaldTrump/status/1276868868359815169.

Yet in this Court, respondents insist that the 2017 amendment did the opposite of what President Trump and the amendment's congressional supporters say it did. Remarkably, they contend that by reducing the tax payment to zero—making it *easier* to forgo insurance—the 2017 Congress actually made it *unlawful* to forgo insurance. Even more remarkably, they contend that imposing an unenforceable insurance mandate was so important that the 2017 Congress would have preferred to see the entire ACA fall rather than see the law continue to operate without such a requirement. House Br. 2.

The 2017 Congress did no such thing. In *NFIB*, this Court construed Section 5000A as offering a lawful choice: obtain insurance or pay a tax in a specified amount. 567 U.S. at 567-568. The 2017 Congress left that choice-creating text and structure unchanged. It simply reduced the tax payment to zero. That approach—which takes this Court's construction of Section 5000A as a given—was an appropriate way for Congress to achieve its stated objective of depriving Section 5000A of any continuing effect. That Congress might instead have accomplished the same objective by repealing Section 5000A altogether is of no moment.

Giving Section 5000A its proper construction makes this a straightforward case. Indeed, the case does not belong in court at all. The individual plaintiffs plainly lack standing. Section 5000A requires nothing of them, inflicts no injury on them, and cannot be enforced against them (because no enforcement mechanism exists). State plaintiffs also lack standing. Section 5000A does not apply to them, and the third-

order effects they posit are too attenuated to show constitutionally sufficient injury and lack any record support.

If the Court reaches the merits, the correct outcome is equally clear. There is no serious argument that Section 5000A would be unconstitutional if construed to offer a choice rather than impose a requirement to purchase insurance. But Section 5000A does offer a choice. Respondents' constitutional challenge thus depends on accepting their incorrect interpretation of the provision.

And if the Court nonetheless concludes that the amended Section 5000A does exceed Congress's powers, the strong presumption in favor of severability set forth in this Court's decisions in *Barr* v. *American Ass'n of Political Consultants*, *Inc.* (*AAPC*), No. 19-631, slip op. 14-15 (July 6, 2020), and *Seila Law LLC* v. *CFPB*, No. 19-7, slip op. 33-36 (June 29, 2020), would require severing Section 5000A from the remainder of the ACA. All of the ACA's remaining provisions, including the guaranteed-issue and community-rating reforms, will operate perfectly well if Section 5000A is invalidated. Millions of people continue to obtain affordable insurance through the ACA exchanges notwithstanding Congress's decision in 2017 to render Section 5000A ineffective as a practical matter. None of that will change if Section 5000A is also rendered ineffective as a formal matter.

ARGUMENT

I. SECTION 5000A CONTINUES TO OFFER A LAWFUL CHOICE BETWEEN ALTERNATIVES

Respondents' case hinges on a mischaracterization of the amended Section 5000A. According to respondents, when Congress reduced the tax payment to zero it converted Section 5000A from a choice into a command. They contend that zeroing out the tax payment eliminated the predicate for treating Section 5000A as an exercise of Congress's taxing power, which in turn precludes construing the provision as a choice between maintaining insurance and paying a tax. DOJ Br. 29-31; Texas Br. 30-32.

As petitioners have demonstrated, however, the amended Section 5000A continues to offer a choice between complying with subsection (a) by purchasing insurance and complying with subsection (b) by making a specified payment, just as it did when this Court definitively construed it in *NFIB*. House Br. 14-19. The sole difference between the original and amended statute is that the tax payment required by subsection (b) is now zero. That change deprived Section 5000A of any practical effect. But it did not eliminate the lawful choice Section 5000A affords.

Respondents' contrary interpretation confuses the Court's holding in *NFIB* with its antecedent statutory construction. Before concluding that Section 5000A could be upheld because Section 5000A(b) was a tax, the Court had to decide whether Section 5000A as a whole was a legal command backed by a monetary penalty, or whether it instead permitted individuals lawfully to choose not to purchase insurance if they made the payment prescribed in that provision. *NFIB,* 567 U.S. at 567-568.

NFIB's adoption of the latter construction did not depend on the existence of a non-zero shared-responsibility payment. Indeed, it could not have: both potential constructions (command or choice) took as given that Section 5000A required individuals to pay if they did not purchase insurance. This Court relied on *other* statutory attributes: that Section 5000A is structured to provide alternatives and imposes no legal consequences (apart from paying the tax) for not maintaining insurance; that Congress anticipated that "four million people" would not buy insurance and could not have intended to "creat[e] four million outlaws"; and that the word "shall" can be construed as an incentive or choice when viewed in conjunction with other provisions of the same law. *Id.* at 568; see *New York* v. *United States*, 505 U.S. 144, 169-170 (1992).

In the 2017 amendment, Congress did not change *any* of the statutory predicates for *NFIB*'s interpretation of Section 5000A. To the contrary, the 2017 amendment reinforces *NFIB*'s choice-conferring interpretation by eliminating any practical consequence for forgoing insurance. That interpretation therefore remains "part of the statutory scheme." *Kimble* v. *Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015).

Respondents protest that, if Congress had intended to eliminate Section 5000A's practical effect, it would have repealed the provision outright. But reducing the tax to zero was a natural and appropriate way for Congress to accomplish its objective. Congress simply started with this Court's definitive construction of Section 5000A and amended the statute to eliminate any financial pressure to purchase insurance. That is the most straightforward explanation for what Congress did. It aligns with the contemporaneous history of Congress's intent. See p. 1, *supra*. It comports with

this Court's precedents, which presume that Congress does not intend to change this Court's binding construction of a statute unless Congress states clearly that it is doing so. House Br. 16. It avoids the unseemly conclusion that Congress flouted this Court's authority by enacting the very legal command that the Court had held in *NFIB* was beyond Congress's powers. And it accords with common sense; it would have been self-defeating for Congress to impose a command to purchase insurance while simultaneously stripping out the only available means of inducing compliance with that command.[3]

If anything, it is respondents who lack a cogent explanation for why Congress proceeded as it did if it wanted to convert Section 5000A into a command. Congress could easily have achieved that result by repealing subsections (b) and (c) of the provision—the choice-creating text and structure—while leaving subsection (a) in place. But Congress did not do that.

This Court should therefore reject respondents' contrived construction of Section 5000A, and give effect to the statute that Congress actually enacted.

II. RESPONDENTS LACK STANDING

Respondents offer a jumble of contradictory rationales to establish standing. But in fact no plaintiff is

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[3] The Senate passed the 2017 amendment under reconciliation procedures, governed by the Byrd Rule, that require a simple majority vote to enact legislation that pertains to the budget. The Senate could not have repealed Section 5000A using those procedures. Sixty votes would have been required to overcome a filibuster. See Health Care Policy Scholars Amici Br. 17-22. Reducing the tax payment to zero was thus a way of achieving the same practical result as an outright repeal of Section 5000A without needing to overcome a filibuster.

injured by Section 5000A. And accepting respondents' arguments for allowing this constitutional challenge to proceed despite the absence of any case or controversy respecting Section 5000A would damage the separation-of-powers values that standing requirements exist to protect.

A. The individual plaintiffs lack standing

1. Individual plaintiffs contend that they are injured because Section 5000A imposes a "command to buy health insurance." Hurley Br. 19. That argument fails for two reasons.

First, Section 5000A offers a choice between two options, see pp. 4-6, *supra*—one of which would not harm individual plaintiffs at all. If plaintiffs had opted to forgo insurance the consequence would have been—nothing. Their independent decision to eschew that option is self-inflicted injury, not injury cognizable under Article III. House Br. 20-23.

Individual plaintiffs nevertheless insist that the Court must assume that Section 5000A commands them to purchase insurance because their constitutional challenge rests on that implausible assumption. Hurley Br. 24. But the Court cannot take "hypothetical jurisdiction" over this case, *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 101 (1998)—and if resolving the standing question requires resolving an antecedent question of statutory interpretation that also bears on the merits, then the Court must resolve that question before proceeding to the merits. That is not merely a matter of labeling a question "jurisdiction[al]." DOJ Br. 22. Rather, the merits arguments in this case are different: they address what Congress could constitutionally do, whereas the statutory interpretation question addresses only what Congress actually *did*. Regardless of whether Congress had the

constitutional power to offer individual plaintiffs the choice to pay nothing and take no other action, Congress cannot be said to have harmed the individual plaintiffs in offering that choice.

Second, even assuming that Section 5000A commands the purchase of insurance, that command can be ignored without consequence. Any compulsion individual plaintiffs feel from "the mere existence" of Section 5000A cannot give rise to standing. *Poe* v. *Ullman*, 367 U.S. 497, 507 (1961) (plurality op.).

Individual plaintiffs claim that concept applies only "pre-enforcement" and is inapplicable here because they have already conformed their conduct to their understanding of the law. Hurley Br. 23. That contention is unavailing. For standing to exist, there must be a "credible threat of prosecution" *by the government* under the statute, *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 15 (2010) (citation omitted)—or this Court would be jousting at "empty shadows," *Poe*, 367 U.S. at 508. That principle applies regardless of whether the plaintiff has already changed his conduct to comply with a statute that he understood as mandatory. For instance, in *Poe*, the plaintiff doctor wished to give contraceptive advice, but refrained because the law forbade it. The plaintiff nevertheless lacked standing because the government would not have punished him for giving the advice. See *id.* at 500, 508; see also *Humanitarian Law Project*, 561 U.S. at 15.

As *Poe* demonstrates, individual plaintiffs cannot force a federal court to adjudicate the constitutionality of Section 5000A simply through "compliance" that is "uncoerced by the risk of [the provision's] enforcement" against them. *Poe*, 367 U.S. at 508. In other words,

plaintiffs cannot obtain standing merely by *self-enforcing*. If they could, the requirement that a plaintiff demonstrate a genuine risk of enforcement would be rendered meaningless.

2. Apparently recognizing that the individual plaintiffs' standing theory is unsound, DOJ takes a different tack. It contends that this Court should "allow the plaintiffs to leverage the invalidity of a provision" that does not "injure them" (Section 5000A) to "attack *other* provisions that" are constitutional but that do "injure them." DOJ Br. 17, 20.

This Court has never approved such a theory of standing through the backdoor of inseverability.[4] To begin with, the theory is irreconcilable with the requirement that an asserted injury must be "fairly traceable to the defendant's allegedly unlawful conduct." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 342 (2006). Whatever injury individual plaintiffs may have suffered from other ACA provisions is not traceable to any "unlawful conduct": the only part of the ACA that is "unlawful" in plaintiffs' view is Section 5000A, which (as DOJ tacitly acknowledges) does not inflict any injury.

In addition, DOJ's standing-through-inseverability theory is irreconcilable with this Court's severability doctrine. One of the reasons for a strong presumption in favor of severability is that "plaintiffs who successfully challenge one provision of a law may lack standing to challenge *other* provisions of that law." *AAPC*,

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[4] DOJ asserts that *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678 (1987), took such an approach. But *Alaska* did not address standing. Its "drive-by" decision provides DOJ no support. *Steel Co.*, 523 U.S. at 91.

slip op. 15 (opinion of Kavanaugh, J.) (reflecting conclusion of seven Justices that provision was severable). A plaintiff thus must have standing to challenge the specific provision of law that triggers the need for a severability analysis. DOJ's approach also contradicts the strong presumption in favor of severability required by this Court's cases and replaces it with a presumption in favor of inseverability at the standing stage.

In the same vein, DOJ's theory fails to account for the fact that severability is a "remed[ial]" inquiry, *Seila Law*, slip op. 30 (opinion of Roberts, C.J.) (reflecting conclusion of seven Justices that provision was severable)—one that comes into play only if a plaintiff is entitled to relief from the challenged provision that creates a "hole" in the statute that Congress originally enacted. Because respondents are not injured by Section 5000A and thus not entitled to relief as to that provision, there is no reason to engage in any remedial inquiry, and therefore no possibility that the remedial inquiry can itself result in a form of redress.

Finally, DOJ's theory would open the federal courts to a breathtaking array of challenges to federal statutes. In this case, it would allow a plaintiff aggrieved by undisputedly constitutional provisions of the ACA (such as its biosimilars regime or its changes to Medicare) to seek to invalidate the entire ACA by challenging a separate provision of the law that harms *no one at all*. See Dellinger Amici Br. 27 n.11. And DOJ's theory would necessarily apply to every federal statute, including immigration statutes, criminal statutes, statutes protecting religious freedoms, and omnibus statutes of all stripes. This Court should reject that result by rejecting—as it has in the past—the notion

that a "plaintiff who has been subject to injurious conduct of one kind possess[es] by virtue of that injury the necessary stake in litigating conduct of another kind." *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996). "That is of course not the law"—and for it to become so would be to dispense standing "in gross," *ibid.*, to all comers.

B. State plaintiffs lack standing

State plaintiffs make two arguments in support of their standing: (1) that Section 5000A increases their costs by increasing enrollment in Medicaid and the Children's Health Insurance Program (CHIP), which are separate programs that predated the ACA, and (2) that provisions of the ACA other than Section 5000A increase the States' costs. Neither argument has any merit.

1. State plaintiffs assert a single alleged injury arising from Section 5000A: they claim "many individuals" will enroll in Medicaid or CHIP to comply with that provision, thus increasing States' costs. Texas Br. 20. But that argument rests on speculative and implausible predictions about third-party behavior that lack any record support. House Br. 25-30; *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

First, it would be untenable to conclude that individuals eligible for Medicaid or CHIP have signed up for insurance solely because of the current version of Section 5000A, or that they would disenroll if Section 5000A were invalidated. State plaintiffs point (Texas Br. 20) to a CBO report stating that a "small number of people" may obtain insurance, despite the absence of any legal consequence for failing to do so, because of a "willingness to comply with the law." CBO, *Repealing the Individual Health Insurance Mandate: An Updated Estimate* 1 (Nov. 2017) (CBO Report). But any such "small number" is exceedingly unlikely to include

individuals who get insurance through Medicaid or CHIP (as opposed to the ACA exchanges that were the focus of the CBO's statement). There is, after all, a powerful incentive for enrollment in Medicaid and CHIP that has nothing to do with Section 5000A: they offer needy people an extremely valuable benefit for little to no cost. And even if some individuals did enroll in Medicaid or CHIP because they misinterpreted Section 5000A as a mandate, state plaintiffs advance no explanation for why those individuals would *give up* their free (or nearly free) insurance if this Court invalidated Section 5000A. That would hardly be "predictable" behavior. *Dep't of Commerce* v. *New York*, 139 S. Ct. 2551, 2566 (2019).

Second, state plaintiffs fail to back up their speculation with actual facts. *Compare id.* at 2565-2566. Their bare insistence that they "*did* offer evidence" (Texas Br. 28), accompanied by a cross-reference to pages of their brief that discuss such irrelevant topics as expenditures for employee health insurance (*e.g.*, *id.* at 23), is misleading at best; they cited no evidence that the 2017 amendment to Section 5000A increased their Medicaid or CHIP costs. State plaintiffs may not have to name a particular individual who enrolled in one of those programs for that reason (*id.* at 28)—but Article III requires that they offer *something* beyond empty speculation. *Lujan*, 504 U.S. at 561.

2. All of state plaintiffs' remaining arguments rest on alleged harms arising from provisions of the ACA *other than* Section 5000A. Texas Br. 20-29. In an effort to justify that novel standing approach, state plaintiffs gesture at a standing-through-inseverability theory (*id.* at 27-28), which lacks merit for the reasons stated above. But they primarily rely on a different argument, raised for the first time in this Court: that

their asserted harms arise from "interact[ion]" between Section 5000A and other provisions of the ACA. *Id.* at 20. That argument lacks any foundation.

There are, of course, cases in which multiple statutory provisions interact to cause an injury. But this is not one of them. State plaintiffs lean on the notion that Section 5000A causes them to incur costs, as employers, in producing 1095-B and 1095-C forms for their employees. Texas Br. 20-22. But Section 5000A does not mandate those forms, and—as their instructions make clear—they serve purposes unrelated to Section 5000A. See 26 U.S.C. 6055(a), 6056(a); House Br. 31; Dellinger Amici Br. 23.[5] If Section 5000A were erased from the ACA, state plaintiffs would still have to produce the same number of forms and comply with the same reporting requirements as they do today.

State plaintiffs also assert that they must spend "time, effort, and money to ensure that they meet the ACA's vast and complex rules and regulations" and that "the ACA * * * prevents them from applying

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[5] The IRS revised its 2019 instructions to clarify that the 1095-B serves purposes unrelated to Section 5000A. Compare https://www.irs.gov/pub/irs-prior/i109495b--2018.pdf with https://www.irs.gov/pub/irs-pdf/i109495b.pdf. Ignoring the current instructions, state plaintiffs rely on a non-binding, outdated "FAQ" page on an IRS website stating that the information on the forms is used in part "by individuals to show compliance with * * * section 5000A." Texas Br. 21-22 (citation omitted). Unsurprisingly, that language appeared on the FAQ page *before* the 2017 amendment, when Section 5000A set forth a non-zero tax payment. See https://web.archive.org/web/20160310003511/https://www.irs.gov/Affordable-Care-Act/Questions-and-Answers-on-Information-Reporting-by-Health-Coverage-Providers-Section-6055 (Mar. 10, 2016 version). Failure to update an FAQ page to conform to a change in the official form instructions cannot affect the standing analysis.

their own laws and policies." Texas Br. 22-23, 29. But they do not trace those amorphous injuries to Section 5000A. They identify no ACA-related requirements mandated by Section 5000A in its current form, because there are none. They do not explain how eliminating Section 5000A would make any such requirements go away, because it would not. And they give no reason why Section 5000A, which imposes no obligations on anybody, prevents them from putting in place any "regulat[ions]" of the "insurance market." *Id.* at 30. That is because it does not do so.

At bottom, state plaintiffs have not suffered any injury stemming from Section 5000A; all they really want is to eliminate other, distinct aspects of the ACA. If that "game of gotcha against Congress" could give rise to standing, *AAPC*, slip op. 16, then the "judicial process" could be freely used "to usurp the powers of the political branches," *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). That cannot be the law.

III. SECTION 5000A IS CONSTITUTIONAL

If this Court reaches the merits, it should uphold Section 5000A because it continues to offer a lawful choice. See pp. 4-6, *supra*. This Court has made clear that statutes that offer regulated parties a choice are constitutional so long as Congress has the authority to enact one of the options provided. *NFIB*, 567 U.S. at 562 (opinion of Roberts, C.J.); *New York*, 505 U.S. at 170. The authority to lay taxes and the Necessary and Proper Clause in Article I give Congress the power to amend Section 5000A to offer the choice of paying no tax. In exercising that power to zero out Section 5000A's tax payment, the 2017 Congress wanted to remove the thumb on the scales favoring insurance coverage by eliminating any financial pressure to pur-

chase insurance. Respondents advance no serious argument that a statute offering individuals an unfettered choice whether or not to purchase insurance exceeds Congress's powers. That should be the end of the matter. See Dorf-Lederman Amici Br. 20-23.

In addition, Congress has authority to enact hortatory statutes that encourage a course of action, but do not create binding legal obligations, without relying on its express powers. Since the Founding, Congress has enacted numerous "sense of Congress" and similar provisions—and many of those provisions would fall outside Congress's authority if they purported to affect legal rights.[6] House Br. 35-36; Dorf-Lederman Amici Br. 27-28. Indeed, this Court has sometimes characterized such provisions as within Congress's authority precisely because they were mere recommendations. See, *e.g.*, *Printz* v. *United States*, 521 U.S. 898, 909 (1997).

It follows from the constitutionality of hortatory statutes that Congress has the power to enact a statute that provides a choice between buying insurance and paying no tax without reliance on any express power. Like a hortatory statute, such a statute needs no express power because it imposes no legal obligation. And because that construction is at minimum "available" to avoid constitutional doubt (in fact, it is compelled by *NFIB*, see pp. 4-6, *supra*), this Court can

[6] The state plaintiffs briefly assert (Br. 33) that Congress must use an enumerated power for such provisions. But they cite no authority.

uphold Section 5000A on that basis. *Edmond* v. *United States*, 520 U.S. 651, 658 (1997).[7]

IV. IF SECTION 5000A IS UNCONSTITUTIONAL, IT MUST BE SEVERED FROM THE REMAINDER OF THE ACT

If this Court invalidates Section 5000A, it must sever that single provision from the remainder of the Act. Just weeks ago, this Court issued two decisions clarifying its approach to severability and reaffirming that respect for Congress's legislative role compels the Court "to salvage rather than destroy the rest of the law passed by Congress" in all but the most "unusual" cases. *AAPC*, slip op. 14-15; see *Seila Law*, slip op. 33-36. To effectuate that principle, the Court applies "a strong presumption of severability," pursuant to which the invalid provision must be severed so long as "the remainder of the statute is 'capable of functioning independently' and thus would be 'fully operative' as law." *AAPC*, slip op. 13-14, 16-17 (citation omitted). That approach obviates the need to "reconstruct a prior Congress's hypothetical intent." *Id*. at 13. A statute will be found inseverable only in those rare instances in which it is "evident" that Congress would have preferred *no* statute to the statute without the invalid provision. *Seila Law*, slip op. 33.

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[7] Section 5000A is constitutional for an additional reason. Congress retained the architecture of a tax should it decide to reinstate the shared-responsibility payment. The Necessary and Proper Clause authorizes Congress to take that step because it is "conducive to the [taxing] authority's beneficial exercise." *United States* v. *Comstock*, 560 U.S. 126, 133-134 (2010) (citation omitted); see House Br. 37-38.

Those principles require that the remainder of the ACA be preserved. The Act's myriad provisions remain fully operative, and capable of functioning independently, without Section 5000A. And respondents have not offered anything close to a persuasive justification for overcoming the strong presumption of severability and inflicting the massive damage to the health-care system that would result from the outcome they seek.

1. a. The ACA's guaranteed-issue and community-rating insurance-market reforms function independently of Section 5000A—that is, they need not be "rewrit[ten]" to permit them to operate without Section 5000A. *Alaska*, 480 U.S. at 684. Those provisions would remain fully operative if Section 5000A were invalidated: they would continue to prohibit insurers from denying coverage or charging higher premiums based on pre-existing medical conditions. Indeed, real-world evidence confirms that those provisions are not only fully operative but also continue to foster stable, affordable, and effective individual markets without an enforceable Section 5000A—just as the CBO predicted in 2017. House Br. 46-47; America's Health Insurance Plans Amici Br. 30-32. Section 5000A is therefore severable from the guaranteed-issue and community-rating provisions. *AAPC*, slip op. 16-17; *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 509 (2010).

b. Because the guaranteed-issue and community-rating provisions remain fully operative, the Court need not consider "other indicia of congressional intent." *AAPC*, slip op. 13. But doing so renders the severability inquiry even *more* straightforward. There is no need to reconstruct Congress's "hypothetical intent" here, *ibid.*, because Congress made clear in enacting the 2017 amendment that the guaranteed-issue and

community-rating provisions—indeed, the entire Act—should stand. By reducing the shared-responsibility payment to zero, Congress effectively repealed Section 5000A(a). Numerous Members of Congress said just that, leaving no doubt how Congress understood the amendment to operate. House Br. 41-42 & nn.8-9 (CBO conclusion that amendment's effect was "very similar" to repeal). At the same time, Congress kept every other provision of the ACA in place. That is conclusive evidence that Congress intended those provisions to stand even without Section 5000A. House Br. 40-41.

2. Respondents make no effort to show that the guaranteed-issue and community-rating provisions cannot function independently, or that they are not fully operative, without Section 5000A. Instead, relying solely on Congress's failure to repeal its 2010 findings, they contend that Congress "would not have wanted" those provisions to stand. DOJ Br. 37 (quotation marks omitted). That argument fails.

a. Section 18091(2)(I), enacted in 2010, states that "[t]he [minimum coverage] 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." 42 U.S.C. 18091(2)(I). On its face, the provision is a "finding" concerning the "effects" of Section 5000A on interstate commerce, and thus focuses on establishing Congress's authority to legislate. Its text says nothing about severability. See Abbe R. Gluck, *Reading the Findings: Location, Text, Context and Textualism as the ACA returns to the*

Court 19-22 (July 25, 2020), 130 Yale L.J.F. (forthcoming 2020).[8] Nevertheless, seizing on the word "essential," DOJ urges (Br. 42) this Court to treat Section 18091(2)(I) as something that it plainly is not—a "targeted inseverability clause."

Even if Section 18091(2) were treated as a nonseverability clause, it would dictate inseverability only "to the extent specified in [its] text." *AAPC*, slip op. 12. Section 18091(2)(I) states only that Section 5000A was "essential to *creating*" effective insurance markets. 42 U.S.C. 18091(2)(I) (emphasis added). As DOJ concedes (Br. 41), the relevant markets were "created" years before 2017. Section 18091(2)(I) does not say that Congress viewed Section 5000A as "essential to *maintaining*" established insurance markets in which the relevant provisions now operate effectively even absent any tax incentive to purchase insurance. That is fatal to DOJ's argument. The Court must "hew closely to the text of [a] nonseverability clause[]" and hold other statutory provisions inseverable only "to the extent dictated" by the text. *AAPC*, slip op. 13 & n.6. Section 18091(2)(I) does not address the severability question before the Court, and that is the end of the matter.

b. Equally to the point, Section 18091(2)(I) is *not* a nonseverability clause. It is a finding without operative force. *Yazoo & Mississippi Valley R.R. Co.* v. *Thomas*, 132 U.S. 174, 188 (1889); Antonin Scalia & Bryan A. Garner, *Reading Law* 217 (2012). Had Congress wanted to enact a binding nonseverability provision, it knew how to do so. See, *e.g.*, 4 U.S.C. 125 (in the event of invalidation, certain other provisions are "invalid and have no legal effect"); Gluck, *supra*, at 19-

[8] https://perma.cc/254Y-M6UJ.

22. Legislative findings, by contrast, are nonbinding aids to interpretation that are intrinsically prone to being "superseded" by subsequent events or legislation. *Gonzales* v. *Carhart*, 550 U.S. 124, 165 (2007).

For that reason, previously enacted findings are not probative of congressional intent when a subsequent enactment represents a "sharp break" from the original legislation containing the findings. *United States* v. *Lopez*, 514 U.S. 549, 563 (1995); see *United States* v. *Peters*, 403 F.3d 1263, 1275 n.2 (11th Cir. 2005). The 2017 amendment represents such a "sharp break": it eliminated the payment that the 2010 Congress viewed as a needed inducement to purchase insurance. Even if Section 18091(2)(I) were not textually limited to *creating* insurance markets, therefore, the finding would have been rendered irrelevant to the severability analysis by Congress's 2017 amendment of Section 5000A's operative text.[9]

c. Even if (contrary to all indications) the 2017 Congress believed the amended Section 5000A would continue to play a role in inducing individuals to purchase insurance, Congress unquestionably would have preferred to maintain the ACA's guaranteed-issue and community-rating protections if Section 5000A were invalidated. *Seila Law*, slip op. 35. Striking the entire statute would cause "major regulatory disruption" and

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[9] DOJ's assertion (Br. 40-41) that Congress may not be found to have impliedly repealed the finding is wrong. Because Section 18091(2) pertains to the role of the originally enacted Section 5000A in the *creation* of insurance markets, holding the amended Section 5000A severable creates no conflict implicating an implied repeal. And because findings are not operative text, Congress need not have repealed the findings (impliedly or explicitly) to render them irrelevant.

"appreciable damage to Congress's work." *Ibid*. Indeed, the consequences would be catastrophic: 10 million Americans would lose insurance coverage and 133 million who have pre-existing conditions could be denied coverage, or face prohibitive premium increases. Dep't of Health & Human Servs., *Health Insurance Coverage for Americans with Pre-Existing Conditions: The Impact of the Affordable Care Act*, at 1 (Jan. 5, 2017). It is untenable to contend that Congress would have preferred that outcome.

If more confirmation were necessary, the evidence before the 2017 Congress provides it. The CBO informed Congress that if the mandate were formally *repealed*—the equivalent of judicial invalidation—and the guaranteed-issue and community-rating provisions continued in effect, individual markets "would continue to be stable." CBO Report 1. Congress thus knew that the individual-market provisions would operate effectively without Section 5000A, while the consequences of striking those provisions were self-evident and grave.

3. Because Section 5000A is severable from the ACA's guaranteed-issue and community-rating provisions, this Court need not consider whether any other provisions of the Act are inseverable. In all events, Section 5000A is severable from the remainder of the ACA as well. Respondents effectively concede that *all* of the Act's remaining provisions can function independently of Section 5000A and are fully operative as law. DOJ Br. 44, 47; Texas Br. 44-45. For good reason. The ACA's other insurance reforms, such as the health insurance exchanges, 42 U.S.C. 18031-18044, and the employer shared-responsibility provision, 26 U.S.C. 4980H, function independently of Section 5000A. And the Act contains myriad provisions that have nothing

to do with individual insurance markets or Section 5000A. House Br. 48.

More fundamentally, the ACA has reshaped American healthcare. See Blue Cross Blue Shield Ass'n Amicus Br. 9-11; 21-22. Those reforms are now inextricably woven into the fabric of our nation's healthcare system. Both the 2010 Congress that enacted the ACA and the 2017 Congress that amended it were hardly unaware that the ACA would transform American health care. Wiping all of the law from the books would trigger exactly the kind of "major regulatory disruption" and "appreciable damage to Congress's work" that the presumption in favor of severability guards against. *Seila Law*, slip op. 35.

Tellingly, respondents have not offered any workable standard for deciding whether Congress would have found the Act's insurance reforms "palatable" in the absence of Section 5000A (DOJ Br. 46); whether Congress would have found certain tax provisions too much of a "boon" to insurers (*id*. at 45); or whether the other insurance-market provisions adequately "balance the costs and benefits" for each regulated party (Texas Br. 44). And DOJ's repeated assertion (DOJ Br. 46) that "there is no indication that Congress would have enacted" various provisions is simply an improper attempt to flip the presumption of severability. See *Seila Law*, slip op. 33.

The Court does not cavalierly "raz[e] whole statutes or Acts of Congress"—especially when the proponents of that drastic action do not even attempt to demonstrate that Congress would have preferred the immediate and devastating consequences that would result. *AAPC*, slip op. 15; see *Seila Law*, slip op. 35.

* * *

Respondents seek to invalidate one of the most consequential legislative enactments in American history on the basis of the flimsiest of legal arguments. But whether the case is viewed through the lens of standing, the constitutional merits, or severability, there is no justification for this Court to undo what Congress has done. See *King* v. *Burwell*, 135 S. Ct. 2480, 2496 (2015).

That respondents persist in such a meritless challenge—in the midst of a public-health emergency that continues to claim thousands of lives each week, ravage the economy, and make normal life impossible—is difficult to comprehend. Millions of Americans have lost their health insurance along with their jobs as a result of the COVID-19 pandemic. The ACA will likely provide the only means by which they can secure access to life-saving health care. Millions more could be afflicted with a pre-existing condition that, absent the ACA, could prevent them from ever again obtaining affordable insurance. And tens of millions would lose the coverage the ACA now provides at the very moment they may need it most. The debilitating uncertainty that respondents' lawsuit has inflicted on the nation's health-care system—and the fear and insecurity it has inflicted on millions of Americans—should be brought to an end now.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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