No. 19-840

In the Supreme Court of the United States

CALIFORNIA, ET AL.,

Petitioners,

v.

TEXAS, ET AL.,

Respondents.

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

OPENING BRIEF FOR THE UNITED STATES HOUSE OF REPRESENTATIVES AS RESPONDENT SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

In *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519 (2012), this Court upheld 26 U.S.C. 5000A, a provision of the Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as a valid exercise of Congress's taxing power because the provision offered individuals a lawful choice between purchasing insurance and paying a tax, known as a "shared-responsibility payment." In December 2017, Congress eliminated the Act's monetary incentive to purchase insurance by reducing the shared-responsibility payment to zero, such that Section 5000A now offers individuals a choice between purchasing insurance and paying $0. In this case, the court of appeals held that Section 5000A, as amended, exceeds Congress's constitutional authority and that the Act's thousands of other provisions may be invalid as a result.

The questions presented are:

1. Whether the individual and state plaintiffs (respondents here) possess Article III standing to challenge the constitutionality of Section 5000A.

2. Whether Section 5000A, as amended, exceeds Congress's constitutional authority.

3. Whether, if Section 5000A is invalid, the provision is severable from the remainder of the Act.

PARTIES TO THE PROCEEDING

Respondent and Cross-Respondent the United States House of Representatives was an intervenor-appellant in the court of appeals.

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

Respondents and Cross-Respondents United States of America, United States Department of Health and Human Services, Alex Azar, II (Secretary of the U.S. Department of Health and Human Services), United States Department of Internal Revenue, and Charles P. Rettig, in his official capacity as Commissioner of Internal Revenue, were defendants in the district court and appellants in the court of appeals.

Respondents and Cross-Petitioners State of Texas, State of Alabama, State of Arizona, State of Arkansas, State of Florida, State of Georgia, State of Indiana, State of Kansas, State of Louisiana, State of Mississippi (by and through its Governor), 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, Neill

Hurley, and John Nantz were plaintiffs in the district court and appellees in the court of appeals.

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OPINIONS BELOW

The corrected opinion of the court of appeals is reported at 945 F.3d 355 and reprinted in the Joint Appendix (JA) at 374-489. The order of the court of appeals sua sponte denying rehearing (JA490-491) is unreported. The opinion and order of the district court granting respondents' claim for declaratory relief is reported at 340 F. Supp. 3d 579 and reprinted in the appendix to the petition filed by California, *et al.* (Pet. App.) at 163a-231a. The opinion and order of the district court staying its ruling and entering partial final judgment (Pet. App. 117a-162a) is reported at 352 F. Supp. 3d 665.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2019. The court of appeals sua sponte denied rehearing on January 29, 2020. The petition for a writ of certiorari was granted on March 2, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions are reproduced at Pet. App. 232a-244a.

INTRODUCTION

When Congress enacted the Affordable Care Act (ACA or Act) in 2010, it made health care available to tens of millions of Americans who had previously been unable to obtain it. Although Congress may not have enacted the ACA with the specific purpose of combatting a pandemic, the nation's current public-health emergency has made it impossible to deny that broad access to affordable health care is not just a life-or-

death matter for millions of Americans, but an indispensable precondition to the social intercourse on which our security, welfare, and liberty ultimately depend.

This Court has held that the ACA's health-insurance reforms are constitutional, *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519 (2012) (*NFIB*), and that the federal government has implemented those reforms in a lawful manner, *King* v. *Burwell*, 135 S. Ct. 2480 (2015). In turning aside challenges to the Act in those cases, this Court stressed that "in a democracy, the power to make the law rests with those chosen by the people," and therefore that when the courts "'say what the law is'" they "must respect the role of the Legislature, and take care not to undo what it has done." *Id*. at 2496 (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); see *NFIB*, 567 U.S. at 588 (Roberts, C.J.).

The present case represents yet another effort by those who oppose the ACA for policy reasons to use the courts, rather than the democratic process, to undo what Congress has done. In 2017, Congress voted down legislation that would have repealed the ACA. Congress instead amended a single provision of the law—Section 5000A—to reduce to zero the tax payment previously imposed on persons who failed to maintain health insurance. Congressional supporters of that change uniformly stressed that it would eliminate any consequence for forgoing insurance and would not cause anyone to lose health care, because the remainder of the ACA would continue to operate exactly as before. See pp. 17, 42, *infra*.

Nevertheless, a group of States and two individuals seized upon that single change to mount yet another assault on the ACA. They contend that the amended

Section 5000A imposes a new mandate and is therefore no longer constitutional, that the provision cannot be severed from the rest of the Act, and that the ACA therefore must be treated as excised from the U.S. Code. They claim, in other words, that Congress brought about the very thing it voted not to do when it refused to repeal the ACA earlier that year—and the very thing the amendment's supporters insisted the amendment did not do.

That claim is baseless. It does not belong in an Article III court in the first place. Neither the individual plaintiffs (who would not have experienced any adverse legal consequence had they chosen to forgo insurance) nor the plaintiff States (who are not subject to Section 5000A) have suffered anything close to a cognizable injury-in-fact sufficient to establish standing. And on the merits, their challenge rests on a reading of Section 5000A that disregards this Court's definitive, and still binding, construction of the provision in *NFIB*. In essence, plaintiffs claim that the 2017 Congress transformed Section 5000A from the lawful choice this Court construed it to be into a binding command—exactly the opposite of what Congress said it was doing.

In the same vein, plaintiffs' contention that Section 5000A (if unconstitutional) cannot be severed from the entirety of the ACA is implausible. It is certain that Congress would have intended the rest of the ACA to continue to operate if Section 5000A were rendered legally inoperative. In 2017, Congress made the deliberate choice to render the provision of no practical effect by eliminating any consequence for failing to maintain insurance, while at the same time leaving the rest of the law untouched—after deliberating about and ultimately rejecting repeal of the entire

ACA. Moreover, the remainder of the ACA plainly *can* operate in the absence of Section 5000A. In fact, it has operated effectively since the amendment went into effect in 2019, providing health insurance to millions of Americans—just as Congress expected. To find Section 5000A inseverable would defy the principles that have always governed this Court's severability analysis—principles that reflect appropriate deference to "the intent of the elected representatives of the people." *Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (citation omitted).

STATEMENT

A. Legal Background

1. When Congress enacted the ACA in 2010, over 45 million Americans could not obtain affordable health insurance in the private market. Responding to those deficiencies, Congress introduced a broad swath of reforms across the health-care sector. See *Maine Community Health Options* v. *United States*, No. 18-1023, 2020 WL 1978706, at *3 (U.S. Apr. 27, 2020). Among many other changes, the ACA barred insurers from denying coverage to individuals with preexisting conditions or from charging higher premiums because of a medical condition, 42 U.S.C. 300gg *et seq*.; created "exchanges" where individuals who do not obtain coverage through an employer can shop for insurance, 42 U.S.C. 18031(b)(1); provided subsidies to defray the cost of that insurance, 26 U.S.C. 36B; altered the rules governing employer-provided coverage, *e.g.*, 26 U.S.C. 4980H(a); and expanded Medicaid to cover millions of additional Americans, 42 U.S.C. 1396a(a)(10)(A)(i)(VIII).

One of the ACA's original provisions, 26 U.S.C. 5000A, amended the Internal Revenue Code to create an incentive for individuals to purchase insurance.

That provision sought to increase the likelihood that the ACA's reforms to the individual insurance marketplace could be implemented in an economically sustainable manner. Subsection (a)—sometimes referred to as the "individual mandate"—states that certain individuals "shall * * * ensure" that they and their dependents are "covered under minimum essential coverage." Subsection (b) provides that if those individuals do not obtain such coverage they must make a "[s]hared responsibility payment" as part of their tax return. Subsection (c) sets the amount of that payment.

2. In *NFIB*, this Court concluded that Congress lacks constitutional power to require individuals to purchase insurance. 567 U.S. at 561 (Roberts, C.J.); *id.* at 647-648 (opinion of Scalia, Kennedy, Thomas, & Alito, JJ.). But the Court upheld Section 5000A after construing it *not* to impose such a mandate. As the Chief Justice explained, Section 5000A gives individuals a choice between alternatives: purchasing qualifying insurance or making a "shared responsibility payment" to the federal government. *Id.* at 574 & n.11. Because Congress plainly possesses the authority to require the latter option (and frequently exercises the tax power to create incentives, see *New York* v. *United States*, 505 U.S. 144, 171 (1992)), it could constitutionally offer individuals the choice described in the provision.

The Court's construction of Section 5000A—as a choice and not a mandate—rested on two aspects of the provision's text and enactment. First, "[n]either the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS." *NFIB*, 567 U.S. at 568. Second, Congress had anticipated that "four million

people each year" would decline to buy insurance. *Id.* at 568. As the Court observed, "[t]hat Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws." *Ibid.* The Court thus concluded that Section 5000A provided individuals with a "lawful choice": "[t]hose subject to the individual mandate may *lawfully* forgo health insurance" so long as they comply with subsections (b) and (c) of the Section 5000A—the "shared responsibility payment." *Id.* at 574 & n.11 (emphasis added).

B. Factual Background

1. Following *NFIB*, the ACA's reforms continued to be the subject of policy debate in Congress and in electoral contests for national office. In the 112th, 113th, and 114th Congresses, the House passed bills that would have repealed the law, defunded it, or blocked its implementation. None of those bills became law. In the 115th Congress, both the House and the Senate considered legislation to repeal substantial portions of the Act. That legislation failed when the Senate voted it down. JA380-381.

2. The 115th Congress instead made a single, narrow adjustment to the Act. In December 2017, Congress passed the Tax Cuts and Jobs Act, a provision of which eliminated the ACA's tax incentive to purchase insurance by reducing the shared-responsibility payment in Section 5000A(c) from "$695" to "$0." Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017). Other than that one change to the dollar figure in Section 5000A(c), the text of Section 5000A remains materially identical to the provision that Congress enacted in 2010, and that this Court construed in upholding the ACA in 2012.

The Members of Congress who voiced support for the 2017 amendment were uniform in their view that the amendment would have no effect on the continued operation of the rest of the ACA. Indeed, numerous legislators made clear their understanding that all other provisions of the Act—particularly its protections for people with preexisting conditions—would remain in force. And those legislators were likewise uniform in expressing their understanding that the point of the amendment was to *reduce* the burden of Section 5000A to nothing, not to impose a new insurance mandate. See pp. 17, 42, *infra*.

Before voting, Congress had received a report from the Congressional Budget Office (CBO) forecasting that markets for individual insurance policies "would continue to be stable in almost all areas of the country throughout the coming decade" if the shared-responsibility payment were eliminated. CBO, *Repealing the Individual Health Insurance Mandate: An Updated Estimate* 1 (Nov. 2017) (CBO Report). That prediction has proven correct.[1]

Evidence shows that the ACA has—both before and after the 2017 amendment—provided millions of Americans with insurance coverage that was previously unavailable to them, improved many Americans' health, and saved many lives.[2]

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[1] See, *e.g.*, CMS, *2020 Federal Health Insurance Exchange Enrollment Period Final Weekly Enrollment Snapshot* (Jan. 8, 2020), https://www.cms.gov/newsroom/fact-sheets/2020-federal-health-insurance-exchange-enrollment-period-final-weekly-enrollment-snapshot.

[2] See, *e.g.*, Amy Goldstein, *With the Affordable Care Act's Future In Doubt, Evidence Grows That It Has Saved Lives*, Washington Post (Sept. 30, 2019), https://www.washingtonpost.com/health/i-

C. Procedural History

1. Three months after Congress enacted the 2017 amendment, a group of States (state plaintiffs) and two individuals (individual plaintiffs) filed this suit in the Northern District of Texas. Pet. App. 178a. They challenged the amended Section 5000A, claiming that it exceeds Congress's constitutional powers. They also asserted that Section 5000A is inseverable from the remainder of the ACA such that the entire statute must be declared invalid. Pet. App. 176a.

The Department of Justice (DOJ) declined to defend the statute. But DOJ disagreed with plaintiffs' requested relief, arguing in the district court that only the ACA provisions that directly regulate the individual insurance market are inseverable from Section 5000A. Pet. App. 177a. Sixteen States and the District of Columbia (state intervenors) intervened to defend the ACA *in toto*. Pet. App. 176a.

2. The district court ruled that the individual plaintiffs had standing to challenge Section 5000A and that Section 5000A is unconstitutional. Pet. App. 178a-204a. Both rulings depended heavily on treating *NFIB*'s interpretation of Section 5000A as invalid in the wake of the 2017 amendment. The court stated that the individual plaintiffs have standing because Section 5000A "*requires* them to purchase and maintain certain health insurance coverage." Pet. App. 182a (emphasis added). The court also concluded that Section 5000A exceeds Congress's power because the provision "command[s]" the purchase of insurance but no longer imposes any tax. Pet. App. 203a.

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would-be-dead-or-i-would-be-financially-ruined/2019/09/29/e697149c-c80e-11e9-be05-f76ac4ec618c_story.html.

The district court then declared that *none* of the ACA remains valid, relying solely on statements regarding the importance of Section 5000A to the original 2010 enactment of the ACA. Pet. App. 204a-231a. The district court entered a partial final declaratory judgment. Pet. App. 162a, 116a.

3. The state intervenors appealed. The Fifth Circuit granted the motion of the U.S. House of Representatives to intervene as an appellant. Petition Appendix, No. 19-841, 112a-114a.

In the court of appeals, DOJ contended for the first time that Section 5000A could not be severed from any other provision of the ACA and that the entire Act is therefore invalid. DOJ also argued, however, that relief should not "extend[] beyond the plaintiff states"—that is, that operation of the ACA in "the intervenor states" should remain unaltered. U.S. Letter Br. 10 (5th Cir. July 3, 2019); U.S. Br. 26 (5th Cir. May 1, 2019). And DOJ argued that any injunction should run only against ACA provisions that actually injure the plaintiffs.

4. A divided panel of the Fifth Circuit agreed with most of the district court's analysis.

a. The court of appeals first held that the individual plaintiffs suffered injury traceable to Section 5000A because they were "obligated to" purchase health insurance, notwithstanding that they would suffer no consequence if they did not do so. JA398. And the court concluded that the state plaintiffs suffered injury because Section 5000A increased the "cost of printing and processing" tax forms for state employees enrolled in minimum essential coverage, even though the record contained no evidence of any increase in enrollment or related costs. JA407.

Turning to the constitutionality of Section 5000A, the Fifth Circuit decided that *NFIB*'s "construction" of Section 5000A "is no longer available" because the "zeroing out of the shared responsibility payment" transformed the provision as a whole into a "command." JA423. Based on that premise, the court ruled that Section 5000A was unconstitutional unless it was an exercise of one of Congress's enumerated powers, and that Section 5000A could not be justified under either the taxing or commerce powers because it does not generate revenue and it "*compels*" individuals "into commerce." JA425.

After declaring Section 5000A unconstitutional, the court of appeals declined to address whether that provision was severable from the rest of the ACA. The court instead remanded to the district court for a new severability analysis. See JA430, 434, 441-442, 444-445.

b. Judge King dissented, characterizing the decision as "perpetuat[ing]" the district court's "textbook judicial overreach." JA489.

Judge King concluded that none of the plaintiffs had standing to challenge Section 5000A. As Judge King explained, after the 2017 amendment, Section 5000A "does nothing more than require individuals to pay zero dollars to the IRS if they do not purchase health insurance, which is to say it does nothing at all." JA451. She reasoned that "[n]obody has standing to challenge a law that does nothing." JA451.

But because the majority addressed the case's constitutional merits, Judge King did as well. "[I]t boggles the mind," Judge King explained, "to suggest that Congress intended to turn a nonmandatory provision into a mandatory provision by doing away with the only

means of incentivizing compliance with that provision." JA472-473. Rather, she concluded, Congress intended to turn Section 5000A into a provision that "does nothing." JA474, 451. And "[w]hen Congress does nothing, no matter the form that nothing takes, it does not exceed its enumerated powers." JA451.

Judge King also expressed strong disagreement with the district court's approach to severability. JA474. She found "the answer here" to be "quite simple": because in 2017 "Congress removed the coverage requirement's only enforcement mechanism but left the rest of the Affordable Care Act in place," Congress gave the "plain[est]" possible "indication" that it "considered the coverage requirement entirely dispensable and, hence, severable." JA449, 474.

SUMMARY OF ARGUMENT

"A fair reading of legislation demands a fair understanding of the legislative plan." *King*, 135 S. Ct. at 2496. Respondents' attack on the ACA, and the court of appeals' endorsement of it, violates that precept at every turn.

I. Respondents' standing and merits arguments depend on their assertion that Congress converted Section 5000A from a choice to a mandate when it deprived that provision of practical effect by zeroing out the tax for failing to obtain insurance. But Section 5000A, as amended in 2017, offers a constitutional choice and does not impose any unconstitutional mandate. In *NFIB*, this Court definitively construed the original version of Section 5000A as offering a lawful choice between maintaining health insurance and making a tax payment. The 2017 amendment left that choice in place. It merely reduced the tax payment to zero. Members of Congress uniformly explained that

they made that change to Section 5000A solely to eliminate any financial consequence from forgoing insurance, thereby freeing individuals to make an unconstrained choice whether to do so. Respondents' contention that the 2017 Congress converted Section 5000A from a choice into a mandate thus flies in the face of the statutory text, this Court's decision in *NFIB*, and all evidence of congressional intent.

II. Respondents lack Article III standing. The individual plaintiffs' claim of injury—that they purchased insurance because of Section 5000A—is precisely the kind of self-inflicted harm that this Court has consistently rejected as a basis for standing. Section 5000A imposes no such requirement, and the contrary view of the individual plaintiffs is implausible. In all events, those plaintiffs face no risk of enforcement because Congress eliminated the only means the ACA provided for securing compliance with any supposed requirement to maintain insurance—the tax payment.

The state plaintiffs' standing arguments are equally insubstantial. Those plaintiffs are not even subject to Section 5000A. Their claim that the provision imposes indirect costs on them rests on a foundation of untenable speculation and lacks any support in the factual record. And their claim that they are injured by provisions *other than* Section 5000A—provisions whose constitutionality they do not challenge—cannot establish standing. Accepting such claims of injury as a basis for standing would reduce bedrock Article III injury-in-fact and traceability requirements to insignificance in federal statutory cases and exponentially increase the risk that the judicial process will be used to usurp the powers of the political branches—

precisely what Article III's case or controversy requirement exists to prevent.

III. If this Court concludes that this case presents a genuine Article III case or controversy, then Section 5000A should be upheld as within Congress's constitutional powers. Congress plainly had the authority to amend Section 5000A by reducing the tax amount to zero. And the provision as amended remains constitutional. It now simply offers individuals a choice whether to purchase insurance free of any consequence for failing to do so. Even if read as expressing a congressional preference that individuals maintain insurance, it is unobjectionable because no consequence follows if that preference is disregarded.

IV. If this Court nevertheless concludes that Section 5000A is now unconstitutional, then Section 5000A must be severed from the remainder of the ACA. There is no doubt that the 2017 Congress would have intended the rest of the ACA to continue to operate if Section 5000A were declared legally inoperative. The 2017 amendment rendered the provision inoperative as a practical matter, and Congress at the same time chose to leave the remainder of the Act in place. Clearer evidence of what Congress intended is difficult to imagine. And even if the evidence were not so clear, the ACA plainly can continue to operate in the manner Congress intended if Section 5000A is declared invalid. That provision has had no practical effect since the 2017 amendment took effect, and the Act has continued to function to provide millions of Americans with access to affordable insurance.

ARGUMENT

I. THE 2017 AMENDMENT DOES NOT CHANGE THIS COURT'S CONSTRUCTION OF SECTION 5000A AS OFFERING A LAWFUL CHOICE BETWEEN ALTERNATIVES.

The Fifth Circuit's analysis of respondents' standing, as well as its analysis of Section 5000A's constitutionality, rests on an implausible construction of Section 5000A that bears no resemblance to what Congress actually did or how the statute actually operates. In the Fifth Circuit's view, when Congress amended Section 5000A to reduce the shared-responsibility payment to zero, it silently transformed the provision from what this Court found it to be in *NFIB*—a lawful choice between maintaining insurance or making a shared-responsibility payment—into a command to purchase insurance. That construction defies common sense. It also defies the principle that, once this Court has authoritatively construed a statute and adjudicated its constitutionality, Congress is presumed to act in accordance with this Court's construction.

A. In *NFIB*, this Court held that Section 5000A gave individuals a lawful choice between two options: purchasing qualifying health insurance or making the shared-responsibility payment. See 567 U.S. at 574 & n.11; *id.* at 596 (opinion of Ginsburg, J.). As the Chief Justice explained, individuals who make the shared-responsibility payment in the amount specified in Section 5000A(c) may "lawfully forgo health insurance." *Id.* at 574 & n.11. The Court rejected the argument that Section 5000A(a)'s use of the word "shall" rendered the provision a legal command to purchase insurance and that Section 5000A(b) prescribed a penalty for disobeying that command. The Court instead

looked to the fact that Section 5000A is structured to provide those alternatives; that Section 5000A imposes no legal consequences for failing to buy insurance apart from the shared-responsibility payment; and that Congress anticipated that four million people each year would decline to buy insurance. Plainly, Congress "did not think it was creating four million outlaws." *Id.* at 568.

Once this Court authoritatively construed Section 5000A, that construction "effectively bec[a]me part of the statutory scheme." *Kimble*, 135 S. Ct. at 2409. The question is therefore whether Congress, in enacting the 2017 amendment, clearly manifested an intent to transform that provision from a choice into a command. See *TC Heartland LLC* v. *Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1516, 1520 (2017). It did not.

As a matter of text and structure, the 2017 amendment did not convert Section 5000A from a choice into a command. When this court construed the original Section 5000A in *NFIB*, the statute provided, in simplified form:

(a) An "applicable individual shall" maintain minimum coverage.

(b) If an individual "fails to meet the requirement of" subsection (a), he must make a "shared responsibility payment" in "the amount determined under subsection (c)."

(c) The amount of the shared-responsibility payment "shall be equal to" certain specified amounts.

26 U.S.C. 5000A (2010). After the 2017 amendment, Section 5000A provides:

(a) An "applicable individual shall" maintain minimum coverage.

(b) If an individual "fails to meet the requirement of" subsection (a), he must make a "shared responsibility payment" in "the amount determined under subsection (c)."

(c) The amount of the shared-responsibility payment "shall be equal to" certain specified amounts, *of which the "applicable dollar amount" is $0*.

26 U.S.C. 5000A (2017) (emphasis added). As that juxtaposition demonstrates, the 2017 amendment left the choice-creating text and structure of Section 5000A unchanged. Congress did not touch subsections (a) and (b), which *NFIB* had construed to create a lawful choice. Congress altered only the *amount* of the payment prescribed in Section 5000A(c). Section 5000A therefore continues to offer a lawful choice: individuals may purchase insurance, or they may make a shared-responsibility payment of $0.

Any conclusion that the 2017 amendment instead transformed subsection (a) into a legal command must rest on the untenable proposition that Congress chose the circuitous route of amending subsection (c)'s payment amount in order to impliedly convert subsections (a) and (b) from a choice to a command. That convoluted inference would hardly provide the "clear indication" of congressional intent necessary to alter a statute's meaning once this Court has authoritatively construed it. *TC Heartland*, 137 S. Ct. at 1520; see *United States* v. *Madigan*, 300 U.S. 500, 506 (1937) ("[T]he modification by implication of the settled construction of an earlier and different section is not favored."). Had Congress actually intended to transform Section

5000A(a) into a command, it had a simple path forward: it could have altered the text that created the choice.

The 2017 amendment's self-evident purpose and effect also foreclose any conclusion that Congress transformed Section 5000A(a) into a command. The originally enacted shared-responsibility payment encouraged the purchase of insurance by imposing a financial consequence for remaining uninsured. *NFIB*, 567 U.S. at 567. By eliminating the payment, Congress made it easier for individuals to forgo insurance. If that action turned subsection (a) into a command, then Congress would have "intended to turn a nonmandatory provision into a mandatory provision by doing away with the only means of incentivizing compliance with that provision." JA472-473 (King, J., dissenting).

Congress had no such implausible intent. Myriad contemporaneous statements by Members of Congress demonstrate that they understood the amended Section 5000A to allow individuals to "cho[o]se not to enroll in health coverage" without any financial consequence. *E.g.*, *Continuation of the Open Executive Session to Consider an Original Bill Entitled the "Tax Cuts and Jobs Act" Before the Senate Comm. on Fin.*, 115th Cong. 106 (Nov. 15, 2017) (*Continuation*) (Hatch); 163 Cong. Rec. H10,212 (daily ed. Dec. 19, 2017) (Ryan); *id.* S8,153 (daily ed. Dec. 20, 2017) (McConnell); *id.* S8115 (daily ed. Dec. 19, 2017) (Toomey); *id.* S8078 (Barrasso); *id.* S8168 (daily ed. Dec. 20, 2017) (Gardner). Those statements confirm that Congress understood the amended text of Section 5000A to mean what it says: individuals now have more freedom to decline to purchase insurance—not less. See Antonin Scalia & Bryan A. Garner, *Reading Law* 388 (2012) (legislator statements can be used to

establish that statutory text is capable of bearing a particular meaning). The whole point of the 2017 amendment to Section 5000A was to *eliminate* any pressure to purchase health insurance, not to create a mandate to make that purchase.

B. Ignoring all this, the Fifth Circuit held that "now that the shared responsibility payment has been zeroed out, the *only* logical conclusion under *NFIB* is to read the individual mandate as a command." JA423 (emphasis added). But for the reasons stated above, that is simply wrong. The 2017 Congress acted against the backdrop of this Court's construction of Section 5000A and removed the incentive to purchase insurance that Section 5000A(c) created by reducing the payment to zero while preserving the rest of the statutory text. That construction aligns perfectly with what Members of Congress said they were doing and what Congress actually did.

Indeed, to construe the current statute as a command, the Fifth Circuit had to violate a cardinal rule of statutory construction: it assumed that Congress and the President *defied NFIB* by transforming Section 5000A into a command unconnected to any alternative to pay a tax, which is precisely what *NFIB* held Congress could not do under its commerce power. See *Boumediene* v. *Bush*, 553 U.S. 723, 738 (2008) (articulating presumption that Congress, in enacting a law, "considered the constitutional issue and determined the amended statute to be a lawful one"). Given the respect due co-equal branches of government, it is remarkable that the Fifth Circuit would assume that Congress silently flouted this Court's constitutional interpretation in *NFIB*, rather than presuming that Congress acted in conformity with it.

* * *

The conclusion that Section 5000A continues to offer a lawful choice between buying insurance or paying nothing makes this a straightforward case. Because the individual plaintiffs could have lawfully declined to buy insurance, any injury is self-inflicted and insufficient for standing to challenge Section 5000A. The state plaintiffs' claimed injury likewise depends on an attenuated chain of possibilities that ultimately rest on the same implausible premise—that individuals will seek insurance coverage based on their erroneous belief that Section 5000A now commands them to do so. And because Section 5000A now lacks legal effect, its continued existence does not exceed Congress's constitutional authority.

II. THE PLAINTIFFS LACK STANDING.

To establish standing, a plaintiff must demonstrate that it has "suffered or [is] imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 125 (2014) (citation omitted). Faithful adherence to those requirements is essential to maintaining "the proper—and properly limited—role of the courts in a democratic society," *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975), and "prevent[ing] the judicial process from being used to usurp the powers of the political branches," *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

Plaintiffs in this case lack standing to challenge Section 5000A. The individual plaintiffs claim that they are injured because Section 5000A obligated them

to purchase health insurance. But Section 5000A imposes no such obligation, and the individual plaintiffs cannot manufacture standing based on their own voluntary decisions. Even if Section 5000A were wrongly construed to require the purchase of insurance, the individual plaintiffs would still lack standing because they would suffer no cognizable injury from failing to comply. The state plaintiffs complain that they are injured because their costs will increase as a result of some individuals misconstruing Section 5000A(a) as a requirement to obtain insurance, but that assertion rests on a chain of speculative inferences and lacks factual support. Nor can the state plaintiffs establish standing by claiming injury from provisions of the ACA they do not challenge as unconstitutional.

A. The individual plaintiffs lack standing.

1. *The individual plaintiffs lack standing to complain about a voluntary choice.*

a. The individual plaintiffs' asserted "injury" is the result of their purely voluntary decision to purchase insurance and therefore cannot establish Article III standing.

As this Court has held, plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416. When plaintiffs take voluntary action because of their misguided views about a statute, rather than responding to an actual statutory requirement, any "ongoing injuries that [they] are suffering" as a result of that action "are not fairly traceable to" the statute itself. *Ibid.*

The injury asserted by the individual plaintiffs is self-inflicted in exactly that way. They say that they

are injured because they have purchased health insurance that meets the Act's minimum-coverage standard, despite the fact that they prefer not to have such insurance. See, *e.g.*, JA33-34. But Section 5000A imposes no obligation to make that purchase, as *NFIB* unequivocally held, and following the 2017 amendment there is no cost for failing to do so. See pp. 14-18, *supra*. Because the individual plaintiffs could have declined to purchase insurance without violating the Act and without paying a cent, their purchase was a voluntary one. Plaintiffs do not have standing to complain that they were injured by that voluntary decision. See *Clapper*, 568 U.S. at 416.

b. The court of appeals incorrectly rejected that analysis.

First, the court of appeals "defer[red]" to what it described as a "factual finding" that the individual plaintiffs "purchased insurance in order to comply with" Section 5000A. JA397-398. But the "evidence" supporting that finding was nothing more than the individual plaintiffs' assertions that Section 5000A required them to purchase insurance. See *ibid.* (quoting individual plaintiffs' declarations); JA71-74, 75-78. That was not a statement of fact. It was a pure conclusion of law—and an implausible one, at that. See Part I, *supra*. A party's own legal conclusion about what a statute may require warrants no deference; such matters are for the court to decide. See *Papasan* v. *Allain*, 478 U.S. 265, 286 (1986). The plaintiffs here were no more entitled to manufacture standing by acting on the basis of their insupportable speculation about how the law would apply than were the plaintiffs in *Clapper*. See 568 U.S. at 416; see also *Amnesty Int'l USA* v. *Clapper*, 638 F.3d 118, 128 n.12 (2d Cir. 2011) (declaration that "relies on [declarant's] analysis of

how the [statute] operates" asserts "a legal determination" that the court need not accept).

Second, the court of appeals suggested that determining whether Section 5000A required the individual plaintiffs to purchase insurance would improperly "conflate[] the merits of the case with the threshold inquiry of standing." JA404. That is incorrect. The legal effect of Section 5000A is a predicate question that is central to both the standing and the merits inquiries. But to recognize that fact is not to conflate the two inquiries. Although the "merits and jurisdiction will sometimes come intertwined," a "court must still answer the jurisdictional question" at the threshold, even if "it must inevitably decide some, or all, of the merits issues" in doing so. *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017).

Here, because the individual plaintiffs' claimed injury-in-fact rests entirely on their implausible misinterpretation of Section 5000A, the court of appeals could not assure itself that the requirements of Article III were met without first addressing that legal question. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 99 (1998); *Bauer* v. *Marmara*, 774 F.3d 1026, 1029 (D.C. Cir. 2014) ("when a plaintiff's alleged injury arises solely from a statute, questions concerning standing and the" merits "may be intertwined"). But the court shirked that duty and assumed that the asserted injury existed—exactly the kind of "hypothetical jurisdiction," JA405, that this Court's precedents forbid.

Both of the incorrect rationales offered by the Fifth Circuit lead to the same untenable result: they make the standing inquiry subjective and easy to manipulate. In the Fifth Circuit's view, a plaintiff can conjure

standing to challenge the constitutionality of a statutory provision just by asserting that the provision should be read to inflict an injury—even if that assertion bears no resemblance to what the statute actually says. That would give rise to the expansion of the judicial role that standing doctrine is designed to foreclose, making standing easy to establish precisely where it should be especially difficult. See *Clapper*, 568 U.S. at 408.

2. *Even assuming that Section 5000A obligates the purchase of insurance, that obligation is unenforceable and therefore inflicts no legally cognizable injury.*

a. Even accepting the plaintiffs' implausible reading of Section 5000A, the individual plaintiffs lack standing because "they can disregard" any supposed "command to purchase health insurance * * * without consequence." JA461 (King, J., dissenting). A plaintiff cannot establish standing merely by alleging that he wishes "to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute." *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298-299 (1979). Instead, he must show intent to violate a statute "*and* * * * a credible threat of prosecution thereunder." *Ibid.* (emphasis added); see *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 161-167 (2014); *Younger* v. *Harris*, 401 U.S. 37, 42 (1971) (no "genuine controversy" where individuals "feel inhibited" but "do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible").

There is no "threat"—much less a "credible" one—that the federal government would take any action

against the individual plaintiffs if they failed to purchase insurance. The *only* consequence of failing to maintain insurance is the tax payment provided for in Section 5000A(b), see *NFIB*, 567 U.S. at 574 & n.11, and that tax amount is now zero. The government therefore has no means to enforce Section 5000A(a)—and the individual plaintiffs suffer no harm by failing to comply. And they can be doubly assured that no enforcement action will occur here, because the Executive Branch has agreed that Section 5000A lacks an enforcement mechanism. U.S. Br. 23 (5th Cir. May 1, 2019); see *Poe* v. *Ullman*, 367 U.S. 497, 507 (1961) (plurality op.) ("If the prosecutor expressly agrees not to prosecute, a suit against him * * * is not such an adversary case as will be reviewed here."); see also *Virginia* v. *Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). Indeed, any effort to enforce Section 5000A as a stand-alone mandate would fly in the face of this Court's ruling in *NFIB*.

b. The court of appeals came to a different conclusion on the ground that "plaintiffs have already incurred a financial injury," such that "this case is not a pre-enforcement challenge." JA402. But the fact that a plaintiff complies with a statutory provision that he wishes to attack does not mean that the government has "enforced" the provision against him. The plaintiff must still show some real threat of prosecution should his compliance stop. See *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 15-16 (2010) (requiring "credible threat of prosecution") (citation omitted); *Steffel* v. *Thompson*, 415 U.S. 452, 459 (1974) (requiring real, not "imaginary or speculative," threat of arrest) (citation omitted).

Even if the individual plaintiffs "feel compelled" by their misinterpretation of Section 5000A to buy insurance, that compulsion comes from "the mere existence" of the statute, not from any "real threat of enforcement." *Poe*, 367 U.S. at 507 (plurality op.). It is accordingly "insufficient grounds to support a federal court's adjudication of [the statute's] constitutionality." *Ibid.*

B. The state plaintiffs lack standing.

The state plaintiffs also lack standing to challenge Section 5000A. First, they contend that Section 5000A will give rise to increased state costs. That argument depends on a chain of speculative inferences that is unsupported by evidence and insufficient to give rise to standing. Second, they point to injuries allegedly flowing from portions of the ACA *other than* Section 5000A—portions that they do not argue are unconstitutional. Such injuries do not give rise to standing to challenge Section 5000A.

1. *The speculative assertion that Section 5000A increases States' costs does not support standing.*

a. Below, the state plaintiffs argued that Section 5000A increased the number of individuals enrolled in Medicaid and CHIP, thereby increasing States' costs for those programs. See Texas Br. 20-21 (5th Cir. May 1, 2019); Brief of Plaintiffs in Support of Application for Preliminary Injunction 42 (N.D. Tex. April 26, 2018), ECF No. 40. Although the court of appeals did not adopt that argument, it appeared to accept a similar theory: that Section 5000A caused more state employees to get "insurance through a state employer," JA410, thereby increasing the costs associated with

certain tax forms that a state employer must send to employees, JA407-408.[3]

In either event, the state plaintiffs' theory of standing rests entirely "on a highly attenuated chain of possibilities" that not only defies logic and commonsense but also finds no support in the record. *Clapper*, 568 U.S. at 411. It therefore fails to establish the existence of a certainly impending injury traceable to Section 5000A. See *id.* at 410-411.

As a preliminary matter, whether the state plaintiffs' costs will increase turns on whether individuals who are already eligible for Medicaid, CHIP, or state-employer insurance under existing law would obtain insurance solely because of Section 5000A. That "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (citation omitted). In such a case, standing is "'substantially more difficult' to establish." *Ibid.* (quoting *Allen* v. *Wright*, 468 U.S. 737, 758 (1984)); see *Clapper*, 568 U.S. at 414.

In relying on an unsupported and unsupportable chain of events, the state plaintiffs have not met that

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[3] It is unclear whether the Fifth Circuit concluded that the state plaintiffs have standing on the theory that (1) the amended Section 5000A caused a greater number of state employees to sign up for state-employer insurance and thereby increased States' reporting costs by requiring them to generate additional tax forms, or (2) regardless of any change in enrollment, any tax-form reporting cost borne by a State flows from the existence of the amended Section 5000A. See JA407-411. Regardless, both theories fail. See *infra* pp. 26-30 (addressing former); *infra* pp. 30-34 (addressing latter).

difficult burden. First, their argument requires accepting that—despite the absence of any tax consequence for failing to buy insurance—individuals in the plaintiff States will misinterpret Section 5000A as requiring them to maintain insurance and will therefore feel compelled to obtain coverage when they otherwise would not. Second, it hypothesizes that those same individuals are eligible for Medicaid, CHIP, or state-employer insurance and will enroll or stay enrolled in those programs only because of their incorrect belief that Section 5000A requires it.

Each link in that chain is untenable. The contention that people will seek insurance because of Section 5000A is far-fetched. As the CBO has explained, "[i]n the case of a mandate to have health insurance, individuals would generally weigh the benefits of that coverage against [the] expected costs [of noncompliance] when determining whether to comply."[4] Accordingly, "[t]he degree to which individuals who are subject to a mandate believe that their noncompliance would be detected, and that fines would be levied as a result, * * * greatly affects a mandate's impact on coverage."[5] When, as here, the consequence of failing to obtain insurance is to pay nothing, a "mandate" is highly unlikely to affect behavior. That is even more true when the non-existent payment is not, in fact, a penalty for noncompliance, but itself a way to satisfy the law's requirements. See pp. 14-18, *supra*.

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[4] CBO, *Key Issues in Analyzing Major Health Insurance Proposals* 49 (Dec. 2008), https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/12-18-keyissues.pdf.

[5] *Id.* at 51.

The next inferential leap is equally untenable. It requires the Court to accept that some number of people who are eligible for Medicaid, CHIP, or state-employer insurance in the plaintiff States would not only misinterpret Section 5000A but would be impelled by the misinterpretation to enroll in those programs, thereby raising the costs of the programs to the States. But Section 5000A does not expand eligibility for any of those programs, and individuals who are eligible for them have long had compelling reasons to enroll that have nothing to do with Section 5000A. That is particularly true with respect to Medicaid and CHIP—programs that enable financially needy people to pay little to nothing for extremely valuable health-care coverage.[6]

In short, the state plaintiffs' claimed injury rests on exactly the type of "highly attenuated chain of possibilities" that this Court has consistently rejected as a basis for standing. *Clapper*, 568 U.S. at 410-411.

b. The state plaintiffs' argument is also doomed by their failure to introduce any supporting evidence. They have not identified a single person who has enrolled in Medicaid, CHIP, or state-employer insurance for the reasons the state plaintiffs posit, or even any substantial risk that any person would do so; they have not estimated how many such people there might be; and they have not presented any other evidence to support their theoretical claim of increased costs, which is far from self-evident because it is much more likely that increased enrollment will reduce state costs

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[6] Christine Eibner & Sarah A. Nowak, *The Effect of Eliminating the Individual Mandate Penalty and the Role of Behavioral Factors*, The Commonwealth Fund, 6 (July 2018), https://www.commonwealthfund.org/sites/default/files/2018-07/Eibner_individual_mandate_repeal.pdf.

by increasing preventive care that lessens the need for serious medical interventions. Because summary judgment was granted in the state plaintiffs' favor, they had to establish that there were no genuine issues of material fact as to standing. See *Lujan*, 504 U.S. at 561. But they produced nothing.

The Fifth Circuit misread the record in concluding otherwise. While the record does demonstrate that the *passage* of the ACA "'increased enrollment'" in programs like Medicaid, JA409, and increased the number of state employees seeking employer-provided insurance, JA347, no evidence suggests that any individual obtained such insurance because of the now-toothless Section 5000A. See JA462 (King, J., dissenting) ("[T]here is no evidence in the record, much less conclusive evidence, to support the state plaintiffs' alleged injuries."). Nor is there any evidence that the state plaintiffs' asserted harms are redressable—that is, that any individuals in the plaintiff States who are currently enrolled in Medicaid, CHIP, or insurance through their state employers would unenroll if Section 5000A were declared unconstitutional.

Indeed, the only declarations in the record from insurance purchasers are from individuals who are *not* eligible for Medicaid, CHIP, or insurance through state employers. JA71, 75. And ample record evidence supports the entirely sensible conclusion that enrollment increases stemmed from features of the ACA other than the post-amendment Section 5000A.[7]

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[7] See, *e.g.*, JA189-190 (explaining that the ACA's changes to definition of "employee" increased the number of individuals South Dakota must insure as employer); JA147-148; JA341-342. One affidavit lists "Form 1095-C administration: $100,000.00 ongoing costs" as one of the "estimated financial burdens" caused by "[t]he

Because there is no evidence that state costs are higher because of the amended Section 5000A, this case is nothing like *Department of Commerce* v. *New York*, 139 S. Ct. 2551 (2019), on which the court of appeals relied, see JA412-413. There, following an eight-day bench trial, the district court made detailed factual findings about the likelihood that third parties would engage in "predictable" violations of law. *New York* v. *Dep't of Commerce*, 351 F. Supp. 3d 502, 592, 596-599 (S.D.N.Y. 2019). Here, the district court made no factual findings regarding the likelihood that individuals would purchase insurance. Nor did the district court otherwise address the effect of Section 5000A on the state plaintiffs.

2. *Any harms flowing from other parts of the ACA are not a basis for standing to challenge the constitutionality of Section 5000A.*

The state plaintiffs also argued—and the Fifth Circuit appeared to accept—that provisions of the ACA other than Section 5000A caused them harm. Those alleged harms do not give rise to standing to challenge Section 5000A—the only provision of the statute that the plaintiffs claim is unconstitutional.

a. The Fifth Circuit said that state plaintiffs have standing because of the 1095-B and 1095-C tax reporting requirements, which mandate that employers—including the state plaintiffs—send forms to their employees showing whether those employees have certain health insurance. See 26 U.S.C. 6055(a), 6056(a);

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individual mandate." JA186-187. But the affidavit makes clear that the costs it lists are ones "[a]ssociated with ACA [r]egulations" generally, not with Section 5000A specifically—much less with the current version of that provision. JA186; see JA186-190.

see also JA407-411. But those forms expressly serve reporting purposes that have nothing to do with Section 5000A: assessing an individual's "eligibility for the premium tax credit" and facilitating administration of the employer mandate. 2019 Instructions for Forms 1094-B and 1095-B, *available at* https://www.irs.gov/pub/irs-pdf/i109495b.pdf; 2019 Instructions for Forms 1094-C and 1095-C, *available at* https://www.irs.gov/pub/irs-pdf/i109495c.pdf.

The forms are not required by Section 5000A, and invalidation of that provision would not render them unnecessary. Accordingly, States' costs of "printing and processing" the forms cannot be said to "flow from" Section 5000A. Contra JA407, 411. Nor would a ruling in the state plaintiffs' favor redress the harm.

The state plaintiffs have also alleged other injuries that have no connection to Section 5000A. The state plaintiffs have said that they must spend millions of dollars on employee insurance, but that is due to 26 U.S.C. 4980H(a)—the so-called "employer mandate." The state plaintiffs have bemoaned the existence of expanded Medicaid pools, but those result from ACA provisions concerning Medicaid eligibility, such as 42 U.S.C. 1396a(e)(14). The state plaintiffs have complained generally that they must "spend funds to fix problems," Texas Br. 24 (5th Cir. May 1, 2019), but have not identified any problem-solving expenditures that are "fairly traceable" to the current Section 5000A, as opposed to "some other" elements of the ACA, *Clapper*, 568 U.S. at 411. And the state plaintiffs have contended that certain States repealed high-risk pools because those laws "no longer serve[d] any functional purpose," Texas Br. 26 (5th Cir. May 1, 2019)—but it is the ACA's guaranteed-issue and community-

rating provisions, not Section 5000A, that have rendered high-risk pools irrelevant.

b. None of those alleged harms can provide standing to challenge Section 5000A. This Court has made clear that an injury resulting from one portion of a statute does not support standing to challenge another portion. See, *e.g.*, *Davis* v. *FEC*, 554 U.S. 724, 733-734 (2008). Rather, Article III's requirements must be met with respect to "each claim" a plaintiff "seeks to press." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006); see *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996).

The result is no different here simply because plaintiffs' untenable severability arguments could theoretically lead to invalidation of the provisions of the ACA on which the state plaintiffs' assertions of injury are premised. See, *e.g.*, Jonathan H. Adler, *How Do the States Have Standing to Challenge an Unenforced and Unenforceable Mandate?* (June 15, 2018), https://reason.com/2018/06/15/how-do-the-states-have-standing-to-chall (relying on "inseverability" to assert standing would render Article III "toothless").

Severability is a remedial inquiry, intended to ascertain whether excision of a statutory provision—because a court blocked the provision from remaining in effect—should disturb the remainder of the statute. See *Ayotte*, 546 U.S. at 329. Without the predicate of such court action, there is no "*absence*" in the statute that would justify an inquiry into whether Congress would have enacted the statute in that new form. *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987) (emphasis added).

Here, Section 5000A cannot be enjoined as to any of the plaintiffs, or even declared unconstitutional at their behest, because it has no effect on them. Without

the possibility of such an order, Section 5000A remains part of the Act, regardless of whether a court might abstractly question the provision's constitutionality. Plaintiffs therefore cannot obtain relief from other portions of the Act by means of a severability analysis.

Adopting the state plaintiffs' "bank shot" standing theory would effectively write Article III's injury and traceability requirements out of the law in cases challenging federal statutes, and would therefore dramatically expand the use of "the judicial process * * * to usurp the powers of the political branches." *Clapper*, 568 U.S. at 408. The same theory that the state plaintiffs advance here would confer standing on a hospital unhappy about ACA changes to Medicare reimbursement rates, or a patent holder unhappy about the ACA's biosimilars regime. In each case, the plaintiff could challenge the constitutionality of Section 5000A and establish standing by contending that the provision it dislikes is inseverable from that provision. The possibilities are endless. Indeed, accepting the state plaintiffs' argument would be a particularly extreme departure from the principles that anchor this Court's standing jurisprudence. It would allow federal courts to decide a challenge to a provision that cannot inflict injury *on anyone*, based on nothing more than an assertion that some other statutory provision is inseverable from the challenged provision.

DOJ's remedial argument further highlights the implausibility of such an approach. According to DOJ, the "relief awarded" in this suit must be "limited only to those provisions that actually injure the * * * plaintiffs." U.S. Br. 28 (5th Cir. May 1, 2019). But the state plaintiffs—like the individual plaintiffs—are not injured by Section 5000A. Under DOJ's theory, the plaintiffs could not receive *any* relief related to Section

5000A, even though it is the *only* provision they challenge as unconstitutional.

In sum, none of the plaintiffs has standing. The Fifth Circuit's decision to the contrary constituted "textbook judicial overreach," JA489 (King, J., dissenting)—the opposite of the "especially rigorous" standing analysis called for by the circumstances of this case, *Clapper*, 568 U.S. at 408 (citation omitted).

III. SECTION 5000A DOES NOT EXCEED CONGRESS'S AUTHORITY.

If this Court reaches the merits, it should uphold Section 5000A.

In 2010, Congress exercised its constitutional authority to create a tax incentive to purchase health insurance. In 2017, Congress sought to nullify that incentive—in the words of Judge King, it sought to turn the provision into a "dead letter." JA473-474 (King, J., dissenting). Working in the shadow of *NFIB*, Congress accomplished exactly what it intended: it converted Section 5000A into a choice between purchasing insurance or paying nothing. A statute of that nature creates no legal rights or duties, and Congress's ability to functionally repeal a law by turning it into an ineffectual, advisory statement does not depend on an enumerated power. By indefensibly freeing itself of *NFIB*'s authoritative statutory construction, the Fifth Circuit adopted the remarkable position that Congress exceeded its constitutional power by reducing to nothing the force of an incentive it had the constitutional authority to enact in the first place. That cannot be correct.

A. Enacting a statute that repeals previous legal obligations does not exceed Congress's powers.

1. In *NFIB*, the Court held that Congress's original enactment of Section 5000A was a valid exercise of its taxing power, as it gave individuals the choice between making a tax payment and obtaining insurance. 567 U.S. at 575. This Court's construction of Section 5000A remains controlling. See p. 14-17, *supra*. Only the parameters of that choice now differ.

By reducing the shared-responsibility payment to zero in the 2017 amendment, Congress permitted individuals to "cho[o]se not to enroll in health coverage" without any consequence. *Continuation* 106, *supra* (Hatch). Before the 2017 amendment, the only legal and practical consequence that followed from failing to maintain health insurance was the prescribed tax payment. After the amendment, the legal and practical consequence of failing to maintain insurance is—nothing.

2. Congress's action in amending Section 5000A fell within its powers. Congress has the power to reduce or repeal a previously enacted tax, and plaintiffs do not contend otherwise. The authority to do so is inherent in the power to lay taxes in the first instance.

The resulting amended version of Section 5000A, which offers a choice between maintaining insurance and paying nothing, also raises no constitutional issue. Congress unquestionably possesses authority to express its views in a non-binding manner, and does so with frequency. Many of those laws would contravene limits on Congress's authority if they directed the actions in question. *E.g.*, 15 U.S.C. 7807 ("States should enact the Uniform Athlete Agents Act of 2000"); Pub. L. No. 100-418, title V, § 5003(d), 102 Stat. 1107, 1424

(Aug. 23, 1988) ("the President should pursue the negotiation" of a particular treaty); *Dimmitt* v. *City of Clearwater*, 985 F.2d 1565, 1573 (11th Cir. 1993) (4 U.S.C. 8 directs the manner of handling the United States flag, but "was not intended to proscribe conduct"). But because individuals remain free to act in whatever manner they prefer, no one has ever thought such enactments must be supported by an enumerated power.

Section 5000A is thus constitutional. Congress exercised its inherent authority under the tax power to reduce to zero the tax payment under Section 5000A(c). And Section 5000A still provides the same choice it did before the 2017 amendment. It does not alter any legal rights or impose any legal duties. As before, subsection (a) merely establishes a condition (not having insurance) that triggers subsections (b) and (c): the shared-responsibility payment. Every individual can comply with the statute by doing nothing. Thus, even though Congress originally enacted Section 5000A in the exercise of its enumerated powers, the provision can be upheld in its amended form without reference to one.

3. The court of appeals did not suggest that Section 5000A would be unconstitutional if it were construed to provide a choice. JA426; JA468 n.11 (King, J., dissenting). Instead, the Fifth Circuit's decision hinged entirely on its erroneous understanding of the 2017 amendment as transforming Section 5000A into a command. JA426. That is wrong. The proper question—one entirely elided by the Fifth Circuit—is whether providing a choice between buying insurance and doing nothing requires an enumerated power. No

party or court has ever explained why a statute presenting that choice is unconstitutional. That is because it is not.

B. Even if Congress's action did require an enumerated power, it can be upheld under the Necessary and Proper Clause.

Even if this Court concludes that Section 5000A, while not a command, nonetheless requires an enumerated power, the Court should still uphold it because it is necessary and proper to the exercise of Congress's power to lay and collect taxes.

The Necessary and Proper Clause grants Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. Const. art. I, § 8, cl. 18. The Clause "makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *United States* v. *Comstock*, 560 U.S. 126, 133-34 (2010) (quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 413, 418 (1819)).

As amended, Section 5000A is necessary and proper to the exercise of Congress's taxing power. Section 5000A is "necessary" because it retains the architecture of the tax upheld in *NFIB*, even though Congress has now made a policy choice to reduce the amount of the tax to zero for the time being. Indeed, no one disputes that it would have been permissible under the tax power for Congress to set the amount of the tax to one dollar in order to retain the structure of Section 5000A in case Congress chose for policy reasons to raise the tax payment in the future. It is equally "convenient or useful" to Congress to retain the option to later reinstate a higher payment in the

existing statutory structure by setting the payment at zero at present. *McCulloch*, 17 U.S. at 413.

And Congress's decision to set the amount of the tax at zero is "proper" too. It neither expands "the sphere of federal regulation," *NFIB*, 567 U.S. at 560 (opinion of Roberts, C.J.), nor compels any action by anyone. Indeed, it eliminates any coercion. It is therefore constitutional.

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

If this Court declares Section 5000A invalid, the Court should sever that single provision and uphold the remainder of the Act. That is the only result that respects both the clearly expressed intent of the 2017 Congress and this Court's precedents.

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." *NFIB*, 567 U.S. at 586 (quoting *Ayotte*, 546 U.S. at 330). A court therefore must ask whether "the legislature [would] have preferred what is left of its statute to no statute at all." *Ayotte*, 546 U.S. at 330. The remainder of the statute is *presumptively* severable unless it is evident that its continued enforcement would produce "a scheme sharply different from what Congress contemplated." *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1482 (2018).

Here, severing Section 5000A from the remainder of the Act results in a statute *materially identical* to the law that Congress passed. Even assuming—contrary to principles of statutory interpretation and Congress's evident intent, see Part I, *supra*—that the

amended version of Section 5000A(a) should be understood as a legal requirement to purchase insurance, the 2017 Congress stripped the provision of any force. And at the same time that Congress deprived Section 5000A(a) of all practical effect, it deliberately left the remainder of the Act intact and fully operative. That is dispositive evidence of Congress's intent to retain the rest of the Act even if Section 5000A were held to be without legal effect as well. And even if Congress's intent were not so clear, the outcome of the severability analysis would be the same because the rest of the ACA can—and does—function without Section 5000A in a manner consistent with Congress's intent. *NFIB*, 567 U.S. at 587-588; *Murphy*, 138 S. Ct. at 1482; *United States* v. *Booker*, 543 U.S. 220, 259 (2005).

Respondents nonetheless urge this Court to strike down the ACA's hundreds of other provisions, among them transformative statutory protections such as provisions mandating coverage for preexisting medical conditions; federal insurance premium tax credits; penalties for employers who decline to offer insurance; and automatic enrollment of employees in employer-sponsored health plans. Yet respondents are unable to muster a shred of evidence that Congress viewed the amended version of Section 5000A as critical to the operation of the rest of the ACA. That is because Congress did not. This Court should reject respondents' extraordinary attempt to leverage Congress's amendment of a single sentence in Section 5000A into an excuse to invalidate the most sweeping public-health legislation in generations.

A. Congress's decision to leave the rest of the Act in place when it amended Section 5000A answers the severability question.

The severability analysis in this case is unusually straightforward. The inquiry asks whether, once a court has invalidated a challenged provision, Congress would "have preferred what is left of [the Act] to no statute at all." *Ayotte*, 546 U.S. at 330; see *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010). Here, there is no need to hypothesize about whether Congress would have preferred the remainder of the ACA to fall if Section 5000A were rendered inoperative. What Congress *actually did* in passing the 2017 amendment definitively answers that question. The amendment's text leaves no doubt that Congress intended to eliminate Section 5000A(a)'s practical effect, while leaving the remainder of the ACA untouched. Congress's action permits only one conclusion: Section 5000A is severable from the remainder of the Act.

1. a. In 2017, Congress reduced the shared-responsibility payment to zero, thereby surgically removing the government's only method of inducing compliance with Section 5000A(a)'s provision that individuals purchase insurance. The sole effect of the 2017 amendment was to deprive Section 5000A(a) of any practical effect on those who would prefer to forgo insurance. At the same time, Congress left the remainder of the ACA unchanged.

The text of the ACA, as amended in 2017, therefore establishes that Congress expected and intended the remainder of the Act to function even in the absence of any financial inducement to purchase insurance. Put another way, Section 5000A(a) is already without effect because Congress eliminated the *only* statutorily

prescribed method of giving it effect—the tax payment. Should this Court decide that the provision *also* has no legal effect because it is unconstitutional, that would not change Congress's expectation about how the rest of the statute would continue to function.

b. The history of the 2017 amendment's enactment confirms that Congress's whole objective was to effectively repeal Section 5000A(a) while leaving the remainder of the Act intact.

On several occasions in 2017, the 115th Congress considered repealing the ACA in full or in substantial part—an action that would have had similar effect as the total-invalidation remedy that respondents now urge.[8] Each time, Congress rejected that option.[9] Instead, Congress opted to eliminate the practical effect of Section 5000A by reducing the shared-responsibility payment to zero, while leaving the remainder of the Act in place. As DOJ explained before the district court: "Congress itself reduced the effect of the mandate by eliminating its penalty in the [2017 amendment], and yet did not repeal the rest of the ACA despite repeated attempts to do so." JA333-334.

Congress understood the effect of its targeted action to be precisely what the statutory text says: to

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[8] Julie Rovner, *Timeline: Despite GOP's Failure To Repeal Obamacare, The ACA Has Changed* (Apr. 5, 2018), https://www.washingtonpost.com/national/health-science/timeline-despite-gops-failure-to-repeal-obamacare-the-aca-has-changed/2018/04/05/dba36240-38b1-11e8-af3c-2123715f78df_story.html.

[9] Carl Hulse, *McCain Provides a Dramatic Finale on Health Care: Thumb Down* (July 28, 2017), https://www.nytimes.com/2017/07/28/us/john-mccains-real-return.html.

render Section 5000A(a) of no practical effect while allowing the remainder of the Act to function. During the congressional debate over the 2017 amendment, the CBO confirmed that eliminating the tax would be "very similar" to formally repealing the mandate. CBO Report 1. Numerous Members of Congress confirmed that they understood the effect of eliminating the shared-responsibility payment to be the "equivalent" of repealing Section 5000A(a) because it would allow individuals to forego insurance without consequence. See p. 17, *supra*; see also, *e.g.*, 163 Cong. Rec. S7500 (daily ed. Nov. 29, 2017) (Portman) (eliminating the payment "stop[s] the ObamaCare individual mandate").

The 2017 amendment's proponents also confirmed, unanimously and without contradiction, that the amendment left the ACA's myriad other provisions intact. Senator Hatch unequivocally stated, for instance, that "[t]he bill does nothing to alter Title 1 of Obamacare, which includes all of the insurance mandates and requirements related to preexisting conditions and essential health benefits." *Continuation*, *supra* (Hatch); see, *e.g.*, *ibid*. (Toomey) (explaining that the 2017 amendment would mean "no cuts to Medicaid" and "no cuts to Medicare," and that "[n]obody is disqualified from insurance"); 163 Cong. Rec. S7666 (daily ed. Dec. 1, 2017) (Scott) (insisting that reducing the tax to zero "take[s] nothing at all away from anyone who needs a subsidy, anyone who wants to continue their coverage"). Members of Congress unquestionably understood that, in practical terms, Congress was eliminating any financial incentive to purchase insurance, while leaving the remainder of the ACA in place.

2. Respondents ask this Court to ignore that reality, in favor of the untenable proposition that the same Congress that left all but one sentence of the Act intact when it deliberately rendered Section 5000A inoperative would have wanted the *entire* Act invalidated if Section 5000A were formally excised as unconstitutional. That argument rests on the counterfactual assertion that even as Congress eliminated Section 5000A's enforcement mechanism, Congress expected a significant number of individuals to continue to purchase insurance *because* they believed Section 5000A commanded it, rather than because they wanted the coverage that the ACA's subsidies made affordable, and that Congress further believed that this unenforceable compulsion was essential to the functioning of the Act's remaining provisions. That argument ignores what actually happened and makes no sense.

a. Respondents have argued that Congress's failure to repeal outright Section 5000A(a)'s provision that individuals "shall" buy insurance necessarily reflects an intent for that provision to continue to induce the purchase of insurance. See U.S. Br. 40 (5th Cir. May 1, 2019). But even assuming—contrary to all evidence—that the post-2017 Section 5000A imposes a legal requirement to purchase insurance as a formal matter, Congress intended it to be toothless.

The evident purpose and effect of eliminating the shared-responsibility payment was to deprive Section 5000A(a)'s statement that individuals shall purchase insurance of any effect on individual conduct. As this Court recognized in *NFIB*, the purpose of imposing the shared-responsibility payment in the originally enacted version of Section 5000A was "plain[]": to create

a mechanism that would induce the purchase of insurance by people who would not do so otherwise. 567 U.S. at 567.

The 2017 Congress's purpose in reducing the payment to zero is equally plain. It is self-evident—and Congress understood—that removing Section 5000A's enforcement mechanism would free people to decide whether to purchase insurance without any tax consequences. Tellingly, respondents have never proffered *any* other reason that Congress would have amended Section 5000A.

b. Respondents have also pointed to the 2017 Congress's failure to repeal the findings made by the 2010 Congress when it first enacted Section 5000A. U.S. Br. 40-41 (5th Cir. May 1, 2019); Texas Br. 15-16 (5th Cir. May 1, 2019). Those findings expressed the 2010 Congress's view that the originally enacted, *enforceable* Section 5000A(a) "is essential to creating effective health insurance markets." 42 U.S.C. 18091(2)(I). Respondents would infer that Congress's failure to repeal those findings in 2017 reflects a view that the amended, unenforceable Section 5000A(a) remains essential to the functioning of the remainder of the ACA.

Congress, however, had no need to repeal the findings in 2017. Findings have no operative legal effect. See, *e.g.*, *Yazoo & Mississippi Valley R.R. Co.* v. *Thomas*, 132 U.S. 174, 188 (1889). As a result, they may be "superseded" by legal and factual developments even if they remain on the books—and when they are, they have no continuing probative force as to a subsequent Congress's intent. *Gonzales* v. *Carhart*, 550 U.S. 124, 165-166 (2007).

Here, the 2010 findings have been both legally and factually superseded. Legally, the 2010 findings have been superseded because those findings reflected the

2010 Congress's view that imposing financial consequences for failing to maintain insurance was important for creating effective insurance markets. See 42 U.S.C. 18091(2)(I). In 2017, Congress made Section 5000A(a) *unenforceable*. This Court has recognized that congressional findings are always a "thin reed" upon which to rest any construction of a statute's operative provisions, even in ordinary circumstances. *Nat'l Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 260 (1994). That is especially true here, where the 2017 Congress made an important change to Section 5000A. Yet respondents ignore the overwhelming evidence that Congress intended to deprive the provision of practical effect—merely because Congress failed to repeal its original findings.

Factually, the 2010 findings have been superseded because those findings pertained to the original Section 5000A(a)'s role in *creating* health-care markets. 42 U.S.C. 18091(2)(I). By 2017, the Act's marketplaces were operational, and "people's expectations about whether one should have coverage [were] more established."[10] As a result, the CBO predicted in 2017 that individual markets "would continue to be stable in almost all areas of the country throughout the coming decade" even without a mandate (enforceable or not). CBO Report 1. The 2017 Congress thus made the different judgment that the Act could continue to operate even without an enforceable mandate. The judgment of the 2017 Congress is all that matters now, and there

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[10] CBO, *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2018 to 2028*, at 21 (May 2018), https://www.cbo.gov/system/files/2018-06/53826-healthinsurance coverage.pdf.

is no reason to think it was reflected in 2010 findings about a different law and a different time.

B. Even if there were no direct evidence of Congress's actual intent, this Court's precedent would still compel severance of the mandate from the rest of the Act.

The 2017 Congress's actions answer the fundamental question of the severability inquiry: whether Congress would want the statute's remaining provisions to stand alone. *Murphy*, 138 S. Ct. at 1482-1484. There can be no doubt that Congress did. No further inquiry is required.

Even if the direct evidence of Congress's intent were not dispositive, the severability considerations that this Court evaluates in the absence of direct evidence of congressional intent compel the same conclusion. The remainder of the ACA's provisions are capable of functioning independently from the invalidated provision and in a manner consistent with Congress's objectives in enacting the statute. *Booker*, 543 U.S. at 258-259; *Free Enter. Fund*, 561 U.S. at 509. Thus, there is no conceivable basis to conclude that the remainder of the ACA cannot be severed from Section 5000A.

1. a. The ACA's guaranteed-issue and community-rating insurance market reforms function independently of Section 5000A, and in the manner that Congress intended. Whatever may have been true when those provisions first took effect in 2014, they continue to be operative and effective despite the absence of any tax consequence for failing to maintain insurance. The Act includes many other provisions that induce healthy individuals to obtain insurance and thereby minimize the risk of so-called "death spirals," including extensive health-insurance reforms,

new exchanges, the employer responsibility provision, federal premium tax credits to subsidize insurance purchases, and automatic enrollment in certain employer-sponsored plans. See p. 4, *supra*. Accordingly, the CBO informed the 2017 Congress that if Section 5000A(a) were repealed or the associated payment eliminated, individual markets would "continue to be stable." CBO Report 1. Congress could readily have relied on that assessment in leaving the guaranteed-issue and community-rating provisions—together with the rest of the ACA—in place while eliminating Section 5000A's tax payment. *Continuation* 105-106, *supra* (Hatch) (relying on CBO study in floor comments in favor of eliminating the "mandate tax").

Real-world experience since the 2017 amendment went into effect confirms that the guaranteed-issue and community-rating provisions continue to function effectively and as Congress intended. Over eight million Americans enrolled on the "healthcare.gov" website for 2019 *and* 2020—only small decreases from 2018. See note 1, *supra*. That robust participation ensures that the individual-market provisions continue to protect individuals with preexisting conditions by preventing insurers from denying coverage or charging higher prices, while avoiding insurance death spirals. Indeed, the health insurance industry itself reports that "data show that the individual markets have demonstrated a continued resiliency—and, in many instances, have shown signs of increasing steadiness" since Congress eliminated the shared-responsibility payment. America's Health Insurance Plans Cert-stage Amicus Br. 23 (citing surveys and 2019 data). Economists agree, stating that "[a]ctual evidence from the 2019 and 2020 plan years" demonstrates that "guaranteed issue, modified community

rating, [and] * * * the ACA's market rules" are functioning well "in the absence of an individual mandate." Bipartisan Economic Scholars Cert-stage Amicus Br. 20-21.

b. The ACA's hundreds of other provisions will also operate effectively and as Congress intended if Section 5000A(a) is invalidated.

The ACA's other major insurance reforms, such as the health insurance exchanges, 42 U.S.C. 18031-18044, and the employer responsibility provision, 26 U.S.C. 4980H, function entirely independently of Section 5000A. And the rest of the Act's provisions either have nothing to do with individuals' purchase of insurance, or went into effect before the originally enacted Section 5000A. The Act includes, for instance, standalone statutory schemes such as the Biologics Price Competition and Innovation Act, which creates an abbreviated pathway for approval of biosimilar drugs, and the Indian Health Care Improvement Act, which governs health-care services for American Indian and Alaskan Native people. See, *e.g.*, Pub. L. No. 111-148, Title VII, §§ 7001-103, 124 Stat. 119, 804-28 (2010); Pub. L. No. 111-148, Title X, § 10221(a), 124 Stat. 935 (2010). The Act also has many other unrelated provisions, such as those that require break time for nursing mothers, 29 U.S.C. 207(r), and those that establish epidemiology and laboratory capacity grants, 42 U.S.C. 300hh-31. Those unrelated provisions can necessarily function effectively absent an individual mandate.

2. Respondents have not proffered a single argument that the amended version of Section 5000A is critical to the operation of any other provision of the ACA. That is because it is not.

Respondents have argued that the Act's individual market and insurance reforms cannot function independently of Section 5000A(a) because that provision is necessary to induce individuals to purchase insurance. U.S. Br. 37-41 (5th Cir. May 1, 2019). That assertion is wrong for the reasons stated above. See pp. 46-48, *supra*. And in any event, the only support that respondents have been able to muster—Congress's 2010 findings and discussions in *NFIB* and *King*—addressed a *different* version of Section 5000A(a) than the one whose constitutionality is at issue in this case, and at a *different* time, before the insurance markets had been established and stabilized. See pp. 44-46, *supra*; *King*, 135 S. Ct. at 2486 (discussing the Act's requirement that individuals maintain insurance "*or make a payment*" (emphasis added)).

Turning to the ACA's myriad other provisions, respondents have conceded that those provisions "might be able to operate in the manner that Congress intended" in the absence of Section 5000A(a). U.S. Br. 48 (5th Cir. May 1, 2019). But respondents have nonetheless asserted that those provisions should be invalidated because they are relatively "minor" and there is no way to know whether "Congress would have enacted them independently." *Id*. at 47-48.[11] Both assertions are wrong.

Those provisions include standalone statutory schemes that are anything but minor. See p. 48, *su-*

[11] The United States made a diametrically opposed argument in a similar context recently before this Court, noting that should the Court invalidate a single provision of the Dodd-Frank Act, it must sever that provision and retain hundreds of provisions located in other titles of the Act. See U.S. Br. 47-48, *Selia Law* v. *CFPB*, No. 19-7 (argued Mar. 3, 2020).

pra. And the sole basis for respondents' total-invalidation argument is the joint dissent in *NFIB*, which expressed the view that when a statute consists of invalid central provisions and "many nongermane" provisions, the entire statute must fall in the absence of any "reliable basis for knowing which pieces of the Act would have passed on their own." *NFIB*, 567 U.S. at 705. That reasoning turns the presumption *against* severability on its head, and in any event has no application here. The 2017 Congress that rendered Section 5000A(a) of no practical effect did not face the choice whether to *enact* the ACA's other provisions in the first instance, but rather whether to repeal them. In 2017, after repeatedly considering repealing the entire statute, Congress instead reduced the shared-responsibility payment and declined to repeal any other provision of the Act. That evidence conclusively demonstrates that Congress intended the rest of the Act to stand irrespective of whether Section 5000A is declared unconstitutional.

* * *

Respondents ask this Court to invalidate the entirety of the most transformative public health-care law of the last half-century because they view a single sentence in it as unconstitutional. To grant that request, this Court would have to disregard Congress's determination that the Act can function without any incentive to purchase insurance and Congress's evident intent that it continue to do so. This Court should uphold the will of the people's representatives.

CONCLUSION

The judgment of the court of appeals should be reversed.

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