No. 19-10011

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees

v.

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

Defendants-Appellants

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

Intervenor Defendants-Appellants

On Appeal from the United States District
Court for the Northern District of Texas
(No. 4:18-cv-00167-O)

REPLY BRIEF OF INTERVENOR-APPELLANT THE U.S. HOUSE OF REPRESENTATIVES

Douglas N. Letter
General Counsel
Todd B. Tatelman
Deputy General Counsel
Kristin A. Shapiro
Assistant General Counsel
Brooks M. Hanner
Assistant General Counsel

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
Tel: (202) 225-9700
Douglas.Letter@mail.house.gov

Donald B. Verrilli, Jr.
Elaine J. Goldenberg
Ginger D. Anders
Jonathan S. Meltzer
Rachel G. Miller-Ziegler
Jeremy S. Kreisberg
MUNGER, TOLLES & OLSON LLP
1155 F. Street N.W., 7th Floor
Washington, D.C. 20004-1361
Tel: (202) 220-1100
Fax: (202) 220-2300
Donald.Verrilli@mto.com

Elizabeth B. Wydra
Brianne J. Gorod
Brian R. Frazelle
Ashwin P. Phatak
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street N.W., Suite 501
Washington, D.C. 20036-2513
Tel: (202) 296-6889
elizabeth@theusconstitution.org
brianne@theusconstitution.org

Counsel for the U.S. House of Representatives

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INTRODUCTION

Assessing the constitutionality of a federal statute is always a grave duty. It is particularly grave in this case because the Court is being asked to strike down the Affordable Care Act, a landmark statute that has transformed the nation's health care system. With the stakes this high, faithful adherence to principles that restrain the exercise of the judicial power is vital.

That is not, however, how the district court approached this case. At every step, the district court overreached in disregard of clear Supreme Court precedent. It found standing based on a manufactured claim of injury; it rejected a readily available constitutional construction of Section 5000A; and it struck down the entire Act rather than severing the mandate and preserving the Act's remaining provisions.

The arguments that Plaintiffs and the Department of Justice ("DOJ") now advance in defense of that extraordinary decision all depend on a single contrived premise: by enacting the 2017 amendment, Congress transformed Section 5000A from what the Supreme Court definitively construed it to be—a lawful choice between maintaining insurance or making a shared responsibility payment, *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)—into a command to purchase insurance.

Plaintiffs and DOJ make no effort to square their caricature of the amendment with the reality that Congress reduced the payment to zero, thereby *eliminating* any

incentive that Section 5000A previously created to maintain insurance. That is the only natural reading of the amendment's text, and every Member of Congress to speak on the issue in 2017 confirmed that the point of the amendment was to eliminate any financial pressure to purchase insurance. Section 5000A thus continues to offer the same choice as it did before the 2017 amendment.

Plaintiffs and DOJ do not deny that Congress possesses the constitutional authority to enact a law that affords a choice between having insurance and paying nothing. Instead, they insist that Section 5000A be forced to bear a meaning that would be unconstitutional under *NFIB* rather than the constitutional meaning that Congress plainly intended—a meaning that would eliminate any prospect of the injury about which they complain. And they rely on that mischaracterization of Section 5000A to generate a declaration of unconstitutionality that they can leverage to invalidate the entire Act under a theory of severability that flatly contradicts binding Supreme Court authority.

That untenable defense of the district court's ruling should be rejected. No plaintiff has standing to challenge 5000A because it inflicts no injury on Plaintiffs or anyone else. Section 5000A is constitutional because it continues to offer the same lawful choice that it did before the 2017 amendment. And, if severability even arises, the mandate is severable from the remainder of the Act, which continues to

function—as the 2017 Congress intended—independent of any requirement to obtain insurance.

At bottom, Plaintiffs and DOJ invite this Court to affirm a massive judicial overreach that would deny vitally important care to millions, sow chaos in health-care markets throughout the country, and contravene fundamental principles that should guide interpretation of an Act of Congress. As the Supreme Court has made clear, "[a] fair reading of legislation demands a fair understanding of the legislative plan," and courts "must respect the role of the Legislature, and take care not to undo what it has done." *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). This Court should therefore reverse the judgment.

ARGUMENT

I. SECTION 5000A DOES NOT IMPOSE A MANDATE.

A. The 2017 amendment did not alter *NFIB*'s authoritative construction of Section 5000A.

Congress's intent in enacting the 2017 amendment is clear. With only one exception, Congress left untouched Section 5000A's text and structure—the text and structure that *NFIB* definitively construed as providing a choice to "lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes." 567 U.S. at 574 n.11. The only change Congress made was to reduce the shared-responsibility payment in Section 5000A(c) to zero. To interpret that amendment as converting Section 5000A into a command to maintain insurance is not plausible.

1. As a matter of text and structure, the 2017 amendment did not convert Section 5000A from a choice into a command. As originally enacted, Section 5000A(a) provided that "[a]n applicable individual shall" maintain insurance, and Section 5000A(b) provided that those who do not may make a "shared responsibility payment" in the amount specified in Section 5000A(c). After the amendment, Section 5000A(a) still provides that "[a]n applicable individual shall" maintain insurance, and Section 5000A(b) still provides for the "shared responsibility payment." The 2017 Congress did not amend those provisions. The only change is that the *amount* of that payment, prescribed in Section 5000A(c), is now $0.

In other words, Congress left the choice-creating text and structure of Section 5000A intact, and made it easier to forgo insurance by reducing the payment to zero. Had Congress intended to transform Section 5000A into a command, it would have altered the text that created the choice. *See Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 563 (2017) (provision containing text that Supreme Court already construed must "ha[ve] that same meaning"). But Congress did not do so. Thus, while DOJ contends that Section 5000A must be construed as a command so as to avoid surplusage, DOJ.Br.31, that is backwards. *DOJ's* interpretation renders Sections 5000A(b) and 5000A(c) superfluous—in its view, the statute would have identical effect had Congress simply repealed those sections, leaving only Section 5000A(a).

2. Statements from Members at the relevant time confirm that Congress did not intend in 2017 to convert Section 5000A into a command. From then-Speaker Ryan and Leader McConnell down, every Member of Congress to address the issue explained that the amendment would "restor[e] the freedom to make our own healthcare choices" and ensure that people are "not forced" to purchase insurance—the opposite of what Plaintiffs and DOJ contend. 163 Cong. Rec. H10,212 (daily ed. Dec. 19, 2017) (Rep. Ryan); *id.* S8,153 (daily ed. Dec. 20, 2017) (Sen. McConnell). Several Senators stated unequivocally that reducing the payment would make purchasing insurance optional: "zero[ing] out the penalty" is "equivalent to repeal[ing]" the mandate. *Id*. S8115 (daily ed. Dec. 19, 2017) (Sen. Toomey); *id.* S8078 (Sen. Barrasso); *id.* S8153 (daily ed. Dec. 20, 2017) (Sen. McConnell); *id.* S8168 (Sen. Gardner). Not a single Member suggested that the amendment would extinguish the previously afforded choice and convert Section 5000A into a command to purchase insurance. Any such suggestion would have provoked a firestorm, but there was none. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 388 (2012) (congressional statements show original public meaning of statutory text).

The challengers' construction of the current version of Section 5000A therefore cannot be reconciled with what Congress sought to achieve in 2017 and how it understood the amended statutory text to operate. *See Murphy v. Nat'l*

Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475 (2018) (rejecting construction "lead[ing] to results that Congress is most unlikely to have wanted").

3. Finally, Congress's action in 2017 cannot plausibly be viewed as converting Section 5000A from a choice to a command, because doing so would require this Court to assume that Congress and the President defied the Supreme Court's recent *NFIB* decision. When Congress amends a statute after the Court has construed the statute pursuant to constitutional avoidance, "the usual presumption is that Members of Congress, in accord with their oath of office, considered the constitutional issue and determined the amended statute to be a lawful one." *Boumediene v. Bush*, 553 U.S. 723, 738 (2008). That presumption should apply here because the legislative record establishes that Congress intended to preserve the choice-conferring structure of Section 5000A that *NFIB* had upheld. Given the respect due co-equal branches of government, it is remarkable that DOJ in particular would insist that Section 5000A be forced to bear a meaning that renders it unconstitutional rather than presuming that Congress intended to preserve the Supreme Court's constitutional interpretation of the provision.

B. Plaintiffs' and DOJ's contrary arguments are incorrect.

Despite the overwhelming evidence of Congress's intent in enacting the 2017 amendment, Plaintiffs and DOJ contend that it is no longer possible to construe Section 5000A as providing a choice. In their view, because the payment amount is

$0, the predicate for *NFIB*'s construction is absent. But it does not matter whether *NFIB* would have adopted the same construction had it initially considered the current version of Section 5000A. What matters is that Congress acted against the backdrop of *NFIB*'s construction, sought to make Section 5000A toothless, and did so by reducing the payment while preserving all operative provisions of the statutory text.

In any event, Plaintiffs' argument turns *NFIB* on its head. *NFIB* framed the relevant question as whether Section 5000A(b)'s shared-responsibility payment could be characterized as a tax rather than (as the dissenters argued) a penalty for violating a command to purchase insurance. 567 U.S. at 563, 566. The tax-versus-penalty question turned on whether Section 5000A(a) could be construed as an option rather than a command. *Id*. at 567. The Court concluded that Section 5000A(a) was not a command because: (1) Section 5000A(a) did not "attach[] negative legal consequences to not buying health insurance"; (2) Congress understood that millions of people would decline to purchase insurance and did not intend to render them "outlaws"; and (3) Section 5000A(a)'s statement that individuals "shall" obtain insurance could reasonably be construed as imposing "only 'a series of incentives.'" *Id*. at 568-69 (citation omitted). Reducing the payment amount to zero altered none of the premises supporting the Court's interpretation of Section 5000A(a). If anything, that change reinforces the Court's

conclusion that Section 5000A provides a choice, since now there are no consequences for forgoing insurance. House.Br.17-18.

DOJ contends, however, that Section 5000A(a)'s statement that individuals "shall" obtain insurance must be construed as a command now that there is no cost for failing to buy insurance. DOJ.Br.29-30. That counterintuitive suggestion is wrong. The 2017 Congress was aware of *NFIB*'s construction and chose to retain both the word "shall" and the statutory structure, thus requiring that the current version of Section 5000A(a) be accorded "that same meaning." *Lightfoot*, 137 S. Ct. at 563. Indeed, *NFIB* held that construing "shall" as merely providing an incentive to purchase insurance was a "reasonable construction" *despite* the existence of what Congress had labeled a "penalty" for failing to purchase insurance, 567 U.S. at 563, 568-69; Congress's reduction of the payment amount only makes that construction more appropriate.

The Supreme Court often has recognized that "shall" or other seemingly compulsory language can mean "may." *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 11-12, 19-27, 37-38 (1981) (provision stating that "Governments have an obligation to assure that public funds" are provided did not create "binding obligations," a "mandate," or "legal duties," but instead expressed "a congressional preference" that was "hortatory"). Construing "shall" to provide an option unquestionably best

effectuates the 2017 Congress's intent to accord individuals unfettered choice whether to obtain insurance.

Were there any ambiguity, the canon of constitutional avoidance would compel construing Section 5000A as providing a choice. *NFIB*, 567 U.S. at 562, 568. The *NFIB* Court interpreted Section 5000A as a lawful choice between buying insurance and paying a tax because "[t]he Government ask[ed it] to interpret the mandate" in that manner. *Id*. at 563. The Court ruled that Congress had the authority under the tax power to offer that choice. Here, the House has likewise asked this Court to interpret the statute as a lawful choice, this time between paying nothing and buying insurance. Congress had the constitutional authority to provide that option for the reasons stated in Part III, *infra*. Neither DOJ nor Plaintiffs contend otherwise. To preserve Section 5000A's constitutionality, this Court is obligated to construe the provision as providing a choice if it is "fairly possible" to do so—which it is. *See id*. at 561-63.

II. PLAINTIFFS LACK STANDING.

In the only claim before this Court, Plaintiffs sought a declaratory judgment that Section 5000A is unconstitutional, and the district court entered a judgment declaring the provision unconstitutional and inseverable from the remainder of the Act. But Plaintiffs lack standing to bring that claim and obtain that declaratory relief, because they have not suffered any constitutionally cognizable injury from that

concededly unenforceable provision. And while Plaintiffs contend that they have standing to challenge Section 5000A because of injury they allegedly suffer from *other* statutory provisions, they cite no authority to support that novel approach, which this Court has rejected. This case thus presents precisely the risk that Article III standing principles exist to prevent: use of the judicial process to "usurp the powers of the political branches" and ensnare the courts in partisan controversy. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

A. Individual Plaintiffs lack standing.

1. No party argues that Section 5000A, if construed to offer a choice, injures Individual Plaintiffs simply because they voluntarily choose to buy insurance. *See* Hurley.Br.26-29; DOJ.Br.23. Such a self-inflicted injury is insufficient for Article III standing. *See, e.g.*, *Glass v. Paxton*, 900 F.3d 233, 242 (5th Cir. 2018).

Instead, Individual Plaintiffs ask this Court to assume for purposes of standing that Section 5000A imposes a legal command. Hurley.Br.30. But this Court cannot assume the existence of its own jurisdiction, and this is a case in which the standing issue is intertwined with the question of what Section 5000A means. *See, e.g.*, *Bauer v. Marmara*, 774 F.3d 1026, 1029 (D.C. Cir. 2014). That question can have only one answer given *NFIB*'s definitive construction. Moreover, where the constitutionality of a federal statute is at issue the standing inquiry is "especially

rigorous," *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997), and an assumption of standing based on an implausible statutory construction is especially unwarranted.

2. Even if Plaintiffs' implausible reading of Section 5000A were accepted, they would still lack standing because that provision cannot be enforced against them. The law is clear: standing exists to bring a pre-enforcement challenge to a statute only if there is a "credible threat of prosecution thereunder." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *see, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). Here, no such threat exists. By reducing the shared-responsibility payment to zero, Congress removed the only possible consequence for failing to maintain insurance. Even DOJ does not dispute that this eliminates any Article III injury. DOJ.Br.23.

Individual Plaintiffs do not respond to that binding Supreme Court precedent. They cite no case in which a court has found standing to challenge a law that cannot be enforced. And although they assert that their injury consists of mere "compliance with the statute, rather than any penalties for violating it," Hurley.Br.23, the Supreme Court has squarely rejected that position: where "compliance with the[] statute[] is uncoerced by the risk of [its] enforcement," such compliance is not a cognizable injury. *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (plurality).

Accepting Plaintiffs' argument, and disregarding that precedent, would eviscerate a key aspect of standing doctrine. It would allow suits by plaintiffs who

wish to manufacture a constitutional challenge to a statute with which they disagree as a political matter—including by, as here, insisting upon a restrictive statutory interpretation that is *against* their own purported interest in being freed from any legal mandate. This Court should not countenance that result. *See, e.g.*, *id.* at 505.

3. Individual Plaintiffs and DOJ nevertheless contend that standing to attack the mandate exists because Individual Plaintiffs are injured by *other* provisions that are (in their view) inseverable from the mandate and therefore would fall if the mandate falls.[1] The only support they offer for that novel argument is *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), but that case never considered standing and therefore has no precedential value on that issue. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) ("[D]rive-by jurisdictional rulings … have no precedential effect.").

This Court, by contrast, has considered appellees' gambit and rejected it. In *National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202 (5th Cir. 2011), plaintiffs sought to challenge "(c) provisions" of a statute that did not injure them by arguing that they had standing to sue because "(d) provisions" of the statute did injure them and were inseverable from the "(c) provisions." *See id.* at 211. This

[1] That argument depends on the erroneous assertion that the mandate is inseverable from provisions that Individual Plaintiffs contend are injurious. *See* Part IV, *infra*.

Court found "erro[neous]" the argument that the alleged inseverability of the two sets of provisions gave plaintiffs standing to challenge the (c) provisions. *Id.*

Although DOJ attempts to distinguish *National Federation* (DOJ.Br.25) on the ground that the (c) provisions did not apply to the plaintiffs in that case, that distinction fails. A plaintiff does not have standing because a statute applies to him; he has standing because the statute *injures* him. The question in *National Federation* was whether the (c) provisions injured the plaintiffs; plaintiffs lacked standing to challenge those provisions, regardless of any severability analysis, because the answer to that question was no. The same is true here.

This Court reached a similar result in *Hotze v. Burwell*, 784 F.3d 984 (5th Cir. 2015), which ruled that an individual lacked standing to challenge the constitutionality of the Affordable Care Act's mandate. *Id.* at 995-96. There, the Court rejected the same argument advanced here—that a plaintiff can challenge the mandate on the ground that "numerous provisions of the ACA operate to increase the cost of insurance" and therefore harm that plaintiff. DOJ.Br.23. Explaining that standing exists only when an injury is "fairly traceable to the statutory provision that [the plaintiff] seeks to challenge," the Court concluded that there was no reason to think that "increased health-insurance premiums are traceable to the individual mandate, instead of to the ACA generally." 784 F.3d at 995 (citation omitted).

Those cases uphold the bedrock principle that "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *see Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) ("[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." (citation omitted)); *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) ("A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." (citation omitted)). Were the rule otherwise, "any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review." *Lewis*, 518 U.S. at 358 n.6. That lax approach to standing, which would give the courts undue power to invade the legislative sphere, "of course [is] not the law." *Id.*; *see, e.g.*, *Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 369-70 (5th Cir. 2018).[2]

Because Individual Plaintiffs are not entitled to any relief as to Section 5000A, they cannot maintain their claim that Section 5000A should be declared unconstitutional, and the district court's judgment awarding them declaratory relief on that claim cannot survive. As that court apparently recognized, and as DOJ

[2] *See also* 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").

effectively acknowledges,[3] if the court has no ability to grant relief specific to Section 5000A, then the court lacks the power even to consider whether Section 5000A is unconstitutional, let alone to embark on a severability analysis that rests on such a merits determination. *See Allen v. Wright*, 468 U.S. 737, 752 (1984) (standing asks whether plaintiff is "entitled to an adjudication of the particular claims asserted"); *Ass'n of Am. Railroads v. United States Dep't of Transp.*, 896 F.3d 539, 550 (D.C. Cir. 2018) (severability arises only after statute "held unconstitutional").

Even assuming a court somehow had the power to opine on Section 5000A's constitutionality without the ability to award relief as to that provision, Individual Plaintiffs' argument would still fail. Severability is a "remedial" inquiry, *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 589 F.3d 433, 436-37 (D.C. Cir. 2009), 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. Without such court action, there is no "*absence*" in the statute that triggers an inquiry into whether Congress would have enacted the statute in that new form. *Alaska*, 480 U.S. at 685, 687 (emphasis added). Here, the mandate

[3] *See* DOJ.Br.28-29. According to DOJ, the "relief awarded" in this suit must be "limited only to those provisions that actually injure the individual plaintiffs." *Id.* at 28. DOJ does not explain why Individual Plaintiffs are injured by "an unenforceable mandate." *Id.* at 23. Accordingly, on DOJ's theory, Individual Plaintiffs cannot receive *any* relief related to the mandate, even though it is the *only* provision they challenge as unconstitutional.

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—and Individual Plaintiffs therefore cannot obtain relief from other portions of the Act by means of a severability analysis.

4. Finally, Individual Plaintiffs claim that they are injured by an IRS requirement that they report in their tax returns whether they maintained insurance. That argument is both premature and incorrect. As Individual Plaintiffs acknowledge, the reporting requirement existed "through tax year 2018," Hurley.Br.26—and there is no reason to think that the IRS will impose the requirement in tax year 2019, after the 2017 amendment's effective date. At that point, whether an individual maintains coverage will not affect the amount he owes the IRS, and so a question on that topic will not be material for tax purposes. Moreover, the IRS surely will not administer Section 5000A through a tax reporting requirement given DOJ's insistence that Section 5000A is no longer a tax. *See* DOJ.Br.29-34.[4] And even if the IRS did continue to require reporting, any resultant injury would be traceable to that independent decision, not to Section 5000A.

[4] Tellingly, DOJ does not join Individual Plaintiffs' argument on this point.

B. State Plaintiffs lack standing.

1. State Plaintiffs too lack standing, as DOJ essentially concedes. *See* DOJ.Br.28 (failing to argue for state standing and contending that relief "should be limited only to those provisions that actually injure the individual plaintiffs").

State Plaintiffs make only one argument that they are injured by the mandate: that Section 5000A will increase Medicaid and CHIP enrollment in their States, which will, in turn, increase those States' costs. But that argument rests entirely on CBO reports that do not reach any such conclusion. *See* States.Br.27&n.5. Although the 2017 CBO report opined that a "small number of people" may purchase insurance because of Section 5000A in the absence of any tax, the report never suggested that those people would do so through Medicaid or CHIP. 2017 CBO Report 1; *see* 2008 CBO Report 53. In fact, because individuals who obtain insurance through those programs pay little to nothing for healthcare, they have powerful incentives to sign up for coverage wholly apart from any supposed interest in "complying" with Section 5000A.

State Plaintiffs' faulty chain of reasoning not only lacks support in CBO reports—it also lacks support elsewhere in the record, despite Plaintiffs' burden at the summary-judgment stage to establish standing through evidence. *See, e.g.*, *Seals v. McBee*, 898 F.3d 587, 591 (5th Cir. 2018). The record does not reveal any instance of any individual, residing in the plaintiff States or elsewhere, who enrolled in

Medicaid or CHIP solely because of Section 5000A or who would disenroll if that unenforceable provision were invalidated. Where, as here, a plaintiff's "claim of injury is not supported by any facts," the suit must be dismissed for lack of standing. *Crane v. Johnson*, 783 F.3d 244, 252 (5th Cir. 2015).[5]

Even if such evidence did exist, State Plaintiffs still would lack any cognizable injury, because no injury to a State arises when citizens who are already eligible for a benefit program voluntarily provided by the State make use of that program in greater numbers. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). The House raised that argument in its opening brief, *see* House.Br.33, and State Plaintiffs did not respond.

2. Each of State Plaintiffs' remaining arguments for standing rests on injury allegedly arising from provisions *other than* Section 5000A. *See* States.Br.21-26. That argument fails for the same reasons stated above. *See* pp. 12-16, *supra*.

For example, the States say they must spend millions of dollars on employee insurance, but that is due to 26 U.S.C. § 4980H(a)—the "employer mandate." The States complain about expanded Medicaid pools, but those result from provisions

[5] The "dozens of record" citations to which State Plaintiffs point, *see* States.Br.27-28, have nothing to do with injury allegedly deriving from Medicaid or CHIP enrollment. Although State Plaintiffs contend that the argument that their claim of injury lacks support has been "forfeited on appeal," States.Br.28, such "a jurisdictional matter cannot be waived," *Barnes v. Levitt*, 118 F.3d 404, 410 (5th Cir. 1997).

concerning Medicaid eligibility, such as 42 U.S.C. § 1396a(e)(14). The States' broad complaint that they must "spend funds to fix problems," States.Br.24, at most identifies harm arising from "the ACA generally," not harm "traceable to the individual mandate." *Hotze*, 784 F.3d at 995. And the contention that certain States repealed high-risk pools because those laws "no longer serve[d] any functional purpose," States.Br.26, identifies a harm that—while likely not sufficient for standing in any event[6]—stems from provisions such as the guaranteed-issue and community-rating provisions.

Finally, the 1095-B and 1095-C tax reporting requirements cited by State Plaintiffs arise from provisions that are separate from the mandate and serve independent purposes. *See* States.Br.23 (citing 26 U.S.C. §§ 6055-6056). The former requirement helps the IRS ensure that individuals receiving the premium tax credit are not enrolled in disqualifying programs; the latter facilitates administration of the employer mandate. Any resulting injury is thus neither traceable to Section 5000A nor redressable by its invalidation. And to the extent that the requirements did derive from Section 5000A, they ceased to be necessary after the 2017 amendment. *See* p. 16, *supra.*

[6] The example State Plaintiffs cite describes only voluntary repeal of state law and thus falls short of actual preemption.

III. SECTION 5000A REMAINS CONSTITUTIONAL.

As shown above, Section 5000A remains constitutional after the 2017 amendment because it can—indeed, must—be construed to offer a choice between lawful options: buy insurance or pay nothing. Congress plainly has the constitutional authority to provide that choice. Neither Plaintiffs nor DOJ contend otherwise. The challengers' unwillingness to contest the constitutionality of Section 5000A as so construed reflects the commonsense force of the House's argument: providing a choice between doing something and doing nothing must fall well within Congress's constitutional authority. Because it is "fairly possible" to construe Section 5000A as a choice, principles of constitutional avoidance require this Court to do so, and to uphold the statute on that basis. *NFIB*, 567 U.S. at 563; *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

Section 5000A can be upheld without reference to an enumerated power of Congress because it alters no legal rights or duties. House.Br.36-38; *see INS v. Chadha*, 462 U.S. 919, 952 (1983). Congress routinely enacts statutes that urge behavior but permit people to choose whether or not to comply, even when such statutes cannot be premised on an enumerated power. House.Br.37. As amended, Section 5000A can be construed as such a statute.

Even if an enumerated power were required, Section 5000A can be justified as necessary and proper to Congress's enumerated powers. *United States v.*

Comstock, 560 U.S. 126, 133-34 (2010). It is "convenient[] or useful" for Congress to maintain the statutory structure upheld in *NFIB*, so that if in the future Congress wishes to reinstate a payment, it may easily do so. *Id*. And doing so is "proper" because providing an optional choice does not expand "the sphere of federal regulation" or compel any action by anyone. *NFIB*, 567 U.S. at 560. Section 5000A remains constitutional.

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

A. Congress's decision to leave the rest of the Act in place when it made the mandate unenforceable answers the severability question.

1. The severability question in this case is unusually straightforward. Severability is a question of congressional intent, *NFIB*, 567 U.S. at 586, and the remainder of the Act is severable unless its "continued enforcement would result in 'a scheme sharply different from what Congress contemplated.'" DOJ.Br.36 (quoting *Murphy*, 138 S. Ct. at 1482). Here, severing the mandate would result in a framework *materially identical* to the one Congress enacted. Congress surgically removed the sole method of enforcing the mandate, for the purpose of depriving the mandate of any practical coercive effect on those who would prefer not to purchase insurance. Simultaneously, Congress left the remainder of the law intact, to function together with the now-unenforceable mandate. As DOJ explained in 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." Dkt. No. 92, at 17. That allows only one conclusion: Congress expected and intended the remainder of the Act to function independently of any effective command to purchase insurance.

2. Plaintiffs and DOJ ask this Court to ignore that reality, in favor of the untenable proposition that the same Congress that left the rest of the Act intact when it made the mandate unenforceable would have wanted the *entire* Act invalidated if the mandate were excised as unconstitutional. That argument rests on the counterfactual assertion that even as Congress eliminated Section 5000A(a)'s enforcement mechanism, Congress expected individuals to continue to comply with Section 5000A(a) by purchasing insurance and viewed that continued compliance as critical to the functioning of the Act's remaining provisions. That argument ignores what actually happened and makes no sense.

a. Even assuming—contrary to all evidence, *see* Part I, *supra*—that the post-2017 mandate imposes a legal requirement to purchase insurance, Congress intended it to be toothless. The express purpose of eliminating the shared-responsibility payment was to render Section 5000A(a) unenforceable, thereby achieving the "equivalent" of repeal and *freeing* individuals not to purchase insurance. *See* pp. 5-6, *supra*; *see also, e.g.*, 163 Cong. Rec. S7500 (daily ed. Nov. 29, 2017) (Sen. Portman) (eliminating the payment "stop[s] the ObamaCare

individual mandate"). The CBO confirmed that eliminating Section 5000A's tax would be "very similar" to repealing the mandate, as "only a small number of people" would buy insurance "solely because of a willingness to comply with the law." 2017 CBO Report 1. Congress thus *expected* that individuals would feel free to ignore the unenforceable mandate. That was the point of the 2017 amendment.

Acknowledging that fact is not, as DOJ argues (DOJ.Br.41), ascribing to Congress an unlikely "pessimis[m]" about human nature. As this Court has repeatedly recognized, it is simply common sense that if a statutory requirement has no enforcement mechanism, individuals will not comply with it. *See, e.g.*, *Asgeirsson v. Abbott*, 696 F.3d 454, 463 (5th Cir. 2012) (if no "punishment for nondisclosure, the speaker would have no incentive to disclose"); *Cox Operating, LLC v. St. Paul Surplus Lines Ins. Co.*, 795 F.3d 496, 507 (5th Cir. 2015). The 2017 Congress legislated against the backdrop of that self-evident proposition, yet left the rest of the Act intact.

b. Plaintiffs and DOJ nonetheless argue that the 2017 Congress's failure to repeal the 2010 Congress's findings somehow establishes that the 2017 Congress continued to view the mandate as integral to the statutory scheme. But unlike with operative statutory provisions, Congress need not repeal findings to render them irrelevant. Because congressional findings do not have binding legal effect, they may be "superseded" by legal and factual developments—and when they are, they

have no continuing probative force as to a subsequent Congress's intent. *Gonzales v. Carhart*, 550 U.S. 124, 130 (2007).[7]

Legally, the 2010 findings have been superseded because those findings reflected the 2010 Congress's view that the *enforceable* mandate was important for creating effective insurance markets. *See* 42 U.S.C. § 18091(2)(I). In 2017, Congress fundamentally altered Section 5000A by making the mandate *unenforceable*. The 2010 findings simply do not address Congress's understanding of the interaction of the unenforceable mandate with the remainder of the Act.

Factually, the 2010 findings have been superseded because those findings pertained to the enforceable mandate's role in *creating* healthcare markets. 42 U.S.C. § 18091(2)(I).[8] By 2017, the Act's marketplaces were operational, and "people's expectations about whether one should have coverage [were] more established." Cong. Budget Office, *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-healthinsurancecoverage.pdf. As

[7] The point is not that the 2010 findings were *repealed*; it is that they are now *irrelevant*. This case has nothing to do with the repeal-by-implication doctrine. *Contra* DOJ.Br.41.

[8] DOJ also notes that the tax was phased in over time, suggesting that Congress believed the mandate would be necessary after the markets' creation. DOJ.Br.42. But that phase-in occurred only over the first three years (until 2016), 26 U.S.C. § 5000A(c)(2)(B), (3)(A)-(B), so it sheds no light on the 2010 Congress's belief about the need for a mandate today.

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). 2017 CBO Report 1. The 2017 Congress thus made a different judgment than the 2010 Congress did. The judgment of the 2017 Congress is all that matters now, and there 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, binding precedent would still compel severance of the mandate from the rest of the Act.

The 2017 Congress's actions establish beyond doubt that Congress would have wanted the Act to stand even if the mandate were invalidated. The severability factors that courts consider in the absence of direct evidence of congressional intent compel the same conclusion. The hundreds of statutory provisions constituting the remainder of the Act are "(1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute." *United States v. Booker*, 543 U.S. 220, 258-59 (2005) (citations omitted). Every provision of the Act would function independently if this Court were to excise Section 5000A(a)'s unenforceable mandate. *See* House.Br.47-56.

Plaintiffs and DOJ resist that conclusion by pointing to empirical evidence showing the importance of a mandate to certain individual-market and insurance reforms, along with reasoning from *NFIB* and *King v. Burwell* making the same

point. But all of Plaintiffs' evidence, and all of the reasoning from those decisions, concerns a *different mandate* than the one at issue in this case. The mandate that Plaintiffs' authorities analyze is the originally-enacted mandate that meaningfully encouraged individuals to buy health insurance by imposing a financial cost on those who forwent it. *See, e.g.*, *King*, 135 S. Ct. at 2486 (discussing the Act's requirement that individuals maintain insurance "*or make a payment*" (emphasis added)). The one at issue here, by contrast, lacks any financial incentive to buy health insurance; it is unenforceable.

Plaintiffs cite no evidence that anyone—any Member of Congress, any Justice, any healthcare expert—has ever concluded that an unenforceable mandate is critical to the Act's individual market and insurance reforms. To the contrary, the only evidence that any party has put forward analyzing an unenforceable mandate with "no penalty at all" concludes that it would be "very similar" to having *no* mandate, because only a few people who otherwise would not have bought insurance will comply with it. 2017 CBO Report 1.[9] In short, the only authority actually

[9] State Plaintiffs cite the CBO Report (Br. 44) for the proposition that "'repealing the mandate' … would result in premiums rising." But that prediction was *expressly* about the originally enacted mandate. 2017 CBO Report 1.

analyzing the provision at issue here arrives at the commonsense conclusion that it plays no material role in the Act.[10]

Nonetheless, Plaintiffs and DOJ go still further, arguing that the now-unenforceable mandate is not only inseverable from the Act's market reforms, but from all other provisions in the Act. They do not even attempt to support their request for this sweeping and unprecedented remedy with any individualized analysis as to the hundreds of affected provisions. Instead, DOJ argues that those provisions should fall because there is no way to know whether "Congress would have enacted them independently." DOJ.Br.47-48. Although DOJ admits that some of these provisions "might be able to operate in the manner that Congress intended," it cavalierly suggests that this Court may strike them because they are "minor" or "ancillary." *Id*. This Court should reject that surprising suggestion, as accepting it would invalidate standalone statutory schemes that are unrelated to the mandate and anything but minor. *See, e.g.*, Pub. L. No. 111-148, §§ 7001-103, 124 Stat. 119, 804-28 (2010) (establishing Biologics Price Competition and Innovation Act, which creates abbreviated pathway for approval of biosimilar drugs); 483.Federally.Recognized.Tribal.Nations.Br.7 (the Act permanently authorizes the

[10] Moreover, Plaintiffs' predictions about whether health-insurance marketplaces could be successfully *established* without a mandate says nothing about whether in 2019 those marketplaces—now up and running—can continue to function effectively without a mandate. *See* pp. 24-25, *supra*.

Indian Health Care Improvement Act, the "primary, stand-alone statutory framework for the delivery of health-care services to Indian people"). Severability law is designed to encourage judicial *restraint*, not overreach. Invalidating the unenforceable mandate provides no basis to strike down any other provision of the Act, let alone major programs that bear no arguable connection to the mandate.[11]

* * *

Plaintiffs and DOJ urge this Court to invalidate the most transformative public healthcare law of the last half-century because they view a single sentence in it as unconstitutional. To do so, this Court would have to disregard Congress's express determination that the Act can function without an enforceable mandate and Congress's evident intent that the Act continue in effect. This Court should uphold the will of the people's representatives.

[11] Indeed, even DOJ shies away from the implications of its sweeping inseverability argument, asking this Court to preserve an undefined category of provisions that do not "actually injure" Plaintiffs. DOJ.Br.27-29. That argument is irreconcilable with severability principles.

CONCLUSION

The judgment should be reversed.

Dated: May 22, 2019

Respectfully submitted,

/s/ *Donald B. Verrilli, Jr.*

Douglas N. Letter
General Counsel
Todd B. Tatelman
Deputy General Counsel
Kristin A. Shapiro
Assistant General Counsel
Brooks M. Hanner
Assistant General Counsel

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
Tel: (202) 225-9700
Douglas.Letter@mail.house.gov

Donald B. Verrilli, Jr.
Elaine J. Goldenberg
Ginger D. Anders
Jonathan S. Meltzer
Rachel G. Miller-Ziegler
Jeremy S. Kreisberg
MUNGER, TOLLES & OLSON LLP
1155 F. Street N.W., 7th Floor
Washington, D.C. 20004-1361
Tel: (202) 220-1100
Fax: (202) 220-2300
Donald.Verrilli@mto.com

Elizabeth B. Wydra
Brianne J. Gorod
Brian R. Frazelle
Ashwin P. Phatak
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street N.W., Suite 501
Washington, D.C. 20036-2513
Tel: (202) 296-6889
elizabeth@theusconstitution.org
brianne@theusconstitution.org

Counsel for the U.S. House of Representatives

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2019, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: May 22, 2019

Respectfully submitted,

/s/ *Donald B. Verrilli, Jr.*
Donald B. Verrilli, Jr.

CERTIFICATE OF COMPLIANCE

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Dated: May 22, 2019

Respectfully submitted,

/s/ *Donald B. Verrilli, Jr.*
Donald B. Verrilli, Jr.