No. 19-10011

IN THE 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-167-O
Hon. Reed O'Connor, Judge

STATE DEFENDANTS' REPLY BRIEF

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May 22, 2019

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INTRODUCTION

Plaintiffs assert that this "case is not about whether the ACA is good or bad policy," but rather about "the proper text-based interpretation of statutes." Texas Br. 3. Yet they ask this Court to do what Congress—after years of debate and deliberation—repeatedly refused to do: dismantle the entire Affordable Care Act. It is no secret that the plaintiffs, and their new-found allies in the federal Executive Branch, oppose the ACA as a policy matter—even though it has fundamentally changed our nation's healthcare system and provided access to high-quality, affordable healthcare coverage to tens of millions of Americans. But they can articulate no plausible legal ground for the breathtakingly broad policy change that they ask this Court to uphold under the guise of constitutional adjudication.

The standing and merits arguments advanced by plaintiffs depend on construing the ACA's minimum coverage provision, 26 U.S.C. § 5000A, as a stand-alone command to buy health insurance. The Supreme Court, however, already interpreted that provision not as a command but as offering individuals a "lawful choice" between maintaining healthcare coverage or paying a tax. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574 (2012) (*NFIB*). Congress has since reduced the amount of the alternative tax to zero, meaning that there is presently no adverse legal consequence—tax or otherwise—for not having healthcare coverage. The individual plaintiffs thus suffer no legally cognizable

harm from Section 5000A in its present form. And while the state plaintiffs allege that the amended provision will cause them financial injury, they have failed to support that allegation with the type of evidence necessary to establish Article III standing.

As to the merits, plaintiffs and the federal defendants insist that Congress's decision to zero-out the alternative tax requires this Court to read Section 5000A(a) in isolation as containing an unconstitutional "command to buy insurance." Hurley Br. 38. But it remains fairly possible to construe Section 5000A as a whole in a way that does not impose any such mandate. After the 2017 amendment, Section 5000A may be understood as a precatory provision, encouraging individuals to maintain coverage without imposing any legal consequence if they do not. Or it may be understood as a tax provision, which Congress decided to leave on the books but, for the moment, not to use for generating revenue. Either of these approaches preserves the constitutionality of Section 5000A. Plaintiffs' approach, on the other hand, is calculated to destroy it. And the legal rule—underscored in this very context by *NFIB*—is that courts must construe statutes to uphold them if they can.

Even if the minimum coverage provision in Section 5000A(a) were now invalid, the proper remedy would be limited to that provision. Plaintiffs and the federal defendants emphasize statutory findings that, for example, state that the

requirement to maintain healthcare coverage was "essential to creating effective health insurance markets," 42 U.S.C. § 18091(2)(I). But those findings expressed the reasons why the 2010 Congress believed the statute was within its Commerce Clause power. They are not an expression of congressional intent on the separate issue of severability. More importantly, plaintiffs ignore that when Congress amended Section 5000A in 2017, it affirmatively chose to make the minimum coverage provision effectively unenforceable by zeroing-out the alternative tax, while leaving the rest of the ACA in place. Under these circumstances, it is apparent what remedy the 2017 Congress would have wanted for any constitutional problem created by that change. An order declaring Section 5000A(a) invalid but severing it from the rest of the ACA would result in essentially the same situation that Congress itself created. In contrast, the remedy plaintiffs seek—a judicial order striking down the entire ACA, causing massive disruption and harming tens of millions of Americans—has no possible basis in congressional intent.

ARGUMENT

I. THE PLAINTIFFS DO NOT HAVE STANDING

The individual plaintiffs recognize that Section 5000A no longer imposes any "monetary penalty" on those who do not maintain healthcare coverage. Hurley Br. 29. But they insist that they have standing to challenge that provision because it now "compel[s] them to purchase health insurance." *Id.* at 15-16; *see also id.* at

20-22 (arguing that the individual plaintiffs have standing because "they are the object of the ACA's individual mandate to purchase health insurance").

That contention cannot be squared with the Supreme Court's construction of Section 5000A. *See* State Defs. Br. 25-26; House Br. 13-16, 21-28. As *NFIB* held, Section 5000A as a whole is not a "legal command to buy insurance." 567 U.S. at 563 (Roberts, C.J.). Instead, it offers individuals a choice between obtaining healthcare coverage or paying a tax. *Id.* at 574 & n.11. Now that Congress has reduced the tax amount to zero, Section 5000A does not impose any legally cognizable harm on those who choose not to maintain coverage. If the individual plaintiffs decide to "spend their own hard-earned money" on health insurance that they do not "want or need," Hurley Br. 16, 19, that volitional act will not establish a cognizable injury for Article III purposes. *See, e.g.*, *Glass v. Paxton*, 900 F.3d 233, 238 (5th Cir. 2018) ("We know that standing cannot be conferred by a self-inflicted injury.").[1]

[1] On appeal, the individual plaintiffs for the first time argue in passing that Section 5000A injures them by requiring them to report on their tax returns "that they have complied with the individual mandate." Hurley Br. 19; *see also id.* at 21. They do not explain how the provision requires them to report anything, why any reporting requirement imposes a cognizable harm, or how any such harm would be redressed by a decision holding Section 5000A(a) unenforceable.

The federal defendants concede that the individual plaintiffs do not face a "credible threat of enforcement" of Section 5000A. U.S. Br. 23.[2] They instead argue that *other* provisions of the ACA "impose concrete financial injuries" on the individual plaintiffs by increasing the cost of health insurance and limiting the kinds of plans that may be purchased. *Id.*; *see also* Hurley Br. 2-4, 9 (similar). But they do not address a recent decision from this Court that considered and rejected the same argument. In *Hotze v. Burwell*, 784 F.3d 984, 995 (5th Cir. 2015), an individual plaintiff challenged the constitutionality of Section 5000A and sought to establish injury based on "increased health-insurance premiums." This Court held that such an "injury must be 'fairly traceable' to the statutory provision that Dr. Hotze seeks to challenge." *Id.* The plaintiff could not establish standing because he did not show that the asserted injury was "traceable to the individual mandate, instead of to the ACA generally." *Id.*[3] The same is true here: neither the plaintiffs

[2] The lack of any possibility of enforcement against any of the plaintiffs (individual or state) means that the result as to justiciability would be the same if the matter were analyzed as a question of statutory jurisdiction under the Declaratory Judgment Act, as suggested by Professors Bray, McConnell, and Walsh. *See* Br. of Samuel Bray, et al. (ECF No. 514897527); *see generally Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-672 (1950). As that brief argues (at 5), in this case the statutory question "overlaps with the absence of Article III jurisdiction owing to the absence of a true case or controversy."

[3] In addition, the asserted harm based on "increased health-insurance premiums [was] a paradigmatic 'generalized grievance'" that was insufficient to confer standing. *Hotze*, 784 F.3d at 995; *compare* U.S. Br. 23 ("[N]umerous provisions of the ACA operate to increase the cost of insurance for individuals like plaintiffs.").

nor the federal defendants have established that any injury arising from other provisions of the ACA is traceable to Section 5000A.

To the extent that plaintiffs advance the similar argument that they are injured by ACA provisions that are "inseverable" from Section 5000A, *e.g.*, Texas Br. 21, that argument is contrary to circuit precedent as well. The "normal rule" is that "severability analysis should almost always be deferred until after the determination that the portion of a statute that a litigant has standing to challenge is unconstitutional." *Nat'l Fed'n of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 211 (5th Cir. 2011). Thus, the district court in *National Federation* erred when it held that the plaintiffs had standing to challenge a statutory provision that did not harm them on the theory that it was inseverable from a provision that did. *See id.* at 209-211.[4] Extraordinary circumstances may occasionally justify a departure from this normal rule. *See id.* at 211 (discussing *I.N.S. v. Chadha*, 462 U.S. 919,

[4] The federal defendants attempt to distinguish *National Federation* by arguing that the plaintiffs in that case "sought to challenge the constitutionality of a provision that *did not actually apply to them*." U.S. Br. 24-25 (emphasis in original). But the challenged provision did not "apply" to those plaintiffs in much the same way that Section 5000A does not apply to the individual plaintiffs here: under the circumstances, there was no evidence that it caused them any actual "injury-in-fact." 647 F.3d at 209. In that case, like this one, the plaintiffs asked the Court to address the constitutionality of a provision that did not harm them on the theory that it was inseverable from other provisions of the challenged law that allegedly did harm them. *Id.* This Court properly declined to do so.

931 & n.7 (1983)). But plaintiffs do not identify any such circumstance here. *See generally* Walsh, *The Ghost that Slayed the Mandate*, 64 Stan. L. Rev. 55, 75, 77 (2012) (theory of "standing-through-asserted-inseverability" would reduce standing doctrine "to a sport for clever counsel").[5]

The state plaintiffs also assert that Section 5000A harms them directly, on the theory that it "increases State outlays" by requiring individuals to "obtain health insurance" and "forc[ing] individuals into the States' Medicaid and CHIP programs." Texas Br. 20. Even before Congress amended Section 5000A, however, the law did not *compel* anyone to enroll in Medicaid or CHIP. More importantly, the state plaintiffs have not provided any sufficient factual basis to support their allegation that Section 5000A in its current form will cause their residents to seek coverage through Medicaid or CHIP. They rely entirely on two Congressional Budget Office reports. *See* Texas Br. 20. One report was written 15 months before the ACA became law; the other predicted that "only a small number of people who enroll in insurance because of the mandate under current law would

[5] *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), does not require a different result. *See* Texas Br. 22 n.2. The Supreme Court did not address whether the legislative-veto provision at issue in that case injured the plaintiffs before deciding whether it was constitutional. Issues not ruled on are "'not to be considered as having been . . . decided'" merely because they might "'lurk in the record.'" *Thomas v. Texas Dep't of Criminal Justice*, 297 F.3d 361, 370 n.11 (5th Cir. 2002).

continue to do so" if Section 5000A's alternative tax were reduced to zero. Cong. Budget Office, *Repealing the Individual Health Insurance Mandate: An Updated Estimate* at 1 (Nov. 2017) (CBO Report).[6] While financial harm to States can certainly be a valid basis for Article III standing, the speculative assertions advanced by the state plaintiffs here fall well short of the "concrete evidence" necessary to establish it in a particular case. *Crane v. Johnson*, 783 F.3d 244, 252 (5th Cir. 2015). *Compare Texas v. United States*, 787 F.3d 733, 748, 752 (5th Cir. 2015) (state introduced evidence that up to 500,000 individuals would become eligible for driver's licenses because of a federal policy, and that it spent $130.89 on each license).[7]

II. THE MINIMUM COVERAGE PROVISION REMAINS CONSTITUTIONAL

On the merits, this case involves an unusual situation. As plaintiffs and the federal defendants point out, one "straightforward reading" of Section 5000A(a),

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[6] *Available at* https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53300-individualmandate.pdf.

[7] Like the individual plaintiffs, *see supra* 4 n.1, the state plaintiffs argue for the first time on appeal that they are injured by the "IRS reporting requirements occasioned by the ACA's mandate." Texas Br. 23. But nowhere in the "reams of evidence" they submitted to the district court (Texas Br. 18) did the state plaintiffs provide any concrete evidence establishing particular compliance costs. In addition, the reporting requirements identified by the state plaintiffs are imposed by provisions of the ACA other than Section 5000A. *See* 26 U.S.C. §§ 6055, 6056. The state plaintiffs have not demonstrated how a declaration that Section 5000A(a) is unconstitutional would remedy these purported harms.

standing by itself, would be that "it commands individuals to purchase insurance." *NFIB*, 567 U.S. at 562 (Roberts, C.J.); *see also* U.S. Br. 8; Texas Br. 34-35; Hurley Br. 46. They acknowledge, however, that in *NFIB* the Supreme Court expressly rejected the approach of reading Section 5000A(a) as a stand-alone provision. The Court instead construed Section 5000A as a whole as offering individuals a lawful choice between obtaining healthcare coverage or paying a tax. 567 U.S. at 574 & n.11. And it did so because courts "have a duty to construe a statute to save it, if fairly possible." *Id.* at 574 (Roberts, C.J.).

In 2017, Congress amended Section 5000A by reducing to zero the amount of the tax that individuals may pay in lieu of maintaining healthcare coverage. Plaintiffs and the federal defendants point out that so long as the amount of this alternative tax remains at zero, Section 5000A will raise no revenue. They argue that, consequently, the provision as a whole can no longer be read as an exercise of the taxing power, and that Section 5000A(a) now *must* be read as an unconstitutional stand-alone "command to buy insurance." Hurley Br. 38. And they seek a judicial order declaring not only that Section 5000A(a) is unconstitutional, but that the rest of the Affordable Care Act must fall as well. *See Id.* at 38-50; Texas Br. 28-50; U.S. Br. 29-49; *see also* ROA.2640-2665.

This argument is directly contrary to *NFIB*'s command that courts must "construe a statute to save it, if fairly possible." 567 U.S. at 574 (Roberts, C.J.).

As the state defendants and the House have demonstrated, nothing about the 2017 amendment requires abandoning the holistic construction of Section 5000A already adopted by the Supreme Court. *See* State Defs. Br. 27-28; House Br. 35-38. The provision continues to offer individuals a choice about whether or not to maintain specified healthcare coverage. *See NFIB*, 567 U.S. at 574. The only difference is that now the amount of the tax imposed for choosing not to maintain coverage has been reduced to zero. That change renders Section 5000A no more than precatory, and certainly not enforceable. But it does not change the statutory structure or require any change in the constitutional analysis.

Neither plaintiffs nor the federal defendants explain why Section 5000A cannot now be understood as a precatory provision. Plaintiffs do not even respond to this argument. For their part, the federal defendants argue that continuing to interpret Section 5000A as offering a choice would permit individuals to "ignore a legislative mandate to engage in certain conduct." U.S. Br. 35. But the whole point is that so long as Congress keeps the alternative tax set to zero, Section 5000A imposes no legislative "mandate" at all. So construed, Section 5000A is no more constitutionally problematic than many other provisions adopted by Congress that declare, exhort, or encourage, but do not impose any enforceable requirement or prohibition. *See* State Defs. Br. 28-29 & n. 23 (collecting examples); House Br. 37 (same). The federal defendants attempt to distinguish these examples on the

ground that they use the word "should" while Section 5000A(a) retains the word "shall," U.S. Br. 34-35, but that misses the point. What all of these statutes have in common is that none imposes any legal consequence for doing or not doing the activity that the statue encourages or discourages.

There is nothing "gratuitous" or "inappropriate" (U.S. Br. 34) about preserving a statutory provision that has no current mandatory or prohibitory effect. Indeed, that kind of provision is quite common in the United States Code. In addition to the many "sense of Congress" provisions discussed in the opening briefs, Congress frequently adopts "statutory findings" (like the ones that plaintiffs rely on so heavily here, *see infra* 18-20). Statutory findings merely "reveal[] the rationale of the legislation," without affecting primary conduct any "more than the reports of the Congressional committees." *United States v. Carolene Products Co.*, 304 U.S. 144, 152, 153 (1938). Congress also regularly adopts severability clauses. *See, e.g.*, 15 U.S.C. § 719n ("If any provision of this chapter . . . is held invalid, the remainder of the chapter shall not be affected thereby."). Severability provisions often speak in mandatory terms, but courts treat them as an interpretative aid, "'not an inexorable command.'" *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884 n.49 (1997). Other statutory provisions remain on the books but have no current effect, because of intervening events or the passage of time. *See, e.g.*, 4 U.S.C. § 1 ("[T]he union of the [United States] flag

shall be forty-eight stars, white in a blue field."); 26 U.S.C. § 5000A(c)(2)(B)(i)-(ii) (detailing the amount of the alternative tax for the 2014 and 2015 taxable years). But no one believes that these provisions are unconstitutional simply because they do not presently command or require anything.

Nor have plaintiffs or the federal defendants shown why Section 5000A cannot continue to be sustained under the Taxing Clause. Plaintiffs make no effort to reconcile their strict revenue-generation requirement with the fact that Congress routinely delays the start date of tax provisions or suspends collection of a tax for a period of time. *See* State Defs. Br. 31-32 (collecting examples). The federal defendants contend that Section 5000A is unlike taxes that have been delayed or suspended because it "will never raise any revenue." U.S. Br. 34. But there is nothing certain about that. Section 5000A will generate revenue again at any time that Congress decides to increase the amount of the tax above zero. In the meantime, there is nothing unconstitutional about leaving Section 5000A(a) on the books so that Congress can make that change easily if it decides to do so—perhaps through the same budget reconciliation process it used to zero out the tax in 2017. Indeed, maintaining the rest of the structure would seem to be the most efficient course.

Despite repeatedly insisting that a tax provision must raise revenue at all times, *e.g.*, Texas Br. 19, 32, 33, 34, 35, the plaintiffs fail to acknowledge that, in

United States v. Ardoin, 19 F.3d 177, 179-180 (5th Cir. 1994), this Court upheld a statute that had not produced revenue for several years as a lawful exercise of Congress's taxing powers. The federal defendants at least address *Ardoin*, attempting to distinguish it on the ground that the defendant there was "responsible for a tax payment of $200." U.S. Br. 32. But *Ardoin* is significant here because the government had stopped collecting the tax entirely, and this Court nonetheless upheld the provision. 19 F.3d at 179-180. That holding squarely refutes plaintiffs' theory that a statute must generate revenue at all times to be sustained as a proper exercise of Congress's taxing power.[8]

III. IF THE MINIMUM COVERAGE PROVISION IS NOW UNCONSTITUTIONAL, IT IS SEVERABLE FROM THE REST OF THE ACA

The federal defendants acknowledge both that severability is a question of congressional intent and that the "normal rule" is "partial, rather than facial, invalidation." U.S. Br. 36 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010)). The plaintiffs similarly recognize that invalid provisions of a law should be severed unless it is "'evident' that Congress would have preferred no statute at all." Texas Br. 38 (quoting *Exec. Benefits Ins.*

[8] The federal defendants also observe that the tax at issue in *Ardoin* "could have been regulated" under Congress's Commerce Clause powers. U.S. Br. 32. That is true, but it does not undermine *Ardoin*'s significance to this case, because the Court also held that Congress could have adopted the statute under its "power to tax." *Ardoin*, 19 F.3d at 180.

Agency v. Arkison, 573 U.S. 25, 37 (2014)) (ellipses omitted). Nonetheless, they all urge this Court to take the extraordinary step of invalidating the entire Affordable Care Act to remedy a purported infirmity in a single statutory provision—a provision that Congress has already intentionally rendered unenforceable. There is no reason to believe that Congress would have wanted that result. *See* State Defs. Br. 34-40; House Br. 41-51.

1. The "touchstone for any decision about remedy is legislative intent." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006). Here we know for certain that Congress would have preferred "what is left" of the Affordable Care Act to "no [Act] at all." *Id.* Congress rendered Section 5000A(a) unenforceable in 2017 by eliminating the only statutory consequence for not maintaining healthcare coverage. At the same time, Congress left every other provision of the ACA in place. These circumstances allow us to "determine[] what Congress would have done by examining what it did." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 560 (2001) (Scalia, J., dissenting). We know that Congress would have wanted to preserve the rest of the ACA even if Section 5000A(a) is not enforceable because that is the situation that Congress itself created.

That conclusion is confirmed by the fact that the ACA will continue to function in a manner that is precisely "consistent with the intent of Congress" even

if Section 5000A(a) is stricken. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). By reducing the alternative tax to zero and leaving the rest of the ACA in place, Congress made a considered determination that it wanted a version of the Act without any enforceable requirement to maintain healthcare coverage. That is the exact statutory scheme that would result from a court order invalidating Section 5000A(a) on constitutional grounds.

The context surrounding the 2017 amendment further demonstrates that Congress's preferred remedy would not have been to invalidate the entire ACA. *Arkison*, 573 U.S. at 37. In the months before it reduced the alternative tax to zero, Congress considered—and rejected—several bills that would have repealed many of the Act's most important protections. *See* State Defs. Br. 11-12, 39; House Br. 7-8. As a result, Congress was well aware of the devastating consequences that would have resulted from repealing the ACA. *See* State Defs. Br. 36-38.[9] There is no reason to believe that Congress would have wanted to impose those costs had it known that reducing the alternative tax to zero would create a constitutional problem. On the contrary, several members of Congress who voted to zero-out the

[9] *See also* Br. of AARP, et al. (ECF No. 514897185); Br. of American Cancer Society, et al. (ECF No. 514896778); Br. of National Women's Law Center, et al. (ECF No. 514897602); Br. of American Medical Association, et al. (ECF No. 514896475); Br. of Families USA, et al. (ECF No. 514897533); Br. of American Association of People with Disabilities (ECF No. 514897614).

tax proclaimed that they were not "changing anything else." 163 Cong. Rec. S7672 (daily ed. Dec. 1, 2017) (statement of Sen. Pat Toomey); *see also* State Defs. Br. 39-40 (collecting additional statements). In any event, Congress well understood that it could not have repealed several of the ACA's most important protections under its own rules governing the budget reconciliation mechanism that it used to change the tax amount. *See* State Defs. Br. 38.

Together, these indicia of congressional intent establish that if Section 5000A(a) is now unconstitutional, the most appropriate remedy is one that reflects what Congress itself did: declare the minimum coverage provision unenforceable, but leave the rest of the ACA intact. *See* State Defs. Br. 40. Alternatively, this Court could eliminate any constitutional problem caused by the 2017 amendment by invalidating that amendment, thus restoring the alternative tax to its previous amount. *Id.* at 40-41 (citing *Frost v. Corp. Comm'n of State of Okla.*, 278 U.S. 515 (1929)).[10]

[10] The plaintiffs do not address *Frost*, and the federal defendants offer little response other than to assert that *Frost* is "inapposite," U.S. Br. 42. It is not. In *Frost*, an amendment to a previously valid statute rendered the law unconstitutional. *See* 278 U.S. at 525-526. The amendment was not "'unconstitutional itself.'" U.S. Br. 42. Rather, the Court concluded that an equal protection problem arose when the amendment dispensed with the requirement that some cotton gin operators make a showing of "public necessity" to obtain a license. *Frost*, 278 U.S. at 522-524. It was the fusing of that amendment with the "'original statute,'" U.S. Br. 42, that created the constitutional problem. If Section

2. Plaintiffs and the federal defendants agree that severability analysis turns on the question of congressional intent. *See* U.S. Br. 36-37; Texas Br. 36-37. And they appear to acknowledge that the relevant intent here is that of the 2017 Congress. *See* U.S. Br. 40; Texas Br. 39, 41-42. But their analysis of the intent of the 2017 Congress focuses almost entirely on the considerations that led the *2010* Congress to adopt the minimum coverage provision. *See* U.S. Br. 37-40; Texas Br. 38-50; Hurley Br. 47-50. They argue that the 2010 Congress would have wanted the entire Act to fall without an enforceable requirement to maintain healthcare coverage, and then seek to impute the intent of that Congress to its 2017 successor. *See* U.S. Br. 40, 43; Texas Br. 39, 41-42; Hurley Br. 48. That analysis is flawed at every step.

As a preliminary matter, it is not at all clear that the 2010 Congress would have preferred "no statute at all" over a remedy severing Section 5000A(a) from the rest of the ACA. *Ayotte*, 546 U.S. at 330; *see* State Defs. Br. 42-43; House Br. 51-53. It appears more likely that the 2010 Congress would have wanted to preserve many other ACA provisions. *See Florida ex rel. Atty. Gen. v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235, 1320-1328 (11th Cir. 2011), *aff'd in*

5000A(a) is now unconstitutional, it is for the same reason: the 2017 amendment changed Section 5000A in a way that makes it invalid. *Frost* thus suggests that a permissible remedy here would be to declare the amendment a "nullity" and restore the statute to its former self. *Id.* at 526-527.

part, rev'd in part on other grounds by NFIB, 567 U.S. 519. As the Eleventh Circuit reasoned, most of the ACA has nothing to do with the individual market reforms, much less the requirement to choose between maintaining healthcare coverage or paying a tax. *Id.* at 1322. And it is not "*evident*" that Congress would have declined to adopt even the community-rating and guaranteed-issue reforms without an enforceable requirement to maintain healthcare coverage. *Id.* at 1327.

The statutory findings adopted by the 2010 Congress—such as the finding that the requirement to purchase minimum coverage was "essential to creating effective health insurance markets," 42 U.S.C. § 18091(2)(I); *see also id.* § 18091(2)(H), (J)—do not support a different conclusion. *See* Texas Br. 39-40; Hurley Br. 48; U.S. Br. 37-38. Statutory findings "aid[] informed judicial review, as do the reports of legislative committees, by revealing the rationale of the legislation." *Carolene Products*, 304 U.S. at 152. They are commonly used to memorialize a legislative judgment that a statute is within the scope of Congress's Commerce Clause power, by establishing that the regulated activity "'substantially affect[s] interstate commerce.'" *United States v. Morrison*, 529 U.S. 598, 612 (2000). And that was the clear purpose of the findings in 42 U.S.C. § 18091, which begins by pronouncing that the "individual responsibility requirement . . . is commercial and economic in nature, and substantially affects interstate commerce." 42 U.S.C. § 18091(1). This type of statutory finding "respecting

Congress's constitutional authority does not govern, and is not particularly relevant to, the different question of severability." *Florida ex rel. Atty. Gen.*, 648 F.3d at 1326.

In any event, whatever these statutory findings tell us about the intent of the 2010 Congress, they do not establish that the 2017 Congress would have wanted Section 5000A(a) to be inseverable from the rest of the ACA. Even if the 2010 Congress believed that the ACA could not work without an enforceable requirement to maintain healthcare coverage, the 2017 Congress plainly had a different view. *See supra* 14-16. As discussed, the best evidence of Congress's intent on that point is "what it did." *Legal Servs. Corp.*, 531 U.S. at 560 (Scalia, J., dissenting). If Congress believed that the "individual mandate [was] essential" to the proper functioning of the entire ACA in 2017, U.S. Br. 37, it would not have left the rest of the Act in place when it reduced the alternative tax to zero. Focusing on what Congress actually did in 2017 is not an improper "effort to 'psychoanalyze those who enacted' the law." Hurley Br. 48; *see also* Texas Br. 3 (same). Rather, it is the best way of determining what that Congress actually "would have done" if faced with the remedial question before the Court. *Legal Servs. Corp.*, 531 U.S. at 560 (Scalia, J., dissenting).

Plaintiffs and the federal defendants discern a contrary intent from the fact that the 2017 Congress did not "amend[] or repeal[]" the statutory findings

discussed above. U.S. Br. 41; *see* Texas Br. 39. But those findings reflected the reasons why the 2010 Congress concluded that an enforceable requirement to maintain healthcare coverage was a proper exercise of the Commerce Clause power. *See supra* 18-19. By 2017, the Supreme Court had rendered them irrelevant by holding that Section 5000A(a) could not be justified under the Commerce Clause. *NFIB*, 567 U.S. at 547-558 (Roberts, C.J.); *id.* at 657 (joint dissent). The findings now have a status similar to that of the current Section 5000A: they remain on the books but have little or no current operative effect.[11] There was no need for the 2017 Congress to amend or repeal them in order to express its own intent—plainly conveyed by the 2017 amendment—that the rest of the ACA should remain in place even without an enforceable requirement to maintain healthcare coverage.

The federal defendants similarly emphasize that Congress left Section 5000A(a) "on the books" when it reduced the amount of the tax in Section 5000A(b)-(c) to zero. U.S. Br. 40-41. But that is not evidence of any intent that the provision would be inseverable from the rest of the ACA—any more than it shows an intent to depart from *NFIB*'s construction and turn subsection (a) into a

[11] It is not uncommon for statutory findings, reflective of the intent or rationale of a prior Congress on a matter that is no longer relevant, to remain in the United States Code. *See, e.g.*, 15 U.S.C. § 6601(a) (findings regarding dangers posed by "year 2000 computer date-change problems").

stand-alone command to maintain healthcare coverage. To the contrary, Congress's decision to make the minimum coverage provision unenforceable while leaving the balance of the ACA intact is a powerful indication that Congress wanted to preserve the Act's other provisions.

Plaintiffs also contend that the Supreme Court's decisions in *NFIB* and *King v. Burwell*, 135 S. Ct. 2480 (2015) support treating Section 5000A(a) as inseverable. *See* Texas Br. 42-44; *see also* U.S. Br. 38-40. Those decisions, however, were issued long before the 2017 amendment. They recount the considerations that led the 2010 Congress to adopt a tax as a means of enforcing the requirement to maintain healthcare coverage. *See NFIB*, 567 U.S. at 547-548 (Roberts, C.J.); *King*, 135 S. Ct. at 2485-2487. They do not—and could not—address the different question of whether the 2017 Congress would have wanted the rest of the ACA to fall without an enforceable requirement to maintain healthcare coverage. And the statutory changes that Congress actually made in 2017 plainly demonstrate its belief that the individual markets created by the ACA,

as well as the Act's many other provisions, could continue to function without such a requirement.[12]

That belief could be explained by the fact that, as an empirical matter, many of the concerns about "'adverse selection'" and the possibility of a "'death spiral'" that contributed to the decision to adopt Section 5000A in 2010 (Texas Br. 40) had largely dissipated by 2017. By that time, the individual markets were up and running, and experience had demonstrated that they could function effectively without a tax on those who chose not to maintain healthcare coverage. *See* State Defs. Br. 45-46; House Br. 49-50. The CBO predicted as much shortly before Congress amended Section 5000A, reporting that the individual insurance markets "would continue to be stable in almost all areas of the country throughout the coming decade" even without the "individual mandate penalty." CBO Report at 1.[13] And thus far, the individual market *has* continued to function without an enforceable requirement to maintain healthcare coverage. As compared with 2018

[12] For similar reasons, the brief regarding severability filed by the United States in *NFIB* in 2012 (*see* Texas Br. 39-43) is inapposite here. The analysis in that brief was based on the intent of the Congress that adopted the ACA, not the intent of the Congress that amended it.

[13] The state plaintiffs note that the CBO also projected that premiums in the individual market would "'ris[e] by 10% per year'" more than if the alternative tax had remained in effect. Texas Br. 44. But the CBO did not conclude that such an increase would make health insurance "prohibitively expensive," *id.*, much less cause the individual markets to "'blow up,'" *id.* at 41.

(the last year during which the alternative tax was collected), in 2019 insurer participation in the ACA's Exchanges increased or remained the same in most parts of the country; premium increases for the benchmark plans offered through the Exchanges were lower; and overall enrollment in those plans dipped by only three percent. Br. of Bipartisan Economic Scholars 26-30 (ECF No. 514897608).[14]

To be sure, the prediction that the individual markets can function effectively without an enforceable requirement to maintain healthcare coverage could, in time, turn out to be wrong. If so, then perhaps Congress will use the statutory structure left on the books in Section 5000A to reinstate a positive alternative tax as an incentive to individuals to maintain coverage. But speculation about how the ACA's individual markets may or may not function in the future does not provide any legal basis for a court to disregard the clear choice that the 2017 Congress

[14] *See also* Br. of America's Health Insurance Plans 25-29 (ECF No. 514896554) (explaining that the ACA's "preexisting-condition provisions would continue to function properly without the mandate in today's individual market"); Br. of Blue Cross Blue Shield Association 20-27 (ECF No. 514897500) (similar); Br. of the American Hospital Association, et al. 8-16 (ECF No. 514896636) (similar); Cong. Budget Office, *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2019 to 2029* at 31 (May 2019), *available at* https://www.cbo.gov/system/files/2019-05/55085-HealthCoverageSubsidies_0.pdf (estimating that the individual market will "remain stable" over the "next decade").

made when it eliminated any enforcement of the minimum coverage provision while preserving every other part of the ACA.

* * *

Plaintiffs are right that this case is "not about whether the ACA is good or bad policy." Texas Br. 3. It is about the correct application of legal principles that limit the role and power of federal courts. The district court's order invalidating the entire Affordable Care Act "extend[s] judicial power . . . beyond its constitutional limits." Br. of Ohio and Montana 23 (ECF No. 514896372). The district court adjudicated the constitutionality of a statutory provision that does not harm anyone; rejected plausible interpretations of that statute that avoid any constitutional problem; and adopted a sweeping "remedy" that conflicts with the plain intent of Congress and would create chaos and harm tens of millions of Americans. Nothing in the law permits that result.

CONCLUSION

The judgment of the district court should be reversed.

Dated: May 22, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 22, 2019, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 22, 2019

/s Samuel P. Siegel
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,011 words, according to the count of Microsoft Word. I further certify that this brief complies with typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in Microsoft Word using 14-point Times New Roman font.

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