Nos. 19-840 & 19-1019

In the Supreme Court of the United States

THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON, ANDY BESHEAR, THE GOVERNOR OF KENTUCKY, AND THE DISTRICT OF COLUMBIA,

Petitioners,

v.

THE STATE OF TEXAS, *et al.*,

Respondents.

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

RESPONSE AND REPLY BRIEF FOR THE PETITIONERS–CROSS-RESPONDENTS

XAVIER BECERRA
Attorney General of California
KATHLEEN BOERGERS
Supervising Deputy Attorney General
NIMROD PITSKER ELIAS
NELI N. PALMA
Deputy Attorneys General

MICHAEL J. MONGAN
Solicitor General
SAMUEL P. SIEGEL*
Deputy Solicitor General
AMARI L. HAMMONDS
Associate Deputy Solicitor General

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
1300 I Street
Sacramento, CA 95814
(916) 210-6269
Sam.Siegel@doj.ca.gov
**Counsel of Record*

July 29, 2020

(*Additional caption listed on inside cover and additional counsel listed on signature pages*)

THE STATE OF TEXAS, *et al.*,

Cross-Petitioners,

v.

THE STATE OF CALIFORNIA, *et al.*,

Cross-Respondents.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES (continued)

Page

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION

Respondents' briefs confirm what has been clear from the beginning: This suit is a transparent attempt to use the courts to impose a sweeping policy change that the elected branches of government have consistently rejected—dismantling the entire Affordable Care Act.

Respondents challenge the constitutionality of just one of the ACA's hundreds of provisions, 26 U.S.C. § 5000A, on the ground that it must be read as a command to purchase insurance. But this Court already held that the text invoked by respondents should not be read that way. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574 (2012) (*NFIB*). Instead, the Court construed Section 5000A as presenting a "lawful choice" between buying insurance or paying a tax. *Id.* Respondents' standing and merits arguments rest on the remarkable premise that when Congress reduced the amount of that tax to zero in 2017, it created the very command that *NFIB* held would be unconstitutional. Those arguments ignore both the *NFIB* construction and the principle behind it—the Court's "duty to construe a statute to save it, if fairly possible." *Id.* at 574 (Roberts, C.J.).

Properly construed, the 2017 amendment allowed Americans to choose between buying insurance and paying zero dollars to the federal government. In other words, it made Section 5000A inoperative. Congress does not violate the Constitution by creating a provision that does nothing and cannot possibly be enforced. Indeed, such a provision does not inflict any legally cognizable injury on anyone.

Of course, respondents' real objective is not to obtain a judicial decree barring the enforcement of a single statutory provision that Congress has already

made unenforceable. They want this Court to impose a remedy that "take[s] down the whole" ACA. *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2351 (2020) (*AAPC*) (plurality opinion). But even if Section 5000A were now invalid, nothing in precedent, text, or congressional intent would justify that extraordinary remedy. This Court applies a "strong presumption of severability," reflecting a "decisive preference for surgical severance rather than wholesale destruction." *Id.* at 2350-2351. The only remedy that would respect "intent and text" (Tex. Br. 37) here would be the one that Congress itself effectively selected in 2017: an order declaring Section 5000A unenforceable but leaving the rest of the ACA intact.

By contrast, the remedy respondents seek would mark an unprecedented judicial incursion into the role of the political branches: invalidating hundreds of provisions that Congress left in place, causing "major regulatory disruption," and inflicting "appreciable damage to Congress's work" on healthcare. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2210 (2020) (plurality opinion). It would have devastating practical consequences as well, including by depriving tens of millions of Americans of health insurance in the middle of a global pandemic. Nothing in the law permits—much less requires—that result.

ARGUMENT

I. RESPONDENTS LACK STANDING

A. The Individual Respondents Are Not Subject to a Command and Face No Threat of Enforcement

The individual respondents' theory of standing rests entirely on the assertion that they are "subject to § 5000A(a)'s command to buy health insurance." Ind. Br. 19. But this Court already held that Section 5000A imposes no such command. *NFIB*, 567 U.S. at 574. The Tax Cuts and Jobs Act (TCJA) of 2017 did not transform it into one. *See* Pet. Br. 25-31; *infra* pp. 8-11.

The individual respondents insist that the Court must accept their interpretation of Section 5000A in analyzing jurisdiction. Ind. Br. 24. As the federal respondents recognize (U.S. Br. 22-23), however, sometimes standing and merits inquiries are "indistinguishable." 13B Wright et al., *Federal Practice and Procedure* § 3531.15 (3d ed. 2008); *see* House Br. 22-23; *cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998). Here, respondents' standing and merits theories both depend on the same flawed statutory interpretation.

And even if the Court assumed that Section 5000A were a command for purposes of analyzing standing, respondents certainly cannot demonstrate any "realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). The purpose and effect of the TCJA was to render Section 5000A inoperative. *See* Pet. Br. 28-29. No

one has suggested any way in which it might be enforced.[1]

The state respondents would dispense with any requirement of threatened—or even possible—enforcement. They cite two early cases for the proposition that "this Court has recognized that '[a] law is an expression of the public will; which, when expressed, is not the less obligatory, because it imposes no penalty.'" Tex. Br. 26. But their citations are to summaries of arguments made by losing advocates, not to any opinion of the Court. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 212 (1796); *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 457 (1841).[2] This Court's actual precedents require plaintiffs to establish that the challenged statute either presently harms them or creates a "threatened injury [that] is certainly impending"—not "speculative" or "hypothetical." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401, 416 (2013); *see* Dellinger Br. 12-16.

The individual respondents assert that *Clapper* is "inapposite" because they have in fact purchased insurance based on their belief that Section 5000A is a command. Ind. Br. 25-26. But the plaintiffs in *Clapper* also claimed "ongoing injuries," arising from

---

[1] The lack of any possibility of enforcement means the result would be the same if the issue were analyzed as a question of statutory jurisdiction under the Declaratory Judgment Act. *See* Bray Br. 2-5; *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-672 (1950).

[2] Other sources provide a more reliable indication of early views on this subject. *See, e.g.*, The Federalist No. 15, at 110 (Hamilton) (Rossiter ed., 1961) ("If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation.").

"measures that they ha[d] undertaken" out of fear that they would be subject to surveillance under the challenged statute. 568 U.S. at 415. As in *Clapper*, the individual respondents cannot "manufacture standing" by unilaterally deciding to incur costs in response to a statute that does not threaten to injure them. *Id.* at 416.

Finally, *NFIB* does not "implicitly" suggest that the individual respondents have standing to bring this suit. Ind. Br. 21-23. The individual plaintiffs in *NFIB* would have faced a legal consequence for choosing not to buy insurance—a required payment to the IRS. The impetus for the present lawsuit is the 2017 amendment removing any legal consequence for going without insurance. Nothing in *NFIB* speaks to the jurisdictional consequences of that change.

B. The State Respondents Have Not Substantiated Their Alleged Financial Harm

As to their own standing, the state respondents acknowledge that they must demonstrate a "'substantial risk' of at least some additional costs as a result of the amended section 5000A." Tex. Br. 20. They continue to speculate that "many individuals" will enroll in their state-funded healthcare plans "solely" because of Section 5000A—even now that there is no legal consequence for not doing so. *Id.* But the only evidentiary support they offer is Congressional Budget Office reports from 2008 and 2017, *id.*, which do not establish that the current provision causes anyone in the respondent States to participate in state-funded plans, *see* Pet. Br. 23-24.

Alternatively, the state respondents argue that "the ACA in general" establishes the requisite injury,

by inflicting "real-world costs" on the States or "prevent[ing] them from applying their own laws and policies." Tex. Br. 18, 24, 29. For example, they point to "reporting costs" arising from 26 U.S.C. §§ 6055-6056, Tex. Br. 20-22; costs of "meet[ing] the ACA's . . . rules and regulations," *id.* at 23; and the potential preemptive effect of certain ACA provisions, *see id.* at 29-30. But none of those purported harms is caused by the amended Section 5000A—and none would go away if the Court declared that provision unenforceable.[3]

Finally, the state respondents suggest that the record here is "sufficient" because petitioners did not offer "contrary evidence" below. Tex. Br. 28. But respondents did not carry their burden to establish standing. That failure is not excused by the fact that the district court denied petitioners an opportunity to introduce evidence on standing. *See* Pet. Br. 22 n.12; J.A. 371-372. And the answer to respondents' "forfeiture" argument (Tex. Br. 19) is that standing "cannot be waived or forfeited." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019).

C. Respondents' Inseverability Theory Does Not Establish Standing

The federal respondents conspicuously decline to address whether the state respondents have standing, and do not endorse the individual respondents' theory of standing. In fact, they do not address whether *any* respondent "would have Article III standing to challenge the individual mandate by itself." U.S. Br. 14.

---

[3] The state respondents invoke (Tex. Br. 26-27) *United States v. Windsor*, 570 U.S. 744 (2013), but in that case—unlike this one—the challenged provision was a "but for" cause of Windsor's financial injury, *id.* at 756.

They argue instead that the Court may exercise jurisdiction based on injuries purportedly inflicted by other statutory provisions that are not directly challenged here, and that "are constitutionally valid when standing on their own," *id.* at 37, but that respondents argue are inseverable from Section 5000A, *see id.* at 14-21. That is incorrect.

"[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). A plaintiff "must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). The claim respondents advance here seeks a declaratory judgment that the minimum coverage provision exceeds Congress's enumerated powers. J.A. 61-63. To invoke the jurisdiction of a federal court with respect to that claim, respondents must establish an injury that is "fairly traceable to" *that* provision. *DaimlerChrysler*, 547 U.S. at 342.

In support of their contrary theory, the federal respondents cite *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), and *Printz v. United States*, 521 U.S. 898 (1997). U.S. Br. 20. But those cases did not discuss or rule on the plaintiffs' standing, and the United States itself has explained that such decisions "should be accorded no precedential effect" with respect to jurisdiction. U.S. Opp. 11, *Segovia v. United States*, No. 17-1463 (Aug. 29, 2018) (internal quotation marks omitted); *see Steel Co.*, 523 U.S. at 91. Nor do the circumstances here "mirror[]" those in *Alaska Airlines*. U.S. Br. 20. The plaintiffs there brought a constitutional challenge to the statutorily required process for approving pending regulations that would directly harm them. *See* 480 U.S. at 680, 682 & n.3; *Alaska Airlines, Inc. v. Donovan*, 594 F. Supp. 92, 93-94 (D.D.C. 1984).

The federal respondents' theory would dramatically expand standing doctrine, allowing plaintiffs to challenge any aspect of a statutory scheme based only on the assertion that it is inseverable from another provision that harms them. It is unclear how that position is consistent with the interests of the federal government; in any event, it is inconsistent with this Court's precedents. *See Lewis*, 518 U.S. at 358 n.6; Dellinger Br. 25-27.

II. SECTION 5000A DOES NOT VIOLATE THE CONSTITUTION

On the merits, respondents argue that Section 5000A now "must" be read as an unconstitutional "command" to purchase insurance. U.S. Br. 30. But text and context show that Congress did not transform that provision into a command when it enacted the TCJA. It merely altered the terms of the choice presented by the provision, allowing Americans to decide between purchasing health insurance and paying a tax of zero dollars. There is nothing unconstitutional about that.

A. Setting the Alternative Tax to Zero Did Not Transform a Constitutional Choice into an Unconstitutional Command

1. Respondents' assertion that the "only" way to construe Section 5000A is as an "unconstitutional command" (Ind. Br. 26) reflects a persistent refusal to acknowledge the backdrop for Congress's 2017 amendment: this Court's decision in *NFIB*. That decision held that Section 5000A presents a "lawful choice" between obtaining the minimum essential coverage addressed by subsection (a) and making the alternative tax payment imposed by subsection (b). *NFIB*, 567 U.S. at 574. When Congress amends a statute

that this Court previously construed, the presumption is that Congress acted "with full cognizance" of that construction. *Ankenbrandt v. Richards*, 504 U.S. 689, 700 (1992). And Congress was more than presumptively aware of the *NFIB* construction when it considered the TCJA: its Members expressly relied on that construction. *See* Health Care Policy Scholars Br. 17-18.

Of course, this Court's "'interpretive decisions'" are "'subject . . . to congressional change.'" Tex. Br. 31 (quoting *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015)). But "[w]hen Congress intends to effect a change of that kind, it ordinarily provides a relatively clear indication of its intent in the text of the amended provisions." *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017). Here, respondents cannot identify anything in the changes made by the TCJA suggesting any intent to transform Section 5000A into a command. The TCJA did not alter the statutory structure that *NFIB* construed as creating a choice between buying health insurance and paying a tax. *See* 26 U.S.C. § 5000A(a)-(b). The only change Congress made was to reduce the amount of the alternative tax, addressed by subsection (c), to zero. *See* Pet. Br. 10. With that change, the choice offered by Section 5000A is now between buying insurance or doing nothing.

Respondents primarily contend that *NFIB*'s "saving construction" is "no longer available" because Section 5000A "no longer produces revenue." Tex. Br. 32. But that contention goes to respondents' separate argument that, as a *constitutional* matter, Section 5000A is no longer a valid exercise of Congress's taxing power. It does not address whether, as a matter of statutory construction, the current version of Section

5000A may still be read as presenting a choice. Plainly it may. *See* Dorf Br. 23.

Nor does the word "shall" in Section 5000A(a) require it to be read as a command. *See* U.S. Br. 33-34. Everyone agrees that "'[t]he word "shall" usually connotes a requirement,'" *e.g.*, *id.* at 33, but in some circumstances it does not, *see, e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2485-2489 (2015); *New York v. United States*, 505 U.S. 144, 170 (1992). Respondents have no persuasive response to these authorities.[4] And while they assert that "[n]othing in Section 5000A(a) indicates that Congress diverged from [the] ordinary understanding of the term," U.S. Br. 34, they ignore that an explicit and essential premise of *NFIB* was that the "shall" in Section 5000A(a) did *not* impose a legal requirement, *see* 567 U.S. at 568-570.

2. The circumstances surrounding the TCJA's enactment confirm that it is pure folly for respondents to contend that Congress imposed a command. Not a single member of Congress described the amendment in that way. Supporters and opponents alike recognized that the TCJA instead effectively "repeal[ed] Obamacare's individual mandate," thereby ensuring that individuals "are *not* forced to purchase something they either don't want or can't afford." *E.g.*, 163 Cong. Rec. S8153 (daily ed. Dec. 20, 2017) (statement of Sen. McConnell) (emphasis added); *see also* Health Care Policy Scholars Br. 15-17. The President shared that view. *Remarks by President Trump at Signing of TCJA* (Dec. 22, 2017), https://bit.ly/3fNh8EZ ("[N]ow

[4] The individual respondents argue that *New York* is inapposite because "'[t]he "shall" in that case was contained in an introductory provision.'" Ind. Br. 34 (quoting *NFIB*, 567 U.S. at 663-664 (joint dissent)). *NFIB* squarely rejected the same argument. 567 U.S. at 569 n.10.

we're overturning the individual mandate."). Indeed, two days after respondents filed their merits briefs, President Trump reiterated "that the very expensive, unpopular and unfair Individual Mandate provision has been terminated by us[.]" Donald Trump, Twitter (June 27, 2020), https://bit.ly/2E3Dlk8.

Respondents' position that Congress transformed Section 5000A into the very "command" that "this Court held in *NFIB* . . . is unconstitutional" (U.S. Br. 30) would be remarkable in any context, in light of the presumption that Congress "legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). But it is astonishing in this one—where we know for sure that leading legislators understood that "the Supreme Court would have nullified" Section 5000A if it were read as a command. Sen. Fin. Comm., *Open Executive Session to Consider the TCJA* 6 (Nov. 15, 2017) (statement of Sen. Hatch), https://bit.ly/3eSYXMM (Finance Hearing). Indeed, dozens of the TCJA's congressional supporters filed a brief in *NFIB* arguing that "requiring [individuals] to purchase health insurance . . . exceeds the authority given to the federal government in the Commerce Clause." Senators Br. 8, *NFIB*, 567 U.S. 519. Respondents' merits theory rests on the untenable premise that in 2017 those Senators intentionally voted to create a "command" that *NFIB* forbade and that *they personally believed* was unconstitutional—all while telling the public they were doing just the opposite.

B. Section 5000A Does Not Exceed Congress's Constitutional Authority

Respondents' constitutional arguments focus on the undisputed point that Congress lacks authority to command Americans to buy insurance. *See, e.g.*, Ind. Br. 26-28. But the best reading of Section 5000A—and

at the very least a "'fairly possible'" one, *NFIB*, 567 U.S. at 563 (Roberts, C.J.)—is that it allows Americans to choose between maintaining minimum health coverage and paying a tax of zero dollars. Respondents identify no basis for holding that such a nugatory provision violates the Constitution.

1. The federal respondents do not dispute that Congress may enact provisions that "lack any legal effect" and are merely "hortatory" in nature. U.S. Br. 33. They effectively concede that if Section 5000A can be construed in that manner, it is constitutional.

The state and individual respondents apparently believe that Congress may not *ever* adopt a provision that is inoperative or precatory. *See* Tex. Br. 33; Ind. Br. 33. But Congress routinely enacts resolutions and statutes containing legislative findings, "sense of the Congress" declarations, and other provisions that may provide context or encourage certain conduct but that have no operative effect. *See* Pet. Br. 32; House Br. 35-36. Such provisions appear throughout the ACA and the rest of the United States Code. *See* Dorf Br. 28-29. Congress has adopted them ever since the founding. *See, e.g.*, Resolution of Sept. 23, 1789, 1 Stat. 96; Resolution of Mar. 2, 1791, 1 Stat. 225; *Printz*, 521 U.S. at 909. That longstanding practice confirms that the Constitution does not prevent Congress from enacting a statute that does nothing. *Cf. Seila Law*, 140 S. Ct. at 2197 (actions of First Congress "'provide[] contemporaneous and weighty evidence of the Constitution's meaning'").

2. Respondents also contend that Section 5000A is no longer sustainable because it "no longer produces revenue." Tex. Br. 32. To be sure, *NFIB* viewed the production of revenue as a salient consideration in deciding whether "the shared responsibility payment"

in the original Section 5000A could "for constitutional purposes be considered a tax, not a penalty." 567 U.S. at 566-567. But it did not consider the distinct question whether the Constitution prohibits Congress from amending a valid tax by reducing the amount to zero while leaving the tax's structure on the books. *See* Pet. Br. 29, 32-34.[5]

That question should not be controversial: If Congress has an enumerated power to do something, it surely has the power to undo the same thing. And if, for reasons of convenience or otherwise, Congress decides to leave the statutory structure of the prior enactment in place after making a change that deprives it of any effect, there is no basis for concluding that the now-inoperative provision violates the Constitution. *See* Dorf Br. 26-27. The remaining statutory text could be justified based on the original enumerated power, or as necessary and proper to the exercise of that power, or simply on the ground that Congress does not need an enumerated power to make a prior enactment inoperative.

3. Respondents criticize the brevity of our merits discussion (Tex. Br. 30), but it should not be surprising that there is little to say on the subject. This Court has not had occasion to squarely hold that Congress

---

[5] Respondents fail to identify any material difference between the TCJA's amendment and amendments that suspend collection of a tax. The medical device tax, for example, was suspended from 2016 to 2019. Pet. Br. 34. No one contends that it was "unconstitutional" during that period—or for the shorter period between when it was finally repealed and when that repeal became effective, during which it was clear the tax would "never again generate tax revenue absent a further Act of Congress." U.S. Br. 32; *see* Pub. L. No. 116-94, § 501(d), 133 Stat. 2534, 3118-3119 (2019) (signed Dec. 20, 2019).

may create a statutory provision that does nothing. Perhaps that is because that question is—or should be—entirely academic. An inoperative provision does not cause anyone legally cognizable harm. *See supra* pp. 3-5. And even if a plaintiff could successfully challenge such a provision, "the Court of course [would] not formally repeal the law from the U.S. Code," but would instead simply hold that it "may not be enforced." *AAPC*, 140 S. Ct. at 2351 n.8 (plurality opinion). That holding would leave the plaintiff—and everyone else—in exactly the same position they were in when Congress made the provision inoperative. No wonder no one has advanced such a fruitless claim. Here, the practical significance of the pending claim to respondents is not that they would benefit from a judgment that the minimum coverage provision "violates the Commerce Clause" (Ind. Br. 54)—which would leave that provision on the books but unenforceable, just as it is now—but instead that they seek to use that purported defect to tear down the entire edifice of the Affordable Care Act.

III. IF SECTION 5000A IS NOW UNCONSTITUTIONAL, IT IS SEVERABLE FROM THE REST OF THE ACA

Respondents argue that if the minimum coverage provision is now unconstitutional, then every single provision of the Act "must also fall." U.S. Br. 48. They acknowledge that they are making this argument in the middle of a pandemic (Tex. Br. 2; Ind. Br. 2)—when health insurance and the ACA's other protections are more important to Americans than ever before. But they assert that the Court is obliged to embrace their breathtakingly broad remedial theory because "both intent and text" establish that "[n]o portion of the ACA is severable from the mandate." Tex. Br. 37, 46.

Principles of judicial restraint, however, counsel in favor of a "strong presumption of severability," which "reflect[s] a decisive preference for surgical severance rather than wholesale destruction, even in the absence of a severability clause." *AAPC*, 140 S. Ct. at 2350-2351 (plurality opinion). Respondents' textual and historical arguments do not come close to overcoming that presumption. To the contrary, their proposed remedy would "disrespect the democratic process, through which the people's representatives" made it "crystal clear" that the balance of the ACA should remain in place if Section 5000A is held unenforceable. *Id.* at 2356.

A. The Text Congress Created Shows That the Rest of the ACA Should Remain in Place Without an Enforceable Section 5000A

1. Respondents acknowledge that the severability inquiry turns on "congressional intent." Tex. Br. 37; *see* U.S. Br. 36; Ind. Br. 35. In this case there is no need "to imaginatively reconstruct a prior Congress's hypothetical intent," *AAPC*, 140 S. Ct. at 2350 (plurality opinion), because Congress directly confronted the relevant severability question. It knew that by reducing the alternative tax to zero, it was making Section 5000A effectively unenforceable. *See* Pet. Br. 28-29. Indeed, that was the point of the change. And despite many invitations and opportunities, it did not disturb the rest of the ACA. Thus, what Congress itself created—"through the constitutional process of bicameralism and presentment" (Ind. Br. 38)—was a statutory scheme *without* an enforceable minimum coverage provision but *with* every other ACA provision. A judicial remedy to that same effect is the only one that would honor both Congress's actions and its intent.

2. Respondents' textual arguments focus on certain statutory findings enacted in the original ACA in 2010. *See, e.g.*, Tex. Br. 37-40. Those arguments both address the intent of the wrong Congress and badly misunderstand the nature and significance of the findings.

a. To the extent there is any constitutional flaw in Section 5000A, it was introduced by the 2017 Congress. Because that is the Congress that would have been confronted with the choice of whether to keep "what is left of" the ACA or "no statute at all," *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006), its intent controls the severability inquiry. It would make no sense to ask whether the 2010 Congress would have preferred no ACA at all to an ACA stripped of a provision that it did not adopt; it makes even less sense to hypothesize about the "combined intent" of *both* Congresses, U.S. Br. 42.

The inquiry is not any different because the purported constitutional infirmity was created by the "interaction between the ACA and TCJA." U.S. Br. 42. An amendment will always "interact" with the statutory scheme it modifies. But in determining congressional intent for severability and other purposes, this Court properly focuses on the Congress that had the relevant information about how the pre-existing scheme functioned and then decided to adopt the amendment at issue. *See, e.g.*, *Regan v. Time, Inc.*, 468 U.S. 641, 652-655 (1984) (plurality opinion); *Boumediene v. Bush*, 553 U.S. 723, 738 (2008); *see also* Senators Br. 14-16. That is why all three judges on the panel below concluded that the district court erred

by ignoring the intent of the 2017 Congress. J.A. 441 (majority opinion); *id.* at 481-482 (dissent).[6]

b. Respondents nonetheless focus on statutory findings adopted by the 2010 Congress and codified in 42 U.S.C. § 18091, arguing that those findings are a "statutory inseverability clause" with respect to Section 5000A's relationship to the guaranteed-issue and community-rating requirements. Tex. Br. 46; *see* U.S. Br. 42-43. They then posit that if those three provisions "are invalidated, the remainder of the ACA should not be allowed to remain in effect." U.S. Br. 43; *see infra* pp. 21-23.

Respondents fundamentally misunderstand Section 18091. Congress knows how to draft an inseverability clause. *See, e.g.*, 4 U.S.C. § 125; 25 U.S.C. § 2201 note (Severability).[7] But that is not what Congress did in Section 18091. Instead, it adopted findings that the original Section 5000A "substantially affects interstate commerce." 42 U.S.C. § 18091(1). Such findings illuminate the views of the original enacting Congress about "the constitutional basis for congressional action." Office of the Legislative Counsel, U.S. House of Representatives, Manual on Drafting Style § 325(a) n.3 (1995); *see* Pet. Br. 41-42. But

---

[6] If the intent of the 2010 Congress did control, a more appropriate remedy than the one sought by respondents would be to "treat[] the original, pre-amendment statute as the 'valid expression of the legislative intent.'" *AAPC*, 140 S. Ct. at 2353 (plurality opinion) (quoting *Frost v. Corp. Comm'n of Okla.*, 278 U.S. 515, 526-527 (1929)).

[7] *See also* Office of the Legislative Counsel, U.S. Senate, Legislative Drafting Manual § 131(b)(2) (1997) (model language).

they "do[] not govern, and [are] not particularly relevant to, the different question of severability." *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1326 (11th Cir. 2011), *aff'd in part, rev'd in part on other grounds sub nom. NFIB*, 567 U.S. 519.[8]

And whatever relevance these findings originally had with respect to the constitutional question has since disappeared due to intervening changes in the law. This Court held in *NFIB* that the original Section 5000A could *not* be sustained under the Commerce Clause. Moreover, because the findings in Section 18091 addressed the "individual responsibility requirement *provided for in this section*," Pub. L. No. 111-148, § 1501(a)(1), 124 Stat. 119, 242 (2010) (emphasis added)—*i.e.*, the text of Section 5000A as originally laid out in Section 1501 of the ACA—they do not apply to the new version of Section 5000A created by the TCJA. Pet. Br. 42.

There was thus no need for the 2017 Congress to "amend or delete" Section 18091 (Ind. Br. 42) in order to convey its intent that the rest of the ACA should remain in place if a court held the new version of Section 5000A unenforceable. This does not amount to an argument for "repeal[] by implication." U.S. Br. 40-41. The point is simply that Congress need not repeal a statutory finding when later events render it irrelevant or inapplicable. While Congress sometimes opts to repeal or "amend statutory findings that are no

[8] Even if Section 18091 had contained an inseverability clause, the presumption that follows from such a clause can be overcome where—as here—"there is strong evidence that Congress intended otherwise." *Seila Law*, 140 S. Ct. at 2209 (plurality opinion); *see AAPC*, 140 S. Ct. at 2349 (plurality opinion) ("extraordinary circumstances").

longer relevant," Tex. Br. 41, often it does not, *see, e.g.*, 15 U.S.C. § 6601(a)(7); 22 U.S.C. § 6021; 42 U.S.C. § 4391. Like other superannuated findings, the ones in Section 18091 have "ceased to have meaning" as a source for interpreting the current statutory scheme. Tex. Br. 42.[9]

B. The Circumstances Surrounding the TCJA's Enactment Confirm that Section 5000A Is Severable

Respondents also invoke "legislative history" to support their severability arguments. Ind. Br. 40; *see* Tex. Br. 38-39. But the members of Congress who discussed the 2017 amendment told their colleagues and the public that Congress was not "chang[ing] anything" in the ACA "except one thing," 163 Cong. Rec. S7672 (daily ed. Dec. 1, 2017) (statement of Sen. Toomey), and that "[n]othing—nothing—in the [TCJA] impacts Obamacare policies like coverage for preexisting conditions," Finance Hearing at 106 (statement of Sen. Hatch); *see also* Senators Br. 8-12. Respondents have not identified a single statement suggesting that anyone who voted for the TCJA believed that the amended Section 5000A was "essential" to the continued operation of any other ACA provision. Tex. Br. 43. While respondents criticize petitioners and amici for relying on "cherry-picked

---

[9] Nor does the fact that the 2017 Congress "did not eliminate" Section 5000A(a) (U.S. Br. 39) establish that the provision is inseverable. In light of the Senate's "Byrd Rule," *see* 2 U.S.C. § 644(b)(1)(A), reducing the tax in Section 5000A(c) was the most straightforward way for Congress to achieve its goal of making Section 5000A inoperative. *See* Health Care Policy Scholars Br. 20-22. That reduction hardly signals an intent that the provision is integral to the rest of the ACA.

statements," *id.* at 42, in this case the entire orchard was in agreement.

Respondents instead urge the Court to consider "[m]ounds of . . . evidence" from 2010 about the relationship between the original Section 5000A and other ACA reforms. Ind. Br. 40. At that time, the 2010 Congress was concerned about the "'adverse selection'" problem and the "economic 'death spiral'" experienced by certain States that had adopted guaranteed-issue and community-rating requirements without an enforceable minimum coverage requirement. *King*, 135 S. Ct. at 2485-2486. But respondents ignore the evidence that was before Congress in 2017. By then, experience had demonstrated that other reforms—including the ACA's generous tax subsidies—would provide a sufficiently "powerful incentive[]" for healthy individuals to purchase insurance to avoid any concern that the individual markets would enter a "'death spiral'" if there were "no effective mandate." Blue Cross Br. 29; *see also* Pet. Br. 45 & n.18; America's Health Ins. Plans Br. 30-32. The Congressional Budget Office advised Congress that the individual markets would "continue to be stable in almost all areas of the country throughout the coming decade" even if Section 5000A were eliminated or the alternative tax were reduced to zero. J.A. 307.[10]

Acting in that context, Congress decided to make Section 5000A unenforceable—without eliminating any other provision of the ACA. The "language and structure" of that enactment, as well as its "legislative

[10] That prediction proved correct. *See* Blue Cross Br. 29-31; Bipartisan Econ. Scholars Br. 7-9.

history[,] provide an uncontradicted view of congressional intent with regard to severance." *Alaska Airlines*, 480 U.S. at 697.

C. An Order Holding Section 5000A Unenforceable Would Be the Only Appropriate Remedy

While respondents principally focus on the relationship between Section 5000A and the guaranteed-issue and community-rating requirements, they also assert that "[t]he entire Act must be held inseverable," Ind. Br. 48.[11] They would have the Court invalidate hundreds of provisions that have no conceivable connection with Section 5000A, *see, e.g.*, Ass'n for Accessible Meds. Br. 3-11; Tribes Br. 3-13, including provisions that have been essential to America's fight against the current pandemic, *see* Pub. Health Experts Br. 15-20. Their proposed remedy would, among many other things, drive up prescription drug costs for elderly Americans, AARP Br. 32; increase uncompensated care costs for hospitals by tens of billions of dollars, Nat'l Hosp. Ass'ns Br. 19-21; reduce state budgets by hundreds of billions of dollars, J.A. 230-277; and deprive 20 million people of health insurance, AMA Br. 27.

Respondents do not seriously attempt to overcome the strong presumption of severability with respect to every provision of the ACA—or any of them. Instead,

---

[11] The federal respondents posit that "any *relief* issued as part of a judgment would be limited to enforcement of the provisions that have been shown to injure the individual plaintiffs." U.S. Br. 21. That theory appears to be inconsistent with how this Court typically approaches severability. *See, e.g.*, *Murphy v. NCAA*, 138 S. Ct. 1461, 1482-1484 (2018); *cf. NFIB*, 567 U.S. at 696-697 (joint dissent) ("The response to this argument is that our cases do not support it.").

they recycle arguments from various briefs and opinions filed in *NFIB* and *King*. *See* U.S. Br. 43-47; Tex. Br. 43-46; Ind. Br. 48-51. But those sources discussed the significance of an enforceable Section 5000A to the statutory scheme that Congress adopted in 2010—at a time when Congress was limited to making predictive judgments about how the ACA might function. They do not inform the severability of the unenforceable version of Section 5000A that Congress created in 2017—after the entire ACA had been in effect for years and generated profound reliance interests, after Congress had observed how the ACA actually functioned, and after it had rejected scores of proposals to repeal the whole Act or its major provisions.

As this case comes to the Court, respondents cannot possibly establish that Congress "would have preferred" other ACA provisions to fall if a court decreed Section 5000A to be unenforceable, *Seila Law*, 140 S. Ct. at 2209 (plurality opinion), because Congress itself made it unenforceable and left the other provisions in place. And they cannot demonstrate that any other ACA provision is incapable of "'functioning independently,'" *id.*, because the balance of the ACA has functioned perfectly well since Section 5000A became unenforceable by dint of the TCJA in January 2019. The only appropriate remedy for any constitutional defect would be an order reflecting the arrangement Congress itself selected: by declaring Section 5000A unenforceable while leaving the rest of the ACA in effect.

The presumption of severability exists for cases like this one. It is designed to honor congressional intent to the greatest extent possible and to maintain a properly modest role for the judiciary in crafting nar-

row remedies for any identified constitutional problem. *See generally AAPC*, 140 S. Ct. at 2350-2352 (plurality opinion). Although they repeatedly invoke principles of judicial restraint, it is apparent that respondents' true objective is to play "a game of gotcha against Congress," by "rid[ing] a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional statute." *Id.* at 2351. That sweeping remedy would be contrary to text and congressional intent—and would plainly exceed the proper role of an Article III court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
SAMUEL P. SIEGEL
Deputy Solicitor General
KATHLEEN BOERGERS
Supervising Deputy Attorney General
NIMROD PITSKER ELIAS
NELI N. PALMA
Deputy Attorneys General
AMARI L. HAMMONDS
Associate Deputy Solicitor General

July 29, 2020

(*Additional counsel listed on the following pages*)

WILLIAM TONG
Attorney General of Connecticut
JOSEPH RUBIN
Assistant Deputy Attorney General
Counsel for the State of Connecticut

PHILIP J. WEISER
Attorney General of Colorado
ERIC R. OLSON
Solicitor General
Counsel for the State of Colorado

KATHLEEN JENNINGS
Attorney General of Delaware
CHRISTIAN DOUGLAS WRIGHT
Director of Impact Litigation
ILONA KIRSHON
Deputy State Solicitor
JESSICA M. WILLEY
Deputy Attorney General
Counsel for the State of Delaware

CLARE E. CONNORS
Attorney General of Hawaii
ROBERT T. NAKATSUJI
First Deputy Solicitor General
Counsel for the State of Hawaii

KWAME RAOUL
Attorney General of Illinois
JANE ELINOR NOTZ
Solicitor General
DAVID F. BUYSSE
Deputy Chief, Public Interest Division
MATTHEW V. CHIMIENTI
Assistant Attorney General,
Special Litigation Bureau
Counsel for the State of Illinois

THOMAS J. MILLER
Attorney General of Iowa
NATHAN BLAKE
Deputy Attorney General
Counsel for the State of Iowa

MAURA HEALEY
Attorney General of Massachusetts
ERIC GOLD
Chief, Health Care Division
Counsel for the Commonwealth of Massachusetts

DANA NESSEL
Attorney General of Michigan
FADWA A. HAMMOUD
Solicitor General
Counsel for the State of Michigan

KEITH ELLISON
Attorney General of Minnesota
SCOTT IKEDA
Assistant Attorney General
Counsel for the State of Minnesota, by and through its Department of Commerce

AARON D. FORD
Attorney General of Nevada
HEIDI PARRY STERN
Solicitor General
Counsel for the State of Nevada

GURBIR S. GREWAL
Attorney General of New Jersey
MATTHEW J. BERNS
Assistant Attorney General
MARIE SOUEID
Deputy Attorney General
Counsel for the State of New Jersey

LETITIA JAMES
Attorney General of New York
BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
LISA LANDAU
Bureau Chief, Health Care Bureau
ELIZABETH CHESLER
Assistant Attorney General,
Health Care Bureau
Counsel for the State of New York

JOSHUA H. STEIN
Attorney General of North Carolina
RYAN Y. PARK
Solicitor General
SRIPRIYA NARASIMHAN
Deputy General Counsel
Counsel for the State of North Carolina

ELLEN F. ROSENBLUM
Attorney General of Oregon
BENJAMIN GUTMAN
Solicitor General
Counsel for the State of Oregon

PETER F. NERONHA
Attorney General of Rhode Island
MICHAEL W. FIELD
MARIA R. LENZ
Assistant Attorneys General
Counsel for the State of Rhode Island

THOMAS J. DONOVAN, JR.
Attorney General of Vermont
BENJAMIN D. BATTLES
Solicitor General
Counsel for the State of Vermont

MARK R. HERRING
Attorney General of Virginia
TOBY J. HEYTENS
Solicitor General
Counsel for the Commonwealth of Virginia

ROBERT W. FERGUSON
Attorney General of Washington
JEFFREY G. RUPERT
Chief, Complex Litigation Division
JEFFREY T. SPRUNG
Assistant Attorney General
Counsel for the State of Washington

LA TASHA BUCKNER
General Counsel
S. TRAVIS MAYO
Chief Deputy General Counsel
TAYLOR PAYNE
Deputy General Counsel
Counsel for Andy Beshear, Governor of Kentucky

KARL A. RACINE
Attorney General for the District of Columbia
LOREN L. ALIKHAN
Solicitor General
CAROLINE S. VAN ZILE
Principal Deputy Solicitor General
Counsel for the District of Columbia