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, Fort Worth Division, No. 4:18-cv-00167-O – Hon. Reed O'Connor

BRIEF OF APPELLEES NEILL HURLEY AND JOHN NANTZ

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CERTIFICATE OF INTERESTED PERSONS

No. 19-10011

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,

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Intervenor Defendants-Appellants.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. John Nantz, a resident of Austin, Texas and plaintiff-appellee in this matter.
2. Neill Hurley, a resident of Katy, Texas and plaintiff-appellee in this matter.
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109. American Psychiatric Association, amicus curiae in this matter.
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150. Hemophilia Federation of America, amicus curiae in this matter.
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188. American Medical Women's Association, amicus curiae in this matter.
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/s/ Robert Henneke
ROBERT HENNEKE
Attorney of Record for Appellees
Neill Hurley and John Nantz

STATEMENT REGARDING ORAL ARGUMENT

Because this case presents issues of exceptional importance, the Individual Appellees believe that oral argument is likely to aid the Court's decisional process.

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INTRODUCTION

Neill Hurley and John Nantz—the "Individual Plaintiffs" or "Individual Appellees"—submit their brief and respectfully request this Court affirm the trial court's declaratory judgment that the Affordable Care Act's (ACA) individual mandate is unconstitutional and the remainder of the ACA cannot be severed from this fatal flaw. Rather than repeat arguments raised in the State Appellees' brief, the Individual Appellees incorporate those arguments by reference. *See* Fed. R. App. P. 28(i). The Individual Appellees submit this brief to demonstrate their standing to bring this suit and to respond to various arguments raised by the Intervenor-Appellants and their amici.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. ROA.508-509. On December 30, 2018, the court entered partial final judgment under Fed. R. Civ. P. 54(b). ROA.2785. The Intervenor States and the United States filed notices of appeal on January 3 and 4, 2019, respectively. ROA.2787; ROA.2844. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the plaintiffs have standing.

2. Whether the individual mandate exceeds Congress's powers under the Constitution.

3. Whether the Affordable Care Act remains valid despite the unconstitutionality of its most "essential" provision.

STATEMENT OF THE CASE

A. EACH OF THE INJURIES TO INDIVIDUAL APPELLEES IS CAUSED BY THE CONTINUED OPERATION AND ENFORCEMENT OF THE ACA.

Neill Hurley, his wife, and children have been enrolled in an ACA-compliant health insurance plan since 2016. ROA.112. Hurley was unable to obtain a plan through the federal marketplace that was accepted by all his and his family's health care providers. ROA.112. Their family practice physician, ENT specialist, dermatologist, urgent care facility, and urologist did not accept their ACA plan, causing them to have to select new health care providers that they would not otherwise have chosen. ROA.112. Their new health care providers are not of the same quality as those that they had before enrolling in an ACA marketplace plan. ROA.112. Some of their new health care providers limit the number of appointments available to patients with ACA plans, which delays the family's ability to timely access medical care. ROA.112.

Hurley continues to maintain minimum essential health insurance coverage because he is obligated to comply with the ACA's individual mandate. ROA.113. Hurley values compliance with his legal obligations and believes that following the law is the right thing to do. ROA.113. The ACA prevents Hurley and his family

from obtaining care from their preferred health care providers and has greatly increased their health insurance costs. ROA.113. Were Hurley not limited to the plans provided through the federal health insurance marketplace, he would purchase reasonably priced insurance coverage that allows his family to access care from their preferred service providers. ROA.113.

John Nantz has been enrolled in an ACA-mandated health insurance plan since 2014. ROA.108. The cost of his current plan is high given the high deductible, limited network of providers, and his age and health status. ROA.108. He enrolled in this plan because he was required to do so by the ACA, and he does not believe it provides sufficient value to warrant the cost. ROA.108.

The ACA has greatly increased Nantz's health insurance costs. ROA.109. If free from the ACA's mandate, Nantz would purchase reasonably-priced insurance coverage that is in accordance with his actuarial risk, and that offers lower premiums than he currently pays. ROA.109. This would be available to him in a consumer-driven, competitive insurance market, but is not available due to the ACA's requirements. ROA.109.

The ACA's individual mandate requires Hurley and Nantz to divert resources from their business endeavors in order to obtain qualifying health insurance coverage, regardless of their own judgment as to whether maintaining such coverage is a worthwhile cost of doing business. ROA.109; ROA.113. The additional costs

imposed upon them by the individual mandate place a burden on their businesses. ROA.109; ROA.113.

Each of the injuries to Individual Appellees is caused by the continued operation and enforcement of the ACA, and each of these injuries will be redressed by a judgment from this Court declaring the ACA unconstitutional.

B. THE INTERVENOR-APPELLANTS AND THEIR AMICI TOUT WHAT THEY CALL THE BENEFITS OF THE ACA, BUT THEIR "FACTUAL" ASSERTIONS OVERLOOK THE REALITY OF THE ACA'S STARK FAILURES.

Many of the amici supporting Intervenor-Appellants focus most or all of their efforts on the supposed policy benefits of the ACA. *See, e.g.*, Br. of Amici Curiae 35 Counties, et al. 2-20; Br. of Amici Curiae Alliance of Community Health Plans, et al. 25-32; Br. of Amici Curiae Families USA, et al. 5-21. But the constitutionality of laws is not determined by popularity. *Contra, e.g.*, Br. of Amici Curiae National Women's Law Ctr., et al. 27 (averring that "the protections afforded by the ACA are widely popular").[1] Courts are concerned "not with the wisdom of legislation but with its constitutional limitation." *Bowen v. Roy*, 476 U.S. 693, 712 (1986) (quotations omitted). As the Supreme Court observed in *Nat'l Fed'n of Indep. Bus. v. Sebelius* (*NFIB*), this case is not about whether the ACA "embodies sound

[1] It would, however, be incorrect to think that the ACA is a treasured American institution. Americans remain deeply divided about the wisdom of that law. *See, e.g.*, Megan Brenan, *Approval of the Affordable Care Act Falls Back Below 50%*, Gallup (Nov. 30, 2018), https://news.gallup.com/poll/245057/approval-affordable-care-act-falls-back-below.aspx.

policies" but "whether Congress has the power under the Constitution" to continue to enforce those policies. 567 U.S. 519, 531-32 (2012).

In any event, amici grossly inflate the ACA's policy benefits. That legislation would fail any conceivable cost-benefit analysis. For instance, despite promises that it would do so,[2] the ACA has done nothing to stem the tide of rising health insurance costs. Instead, it has exacerbated the problem. In the four years after the ACA came into effect, average premiums for individual health insurance plans more than doubled—from $2,784 per year in 2013 to $5,712 per year in 2017. DHS, *Individual Market Premium Changes: 2013-2017*, at 2 (May 23, 2017).[3] And the cost of ACA marketplace insurance has continued to rise since. In 2018, price increases far outpaced inflation, particularly for the cheapest plans favored by less well-off Americans: That year, "[t]he national average increase was 32.0 percent for the lowest-priced silver plans and 19.1 percent for gold plans." Urban Institute, *Changes in Marketplace Premiums, 2017 to 2018*, at 2 (March 2018).[4] In Texas, premiums for the lowest-priced silver plans increased from 2017 to 2018 by a whopping 41.3%. *Id.* at 5.

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[2] *See, e.g.*, Remarks by President Obama on the Affordable Care Act, Miami Dade College (Oct. 20, 2016), at 32:33–32:50, https://www.youtube.com/watch?v=F34Vlqtv0lQ (claiming that "overall health care costs have turned out to be significantly lower than everyone expected" and that the ACA has "saved the federal government billions of dollars").

[3] *Available at* https://aspe.hhs.gov/system/files/pdf/256751/IndividualMarketPremiumChanges.pdf.

[4] *Available at* https://www.urban.org/sites/default/files/publication/97371/changes_in_marketplace_premiums_2017_to_2018_0.pdf.

It would be surprising if this were not the case. For one, the ACA requires plans to include all sorts of expensive "benefits" that many consumers do not want. *See, e.g.*, ROA.636-637; ROA.640-641. Moreover, the ACA marketplace fails basic economics. For many Americans, that "marketplace"—with the word conjuring up an image of multiple sellers vying for the business of consumers—is a misnomer. In 2018, over half the counties in the country had just one participating insurer. *E.g.*, Rachel Fehr, et al., *Insurer Participation on ACA Marketplaces, 2014 – 2019*, Henry J. Kaiser Family Foundation, at 2 (Nov. 2018).[5] A further 30 percent of counties had only two. *Id.* It is little wonder that a market with no or little competition yields costly products.

Amici tout modest increases in the number of insured following the ACA's passage. *See, e.g.*, Br. of Amici Curiae Families USA, et al. 10-11; Br. Amicus Curiae Small Business Majority Foundation 9. But, as of 2018, 28 million Americans remain uninsured. *E.g.*, Chris Pope, *How to Increase Health-Insurance Coverage by Reducing ACA Crowd-Out*, Manhattan Institute, at 10 (Jan. 2018).[6] And a significant percentage of those Americans have remained uninsured at great personal cost. Using IRS data on individual tax returns, one U.S. Senator calculated that, in 2015 when the individual mandate penalty was in effect, nearly 6.7 million

[5] *Available at* http://files.kff.org/attachment/Issue-Brief-Insurer-Participation-on-ACA-Marketplaces-2014-2019.

[6] *Available at* https://media4.manhattan-institute.org/sites/default/files/R-CP-0118.pdf.

Americans paid the penalty rather than buy ACA-compliant health insurance plans. Office of Sen. Steve Daines, *Obamacare's Poverty Tax: Americans Paying Individual Mandate Tax Penalty*, at 1.[7] Of these, over a quarter were Americans earning less than $25,000 per year and three quarters earning less than $50,000. *Id.*

In any case, given the amount of subsidies continually lavished on the ACA, it would be truly remarkable if there were not some incidental benefits in the insured rate. In January 2017, the Congressional Budget Office ("CBO") estimated that the federal government would spend $49 billion that year on subsidies for coverage obtained through ACA marketplaces. CBO, *Federal Subsidies Under the Affordable Care Act for Health Insurance Coverage Related to the Expansion of Medicaid and Nongroup Health Insurance: Tables from CBO's January 2017 Baseline*, at Box 1-1, (Jan. 2017).[8] The CBO projected that number would continue to grow at nine percent per year, crossing $100 billion in less than a decade. *Id.* And that cost pales in comparison to that occasioned by the expansion of Medicaid eligibility under the ACA. That rang in at roughly $70 billion in 2017, and is set to reach $142 billion by the end of the decade. *Id.* In 2027, the CBO estimates that just these two ACA federal expenditures will constitute nearly one percent of the country's gross

[7] *Available at* https://www.daines.senate.gov/imo/media/doc/Obamacare%20Poverty%20Tax%202015.pdf.

[8] *Available at* https://www.cbo.gov/sites/default/files/recurringdata/51298-2017-01-healthinsurance.pdf.

domestic product. *Id.* To put that into perspective, that is roughly the same percentage of GDP currently allocated to *all* federal education and transportation spending. *See* Ctr. on Budget & Policy Priorities, *Policy Basics: Where Do Our Federal Tax Dollars Go?* (Jan. 29, 2019).[9]

It would be one thing if this massive expenditure was necessary to solve, once and for all, the country's health insurance problems. But there is no reason to believe the tremendous sum of money spent under the ACA has been, or will be, allocated efficiently to address the problem of the uninsured. Instead, it has been scattershot. One study, for instance, concluded that "[a]bout 40% of the entitlement funds disbursed under the [ACA] have gone to individuals who already had private coverage." Pope, *supra*, at 4.

In short, the so-called factual assertions of the Intervenor-Appellants and their amici defending the ACA cannot be squared with the actual record of this failed legislation. The Court should decide the legal issues before it without reference to whatever provisions may or may not be politically popular at any given moment.

SUMMARY OF THE ARGUMENT

The ACA orders people to buy health insurance. Individual Appellees Neill Hurley and John Nantz are both law-abiding taxpayers struggling under the strain

[9] *Available at* https://www.cbpp.org/research/federal-budget/policy-basics-where-do-our-federal-tax-dollars-go (estimating that education and transportation-and-infrastructure spending make up 3% and 2% of the budget, respectively, and that the budget is 21% of GDP).

imposed by this unprecedented intrusion into personal economic choices. Despite their hard work and best efforts, the ACA's individual mandate has taken a significant toll on both their personal finances and business operations, while at the same time limiting their access to quality healthcare. While Hurley and Nantz seek individual relief from the legal burdens imposed upon them, the stakes of this case reach much further. That is because, as Justice Kennedy recognized during oral argument in *NFIB*, the ACA's individual mandate fundamentally "chang[es] the relation of the individual to the government."[10] Not only does the mandate compel Hurley and Nantz to continue spending both their time and money on obtaining unwanted, inferior insurance at an inflated price, it also does violence to the Constitution itself by countenancing the exercise of federal power well beyond the bounds of Article I, Section 8. Accordingly, Hurley and Nantz not only pray for relief from the illegitimate financial and administrative burdens that have been placed upon them, but further seek to vindicate what has been called "the right most valued by civilized men"—the right to be let alone. *See Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Hurley and Nantz have standing to bring this action because they are directly injured by the ACA, and the relief they seek would redress that injury. The district

[10] Transcript of Oral Argument, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S 519 (2012), p. 12, ln. 1-6, *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/11-398-Tuesday.pdf.

court held correctly that the command in Section 5000A to buy insurance is beyond Congress's enumerated powers and violates the Constitution. Not only that, but the ACA requires Hurley and Nantz to undertake additional injurious actions. As individual taxpayers, Hurley and Nantz must submit annual tax returns to the IRS, and the ACA requires that they must report their purchase of minimum essential health coverage as part of this process. These requirements increase and sustain Hurley and Nantz's ongoing injuries from Section 5000A.

Furthermore, Hurley and Nantz are not citizens with generalized grievances against governmental action; they are the direct objects of the individual mandate. And since it is undisputed that the Individual Appellees are the object of the individual mandate, there is little question that the statute is causing them injury. As a result, causation and redressability flow naturally from the injuries caused by Section 5000A. Absent the individual mandate, Hurley and Nantz would neither be required to buy health insurance nor to report whether they made such a purchase on their tax returns. Thus, a declaratory judgment that Section 5000A is unconstitutional would relieve them of these injuries.

The arguments put forth by the Intervenor-Appellants and their amici misconstrue Article III and the nature of the ACA. Because Hurley and Nantz are legally compelled to purchase minimum essential coverage, the harm resulting from this unwanted purchase cannot be considered self-inflicted so as to defeat standing.

Finally, only one plaintiff is required to satisfy standing and, as detailed in their brief to the Court, the State Appellees independently have standing to pursue this cause of action.

The Court also has subject matter jurisdiction to consider the Individual and State Appellees' constitutional claims because they present federal questions that arise under the United States Constitution and the United States Code. The relevant federal jurisdictional statute expressly states that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. An action arises under federal law if a right created by the U.S. Constitution is an essential element of the claim. Appellees' filed suit seeking a declaratory judgment that the ACA—a federal statute which directly regulates them—is unconstitutional, as well as an injunction to prevent the statute's further operation and enforcement against them. Appellees' seek to enforce the jurisdictional limits that the Constitution places on congressional power. Therefore, this case is directly within the jurisdiction of the federal courts.

As recognized by a majority of the justices that decided *NFIB*, the text of the individual mandate most naturally reads as a command to purchase health insurance. Regardless of whether this command is accompanied by a monetary penalty for noncompliance, those subject to the statutory provision still have a duty to obey the

law. Were it otherwise, respect for the rule of law—which is both central and indispensable to our constitutional republic—would be severely undermined.

Additionally, *NFIB* fully supports the district court's conclusion that the individual mandate cannot now be saved by being construed as providing a lawful choice under the taxing power. This saving construction is no longer possible because the shared responsibility payment now lacks the essential feature of a tax; it raises no revenue for the government. An unconstitutional mandate remains, which still compels Hurley and Nantz to purchase health insurance.

The individual mandate itself is constitutionally indefensible. In fact, not a single amicus curiae attempts to defend the constitutionality of the individual mandate in light of the reduction of the tax to zero. Their silence on the core issue of this case is deafening. But arguments advanced by Intervenor-Appellants on severability also miss the mark. Rather than attempting to read legislators' minds to try to glean their subjective motivations as the Intervenors have advocated, this Court should instead anchor its analysis to the actual text of the statute. Even if, considered in a vacuum, some of the ACA's other provisions are not as constitutionally deficient as Section 5000A, those provisions are incapable of functioning as Congress envisioned absent the individual mandate. Accordingly, because the individual mandate is at the very heart of the ACA as a whole, it is inseverable from the law's remaining provisions.

STANDARD OF REVIEW

The Court reviews a district court's "grant of summary judgment de novo." *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 417 (5th Cir. 2016).

ARGUMENT

A. THE INDIVIDUAL APPELLEES HAVE STANDING AND THIS COURT HAS SUBJECT MATTER JURISDICTION TO DECIDE THE CASE.

Hurley and Nantz have standing to challenge the ACA's individual mandate to purchase minimum essential health insurance coverage because it directly and unconstitutionally regulates their actions. Hurley and Nantz are consumers of health insurance and taxpayers who must complete and submit income tax returns each year to the IRS. 26 U.S.C. § 6012. They are small business owners who purchase their health insurance plans through the federal health insurance marketplace exchange created by the ACA. ROA.108, 112. The ACA does not exempt them from the requirements of the individual mandate.

Intervenor-Appellant, the U.S. House of Representatives (the "House"), contends that Hurley and Nantz complain only of generalized, speculative harm that is not traceable to the ACA's individual mandate or redressable by the Court. House Br. 21-25. According to the House, the individual mandate is not a command to purchase health insurance and imposes no legal obligation upon Hurley and Nantz to participate in the health insurance market. House Br. 23. Instead, the House avers

that Hurley and Nantz may choose to comply with the individual mandate by purchasing health insurance that complies with the ACA's minimum essential coverage requirements, that this choice is entirely voluntary, and, as a result, Hurley and Nantz lack standing to challenge the ACA because the federal government has not applied the mandate directly against them. House Br. 24-26. The House, however, misconstrues Hurley and Nantz's standing to challenge the ACA.

Article III requires the party invoking standing to "have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Contender Farms, L.L.P. v. U.S. Dept. of Agric.*, 779 F.3d 258, 264 (5th Cir. 2015) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007)) (internal quotation marks omitted). The elements of Article III standing are satisfied by "present[ing] (1) an actual or imminent injury that is concrete and particularized, (2) fairly traceable to the defendant's conduct, and (3) redressable by a judgment in [their] favor." *Duarte ex rel. Duarte v. City of Lewisville, Tex.*, 759 F.3d 514, 517 (5th Cir. 2014). If a plaintiff can establish that it is an "object" of the law at issue, "there is ordinarily little question that the action or inaction has caused [the plaintiff] injury, and that a judgment preventing or requiring the action will redress it." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

Section 5000A requires Hurley and Nantz to purchase health insurance. They are not exempt from the individual mandate by any of the ACA's other provisions. Because the individual mandate compels them to buy health insurance that they would otherwise choose not to purchase, Hurley and Nantz have suffered an invasion of a legally protected interest that is concrete, particularized, and actual. This harm affords them a concrete stake in ensuring that Congress does not legislate outside of its constitutional bounds, and the relief provided by the district court redresses their injuries.

Not only do Individual-Appellees have standing to bring this case, but State-Appellees independently possess standing as well. Additionally, both the district court and this Court have federal question jurisdiction to decide the issues presented and provide the remedies requested. Accordingly, this Court should proceed to the merits.

1. Compelling Individual Appellees to buy unwanted insurance is "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."

To establish an "injury in fact" sufficient to confer standing, a plaintiff must have suffered "an invasion of a legally protected interest" that is "concrete and particularized" as well as "actual or imminent," as opposed to "conjectural or hypothetical." *Lujan*, 504 U.S. at 560. In the instant case, Hurley and Nantz challenge Congress's authority to compel them to purchase health insurance as

outside of its enumerated powers. They also challenge the IRS's authority to require them to report the number of months during each tax year that they carried ACA-compliant health insurance coverage for themselves and their dependents. As detailed below, the alleged injuries associated with these challenges are sufficient to confer standing. *See Texas v. United States*, 497 F.3d 491 (5th Cir. 2007) (holding that because Texas challenged the Agency Secretary's authority to undertake a regulatory process, Texas alleged a sufficient injury for standing purposes).

The legally protected interests in this case are straightforward: Section 5000A forces Hurley and Nantz to spend their own hard-earned money to purchase health insurance—minimum essential coverage—that provides them with poor benefits and diminished options for service. By requiring them to do so, Congress has overstepped the bounds of its enumerated powers. They must also spend time and resources complying with the statute's reporting requirements. The resulting injuries are "actual" because they are not merely imminently threatened; they are ongoing, and will continue to occur unless the Court affirms the district court's declaratory judgment, relieving Hurley and Nantz of their legal duty to purchase minimum essential coverage and report their insurance coverage when filing their taxes.

Hurley and Nantz's injuries are also "concrete" and "particularized." While the Supreme Court uses the word "concrete" to mean "real," as opposed to

"abstract," the term is "not . . . necessarily synonymous with 'tangible.'" *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548-49 (2016). For example, the intangible injury of the frustration of a developer's "interest in making suitable low-cost housing available in areas where such housing is scarce" has been held to be an injury-in-fact, as it was "not [a] mere abstract concern about a problem of general interest." *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977). Even when the harm is widely-shared, it may still be considered concrete. *FEC v. Akins*, 524 U.S. 11, 24 (1998).

When analyzing the concreteness of harm for the purposes of standing, the Court must consider whether the harm is closely related to the sort of harm that has "traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S.Ct. at 1549. Within this tradition, there is no shortage of cases that—like the instant case—involve the extent the government is empowered to compel individuals to act. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (weighing the state's interest in compulsory school attendance past the eighth grade against the free exercise claims of Amish parents); *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating the privilege against self-incrimination against the states); *Rochin v. California*, 342 U.S. 165 (1952) (finding that deputy sheriffs directing a physician to forcibly pump a suspect's stomach is conduct that "shocks the conscience" and violates due process of law); *W. Virginia State Bd. of Educ. v.*

Barnette, 319 U.S. 624 (1943) (recognizing the "fixed star in our constitutional constellation" that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein"); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding a mandatory vaccination statute as a valid use of police power). In each of these cases, the injuries were concrete enough for the relevant legal issues to be decided on the merits because the invasions of the legally protected interests were "real" and not "abstract." *See Spokeo*, 136 S.Ct. at 1549.

Hurley and Nantz's injuries are also particularized. They are both individually compelled to purchase minimum essential coverage under the law. ROA.109, 113. Their insurance costs have skyrocketed. ROA.157. Their quality of care has plummeted. ROA.108, 112. And because of the lack of viable alternatives, their options for rectifying this situation have been curtailed. ROA.108-09, 112-13. It is certainly true that millions of other Americans are also harmed by the individual mandate. But this in no way undermines particularity for the purposes of standing. After all, it is a "self-evident proposition that more than one party may have standing," and once a plaintiff suffers a traceable and redressable injury, "that plaintiff has standing—regardless of whether there are others who would also have standing to sue." *Clinton v. City of New York*, 524 U.S. 417, 434–36 (1998).

Furthermore, an increased regulatory burden on an individual satisfies the injury-in-fact requirement. *Contender Farms, L.L.P.*, 779 F.3d at 266. In *Contender Farms*, a company and its principal, Mike McGartland, challenged an agency regulation under the Horse Protection Act that required certain entities to suspend horse trainers who engaged in a practice known as soring. *Id*. at 262. This Court analyzed whether the plaintiffs had standing to challenge the regulation. The court held first that the plaintiffs were the object of the challenged regulation because the regulation targeted participants in Tennessee walking horse events like Contender Farms and McGartland. *Id*. at 265. Second, the court determined the regulation amounted to an increased regulatory burden because it required competitors to "take additional measures to avoid even the appearance of soring." *Id*. at 266. Because "[a]n increased regulatory burden typically satisfies the injury in fact requirement," and because the court found that causation and redressability naturally flowed from the type of injury alleged, the plaintiffs satisfied Article III standing. *Id*.

In the instant case, Section 5000A undoubtedly imposes additional regulatory burdens on Hurley and Nantz. It requires them to purchase health insurance they do not want or need. They are spending money today they would not otherwise spend as a result of the ACA's individual mandate. Moreover, every year, they must file an individual tax return informing the IRS that they have complied with the individual mandate. The regulatory burden is not theoretical; for Hurley and Nantz

it is palpable. As discussed below, causation and redressability also flow naturally from Hurley and Nantz's injuries.

2. Because they are the object of the ACA's individual mandate to purchase health insurance, Individual Appellees' injuries are fairly traceable to the statute and would be redressed by declaring it unconstitutional.

Hurley and Nantz's standing is reinforced by the fact that they are the objects of the individual mandate. The Supreme Court has stated that when a suit challenges "the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether" the plaintiffs are themselves the objects "of the action (or forgone action) at issue." *Lujan*, 504 U.S. at 561. If they are, "there is ordinarily little question that the action or inaction has caused [them] injury, and that a judgment preventing or requiring the action will redress it." *Id.* at 561-62.

There is no question that Hurley and Nantz are the objects of the ACA's individual mandate, which weighs in favor of concluding that they have standing to challenge the law. ROA.113 ("I continue to maintain minimum essential health coverage because I am obligated.); ROA.109 ("I am obligated to comply with the Affordable Care Act's individual mandate."). Congress intended the individual mandate to force individuals into the market for health insurance. *See* 26 U.S.C. § 1501. The IRS's enforcement and tracking of compliance with Section 5000A

directly impacts taxpaying individuals who are not exempt from compliance with the individual mandate.

With few exceptions not applicable here (for example, nonresident aliens), the individual mandate applies to all individual taxpayers who are required by federal law to file income tax returns. Indeed, individual taxpayers—like the Individual Appellees in this case—are required to report to the IRS whether they maintained ACA-compliant health insurance coverage for themselves and all of their dependents for each month of the reporting year when submitting their federal income tax returns. *See* Publication 5187 - Affordable Care Act: What You and Your Family Need to Know, https://www.irs.gov/pub/irs-pdf/p5187.pdf ("For tax year 2018, the IRS will not consider a return complete and accurate if the taxpayer did not: check the "Full-year coverage or exempt" box on Form 1040 or report a shared responsibility payment on the tax return"). Tax return forms must be complete and accurate when submitted to the IRS. Failure to submit complete income tax return forms can result in the IRS's rejection of the return and even trigger an audit.

Furthermore, the injuries to Hurley and Nantz are directly traceable to the application of the individual mandate to their lives. Causation and redressability then "flow naturally" from the injury created by the individual mandate. *See Contender Farms*, 779 F.3d at 266. Without it, Hurley and Nantz would not be

required—in violation of the Constitution—to maintain specific health insurance coverage, nor would they be subject to an increased regulatory burden. ROA.2770.

A declaratory judgment holding that the individual mandate is unconstitutional, and therefore may no longer be enforced or applied, would redress the alleged injuries. ROA.2626. By freeing Hurley and Nantz from the requirement of complying with an unconstitutional law, a favorable judgment would allow them to tailor their insurance purchasing decisions to options better suited to their individual health statuses and financial realities. *Id*. They would be free to purchase health insurance below the "minimum essential coverage" threshold, or even to forego purchasing health insurance altogether. It is this lack of freedom to choose their own destiny that the Individual Appellees challenge in this case.

3. The Intervenor-Appellants misconstrue the standing inquiry.

a. *The Intervenor-Appellants misunderstand the analysis of injury-in-fact.*

Hurley and his dependent family members, along with Nantz, are currently suffering injuries due to the ACA's individual mandate. While the House contends that Congress's recent reduction of the individual mandate tax to $0.00 means Hurley and Nantz are not suffering a legally cognizable injury, the proper inquiry is not so limited. Whether Hurley and Nantz are penalized if they break the law is one potential form of injury, but it is far from the only one. Since the individual mandate compels them to purchase insurance that they otherwise would not buy, it is actually

Hurley and Nantz's forced compliance with the statute, rather than any penalties for violating it, that results in their most egregious injury.

The House argues that Section 5000A contains only a generalized legal obligation, the existence of which does not directly injure Hurley and Nantz. House Br. 25. But the text of the ACA refutes this argument. When Congress enacted the ACA, it stated that the purpose of the individual responsibility requirement to maintain minimum essential coverage, along with the other provisions of the Act, was to "add millions of new consumers to the health insurance market." 42 U.S.C. § 18091(2)(C). Congress further found that without the requirement to purchase health insurance, "many individuals would wait to purchase health insurance until they needed care." 42 U.S.C. § 18091(2)(I). Contrary to the House's assertions, the individual mandate compels the purchase of health insurance; it does not merely suggest individuals may purchase it if they wish to do so.

The House also contends that there is no injury to Hurley and Nantz because no enforcement action is pending or threatened against them. House Br. 24. However, an enforcement action by the federal government is not the only situation in which Individual Appellees would have standing to challenge the individual mandate. Applying the House's logic, while Congress may exceed its constitutional authority with impunity, the Individual Appellees are forbidden from challenging the unconstitutional application of the law even though it applies directly to them.

According to the House, Individual Appellees must be subjected to unconstitutional jurisdiction, *see Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 580 (1985), and must continue to suffer ongoing harm to their families, health, and to their business and personal interests. Individual Appellees need not "await the consummation of threatened injury to obtain relief." *Id.* at 581.

Additionally, the ACA's amendment of the Internal Revenue Code imposes a mandatory reporting scheme upon Hurley and Nantz. 26 U.S.C. § 5000A(b). This scheme forces an increased regulatory burden on the Individual Appellees and raises their costs of preparing and filing their income tax returns each year. While the House argues that Hurley and Nantz are not obligated to purchase ACA-compliant health insurance and cannot be injured by voluntarily purchasing it, House Br. 20-21, the "forced choice" of either submitting to the ACA's unlawful mandatory reporting scheme or declining to enter the consumer health insurance market "is itself sufficient to support standing." *See Texas v. United States*, 497 F.3d at 497.

Finally, in arguing against particularity, the House asserts that a plaintiff "cannot claim that the law itself, sitting on the books, chills his conduct or injures him merely because he believes—along with millions of other citizens—that obeying the law is important." House Br. 26 (citing *Lance v. Coffman*, 549 U.S. 437 (2007)). But Hurley and Nantz make no such claim. Instead, their injuries more closely resemble those of the individual voters in *Baker v. Carr*, 369 U.S. 186

(1962), which *Lance* cited approvingly and distinguished from the facts before it. *See Lance*, 549 U.S. at 437. Hurley and Nantz "seek relief in order to protect or vindicate an interest of their own" by "asserting a plain, direct and adequate interest" in being free from unconstitutional government coercion, "not merely a claim of the right possessed by every citizen to require that the government be administered according to law." *Baker*, 369 U.S. at 207-08. This is a far cry from "the kind of undifferentiated, generalized grievance about the conduct of government" that marked the citizens' challenge under the Elections Clause in *Lance*. *See* 549 U.S. at 442. Consequently, Hurley and Nantz suffer injuries sufficient to support standing to challenge the ACA's unconstitutional individual mandate.

b. *The Intervenor-Appellants are wrong on causation.*

The House also characterizes Hurley and Nantz's purchase of minimum essential coverage as "an entirely voluntary choice," and that "[h]aving voluntarily elected to buy insurance, plaintiffs do not have standing to complain that they were injured by that decision." House Br. 21. Similarly, a supporting amicus brief from Professors Walter Dellinger and Douglas Laycock argues that "Individual Plaintiffs cannot manufacture standing simply by purchasing health insurance." *See* Br. for Amici Curiae Walter Dellinger & Douglas Laycock in Support of Intervenor Defendants-Appellants Supporting Remand and Dismissal 16, ECF No. 00514897468 ("Dellinger & Laycock Amicus Brief").

However, the individual mandate imposes a legal command on Hurley and Nantz to purchase insurance and is therefore neither voluntary nor an attempt to "manufacture standing." *See supra* Part II.B. This conclusion is supported by the IRS's assessment of the associated shared responsibility payment for failure to comply with the mandate (through tax year 2018), and also its continuing tracking of individuals' maintenance of ACA-compliant health insurance coverage. These practices directly contradict the House's argument that compliance with the mandate is not required by law. Accordingly, as the district court recognized, "the Individual Plaintiffs' alleged injury—the requirement to purchase an unwanted product—is not self-inflicted, it is congressionally inflicted." *See* ROA.2769.

The House and amici Dellinger & Laycock cite three cases in support of their assertion that Hurley and Nantz's purchase of insurance is self-harm that is insufficient to confer standing: 1) *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013); 2) *Glass v. Paxton*, 900 F.3d 233 (5th Cir. 2018); and 3) *Zimmerman v. City of Austin*, 881 F.3d 378 (5th Cir. 2018). All three are readily distinguishable from the case currently before this Court.

In *Clapper*, the plaintiffs claimed that the risk of being surveilled under 50 U.S.C. § 1881a made it reasonable for them to take costly measures protecting the confidentiality of their communications. 568 U.S. at 415-16. Analyzing this claim under the "fairly traceable" factor of Article III standing doctrine, the Court wrote

that the plaintiffs could not "manufacture standing merely by inflicting harm on themselves based on their fears of *hypothetical future harm that is not certainly impending*." *Id*. at 416 (emphasis added). But, once again, context is important. The Court ruled that it was the plaintiffs' "fail[ure] to offer any evidence that their communications have been monitored under § 1881a" that substantially undermined their standing theory. *Id*. at 411. Instead, they offered evidence that they had previously been surveilled by the government *under a different statute* that predated the passage of section 1881a. The Court reasoned that since the plaintiffs "had a similar incentive to engage in many of the countermeasures that they are now taking" even before section 1881a was implemented, it was "difficult to see how the safeguards . . . can be traced to § 1881a." *Id*. at 417. By contrast, in the instant case there is no doubt that the requirement to buy insurance actually (rather than hypothetically) harms Hurley and Nantz, and that this harm is directly traceable to the individual mandate provision.

The House also argues, citing *Glass v. Paxton*, that Hurley and Nantz are simply manufacturing standing to challenge the individual mandate. *See* House Br. 22. Putting aside the objectionable attempt to impute improper motives to Hurley and Nantz, this argument ignores the reality that *Glass* hinged upon the uncertainty surrounding the harm that was alleged in that case. There, the plaintiff could not "manufacture standing by self-censoring her speech based on what she alleges to be

a *reasonable probability* that concealed-carry license holders will intimidate professors and students in the classroom." 900 F.3d at 242 (emphasis added). This "reasonable probability" claim, based on the "independent decision-making" of students, fell short of the requirement that the alleged harm be "certainly impending," and thus the professor's decision to self-censor her speech was not fairly traceable to the law in question. *Id*. at 240-42. Here, however, no independent decision-making of third parties is involved. Hurley and Nantz have consistently argued that the harm of being compelled to buy unwanted insurance is not merely "certainly impending," but in fact is actually ongoing.

Zimmerman v. City of Austin is inapposite for the same reasons as *Glass*. The harm in *Zimmerman* depended on the actions of third-parties—in that case political donors. Specifically, the court discounted "the risk that soliciting funds from persons outside of the Austin area would have resulted in prosecution," noting that prosecution would have only resulted if "more than 100 such persons contributed the maximum allowable $350." 881 F.3d at 390. Because there was "no evidence in the record of such interested donors," the court found the harm to be "speculative." *Id*. Here, no such speculation is required for the harm to Hurley and Nantz to be realized. The mandate to purchase insurance is unequivocal and in no way contingent on the actions of third parties.

Friends of the Earth, Inc. v. Laidlaw Envtl. Services, (TOC) Inc., 528 U.S. 167 (2000), provides the Court with a better understanding of the law applicable to Hurley and Nantz's standing. In *Laidlaw*, an environmental organization sued a private company for noncompliance with the permitting requirements of the Clean Water Act. *Id*. at 177. Despite the district court's finding that there had been "no demonstrated proof of harm to the environment," *id*. at 181, the Supreme Court found it to be "entirely reasonable" for nearby residents to curtail their recreational use of the river in response to the company's illegal discharge of pollutants. *Id*. at 184-85. The Court reasoned that statements by these residents that they would have used the river if the company were not discharging pollutants were different than the "speculative some day intentions" that were rejected in *Lujan*, and were thus sufficient to show injury-in-fact. *Id*.

Similarly, Hurley and Nantz argue that the individual mandate is beyond Congress's enumerated powers. Even though there is no monetary penalty for noncompliance, these appellees are still harmed by being legally mandated to purchase unwanted insurance. Accordingly, this Court should recognize that it is "entirely reasonable" for them to have purchased such insurance in order to comply with the law, especially since their credible statements that they would not otherwise have purchased minimum essential coverage in no way constitute "speculative some day intentions."

c. *The Intervenor-Appellants wrongly conflate the merits with the jurisdictional inquiry.*

Hurley and Nantz assert, and the district court held, that being compelled under Section 5000A to purchase unwanted health insurance causes them injuries sufficient to confer standing to challenge the ACA's constitutionality. ROA.2628. The House tries to brush this mandate aside by arguing that the statute does not actually compel Hurley and Nantz to make such a purchase since there is no longer a penalty for failing to do so, and then skips ahead to parlay its merits argument into a rationale for defeating Hurley and Nantz's standing. But, as the district court correctly concluded, this unnecessarily conflates two distinct issues: 1) the merits issue of whether Section 5000A should be construed as a legal command or a choice between two lawful options; and 2) the standing issue of whether the statute imposes an injury-in-fact on the appellees. ROA.2767. In attempting to refute this conclusion, the House cites three cases to support their argument that "adjudicating the individual plaintiffs' standing is not possible" until this Court first determines whether "Section 5000A required them to purchase insurance." House Br. 22-23. However, none of these cases support their contention.

First, the House cites *Bauer v. Marmara*, 774 F.3d 1026 (D.C. Cir. 2014), for the proposition that "when a plaintiff's alleged injury *arises solely from a statute*, questions concerning standing and the availability of a private cause of action under the statute may be intertwined." *Id*. at 1029 (emphasis added). In *Bauer*, the D.C.

Circuit considered whether the Neutrality Act implicitly granted a private cause of action. *Id*. at 1028. But here, Hurley and Nantz's injuries instead arise from a violation of their constitutional right not to be ordered to buy insurance. *See NFIB*, 567 U.S. at 575 (Roberts, C.J.). This distinction makes a difference, since "it is established practice for [the Supreme] Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Bell v. Hood*, 327 U.S. 678, 684 (1946); *see also Duarte* , 759 F.3d at 520 (recognizing the plaintiff's right to challenge a statute based on claims that it "deters the exercise of his constitutional rights," and reversing and remanding because the district court had "erroneously granted summary judgment for lack of standing because it conflated the actual-injury inquiry for standing purposes with the underlying merits of the [plaintiffs'] constitutional claims"). While the constitutional injury alleged in this case stems from a violation of the Constitution's structural protections rather than any infringement of Hurley and Nantz's individual rights, the distinction is irrelevant. *See United States v. Lopez*, 514 U.S. 549, 552 (1995) (recognizing that the "constitutionally mandated division of authority was adopted by the Framers to ensure protection of our fundamental liberties") (internal quotation marks omitted); *Bond v. United States*, 564 U.S. 211, 222 (2011) ("The structural principles secured by the separation of powers protect the individual as well").

Second, the House's citation to *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, 137 S.Ct. 1312 (2017), is similarly unavailing. *Helmerich* did not involve questions about standing. Instead, it focused on another jurisdictional concern—foreign sovereign immunity. *Id*. at 1316. Additionally, much like *Bauer*, *Helmerich* did not involve a constitutional question, but instead "pose[d] a pure question of statutory construction." *Id*. at 1318 (internal quotation marks omitted). In fact, the Supreme Court recognized that, unlike Article III standing, the issue of foreign sovereign immunity was only jurisdictional "because explicit statutory language makes it so." *Id*. Finally, it was only in the context of providing "a purely hypothetical example" where intertwined merits and jurisdictional considerations were "the only serious issue in the case" that the decision referred to a court's duty to "still answer the jurisdictional question," even "[i]f to do so, it must inevitably decide some, or all, of the merits issues." *Id*. at 1319. It would be a mistake to base any determination on standing in this case on the hypothetical posed in *Helmerich* clarifying how to apply statutory language within an unrelated jurisdictional doctrine.

Finally, the House cites *Steel Co. v. Citizens for a Better Environment*. But there, the Supreme Court expressly declined to abandon "two centuries of jurisprudence affirming the necessity of determining jurisdiction before proceeding to the merits." 523 U.S. 83, 98 (1998). That case presented the Court with both the

jurisdictional question of Article III standing and the merits question of whether the relevant statute authorized lawsuits for purely past violations. *Id*. at 86. Writing for the Court, Justice Scalia first rejected any "attempt to convert the merits issue . . . into a jurisdictional one," *id*. at 93, finding that it was unreasonable to read the statute's cause of action provisions as jurisdictional. *Id*. at 90. After dispensing with this errant conflation, the Court then moved on to what it characterized as "the bolder point that jurisdiction need not be addressed first anyway." *Id*. at 93.

This practice, known as the "doctrine of hypothetical jurisdiction," had allowed courts of appeals "to proceed immediately to the merits question, despite jurisdictional objections, at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." *Id*. at 93-94. The Supreme Court declined to endorse this novel approach, reasoning that its adoption would "carr[y] the courts beyond the bounds of authorized judicial action and thus offend[] fundamental principles of separation of powers." *Id*. at 94. However, as the district court observed here, this is essentially what the Appellants are asking this Court to do—"to skip ahead to the merits to determine § 5000A(a) is non-binding and therefore constitutional and then revert to the standing analysis to use its merits determination to conclude there was no standing to reach the merits in the first place." ROA.2768. Based on Supreme Court precedent, historical practice, and

plain common sense, this Court should instead follow the *Steel Co*. example and reject "the precedent–shattering general proposition that an 'easy' merits question may be decided on the *assumption* of jurisdiction." *Steel Co.*, 523 U.S. at 99. Thus, the Court should evaluate Hurley and Nantz's standing before skipping ahead to the merits of their case.

d. *Skelly Oil poses no jurisdictional obstacle.*

Three amici curiae law professors suggest a jurisdictional defect under *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). That argument has not been raised by any party or intervenor,[11] and for good reason: it fails to account for the text of the jurisdictional statute; it misses the point of *Skelly Oil*; and it conflicts with Supreme Court precedent.

By invoking *Skelly Oil*, amici imply that the district court lacked federal-question jurisdiction over Individual Plaintiffs' constitutional claims. But amici's argument conspicuously fails to consider the text of the relevant statute, which provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. For a case to "arise under" federal law for purposes of § 1331, "a right or immunity created by the Constitution or laws of the United States must be an

[11] *See, e.g., Voices for Int'l Bus. & Educ., Inc. v. Nat'l Labor Relations Bd.*, 905 F.3d 770, 775 n.6 (5th Cir. 2018) ("[W]e do not consider arguments raised by an amicus that the party it is supporting never made.")

element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936). That is unquestionably true here. Individual Plaintiffs brought claims for declaratory and injunctive relief against a federal statute under the United States Constitution. Those claims plainly "arise under federal law" because federal law creates Individual Plaintiffs' cause of action. *See, e.g.*, *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action."). This is not a case in which the plaintiff relies on a state-law claim or one in which "a question of federal law is lurking in the background." *Gully*, 299 U.S. at 117. Individual Plaintiffs' suit to enforce constitutional limits on congressional authority falls squarely within Congress's grant of federal-question jurisdiction.

Skelly Oil presented an entirely different question: whether a federal declaratory-judgment action to declare contracts "in effect and binding upon the parties thereto" was a suit that "arises under the Constitution, laws or treaties of the United States." *Skelly Oil*, 339 U.S. at 671. Citing the well-pleaded-complaint rule, the Court explained that in order for a suit to "arise under" federal law, "[t]he plaintiff's claim itself must present a federal question 'unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.' " *Id.* at 672 (quoting *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914)). The plaintiffs failed to meet that test in *Skelly Oil* because their contract claim

"would 'arise' under the State law governing the contracts," whereas any federal question would "be injected into the case only in anticipation of a defense to be asserted" by the defendants. *Id*. *Skelly Oil* thus "stand[s] for the proposition that 'if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking.'" *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 19 (1983) (quoting 10A C. Wright, A. Miller & M. Kane, Fed. Prac. & Proc. § 2767, at 744-45 (2d ed. 1983)). That is not the case here. Unlike the complaint in *Skelly Oil*, Individual Plaintiffs' complaint contains no hint of a state-law cause of action.

Amici reach the wrong conclusion in part because they ask the wrong question. According to amici, federal-question jurisdiction is absent because the United States could not bring a coercive suit against the Individual Appellees. *See* Br. 3 (asserting that federal courts lack jurisdiction "to opine whether an unenforceable statutory provision is unconstitutional"); Br. 4 (asserting that "the federal government has no right to nondeclaratory relief against any Plaintiffs"). That argument, which appears to confuse standing with federal-question jurisdiction, would fail even if a federal question did not appear on the face of Individual Plaintiffs' complaint. The Supreme Court has clearly explained that the relevant question for federal-question jurisdiction in a declaratory-judgment action is not the *likelihood* of a coercive action by the declaratory defendant, but rather "the *nature*

of the threatened action in the absence of the declaratory judgment suit." *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 197 (2014) (emphasis added). In *Medtronic*, the defendant argued that federal-question jurisdiction did not exist because a coercive action against the declaratory-judgment plaintiff "would be unlikely." *Id.* But the Court rejected that argument because the *likelihood* of a hypothetical coercive action "is not the relevant question. The relevant question concerns the *nature* of the threatened action in the absence of the declaratory judgment suit." *Id.* (emphasis added). To answer that question, federal courts ask "whether 'a coercive action' brought by 'the declaratory judgment defendant' . . . 'would necessarily present a federal question.'" *Id.* (quoting *Franchise Tax Bd.*, 463 U.S. at 19). Even if jurisdiction depended on the nature of a hypothetical coercive action by the United States—and it does not—any action to enforce the ACA would necessarily arise under federal law.

4. Even if the Individual Appellees lacks standing, Article III is nevertheless satisfied because the State Appellees have standing in their own right.

For the reasons set out in the State Appellees' brief, the district court correctly concluded that the State Appellees have standing. The Individual Appellees adopt those arguments by reference. *See* Fed. R. App. P. 28(i). Since only "one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," *Texas*

v. United States, 809 F.3d 134, 151 (5th Cir. 2015) (citation omitted), that is all the Court needs to proceed to the merits.

B. WHETHER DETERMINED AS PART OF THE COURT'S ANALYSIS OF STANDING OR ON THE MERITS, THE INDIVIDUAL MANDATE CAN NOW ONLY BE READ AS AN ATTEMPT BY CONGRESS TO LEGALLY REQUIRE INDIVIDUALS TO BUY HEALTH INSURANCE.

As explained above, the determination of whether the individual mandate provides a choice between two lawful alternatives or imposes a legal command to buy insurance should properly be undertaken on the merits rather than as part of analyzing standing. However, even if this Court does adopt the view that these issues are so intertwined that they must be determined in concert, the only plausible interpretation of the provision is that the statute attempts to compel individuals to purchase unwanted insurance under the mistaken belief that the Commerce Clause empowers Congress to do so.

The House argues otherwise. But, as the district court found, that narrative rests primarily on two faulty premises: 1) that "written law is not binding"; and 2) "that the Supreme Court's reasoning in *NFIB* did not simply craft a saving construction but instead permanently supplanted Congress's intent by altering the very nature of the ACA." *See* ROA.2761. Neither of these faulty premises require the Court to hold that the harm visited upon Hurley and Nantz is self-inflicted. Rather, this harm is a natural and inevitable result of Congress's mandate—a

provision whose constitutionality even Intervenor-Appellant's amici can barely muster any argument to support.

1. When a law compels specific actions, the individuals subject to that command are legally obligated to comply.

The text of the individual mandate is clear: "An applicable individual *shall* for each month beginning after 2013 ensure that the individual . . . is covered under minimum essential coverage for such month." 26 U.S.C. § 5000A(a) (emphasis added). But both State-Appellants and the House argue that because the statute now lacks a monetary penalty for noncompliance, Hurley and Nantz are no longer compelled to follow the law. *See* State Defendants-Appellants' Opening Br. 3, ECF No. 00514887395 ("States' Brief") (stating that since the penalty for not obtaining minimum essential coverage is now zero, "Section 5000A no longer compels any individual to maintain healthcare coverage"); *see also* House Br. 21 (asserting that since "the Act imposes no legal requirement to obtain insurance, individual plaintiffs could have declined to purchase insurance without breaking the law"). This reasoning is not only legally incorrect, but also undermines the rule of law that is so fundamental to our system of governance.

Our constitutional republic relies heavily on respect for the rule of law to both maintain order and preserve liberty. As the Supreme Court ruled nearly a half century ago, "it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the 'state of nature.'" *Boddie v.*

Connecticut, 401 U.S. 371, 374 (1971). And one essential aspect of the rule of law is that members of society are duty-bound to follow the law. This connection was recognized by no less of an authority than John Locke—the philosopher who heavily influenced the founding-era understanding of liberty. Locke wrote that "every man, by consenting with others to make one Body Politick under one Government, puts himself under an Obligation to everyone in that Society, to submit to the determination of the majority, and to be bound by it." J. Locke, Second Treatise of Government § 97, p. 332 (P. Laslett ed. 2008). If the individual "were no farther tied by any Decrees of the Society, than he himself thought fit," then this social contract "would signifie nothing" because it would be as "if he be left free, and under no other ties, than he was in before in the State of Nature." *Id*. Echoing Locke's sentiments centuries later, one of this Court's sister circuits observed:

> To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves . . . to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic, as appellants claim, but inevitably anarchic.

United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969).

That the maintenance of order and a proper respect for the law is fundamental to our constitutional system has been widely recognized. For example, over eight decades ago the Supreme Court began to analyze whether particular rights were to be considered "fundamental" by asking whether they were "implicit in the concept

of *ordered* liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (emphasis added). In *Boddie*, the Court explained that a system based on the rule of law that allowed members of society to "definitively settle their differences in an *orderly*, predictable manner" was among the most "fundamental" characteristics of an "*organized* and cohesive society." 401 U.S. at 374 (emphasis added). Even where members of the Court disagreed about how best to achieve order and respect for the law, there was no disagreement about the legitimacy of such pursuits. *Compare Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) (opining that retribution was a constitutionally permissible ingredient in punishment because it "serves an important purpose in promoting the stability of a society governed by law," since channeling that impulse through formalized legal determinations prevents the sewing of "the seeds of anarchy—of self-help, vigilante justice, and lynch law"), *with id*. at 303 (Brennan, J., concurring) (questioning whether the death penalty serves the legitimate purposes of "inculcate[ing] respect for the law" and "prevent[ing] disorder, lynching, and attempts by private citizens to take the law into their own hands" more effectively than imprisonment).

The notion that individuals have a duty to follow the law is so elementary, so intuitively obvious, and so deeply-ingrained, that finding legal authority to confirm the idea is challenging only insofar as the opportunities for courts to even hear arguments in opposition to this principle are limited. Still, every now and then such

an occasion arises, and courts treat the issue as one might expect—by recognizing that individuals have such a duty. *See Montero v. City of Yonkers, New York*, 890 F.3d 386, 396 (2d Cir. 2018) (recognizing that "a public employee speaks 'as a citizen' when he or she refuses to commit a crime because *all* citizens have a duty to follow the law"); *see also Song v. I.N.S.*, 82 F.Supp.2d 1121, 1133 (C.D. Cal. 2000) (rejecting the government's contention that lawful permanent residents have a greater duty to follow the law than illegal immigrants because "[a]ll individuals present in the United States have a duty to follow the law"); *accord* J. Locke, Second Treatise of Government § 119, p. 348 (P. Laslett ed. 2008) (stating that "the very being of any one within the territories of" a particular government means that individual has given his "tacit consent" and is "obliged to Obedience to the Laws of that Government"). Importantly, this obligation applies regardless of whether the failure to abide by one's legal duty can be penalized by the government. *See United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983) (explaining that even though a jury could not be punished for its decision to nullify, it is still the case that "[s]uch verdicts are lawless"). This Court should follow in those noble footsteps by recognizing what is self-evident—that individuals in society are obligated to follow the law.

2. Because it is no longer "fairly possible" to interpret the shared responsibility payment as a tax, the only remaining practicable reading of the statute is that the individual mandate is a legal command to buy insurance.

In attempting to refute the contention that Section 5000A imposes a legal requirement to buy insurance, Intervenor-Appellants rely on *NFIB*, 567 U.S. at 574, for the notion that the statute merely presents individuals with a "lawful choice" to either purchase minimum essential coverage or make a shared responsibility payment. *See* State Appellants' Br. 25 ("that subsection must be understood in light of the statutory construction adopted by *NFIB*, which held that Section 5000A as a whole allows individuals to choose between maintaining minimum coverage . . . or paying a tax in a particular amount"); *see also* House Br. 12 ("Rather, the Court held, Section 5000A gives individuals a choice between two *lawful* options: purchasing insurance or making a 'shared responsibility payment' to the federal government"). Appellants then extrapolate this "lawful choice" language to conclude that Hurley and Nantz have suffered no injury-in-fact. *See* States' Br. 26 ("A statute that offers plaintiffs a choice between purchasing insurance or doing nothing does not impose any legally cognizable harm."); *see also* House Br. 21 ("Having voluntarily elected to buy insurance, plaintiffs do not have standing to complain that they were injured by that decision."). But this flawed approach employs a fundamental misreading of *NFIB* to reach an untenable conclusion.

In its analysis of the individual mandate, the Supreme Court in *NFIB* found that the provision could be read as either a command for individuals to buy insurance pursuant to Congress's power under the Commerce Clause or, alternatively, as a condition (being uninsured) that triggers a tax under the Taxing Power. 567 U.S. at 561-63. Even though the Court addressed and rejected the Commerce Clause argument, *id*. at 547-561, it specifically noted that "Congress thought it could enact such a command under the Commerce Clause, and the Government primarily defended the law on that basis." *Id*. at 562. The Court then went on to analyze the statute under Congress's power to "lay and collect Taxes," *id*. at 561-575, eventually adopting a "saving construction" under the taxing power in order to avoid striking down the law as unconstitutional. *Id*. at 574-75. However, as the dissent observed, "say[ing] that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it." *Id*. at 668 (Scalia, J., Kennedy, J., Thomas, J., Alito, J., dissenting). This was because there was "simply no way, without doing violence to the fair meaning of the words used," to interpret Section 5000A as anything but a command for individuals to maintain minimum essential coverage. *Id*. at 662 (internal citations and quotations excluded). Crucially, even the majority adopting the interpretation of the statute as a tax repeatedly recognized that it would be more logical to read the mandate as an attempt to compel individuals to buy insurance under the Commerce Clause. *See NFIB*, 567 U.S. at 562 ("The most straightforward

reading of the mandate is that it commands individuals to purchase insurance."); *id*. at 574 ("The statute reads more naturally as a command to buy insurance than a tax.").

In adopting this taxing power construction, the Court found that the relevant question was not whether this reading was "the most natural interpretation of the mandate, but only whether it is a 'fairly possible' one." *Id*. at 563. However, it was only "fairly possible" to construe the mandate in this way because the statute possessed "the essential feature of any tax: It produces at least some revenue for the Government." *Id*. at 564. This no longer holds true following the passage of the Tax Cuts and Jobs Act of 2017 ("TCJA"), which reduced the penalty for not purchasing minimum essential coverage to zero. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, sec. 11081, 131 Stat. 2092 (2017). Hence, because Section 5000A no longer raises any revenue, it is no longer "fairly possible" to construe the shared responsibility payment as a tax.

Once one realizes that the shared responsibility payment under Section 5000A can no longer be considered a tax, the contention that the law provides a "lawful choice"—rather than legally compelling individuals to buy insurance—also falls apart. The plain language of the *NFIB* decision says as much, explicitly stating that it was the "*imposition of a tax* [that] leaves an individual with a lawful choice to do or not do a certain act." 567 U.S. at 574 (emphasis added). "No tax" means "no

choice." Even though the shared responsibility payment remains in statute, albeit set at $0.00, because it no longer generates some revenue for the government, it cannot be construed anymore as a tax. Accordingly, the only possible interpretation that remains is the most straightforward one—that the individual mandate imposes a legal command on Hurley and Nantz, and millions of other Americans, to buy insurance.

Intervenor-Appellants thus are wrong to argue that this Court remains bound by the Supreme Court's saving construction. *See* House Br. 9 (the saving construction is "definitive" and "binding"). That of course would be true if the saving construction were still fairly permissible. But it is not. As set out above, a five-Justice majority left no doubt that the saving construction depends on a revenue-generating penalty for failure to comply with the individual mandate. When Congress eliminated that penalty, it fundamentally altered the *NFIB* calculus. *See* 567 U.S. at 575. It made *NFIB*'s saving construction no longer "fairly permissible."

Ignoring that commonsense conclusion, and without citing a single authority, Intervenors demand "subsequent congressional intent reflecting a clear intent to override" the saving construction. House Br. 13. But the "best evidence of congressional intent is the statutory text that Congress enacted." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 392 n.4 (2013) (citing *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991)). As mentioned above, *NFIB* recognized that

"the essential feature of any tax" is that "[i]t produces at least some revenue for the Government." 567 U.S. at 564. Congress's decision to eliminate any such revenue is clear statutory intent to eliminate the saving construction.

3. None of the nearly two dozen amici mount a defense of the mandate.

The individual mandate is an unlawful command to buy insurance and is no longer justified by the saving construction set out in *NFIB*. *See* Br. of State Appellees (incorporated herein by reference; *see* Fed. R. App. P. 28(i)). The silence of the Intervenor Appellants' amici on that issue is remarkable. Despite submitting over 500 pages of amicus briefing—drowning the court in 106,710 words of amicus argument—Intervenor-Appellants' amici can barely muster a sentence in defense of the mandate's continued constitutionality. The only one to try—AARP—simply opines in a paragraph that a zero-dollar penalty remains a tax because Congress "might raise the penalty in the future." Br. for Amici Curiae AARP et al. 33. But that, of course, does not make the mandate lawful today. No other amicus even tries to argue otherwise.

C. THE INTERVENOR-APPELLANTS' SEVERABILITY ARGUMENTS ARE WRONG.

For the reasons set out in the State Appellees' briefing, the remaining portions of the ACA cannot be severed from the unconstitutional mandate. *See* States' Br. Rather than repeat them, the Individual Appellees adopt those arguments by

reference, *see* Fed. R. App. P. 28(i), and instead respond in this brief to the arguments raised by the Intervenor-Appellants.

1. Intervenor-Appellants ask the Court to wade into the murky, subjective motivations of legislators, not the statutory text.

Intervenor-Appellants present a different vision for the severability analysis—one grounded not in statutory text, but in suppositions about congresspersons' subjective motivations. They hypothesize that because Congress failed to repeal the entire ACA when it zeroed out the penalty for failing to comply with the mandate, it probably intended to keep the ACA in place. *See*, *e.g.*, House Br. 42. That argument overlooks the text proclaiming the mandate "essential" to the ACA in favor of legislative history. House Br. 44 (quoting various senators' comments from committee process). It is nothing more than an atextual effort to "psychoanalyz[e] those who enacted" the law. *See Carter v. United States*, 530 U.S. 255, 271 (2000) (citation omitted).

Such "psychoanalyzing" is impermissible for a good reason: while the text is clear, the political landscape and legislative history only obfuscate. For example, the TCJA was enacted via the reconciliation process, meaning it was limited only to fiscal matters. *See* ROA.2620-2621; ROA.2662 (documenting process). That tells us nothing about whether individual legislators wanted to repeal the ACA in its entirety; that question was not before them when they considered the TCJA.

The House also insists that the fact that the Senate voted down a full repeal of the ACA must make the mandate severable. House Br. 46. But the actual legislative history is contradictory, and if anything points in the other direction. First, the House of Representatives passed a bill to repeal the ACA. H.R. 3762, 114th Cong., Sess. 1. The Senate voted against repeal when it rejected an amendment from Senator Rand Paul that would have replaced the text of the House bill with a separate bill, the Obamacare Repeal Reconciliation Act of 2017. That amendment in turn authorized large block grants totaling $750 million per year to states to address substance abuse and "urgent mental health needs." H.R. 1628 amend. 271, § 202, Sen. Rec. S4219 (July 25, 2017). And that bill failed. Whether the senators who opposed that legislation objected to those grants, or to the repeal of the ACA, or to something else, is neither discernible nor a proper inquiry for this Court.

Intervenor-Appellants also ask the Court to overlook text in favor of "[r]eal-world experience." House Br. 49. But such "experience" is irrelevant in light of plain statutory text, and in any event, points in the other direction. As the Supreme Court recognized in *King v. Burwell*, the experience of several states attempting to expand health-insurance coverage without implementing a mandate repeatedly "led to an economic 'death spiral.'" 135 S.Ct. 2480, 2486 (2015). When Congress voted to zero-out the penalty, it surely was aware of that real-world experience and the likelihood that its action would result in the collapse of the ACA.

Finally, Intervenor-Appellants complain that the court below "failed to respect the limits on its authority." House Br. 51. But the reality is that the district court faithfully applied the binding principles set out by the Supreme Court. There is no arbitrary "limit" on what portions of a complex regulatory regime a district court may declare unlawful. Here, Individual Appellees put on unrebutted evidence that the individual mandate and ACA harm them. They persuasively demonstrated that the individual mandate is unconstitutional and inseverable. The district court simply followed its prerogative to decide the controversy before it, and it did so in a way that, if upheld, remedies the injury the Appellees have identified.

2. The *Booker* factors confirm that the mandate is inseverable.

Intervenor-Appellants propose their own test for performing the severability analysis as set out in *United States v. Booker*, 543 U.S. 220, 258-59 (2005). The better statement of the relevant analysis lies in the cases discussed in the State Appellees' brief, but even if *Booker* controls, the result is no different. While Appellees do not dispute that many portions of the ACA do not independently offend the Constitution the way section 5000A(a) does, Congress has declared those provisions incapable of independent function and inconsistent with Congress's basic objective. *See* State Appellees' Br. 33-47; *cf. Booker*, 543 U.S. at 258-59 (citations omitted).

CONCLUSION

Neill Hurley and John Nantz continue to suffer injury at the hands of the individual mandate. The mandate is not only unjust, it is unconstitutional. An individual suffering legal wrong because of congressional action has standing to seek judicial review of that action. The mandate is the core of the ACA; therefore, it is inseverable from the remainder of the statute. Additionally, this court has subject matter jurisdiction to consider Appellees' cause of action because their suit seeks to vindicate their rights that arise under the United States Constitution. Therefore, this case lies squarely within the court's jurisdiction. This court should affirm the district court's grant of partial summary judgment declaring that the individual mandate, 26 U.S.C. § 5000A(a), is unconstitutional as well as that the remaining provisions of the ACA, Pub. L. 111-148, are inseverable and therefore invalid.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on May 1, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Robert Henneke
ROBERT HENNEKE

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the document exempted by Rule 32(f), it contains 12,137 words.

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Dated: May 1, 2019

/s/Robert Henneke
ROBERT HENNEKE