Nos. 19-840, 19-841

In the Supreme Court of the United States

STATE OF CALIFORNIA, ET AL.,
Petitioners,
v.
STATE OF TEXAS, ET AL.,
Respondents.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,
v.
STATE OF TEXAS, ET AL.,
Respondents.

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

BRIEF OF AMICUS CURIAE JEREMY C. DOERRE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Jeremy C. Doerre is an individual attorney who believes that this case involves issues of exceptional importance to all Americans. Amicus' only interest is in highlighting a point that may have been overlooked in the lower court opinion in case it will be helpful to this Court's consideration. Amicus has no stake in any party or in the outcome of this case.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae or amicus curiae's counsel made such a monetary contribution to the preparation or submission of this brief. All parties have provided written consent to the filing of this brief. Counsel for the State Petitioners provided written consent to the filing of this brief. The U.S. House of Representatives filed statements of blanket consent to the filing of amicus briefs. Counsel for the Federal Respondents provided written consent to the filing of this brief. Counsel for the State Respondents provided written consent to the filing of this brief. Counsel for the individual Respondents provided written consent to the filing of this brief. A copy of written consent from the Petitioners and Respondents was provided to the Clerk upon filing. Counsel of record for each of the parties received timely notice of amicus curiae's intent to file this brief.

SUMMARY OF THE ARGUMENT

In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, this Court held that 26 U.S.C. "§ 5000A need not be read to do more than impose a tax."[2]

In the present case, the Fifth Circuit concluded that "[n]ow that the shared responsibility payment amount is set at zero, the provision's saving construction is no longer available."[3]

However, the Fifth Circuit's premise (that "the shared responsibility payment amount is set at zero"[4]) overlooks that "the shared responsibility payment amount is [not] set at zero"[5] for all tax years.

Similarly, the Fifth Circuit's suggestion that "the provision no longer yields the 'essential feature of any tax' because it does not produce 'at least some revenue for the Government'"[6] overlooks that "the shared responsibility payment amount is [not] set at zero"[7] for all tax years and is revenue-producing. In this regard, not only did § 5000A already produce revenue collected by the IRS for which the calculated amounts

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[2] *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 570 (2012).

[3] Pet. App. 44a.

[4] Pet. App. 44a.

[5] Pet. App. 44a.

[6] Pet. App. 44a-45a (quoting *NFIB*, 567 U.S. at 564).

[7] Pet. App. 44a.

have not changed under the amended statute, but additionally § 5000A as amended is currently still applicable to produce revenue from delinquent filers.

Overall, § 5000A's "requirement that certain individuals pay a financial penalty for not obtaining health insurance [still] may reasonably be characterized as a tax"[8] because "the shared responsibility payment amount is [not] set at zero"[9] for all tax years and is revenue-producing.

Further, "§ 5000A [still] need not be read to do more than impose a tax"[10] because analogously to *NFIB*, "the individual mandate … need not be read to declare that failing to [purchase health insurance] is unlawful"[11] even if "individuals who are subject to the mandate are nonetheless [effectively] exempt from the penalty"[12] for some tax years because it is zero dollars.

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[8] *NFIB*, 567 U.S. at 574.

[9] Pet. App. 44a.

[10] *NFIB*, 567 U.S. at 570.

[11] *NFIB*, 567 U.S. at 567-568.

[12] *NFIB*, 567 U.S. at 539-540.

ARGUMENT

I. § 5000A's "requirement that certain individuals pay a financial penalty for not obtaining health insurance [still] may reasonably be characterized as a tax"[13] because "the shared responsibility payment amount is [not] set at zero"[14] for all tax years and is revenue-producing.

In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, this Court held that "[t]he Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax."[15]

Subsequently, "[i]n December 2017, … Congress" amended 26 U.S.C. § 5000A to modify, for some but not all tax years, calculation of "the 'shared responsibility payment' amount—the amount a person must pay for failing to comply with the individual mandate."[16] In particular, Congress left in place the existing framework for calculating non-zero shared responsibility payments for 2014 and 2015,

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[13] *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 574 (2012).

[14] Pet. App. 44a.

[15] *NFIB*, 567 U.S. at 574.

[16] Pet. App. 9a.

but modified the statute such that the calculated shared responsibility payment for any taxpayer for "taxable years beginning after 2015"[17] will be zero dollars.

In the present case, the Fifth Circuit concluded that "[n]ow that the shared responsibility payment amount is set at zero, the provision's saving construction is no longer available."[18]

A. Amicus urges that the Fifth Circuit's premise (that "the shared responsibility payment amount is set at zero"[19]) overlooks that "the shared responsibility payment amount is [not] set at zero"[20] for all tax years.

In amending 26 U.S.C. § 5000A, Congress could have chosen to have "the shared responsibility payment amount [] set at zero"[21] for all taxpayers for all taxable years. Indeed, although the amendments are "effective January 2019,"[22] Congress chose to retroactively alter statutory calculation of the shared responsibility payment amount for some prior years, namely "taxable years beginning after 2015."[23]

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[17] 26 U.S.C. § 5000A(c)(2)(B)(iii).

[18] Pet. App. 44a.

[19] Pet. App. 44a.

[20] Pet. App. 44a.

[21] Pet. App. 9a.

[22] 26 U.S.C. § 5000A(c)(2)(B)(iii).

[23] 26 U.S.C. § 5000A(c)(2)(B)(iii).

Importantly, however, Congress left in place the pre-existing framework for calculation of the shared responsibility payment amount for some years, namely 2014 and 2015, and § 5000A as amended still provides for calculation of non-zero amounts for taxpayers for these years.[24] That is, Congress left the shared responsibility payment at a non-zero amount for some taxable years, specifically years 2014 and 2015.

The Fifth Circuit's premise that "the shared responsibility payment amount is set at zero"[25] does not take this into account.

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[24] The statute as amended still provides for calculation of non-zero amounts under both prongs of 26 U.S.C. § 5000A(c)(2): the "Flat dollar amount" prong of (c)(2)(A); and the "Percentage of income" prong of (c)(2)(B). Under the "Flat dollar amount" prong, although Congress amended § 5000A(c)(3)(A) to indicate that "Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $0," subparagraph (B) still provides that "The applicable dollar amount is $95 for 2014 and $325 for 2015." § 5000A(c)(3)(B). Similarly, under the "Percentage of income" prong, although Congress amended § 5000A(c)(2)(B) to specify a percentage of "Zero percent for taxable years beginning after 2015," the statute as amended still specifies a percentage of "1.0 percent for taxable years beginning in 2014" and a percentage of "2.0 percent for taxable years beginning in 2015." § 5000A(c)(2)(B).

[25] Pet. App. 44a.

B. Similarly, the Fifth Circuit's suggestion that "the provision no longer yields the 'essential feature of any tax' because it does not produce 'at least some revenue for the Government'"[26] does not take into account that "the shared responsibility payment amount is [not] set at zero"[27] for all tax years and is revenue-producing.

1. As a first matter, the Fifth Circuit's suggestion that § 5000A cannot be characterized as a tax "because it does not produce 'at least some revenue for the Government'"[28] overlooks that § 5000A already produced revenue collected by the IRS for which the calculated amounts have not changed under the amended statute.

Specifically, § 5000A already produced revenue for the Government collected by the IRS for tax years 2014 and 2015, and the amendment to reduce the shared responsibility payment to zero for "taxable years beginning after 2015"[29] did not change the calculated amounts of these shared responsibility payments that were paid. Thus, the amendment to reduce the shared responsibility payment to zero for "taxable years beginning after 2015"[30] does not

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[26] Pet. App. 44a-45a (quoting *NFIB*, 567 U.S. at 564).

[27] Pet. App. 44a.

[28] Pet. App. 44a-45a (quoting *NFIB*, 567 U.S. at 564).

[29] 26 U.S.C. § 5000A(c)(2)(B)(iii).

[30] 26 U.S.C. § 5000A(c)(2)(B)(iii).

change the fact that revenue has been properly collected under § 5000A for tax years 2014 and 2015, or undermine this Court's prior conclusion that such shared responsibility payments "may reasonably be characterized as a tax."[31]

2. Moreover, the Fifth Circuit's suggestion that § 5000A cannot be characterized as a tax "because it does not produce 'at least some revenue for the Government'"[32] does not take into account that § 5000A as amended is currently still applicable to produce revenue from delinquent filers.

Specifically, given that the IRS normally enforces delinquency procedures for up to six years,[33] 26 U.S.C. § 5000A as amended is currently still applicable to enable revenue collection in the form of shared responsibility payments from delinquent filers, e.g. for 2015. Just as this Court detailed in *NFIB*, such shared responsibility payments are to be

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[31] *NFIB,* 567 U.S. at 574.

[32] Pet. App. 44a-45a (quoting *NFIB*, 567 U.S. at 564).

[33] See Internal Revenue Manual 1.2.1.6.18, IRS Policy Statement 5-133, Delinquent returns—enforcement of filing requirements, available at https://www.irs.gov/irm/part1/irm_01-002-001 ("Normally, application of the above criteria will result in enforcement of delinquency procedures for not more than six (6) years. … Also, if delinquency procedures are not to be enforced for the full six year period of delinquency, prior managerial approval must be secured.").

"paid into the Treasury by 'taxpayer[s]' when they file their tax returns,"[34] are "determined by such familiar factors as taxable income, number of dependents, and joint filing status,"[35] and are "enforced by the IRS, which…must assess and collect it in the same manner as taxes."[36]

Amicus urges that the continued ability to collect tax revenue, e.g. in the form of delinquent shared responsibility payments for 2015 which are still non-zero under the amended statute, evidences that the shared responsibility payment still "may reasonably be characterized as a tax."[37] [38] Indeed, invalidating

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[34] *NFIB*, 567 U.S. at 563 (quoting 26 U.S.C. § 5000A(b)).

[35] *NFIB*, 567 U.S. at 563 (citing §§ 5000A(b)(3), (c)(2), (c)(4)).

[36] *NFIB*, 567 U.S. at 563-564 (internal quotation omitted).

[37] *NFIB,* 567 U.S. at 574.

[38] Amicus would urge that this continued ability to collect tax revenue under § 5000A should be sufficient to allow the shared responsibility payment to "reasonably be characterized as a tax," *NFIB*, 567 U.S. at 574, irrespective of whether any delinquent taxpayers actually pay their delinquent owed shared responsibility payment amount, as the classification of a particular exaction as a tax should not be dependent on whether an owed amount is actually paid. Moreover, it is a challenger's burden to "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

§ 5000A as unconstitutional would eliminate the ability of the IRS to collect revenue in the form of delinquent shared responsibility payments.

II. "§ 5000A [still] need not be read to do more than impose a tax"[39] because, analogously to *NFIB*, "the individual mandate … need not be read to declare that failing to [purchase health insurance] is unlawful"[40] even if "individuals who are subject to the mandate are nonetheless [effectively] exempt from the penalty"[41] for some tax years because it is zero dollars.

In *NFIB*, this Court reasoned that "[w]hile the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful[,] [as] [n]either the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS."[42] Accordingly, this Court concluded "that § 5000A need not be read to do more than impose a tax."[43]

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[39] *NFIB*, 567 U.S. at 570.

[40] *NFIB*, 567 U.S. at 567-568.

[41] *NFIB*, 567 U.S. at 539-540.

[42] *NFIB*, 567 U.S. at 567-568.

[43] *NFIB*, 567 U.S. at 570.

The amendment to § 5000A to set the shared responsibility payment to zero for some but not all tax years did not change this reality that "[n]either the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS."[44]

However, the Fifth Circuit has suggested that "[n]ow that the shared responsibility payment has been zeroed out, the only logical conclusion under *NFIB* is to read the individual mandate as a command."[45]

As noted above, though, the Fifth Circuit overlooked that "the shared responsibility payment amount is [not] set at zero"[46] for all tax years.

Moreover, the Fifth Circuit's reasoning overlooks that this Court in *NFIB* already found that "the individual mandate … need not be read to declare that failing to [purchase health insurance] is unlawful"[47] even when "individuals who are subject to the mandate are nonetheless exempt from the penalty,"[48] e.g. are exempt for some tax years because of "income below a certain threshold."[49]

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[44] *NFIB*, 567 U.S. at 567-568.

[45] Pet. App. 48a.

[46] Pet. App. 44a.

[47] *NFIB*, 567 U.S. at 567-568.

[48] *NFIB*, 567 U.S. at 539-540.

[49] *NFIB*, 567 U.S. at 539-540 (citing 26 U.S.C. § 5000A(e)).

Analogously, "the individual mandate … need not be read to declare that failing to [purchase health insurance] is unlawful"[50] even if "individuals who are subject to the mandate are nonetheless [effectively] exempt from the penalty"[51] for some tax years because the shared responsibility payment is zero dollars.

Accordingly, amended "§ 5000A [still] need not be read to do more than impose a tax."[52] [53]

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[50] *NFIB*, 567 U.S. at 567-568.

[51] *NFIB*, 567 U.S. at 539-540.

[52] *NFIB*, 567 U.S. at 570.

[53] As in *NFIB*, this remains true even if "the statute reads more naturally as a command to buy insurance than as a tax," *NFIB*, 567 U.S. at 574, because "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895).

CONCLUSION

Amicus urges this Court to grant certiorari.

Respectfully submitted,

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