Nos. 19-840, 19-1019

In the Supreme Court of the United States

CALIFORNIA, ET AL., PETITIONERS / CROSS-RESPONDENTS

v.

STATE OF TEXAS, ET AL.

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

BRIEF FOR RESPONDENT / CROSS-PETITIONER STATES

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QUESTIONS PRESENTED

In 2010, Congress commanded almost every American to buy "minimum essential [health-insurance] coverage." Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119, § 1501(b) (codified at 26 U.S.C. § 5000A). In 2012, this Court held that "[t]he Federal Government does not have the power to order people to buy health insurance." *Nat'l Fed'n of Indep. Bus. v. Sebelius* (*NFIB*), 567 U.S. 519, 575 (2012). The Court upheld the law only because that mandate was attached to a revenue-producing penalty and thus could "reasonably be characterized as a tax." *Id.* at 574.

In 2017, Congress eliminated that tax. But it left undisturbed both the mandate itself and the ACA's inseverability clause—that is, the sections of the statute that declare the mandate "essential" to the ACA's operation. 42 U.S.C. § 18091(2)(I). The questions presented are:

1. Whether at least one respondent has standing to challenge the constitutionality of Congress's ongoing command that Americans buy health insurance.

2. Whether Congress may command Americans to buy health insurance other than as a trigger for a revenue-producing tax.

3. Whether, in light of Congress's decision in 2017 to eliminate any revenue-producing tax yet leave intact both the command and the inseverability clause, any provisions of the ACA remain operative.

4. Whether the district court properly declared the ACA invalid in its entirety and unenforceable anywhere.

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OPINIONS BELOW

The operative opinion of the court of appeals (Joint Appendix (JA) 374-489) is reported at 945 F.3d 355. The order of the court of appeals denying en banc rehearing (JA.490-91) is unreported. The opinion of the district court (Petition Appendix (PA)[1] 163a-231a) is reported at 340 F. Supp. 3d 579. The opinion and order entering partial final judgment (PA.117a-62a) is reported at 352 F. Supp. 3d 665.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2019 (PA.1a). The petitions of the state petitioners and the respondent/cross-petitioner States were granted on March 2, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the Joint Appendix.

INTRODUCTION

In 2010, Congress ordered millions of Americans to "ensure that [they] . . . [are] covered under minimum essential [health-insurance] coverage." 26 U.S.C. § 5000A(a). Those who refused to comply were subject to a tax penalty. *NFIB*, 567 U.S. at 519. Though this Court determined that this provision was best understood as an unconstitutional command compelling Americans to enter the insurance market, *id.* at 561, it nonetheless upheld the mandate because, as it then existed, it was

[1] Any reference to "PA" will refer to the appendix to the petition in 19-840.

"fairly possible" to construe the mandate as a tax. *Id.* at 563.

In 2017, Congress amended section 5000A to set the tax penalty for violating the mandate to zero. That change made it impossible to fairly interpret section 5000A as a tax. As amended, section 5000A lacks the "essential feature" of any tax: It raises no revenue. It further lacks the other common characteristics of taxes that *NFIB* described—namely, it does not result in payments to the Treasury, does not discriminate between those who file tax returns and those who do not, and is not enforced by the IRS. 567 U.S. at 554-55. Without these characteristics, section 5000A is an unadorned command to Americans to participate in commerce. Such a command is unconstitutional. *Id.*

Petitioners appear to recognize as much, devoting the bulk of their arguments to severability. But there, too, Congress has spoken. Congress has deemed the mandate "essential" to the ACA, particularly the Act's community-rating and guaranteed-issue components. 42 U.S.C. § 18091(2)(I). Without the mandate, Congress determined, these major reforms do not work. On this, Congress should be taken at its word. Without this "three-legged stool," *Halbig v. Burwell*, 758 F.3d 390, 409 (D.C. Cir. 2014), *vacated on other grounds*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014), the ACA's core changes to the Nation's insurance markets disintegrate. Whatever the merits of the ACA's remaining major and minor provisions, they do not provide the near-universal healthcare coverage that the ACA's drafters attempted to create. *King v. Burwell*, 135 S. Ct. 2480, 2487 (2015). They too must fall. *Id.*

In the end, petitioners defend the ACA as good policy, citing the current pandemic. Not only are those

policy arguments incorrect, but they miss the point. Policy considerations cannot create Article I power. The ACA contains an unconstitutional command that can no longer be saved as a tax. The ACA itself insists that its other major health-insurance reforms rise and fall with this unconstitutional command. And those reforms were the core of the ACA. *See King*, 135 S. Ct. at 2486. The policy merits of the ACA can neither save section 5000A nor sever what Congress expressly conjoined. *See Bostock v. Clayton County*, No. 17-1618, 2020 WL 3146686, *3 (U.S. June 15, 2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law.").

STATEMENT

I. Background and Statutory Framework

A. The ACA

In 2010, Congress passed the ACA to achieve three express goals: (1) "near-universal [health-insurance] coverage," (2) "lower health insurance premiums," and (3) "creat[ion] [of] effective health insurance markets." 42 U.S.C. §§ 18091(2)(D), (F), (I). To achieve these goals, Congress created a complex latticework of "closely interrelated" provisions resting on three key features. *NFIB*, 567 U.S. at 691 (dissenting op.). Those features, described as a "three-legged stool,"[2] are: (1) a requirement that Americans buy minimum essential health insurance, known as the "individual mandate"; (2) a guaranteed-issue provision; and (3) a community-rating provision. *Id.* Along with these three key provisions, the ACA includes numerous subsidiary provisions designed either to

[2] *Halbig*, 758 F.3d at 409.

effectuate Congress's vision of universal coverage or to offset its staggering costs.

1. Individual mandate

At the heart of the ACA is a directive—labeled a "requirement"—that each "applicable individual shall . . . ensure that the individual . . . is covered under minimum essential coverage." 26 U.S.C. § 5000A(a). This coverage obligation, known as the "individual mandate," commands most Americans to procure qualifying health insurance.

As originally passed, section 5000A(b) imposed a tax penalty on many "applicable individual[s]" who failed to comply with the individual mandate. Congress labeled this tax penalty a "[s]hared responsibility payment," *id.*, providing: "If a taxpayer who is an applicable individual . . . fails to meet the requirement of subsection (a) . . . then . . . there is hereby imposed on the taxpayer a penalty with respect to such failure[]." *Id.* § 5000A(b)(1).

Some individuals who were subject to the mandate's command were nonetheless always exempt from the tax penalty. *See id.* §§ 5000A(e)(1)-(5). Five classes of people, including the poor and members of "an Indian tribe," fell into this category. *Id.* Nevertheless, these individuals have always been required to obtain "minimum essential coverage" in order to "comply with [the] mandate, even in the absence of penalties." CONGRESSIONAL BUDGET OFFICE, KEY ISSUES IN ANALYZING MAJOR HEALTH INSURANCE PROPOSALS 53 (Dec. 2008), https://tinyurl.com/CBO2008Report (CBO 2008 REPORT). Congress's reason for subjecting many individuals to the mandate, but not to the tax penalty, was sensible: For many people, especially the poor, imposing a tax penalty for failure to comply with the mandate would be unjust.

Congress nevertheless required those individuals to enroll in ACA-compliant health insurance. A core purpose of the ACA was to prevent the emergency-room cost-shifting problem—where individuals without health insurance obtain uncompensated care in an emergency room, inevitably requiring medical providers to increase costs for insured persons. *See* 42 U.S.C. §§ 18091(2)(A), (F), (I). Congress therefore mandated that penalty-exempt individuals obtain coverage and offered them the means to satisfy the mandate through the Medicaid system, 26 U.S.C. §§ 5000A(f)(1)(A)(i)-(iii), but excepted them from the tax penalty if they failed to comply with the mandate, *id.* § 5000A(e)(1). This tracked a CBO recommendation, which found that "[m]any individuals" subject to the mandate, but not the penalty, would nonetheless comply with the mandate and obtain coverage "because they believe in abiding by the nation's laws." CBO 2008 REPORT at 53.

Indeed, the tax penalty was never intended to be the only factor that would encourage Americans to comply with the individual mandate. The CBO identified at least three major factors that would ensure compliance: (1) "personal values" and "social norms" that lead "[m]any individuals and employers [to] comply . . . because they believe in abiding by the nation's laws"; (2) provisions that make compliance easier, such as subsidies and exemptions; and (3) penalties for noncompliance. *Id.* at 50-53.

Congress took advantage of all three. In 2010, Congress found that the insurance "requirement, together with the[se] other provisions" of the ACA would lead to universal healthcare coverage and lower health-insurance premiums. 42 U.S.C. § 18091(2)(F).

2. Guaranteed issue and community rating

Congress required individual Americans to buy health insurance to sustain the ACA's most sweeping changes: the guaranteed-issue and community-rating requirements. *See id.* §§ 300gg to gg-4. The guaranteed-issue provision mandates that health-insurance companies "accept every employer and individual in the State that applies for . . . coverage," regardless of preexisting conditions. *Id.* § 300gg-1(a). The community-rating provision prohibits health insurers from charging higher rates to individuals within a given geographic area on the basis of their age, sex, health status, or other factors. *See id.* §§ 300gg, 300gg-4(a).

As the United States conceded in *NFIB*, the guaranteed-issue and community-rating provisions cannot function alone. Per the United States, "in a market with guaranteed issue and community rating, but without a minimum coverage provision, 'many individuals would wait to purchase health insurance until they needed care.'" Br. for Fed. Gov't on Severability 45, *NFIB v. Sebelius*, 567 U.S. 519 (2012) (*NFIB* Br.) (quoting 42 U.S.C. § 18091(a)(2)(I)). This "adverse selection" problem—where only individuals who need care purchase insurance—would cause premiums to "go up, further impeding entry into the market by those currently without acute medical needs, risking a 'marketwide adverse-selection death spiral.'" *Id.* at 46; 42 U.S.C. § 18091(2)(J).

Congress imposed the individual mandate to prevent this "death spiral" by requiring healthy individuals to purchase insurance, thus enabling insurance companies to continue to issue policies to those already sick. *NFIB* Br. 45-46. The D.C. Circuit thus described the individual-mandate, guaranteed-issue, and community-rating

provisions as a "three-legged stool[:] remove any one, and the ACA will collapse." *Halbig*, 758 F.3d at 409.

Congress recognized as much when it passed the ACA. The ACA's text confirms that "[t]he requirement [to buy health insurance] is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." 42 U.S.C. § 18091(2)(I). As the United States conceded in *NFIB*, these findings "effectively serve[] as an inseverability clause." *NFIB* Br. 26.

That is because, as the United States has acknowledged, "the minimum coverage provision is necessary to make effective the ACA's guaranteed-issue and community-rating insurance market reforms." *Id.* at 26. "Congress's findings expressly state that enforcement of" community rating and guaranteed issue "without a minimum coverage provision would *restrict* the availability of health insurance and make it *less* affordable—the opposite of Congress's goals in enacting the Affordable Care Act." *Id.* at 44-45. This hazard is why Congress repeatedly described minimum coverage "as 'essential'" to "the guaranteed-issue and community-rating reforms" in the ACA's text. *Id.* at 46-47.

3. Other chief provisions

The ACA's other chief provisions reinforced the broad health-insurance coverage that Congress anticipated would result from the individual-mandate, guaranteed-issue, and community-rating provisions. First, Congress defined the minimum essential coverage that it directed Americans to buy as including numerous "essential health benefits," including "ambulatory patient services, emergency services, hospitalization, maternity and newborn care, mental health and substance use disorder

services," and several other costly services. 42 U.S.C. § 18022(b)(1) (capitalization altered).

Congress then obliged employers to provide insurance satisfying the minimum-essential-coverage requirements to employees. 26 U.S.C. § 4980H. This "employer mandate" requires employers of 50 or more full-time employees to offer health insurance that satisfies the individual mandate's requirements if any employee qualifies for a subsidy to comply with the mandate. *See Id.* The employer mandate applies to government employers. *Id.* An employer's failure to offer insurance results in a penalty of thousands of dollars per employee, per year. *Id.* §§ 4980H(a), (b), (c)(1); 79 Fed. Reg. 8544, 8544 (Feb. 12, 2014).

To reach individuals not covered under the employer mandate, the ACA also substantially expanded Medicaid to enable low-income individuals to meet the minimum-essential-coverage requirements. States Br. 6. This expansion required, as a condition for all Medicaid funding, 42 U.S.C. § 1396c, that participating States provide the minimum essential coverage required by the mandate to all individuals under 65 earning income below 133% of the poverty line, *id.* §§ 1396a(a)(10)(A)(i)(VIII), 1396u-7(b)(5), 18022(b). It also made two new populations eligible for Medicaid: individuals under age 26 who were enrolled in federally funded Medicaid when they aged out of foster care, 42 U.S.C. § 1396a(a)(10)(A)(i)(IX); and children ages 6 to 18 who were eligible for the Children's Health Insurance Program (CHIP) prior to the ACA, *id.* § 1396a(a)(10)(A)(i)(VII)). And the ACA required States to determine eligibility for most populations by a single metric—Modified Adjusted Gross Income (MAGI), *id.* § 1396a(e)(14)—thereby further adding to Medicaid rolls

by increasing the pool of persons who meet Medicaid's income thresholds.

Congress also used the individual mandate's minimum-essential-coverage requirement to define many other obligations throughout the ACA. For example, the minimum-essential-coverage requirement defines insurance companies' disclosure obligations to their customers, 42 U.S.C. § 300gg-15, and employers' disclosure obligations to the IRS, 26 U.S.C. § 6056. And Congress used the same requirement to trigger individuals' ability to access public insurance exchanges, 42 U.S.C. § 18081; their right to receive public subsidies to buy insurance, 26 U.S.C. § 36B; and their obligation to pay a tax penalty if they fail to do so, *id.* § 5000A(c).

4. Minor provisions

Finally, the ACA includes a number of minor provisions that were "[o]ften . . . the price paid for [a legislator's] support of a major provision," *NFIB*, 567 U.S. at 704 (dissenting op.). These minor provisions include "a number of provisions that provide benefits to the State of a particular legislator," *id.*; a tax on medical devices, 26 U.S.C. § 4191(a); a mechanism to issue compliance waivers to States, 42 U.S.C. § 1315; and regulations on the display of nutritional content at restaurants, 21 U.S.C. § 343(q)(5)(H).

B. Impacts to state expenditures, programs, and insurance markets

States primarily interact with the healthcare system and individual-mandate-driven obligations imposed by the ACA in three capacities: as Medicaid participants, as sovereigns that regulate local health-insurance markets, and as large employers that provide employees with health-insurance coverage.

Medicaid Participants. The individual mandate has substantially increased States' Medicaid rolls and costs. Many individuals have met and will continue to meet their individual-mandate obligations by participating in Medicaid. *See, e.g.*, CBO 2008 REPORT at 9-10; CBO, REPEALING THE INDIVIDUAL HEALTH INSURANCE MANDATE: AN UPDATED ESTIMATE, at 1, 3 (Nov. 8, 2017), https://tinyurl.com/CBO2017Report (CBO 2017 REPORT). This costs States money because "Medicaid is funded by both the state and federal governments," with costs "determined by the caseload—the volume or number of individuals served" and "cost per client." JA.93-94.

Alongside the ACA's other requirements, the individual mandate burdens States in several ways. It increases the cost of covering each Medicaid client by requiring costly services; requires Medicaid to cover new groups of people; and it requires States to determine Medicaid eligibility using a measurement (MAGI) that does not include an individual's assets or certain types of income. 42 U.S.C. § 1396a(e)(14). Rising healthcare costs caused by the ACA likewise result in higher state Medicaid expenses.

Sovereigns. The individual mandate's minimum-essential-coverage requirement and associated provisions have significantly curtailed what healthcare policies States can adopt. Before the ACA, the States carefully crafted programs to respond to the unique public needs and preferences of their populations. For example, multiple States created high-risk pools that "operated as an insurer of last resort for people when private insurers refused to issue coverage to them due to expensive anticipated medical costs." JA.175. These programs "effectively managed the health-insurance needs of high-risk individuals," JA.121, while "keep[ing] high-cost

individuals from driving up premiums for insurance purchasers of average or good health," JA.175. *See* JA.110-11, 180. Similarly, States addressed cost-sharing for preventative services, treatment of preexisting conditions, and the ability to rescind health-insurance contracts for false statements in their comprehensive effort to make health-insurance markets work for everyone. JA.121-22.

The individual mandate's minimum-essential-coverage requirement, along with guaranteed issue and community rating, displaced virtually all of these policy choices. States instead now spend countless hours ensuring ACA compliance, including by creating programs to help individuals navigate the ACA, JA.108-13, providing direction to insurers, JA.122, and "reading and enforcing thousands of pages of federal regulations [and] guidance," JA.174. Likewise, States must maintain benefits programs for their employees that enable those individuals to comply with the mandate. 26 U.S.C. § 4980H.

The ACA harms States in other ways, too. Because of the ACA's burdensome regulations, many insurers have left state markets, scaled back their offerings, or otherwise limited their exposure to the individual market. JA.106, 137, 173-74. *Cf.* JA.117. United Health Care "withdrew from participation in the Arkansas exchange" "as a result of the ACA costs." JA.137. And "[i]n 2017, two major carriers"—Aetna and Blue Cross and Blue Shield—"exited Nebraska's individual market" because of significant financial losses, leaving only one major carrier in a State that had 30 major carriers in 2010. JA.173; *see also* JA.179 (explaining lack of competition), 132-34 (same). Even those States without significant carrier losses have had major carriers threaten to leave if the market continues to worsen. JA.106-08.

This flight of insurance carriers is part of a vicious cycle of rising premiums and healthcare costs. Premiums have consistently risen since the ACA was enacted. JA.118, 137. Indeed, the CBO's April 2018 "Budget and Economic Outlook: 2018 to 2028" estimates that, under current law, federal outlays for health-insurance subsidies and related spending will rise by about 60% over the next ten years. CBO, THE BUDGET AND ECONOMIC OUTLOOK: 2018 TO 2028 51 (April 2018), https://tinyurl.com/CBOBudgetEconOutlook-2018-2028. It is no surprise, then, that the only major carrier remaining in Nebraska's individual market raised premiums 31% in 2018 alone. JA.173-74.

The States are now attempting to do what they can to mitigate the harms caused by the ACA, re-stabilize markets, and make health insurance affordable. For example, in Missouri, a bipartisan committee voted to create the "Missouri Reinsurance Plan" to stabilize the individual-insurance market. *See* H.B. 2539, 99th Gen. Assem., 2d Reg. Sess. (Mo. 2017), https://tinyurl.com/Mo-HB2539-2017. Other States may find it necessary to enact similar programs if their insurance markets continue to deteriorate.

Large Employers. The ACA also affects States as large employers subject to the ACA's employer mandate. 26 U.S.C. § 4980H. Besides keeping up with rising healthcare costs generally, States have had to increase their plans' benefits to ensure that they meet "minimum essential coverage" requirements embedded in the individual and employer mandates. States have spent hundreds of millions of dollars to provide new benefits, such as coverage of dependents up to age 26 and no-cost-share coverage for certain preventative-care services. *See* JA.80-81, 139, 163-64, 183-84. They have also had to allow

employees who work between 30 and 40 hours per week to purchase insurance that complies with the mandate, increasing the number of individuals covered and, therefore, the States' costs. *See* JA.83, 160-62, 174. Some of these individuals would not purchase health coverage but for the individual mandate, increasing States' costs. JA.83. Moreover, due to medical inflation, States face the ACA's 40% excise tax if they cannot adjust or reduce plan costs (while still complying with the terms of the mandate). *See* JA.127-28. Alongside the minimum-coverage requirement, this steep surcharge makes it virtually impossible for States to avoid increased costs.

C. ***NFIB v. Sebelius*** and the Tax Cuts and Jobs Act of 2017

In 2012, before the individual mandate went into effect, this Court considered whether the Constitution empowered Congress to command individuals to buy insurance in the course of "[f]ederal regulation of the health insurance market." 42 U.S.C. § 18091(2)(H). The Court concluded that Congress could *not* do so as an exercise of its power to regulate interstate commerce. Though Congress may regulate the insurance market, the Court held, it may not "create the necessary predicate to the exercise of an enumerated power." *NFIB*, 567 U.S. at 560. Cognizant of its "duty to construe a statute to save it, if fairly possible," however, the Court upheld the minimum-essential-coverage requirement as a trigger for a tax, namely section 5000A's tax penalty. *Id.* at 574-75.

In 2017, Congress eliminated this Court's statutory "basis to adopt such a saving construction," *NFIB*, 567 U.S. at 575, by reducing the operative parts of section 5000A(c)'s tax penalty to "[z]ero percent" and "$0." Tax Cuts and Jobs Act of 2017 (TCJA), Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017). As petitioners

acknowledge, the TCJA left "every other provision of the ACA in place," including the individual-mandate, guaranteed-issue, and community-rating provisions, all of the other provisions that are triggered by the mandate, and the inseverability clause labeling the mandate essential. States Br. 36; *cf.* House Br. 39 (noting TCJA's "amendment of a single sentence"). Specifically, Congress preserved all of its earlier findings that the individual mandate "is an essential part of [the Government's] regulation of economic activity." 42 U.S.C. § 18091(2)(H).

As a result, the U.S. Code as it stands today includes the following: (1) a naked command to the American people to buy insurance and all associated obligations created by the ACA, (2) a penalty provision for failure to comply that raises no revenue, and (3) Congress's textual declarations that the individual mandate remains "essential" to the operation of the law.

II. Procedural History

The two individual and eighteen state respondents who brought this suit are among the many employers who continue to obey the law. The operative complaint documents the various harms they are suffering as a result. JA.29-70. They have pleaded five claims because the ACA, as amended, "forces an unconstitutional and irrational regime on the States and their citizens." JA.29, 61-67. Because the United States agrees that the minimum-essential-coverage requirement is unconstitutional, state petitioners intervened to defend the law. *Cf.* JA.18-19.

In December 2018, the district court granted respondents' request for a judgment declaring the individual mandate unconstitutional and the rest of the ACA inseverable from the mandate. PA.163a-231a. The court concluded that individual respondents have standing because they "are the object of the Individual Mandate"

and have been financially harmed by being compelled to buy insurance that they did not want. PA.181a-85a. Because Article III requires only one party to have standing, *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006), the district court did not address state respondents' standing. PA.184a-85a.

On the merits, the court concluded that the individual mandate was unconstitutional because the saving construction adopted by *NFIB* was no longer fairly possible after the TCJA. PA.185a-204a. As to remedy, the court noted that respondents (individual, state, and federal) "agree[d] . . . that the guaranteed-issue and community-rating provisions . . . are inseverable" from the individual mandate. PA.204a; *NFIB* Br. 44-54. The court focused on statutory text as well as the intent of Congress in 2010, which was the only valid and relevant expression of congressional intent as the 2017 amendment both rendered the statute unconstitutional and was passed through reconciliation, a procedure that reflects that Congress has reached agreement only on budgetary issues. Based on its analysis, the court determined that the remainder of the ACA was inseverable from the mandate as well. PA.204a-05a. At the request of the state petitioners, ROA.2667-73,[3] the district court entered a partial final judgment to allow immediate appeal and stayed litigation regarding respondents' remaining claims pending the outcome of that appeal. PA.117a-62a.

The Fifth Circuit broadly affirmed. In particular, the Fifth Circuit agreed that individual respondents have standing, JA.394, and further held that state respondents have standing based on their fiscal injuries as

[3] "ROA" refers to the record on appeal in *United States v. Texas*, No. 19-10011 (5th Cir.).

employers, JA.406. Without deciding whether the mandate injured States' sovereign rights to enforce their own laws, the Fifth Circuit concluded that "[t]he record is replete with evidence that the individual mandate itself has increased" state respondents' compliance costs, which satisfied Article III. JA.407-10 & nn.27-28. It then agreed with the district court on the merits, concluding that the individual mandate is unconstitutional. JA.414.

The Fifth Circuit declined to affirm, however, the district court's conclusion that the remainder of the ACA is inseverable from the unconstitutional mandate. The circuit court noted that the United States "ha[d] shifted their position on [severability and remedy] more than once." JA.386. At oral argument, the United States argued that under *Gill v. Whitford*, 138 S. Ct. 1916 (2018), remand was necessary because the appropriate remedy "should only reach ACA provisions that injure" respondents. JA.446. Because this remedial argument "came as a surprise" to state respondents, the Fifth Circuit ordered the district court to consider this new argument—including whether it was "timely raised"—in the first instance. JA.447.

SUMMARY OF ARGUMENT

I. The Fifth Circuit correctly applied this Court's well-established standing precedent. Indeed, petitioners do not even challenge most of its analysis. That the law requires individual respondents to purchase costly ACA-compliant healthcare coverage that they do not want satisifes Article III. Far from relying on a "chain of speculative inferences" (House Br. 25), state respondents also demonstrated standing by presenting reams of evidence below about the economic costs they have incurred due to the mandate and the obligations it triggers. That evidence is both uncontroverted and

consistent with the findings of the Congressional Budget Office. Such an economic harm satisifies Article III.

II. The ACA's individual mandate is unconstitutional. This Court already held in *NFIB* that the mandate's most natural reading is a command to buy insurance, and under that reading violates the Commerce and the Necessary and Proper Clauses. Because the mandate raises no revenue, it can no longer be read as a tax. The most natural reading is now the only permissible reading. Though this Court normally will construe a statute to avoid constitutional doubt, "[n]o matter how severe the constitutional doubt, courts may only choose between reasonably available interpretations of a text." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 471 (2001).

III. Statutory text directs this Court to declare the remaining major and minor provisions of the ACA unconstitutional. Both Congress and the Department of Justice have repeatedly described the mandate as essential to the ACA's community-rating and guaranteed-issue provisions. And this Court has observed that those provisions "would not work" without the mandate. *King*, 135 S. Ct. at 2487. Likewise, the various other provisions in the ACA—both major and minor—cannot operate in the manner Congress intended without the three-legged stool that props up the ACA's essential features.

IV. The district court correctly applied its ruling nationwide. The United States not only forfeited any objection to the scope of relief, it *affirmatively argued* that declaratory relief would operate as a nationwide injunction, thereby rendering narrower relief unnecessary. Moreover, because of the way Medicaid functions, if any declaratory relief were to apply only to

state respondents, they would be required to subsidize the continued operation of ACA programs in the rest of the country. That perverse result would not alleviate the economic injuries that brought state respondents to court in the first place.

ARGUMENT

I. Respondents Have Standing.

As petitioners do not dispute, the Fifth Circuit applied the correct standard to determine whether respondents have standing, namely by asking whether respondents have an injury that (1) is "actual or imminent, not 'conjectural' or 'hypothetical,'" (2) is fairly trace[able] to the challenged action of the defendant," and (3) "likely . . . will be redressed by a favorable decision." JA.393 (quoting, *inter alia*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). This is not a high bar, "requir[ing] no more than *de facto* causality." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.)). Because "legislatures[] do not generally resolve massive problems in one fell swoop," this Court also considers whether different provisions of an integrated regulatory scheme have worked together to harm the plaintiff. *Massachusetts v. EPA*, 549 U.S. 497, 499, 524 (2007); *see also, e.g.*, *United States v. Windsor*, 570 U.S. 744, 755 (2013); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 683 (1987).

Before the district court and the Fifth Circuit, respondents demonstrated real-world costs stemming from the individual mandate and the ACA more broadly, including increased administrative costs, healthcare expenses, and compliance costs. *See, e.g.*, JA.83, 160-62, 174.

Petitioners hardly bother to dispute most of the Fifth Circuit's standing analysis. Instead, petitioners make two specific assertions, neither of which has merit. First, they claim that respondents lack standing because the individual mandate is no longer enforced through its tax penalty. But this overlooks that compliance with the mandate triggers direct costs to respondents—whether the IRS collects a shared-responsibility payment or not. These costs, traceable directly to the mandate, suffice for Article III. Second, trying to avoid this result, petitioners then demand ever-more-granular evidence of state respondents' injuries-in-fact. This argument ignores the forfeiture of proof-related issues in the district court, misstates the record, and misapprehends the law.

A. Article III is satisfied because the individual respondents have standing.

For the reasons set out in the individual respondents' brief, the courts below correctly concluded that they have standing to prosecute this action. Since only "one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," *Rumsfeld*, 547 U.S. at 52 n.2, that is all the Court needs to proceed to the merits.

B. State respondents have standing.

State respondents have standing to pursue this action twice over: first, because multiple parts of the ACA, including the individual mandate, inflict a straightforward pocketbook injury on the States; and second, because the ACA impinges on their sovereign rights to enforce their laws.

1. The ACA inflicts classic pocketbook injuries on the States.

The individual mandate increases state outlays and regulatory burdens, creating an injury-in-fact. Further,

the mandate imposes "[a] fiscal injury resulting from the effects of a federal policy on choices by third parties." States Br. 21 (citing *Dep't of Commerce*, 139 S. Ct. at 2565-66). State respondents have demonstrated both kinds of injuries and therefore have standing.

a. As the Fifth Circuit correctly determined, the record is "replete with evidence that the individual mandate itself increased the cost[s]" to state respondents in at least six ways. JA.407.

First, for state respondents to have standing, there only needs to be a "substantial risk" of at least some additional costs as a result of the amended section 5000A. *Dep't of Commerce*, 139 S. Ct. at 2565. Evidence of such a risk was offered to Congress *before the amendment*, and presumably formed part of the basis of its decision. As the CBO has twice explained, at least some people obtain health insurance solely out of a "willingness to comply with the law." CBO 2017 REPORT at 1; *see also* CBO 2008 REPORT at 53 ("[m]any individuals" will comply with the mandate despite not being subject to a penalty). And the ACA specifically provides that enrolling in Medicaid—a program for which the States share coverage expenses for enrollees—complies with the mandate. 26 U.S.C. § 5000A(f)(1)(A)(ii). It follows that many individuals will do just what Congress expected and comply with the mandate by applying for and (if eligible) enrolling in Medicaid or CHIP. *See generally* 42 U.S.C. §§ 1396-1396w.

Second, as the Fifth Circuit explained, the individual mandate interacts with other provisions of the ACA to increase States' reporting costs. JA.407-10 & nn.27-28. Specifically, notwithstanding the TCJA, States must continue to comply with IRS reporting requirements occasioned by the ACA's mandate. *See* Pub. L. No. 111-148,

§ 1502(a), 124 Stat. at 250 (*codified at* 26 U.S.C. § 6055); *id.* § 1514(a), 124 Stat. at 256 (*codified at* 26 U.S.C. § 6056). These requirements have led to the ubiquitous Form 1095-B and 1095-C statements employees receive around tax time, filled with a series of check boxes indicating the months during which employees had ACA-compliant health coverage, so that employees filing their taxes can attest to being "covered under minimum essential coverage for such month," 26 U.S.C. § 5000A(a), and thus comply with the mandate.

These forms do not generate themselves. It is unquestionable that completing these required reporting forms for every employee "ha[s] been and continue[s] to be difficult and costly for employers."[4] *After AHCA Withdrawal, Eyes Turn to Executive Branch*, 25 No. 2 Coordination of Benefits Hndbk. Newsl. 8 (April 2017). Indeed, one commentator observed that the Form 1095 reporting requirements constitute the "greatest administrative burden imposed on employers since the Tax Payment Act of 1943 demanded payroll reporting."[5]

The IRS recognized the magnitude of this burden when it delayed implementation of the ACA's mandate-related reporting requirements for a year to allow employers "additional time to develop their systems for assembling and reporting the needed data."[6] As the IRS specifically explains, these returns are used in part "by

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[4] That state respondents have not precisely quantified these costs is irrelevant. That there is demonstrably *some* cost is enough. *See Dep't of Commerce*, 139 S. Ct. at 2565 (finding standing based on loss of unspecified federal funding).

[5] Adam Okun, Reporting Acrobatics, https://frenkelbenefits.com/blog/2015/07/20/reporting-acrobatics/ (July 20, 2015).

[6] IRS Notice 2013-45, 2013-31 I.R.B. 116, Q/A-1, at 2, https://www.irs.gov/pub/irs-drop/n-13-45.PDF.

individuals to show compliance with . . . the individual shared responsibility provision in section 5000A."[7]

These reporting requirements remain in place, even after elimination of the mandate's tax penalty. Employers can be sanctioned by the IRS for failing to submit adequate information. The current penalty for failure to file the necessary paperwork is $270 per employee with an annual cap of $3,275,500.[8] By regulation, the IRS may authorize the Department of Justice to seek enforcement of penalties assessed under the Internal Revenue Code in federal court. 26 C.F.R. § 301.7401–1.

In other words, state respondents are compelled under threat of government sanction to produce forms to enable individuals to comply with section 5000A's mandate. Publicly available sources reflect that the IRS "has been more aggressive recently in [enforcing] ACA reporting failures and in assessing ACA-related penalties," even since the district court ruled. *See, e.g.*, Ogletree Deakins, *An IRS Holiday Gift: 2019 Affordable Care Act Reporting Relief* (Dec. 10, 2019), https://tinyurl.com/yaef5yb8. This type of pervasive enforcement establishes state respondents' standing. *Cf. Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014) ("[P]ast enforcement against the same conduct is good evidence that the threat of enforcement is not 'chimerical.'").

Third, and relatedly, the ACA forces state respondents to spend significant time, effort, and money to

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[7] IRS, *Questions and Answers on Information Reporting by Health Coverage Providers (Section 6055)*, https://tinyurl.com/hw64ex2 (last updated Apr. 3, 2020).

[8] IRS, *Information Reporting by Applicable Large Employers*, https://tinyurl.com/y9klkuza (last updated Apr. 3, 2020).

ensure that they meet the ACA's vast and complex rules and regulations. *See* JA.152-53, 174, 190-91.[9]

Fourth, the employer mandate—which is designed to ensure that most individuals satisfy the individual mandate through employer-sponsored insurance—forces state respondents to spend millions of dollars on expanded employee health-insurance coverage. Under the employer mandate, States must offer their full-time employees (and qualified dependents) "minimum essential coverage under an eligible employer-sponsored plan," or else pay a substantial tax penalty. 26 U.S.C. § 4980H(a). State respondents have complied with this mandate to avoid the penalty—but at significant cost. Texas has already spent $473.2 million in fiscal years 2011 through 2017 to provide new ACA-mandated employee health-insurance benefits. JA.86. Missouri estimated that keeping its Consolidated Health Care Plan compliant with the ACA would cost "nearly $3 million" in 2019, beyond millions already spent. JA.163. All state respondents are incurring these costs. *See, e.g.*, JA.184 (net financial impact to South Carolina from providing expanded ACA coverage from 2011 through 2017 was $29.2 million), 139, (Kansas); 186-90 (South Dakota). These are archetypal economic injuries that establish standing.

Fifth, the ACA requires States to expand Medicaid eligibility to allow low-income Americans to meet the individual mandate, thereby increasing States' Medicaid expenditures. Under the ACA, States must determine Medicaid eligibility using MAGI. *See* 42 U.S.C. § 1396a(e)(14). This statutory command adds hundreds

[9] Because the ACA's regulations carry significant penalties for noncompliance, the assertion by certain amici that no federal agency could bring an enforcement action against state respondents is mistaken. *See* Br. of Samuel Bray et al. at 3-4.

of thousands of individuals to state respondents' Medicaid rolls. *See* JA.91, 98-103, 152-54, 146-50.[10] So, too, does the ACA's command that States add to Medicaid individuals previously in foster care or CHIP. *See, e.g.*, JA.88-89, 91. This expansion of Medicaid rolls, occasioned by provisions designed to promote compliance with the individual mandate, predictably adds to state respondents' healthcare costs. *Dep't of Commerce*, 139 S. Ct. at 2566 (endorsing standing based "on the predictable effect of Government action on the decisions of third parties").

Finally, the ACA causes a pocketbook injury by forcing States to spend funds—and, in many instances, change state law—to fix problems, including market instability and rising healthcare costs, directly caused by the ACA in general and the individual mandate in particular. The ACA pressures States to stave off runaway healthcare costs, counter the threat of major insurance companies leaving the market, *and* otherwise minimize the ACA's harmful effects. *See, e.g.*, JA.106-08 (noting increase in insurer threats). States may do nothing and bear the ACA's full budgetary brunt, or they may enact new laws at substantial cost that they would not have but for the ACA's effects. Either way, States suffer an injury. *Cf. New York v. United States*, 505 U.S. 144, 188 (1992). Even if all the costs were avoidable, a forced choice between incurring financial costs and changing the law is an injury sufficient to support standing. *See*

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[10] Indeed, the U.S. House conceded in the Fifth Circuit that "a State has standing to challenge a federal policy that *itself* expands the pool of beneficiaries eligible for a state benefit." House Br. 33, *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019). This confirms the States' standing, as no one doubts that the MAGI provision expands Medicaid eligibility. *See Alaska Airlines*, 480 U.S. at 683.

Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 582 (1985) (citing *Allen v. Wright*, 468 U.S. 737 (1984)); *see also Texas v. United States*, 809 F.3d 134, 157 (5th Cir. 2015) ("[T]reating the availability of changing state law as a bar to standing would deprive states of judicial recourse for many *bona fide* harms."), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

b. Petitioners neither challenged the factual sufficiency of this evidence nor offered contrary proof in the district court. JA.398. Instead, petitioners argued on appeal that respondents failed to present sufficiently granular evidence that the individual mandate caused their fiscal injury absent the now-zeroed tax penalty. *E.g.*, States Br. 22 (raising evidentiary objections), House Br. 28 (same). This argument fails for at least three reasons.

First, petitioners' myopic focus on the collection of the individual shared-responsibility payment as the only means of enforcement takes *NFIB* out of context. *See, e.g.*, States Br. 27 (quoting *NFIB*, 567 U.S. at 574). The individual mandate was not yet effective in 2012. 26 U.S.C. § 5000A(a). Standing analysis in such a pre-enforcement challenge focuses on the extent to which there is a "credible threat of prosecution" under the challenged statute. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *accord Susan B. Anthony List*, 573 U.S. at 159. In 2012, the only threat of prosecution was through the tax penalty, which this Court construed as a "lawful choice" between buying insurance or paying the tax. *NFIB*, 567 U.S. at 574. But this "is not a pre-enforcement challenge." JA.402. The individual mandate has been in effect for more than five years. As a result, the question is not how the United States threatened enforcement in 2012. Instead, the question is whether and

through what means the United States *has* enforced and continues to enforce the mandate today.

Second, because the mandate is in force, the Fifth Circuit properly looked not only to the costs imposed by section 5000A but also to the costs "created in part by the individual mandate's practical *interaction* with other ACA provisions." JA.410 n.29. Because "legislatures[] do not generally resolve massive problems in one fell swoop," courts consider whether different provisions of an integrated regulatory scheme have worked together to harm the plaintiff. *Massachusetts*, 549 U.S. at 499, 524; *see also, e.g.*, *Windsor*, 570 U.S. at 755; *Alaska Airlines*, 480 U.S. at 683.

Petitioners' contrary assertions depend on the incorrect premise that because the mandate lacks a specific penalty, it is not enforced. Almost since the Founding, this Court has recognized that "[a] law is an expression of the public will; which, when expressed, is not the less obligatory, because it imposes no penalty." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 212 (1796); *see also, e.g.*, *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 457 (1841). The law includes many instances where statutes are enforced through means other than direct penalties—*e.g.*, preemption provisions, statutes of limitations, self-executing treaties, and statutory definitions. A party suffering injury from such provisions alone or in combination may challenge the statute. *Alaska Airlines*, 480 U.S. at 683.

This Court's decision in *Windsor* demonstrates as much. There, a taxpayer sought to challenge the Defense of Marriage Act, 28 U.S.C. § 1738C, in an action for a tax refund under the marital exemption from the federal estate tax, 26 U.S.C. § 2056(a). Under the U.S. House's view here, the taxpayer should not have been permitted

to challenge DOMA because her tax claim "ha[d] no connection" to DOMA, which was in a completely different title of the U.S. Code. House Br. 31. There was, however, "no dispute" that Ms. Windsor had standing because "being forced to pay [the allegedly unconstitutional] tax causes a real and immediate economic injury." *Windsor*, 570 U.S. at 755 (quoting *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 599 (2007) (plurality op.)). Here, the state respondents' injury stems from the mandate and other provisions—all of which, unlike DOMA and the tax code, were specifically designed to work in tandem.

Nor can the petitioners' argument be reconciled with *Alaska Airlines*. There, a group of airlines challenged various provisions of the Airline Deregulation Act on the basis that a *different* provision involving a legislative veto was unconstitutional and inseverable. *Id.* at 680. This Court agreed that the legislative-veto provision was unconstitutional but found it severable. *Id.* at 683. Critically, at no point did this Court question the airlines' standing or otherwise express doubt that it had jurisdiction. Petitioners cite *Alaska Airlines* repeatedly in support of their severability argument, all while failing to realize that it confirms jurisdiction here.

The authorities cited by the U.S. House (at 32) are not to the contrary. The plaintiffs in *DaimlerChrysler Corp. v. Cuno* tried to use their status as *municipal* taxpayers to challenge their *state* taxes. 547 U.S. 332, 351-52 (2006). The Court refused to allow them to use a federal court's pendent jurisdiction under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), to evade Article III standing requirements. *Cuno*, 547 U.S. at 353-54. *Cuno* says nothing about how to analyze standing where two federal statutes work together to harm a plaintiff.

And *Davis v. FEC* supports respondents because it requires courts to examine how a challenged statute works in practice when assessing a plaintiff's standing. 554 U.S. 724, 733-34 (2008). The Fifth Circuit did precisely that.

Third, the U.S. House's complaint (at 28) about state respondents' supposed "failure to introduce any supporting evidence" that a "single person . . . enrolled in Medicaid, CHIP, or state-employer insurance for the reasons the state plaintiffs posit" misstates both the standard of proof and the record. As state petitioners concede, "state respondents were not required to identify any 'specific' individual who would enroll because of the amended [s]ection 5000A," only that there was "a 'substantial risk' that at least one such person would make that choice, causing them cognizable fiscal harm." States Br. 24 n.15 (quoting *Dep't of Commerce*, 139 S. Ct. at 2565)). And state respondents *did* offer evidence of a "substantial risk," *Dep't of Commerce*, 139 S. Ct. at 2565, summarized above (at 21-24; *see also* JA.407-10 & nn.27-28).

In any event, the record is more than sufficient to assure this Court of its jurisdiction in the absence of contrary evidence from petitioners. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 & n.15 (1973) (plurality op.); JA.408 ("[A]s even counsel for the [petitioner] states admitted at oral argument, nobody challenged [state respondents'] evidence as conclusory" or otherwise insufficient "in the district court or in the [circuit] court."). State respondents offered extensive evidence of the impact of the ACA, including the individual mandate, on their management of their internal affairs, which the Fifth Circuit summarized at length. JA.407-10 & nn.27-28. That is all Article III requires.

2. The ACA prevents States from enforcing their own laws and policies.

State respondents also have standing because the ACA—both its core individual mandate and the provisions that work in tandem—prevents them from applying their own laws and policies governing their own healthcare markets. Though the Fifth Circuit did not reach this ground because it found standing based on the States' pocketbook injuries, this Court has discretion to "affirm on any ground supported by the law and the record." *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018).

It is well established that States have a sovereign interest in "the power to create and enforce a legal code." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). Thus, whenever "a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

That irreparable injury is no less real when a federal law—not a federal court—prevents a State from implementing its own laws and policy preferences. *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 601; *see also, e.g.*, *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008) (applying *Snapp*).

The ACA's myriad requirements do just that. For example, Texas, among other states, established and operated high-risk insurance pools that "effectively managed the health-insurance needs of high-risk individuals." JA.121; *see also* Tex. Ins. Code §§ 1506.001-.205 (repealed 2015). These pools explicitly addressed difficult

and contentious issues such as the treatment of preexisting conditions and scope of coverage. *See* Tex. Ins. Code § 1506.155 (repealed 2015). But States like Texas can no longer craft their own solutions to these tricky policy issues. Instead, the ACA requires States to regulate the insurance market as the federal government sees fit.

II. The Individual Mandate Is Unconstitutional.

The Fifth Circuit correctly held that section 5000A is unconstitutional. Petitioners acknowledge that the only reason that the Court was able to uphold the mandate in 2012 was because it then bore the indicia of a tax. States Br. 8-9; House Br. 5. The TCJA squarely eliminated the features on which this Court relied in *NFIB*, and with it, the availability of the saving construction. Petitioners and their flurry of amici barely even attempt to defend the mandate's constitutionality, focusing entirely on severability. To the extent they muster a defense of the mandate, they misstate the law.

A. *NFIB* held that the Commerce Clause and the Necessary and Proper Clause do not permit Congress to mandate the purchase of health insurance.

In *NFIB*, this Court squarely held that Congress may not use its power to regulate interstate commerce to order Americans to buy health insurance—as it purported to do in section 5000A—any more than it can order them to buy a new car or broccoli. 567 U.S. at 547-61 (Roberts, C.J.) (holding law also exceeded power under Necessary and Proper Clause); *id.* at 657 (dissenting op.). Though Congress has "broad authority" to "regulate existing commercial activity," that authority does not extend to compelling individuals to create

commercial activity. *Id.* at 549, 552 (Roberts, C.J.); *id.* at 649-50 (dissenting op.).

The only reason that section 5000A survived was because it was "fairly possible" to read its minimum-essential-coverage mandate as the trigger for a tax. *Id.* at 563 (Roberts, C.J.). Key to that construction was that section 5000A, as a whole, had the "essential feature of any tax: It produces at least some revenue for the Government." *Id.* at 563-64 (citing *United States v. Kahriger*, 345 U.S. 22, 28 n.4 (1953), *overruled in part on other grounds*, *Marchetti v. United Sates*, 390 U.S. 39 (1968)).

Petitioners maintain that because this Court once found the mandate reasonably characterized as a tax, it must always be so understood. House Br. 15; *cf.* States Br. 27. But this Court's "interpretative decisions" are "subject (just like the rest) to congressional change." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015).

Congress has now removed an essential feature on which this Court relied in characterizing section 5000A as a tax—the revenue-producing shared-responsibility payment—while retaining the features that made it an unconstitutional command. *Compare NFIB*, 567 U.S. at 566 (Roberts, C.J.), *with* 26 U.S.C. § 5000A(b). Whether this Court can preserve this unconstitutional command through a saving construction now is a separate question, which must be analyzed under the text as it currently exists. *Cf. Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173-78 (2009).

B. In light of the TCJA, it is no longer "fairly possible" to save the mandate as a tax.

The TCJA removed the textual hook that allowed this Court to construe the mandate as a tax. The Tax Clause grants to Congress the power to "lay and collect Taxes

. . . to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. ART. I, § 8, cl. 1. But no matter Congress's goals, a statute is only valid under the Tax Clause if it is "productive of some revenue" for the Government. *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937). Following the 2017 amendment, the provision no longer produces revenue, so the saving construction adopted in *NFIB* is no longer available. *Cf.*, *id.*; *In re Kollock*, 165 U.S. 526, 536 (1897). Petitioner makes three arguments to the contrary. None has merit.

First, contrary to the U.S. House's assertion (at 15), section 5000A did not forever become a tax because *NFIB* held that the 2010 version could be reasonably characterized as such. When a statute materially changes, this Court is free to once again interpret the statute given that change. *Kimble*, 135 S. Ct. at 2409. In *NFIB*, in order to save the mandate from unconstitutionality, 567 U.S. at 564, 566 (Roberts, C.J.), this Court construed the combination of a mandate to buy minimum essential coverage with a tax penalty to create a tax, *id.* at 570 (same). But the canon of constitutional avoidance does not permit this Court to take a view of the statute that is not a "reasonably available interpretation[] of [its] text." *Whitman*, 531 U.S. at 471; *Boumediene v. Bush*, 553 U.S. 723, 787 (2004).

In its post-amendment form, section 5000A contains no revenue-producing penalty, and thus cannot reasonably be viewed as tax—or as a choice between buying insurance or paying a tax. *Contra* House Br. 16; State Br. 27. As amended, it is "fairly possible" to interpret section 5000A only as a "command to buy insurance." *NFIB*, 567 U.S. at 574 (Roberts, C.J.). Far from an "implausible" construction, House Br. 17, this has always been the

most "natural[]" reading of the individual mandate. *NFIB*, 567 U.S. at 574 (Roberts, C.J.). Now it is the only possible reading.

Second, petitioners assert that because section 5000A lacks an enforcement provision, it is hortatory and no longer depends on an enumerated power. States Br. 32; House Br. 15. But neither component of this assertion is true. The individual mandate is written with the imperative "shall," which, according to petitioner's own authority, "is a word of command, and one which has always or which must be given a compulsory meaning: denoting obligation." BLACK'S LAW DICTIONARY 1499 (9th ed. 2009); States Br. 30. As petitioners' authority explains, the best meaning of "shall" is "the mandatory sense that drafters typically intend." BLACK'S LAW DICTIONARY 1499.

Even if "shall" could be seen as hortatory, Congress has no police power; it cannot do *anything* without an enumerated power. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 617-18 (2000); *id.* at 639 (Souter, J., dissenting) ("The premise that the enumeration of powers implies that other powers are withheld is sound."). That Congress has purported to pass (supposedly) nonbinding laws and concurrent resolutions that fall outside the scope of its enumerated authority "does not, by itself, create power" to do so. *Medellin v. Texas*, 552 U.S. 491, 531-32 (2008).

Third, the individual mandate does not remain a tax for purposes of the Tax Clause merely because Congress chose to zero out section 5000A's formula rather than deleting it entirely. *Contra* House Br. 35-36; States Br. 32-33. This Court has already rejected the notion that Congress's label makes something a tax. As Chief Justice Roberts explained in *NFIB*, while Congress is free to label a provision a "tax" for some purposes, such as the

Anti-Injunction Act, this Court's *constitutional* analysis regarding whether a provision is a tax and how it works is functional in nature. *See, e.g.*, *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 182-83 (1995) (discussing tax functionalism in Commerce Clause context); *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 8-9 (2009) (Tonnage Clause). And analyzed functionally, a tax of zero dollars is no tax at all. *E.g.*, *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 778 (1994) (noting taxes and fines share the critical features of "generat[ing] government revenues").

Petitioners' appeal to the Tax Clause and Necessary and Proper Clause is equally unavailing. They maintain that the zero-revenue mandate may be upheld because Congress "retain[ed] the structure of section 5000A in case Congress chose for policy reasons to raise the tax payment in the future."[11] House Br. 37. "Preserving that option would seem to be the most sensible and efficient course," state petitioners claim, because it would allow future Congresses to pass a tax more easily through the rules of budgetary reconciliation. States Br. 33.

This argument proves too much. The Necessary and Proper Clause enables Congress to employ convenient and useful means "for carrying into Execution [a] foregoing Power." U.S. CONST. art. I, § 8, cl. 18. But Congress cannot pass a noneffective law (*e.g.*, a zero-revenue "tax" structure), and justify an unconstitutional law (*i.e.*,

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[11] Petitioners fail to realize that to the extent this possibility is true, it only reinforces respondents' standing claims. After all, the federal government is free to raise or reinstate taxes retroactively. *United States v. Carlton*, 512 U.S. 26, 30 (1994). The prospect of a retroactive return of the mandate's tax penalty could explain in part why many Americans feel compelled to obey section 5000A even absent a penalty. *See generally* CBO 2008 REPORT.

the mandate) as necessary to execute a power it has, by definition, *not* exercised yet (*e.g.*, the power to tax). *See generally United States v. Kebodeaux*, 570 U.S. 387, 402 (2013) (Roberts, C.J., concurring in judgment) ("[T]he Necessary and Proper Clause authorizes congressional action 'incidental to [an enumerated] power.'") (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418 (1819)). Stated differently, an otherwise unconstitutional act of Congress cannot be "incidental to" the exercise of an enumerated power if Congress has not exercised that enumerated power in the first place. If Congress could pass a placeholder statute that might be used to exercise an enumerated power in the future, then justify an unconstitutional law as necessary and proper to that possible future exercise of congressional power, the Necessary and Proper Clause would not be an *incidental* exercise of power, but a freestanding one. That is not how our Constitution works. *Id.*

State petitioners' invocation of legislative ease (at 33-34) misses the point. Our Constitution made passing legislation, and particularly taxes, difficult *by design*. *E.g.*, THE FEDERALIST No. 62 (C. Rossiter, ed. 1961) (Madison); *INS v. Chadha*, 462 U.S. 919, 950 (1983).

Nor, contrary to state petitioners' claims (at 34), would adopting state respondents' position render unconstitutional taxes with deferred start dates or taxes intended to deter particular conduct. Congress typically passes taxes with deferred start dates to allow parties and agencies to adjust their behavior and to facilitate the administration of that tax. *See, e.g.*, *NFIB*, 567 U.S. at 567. Such a delay is at least an appropriate exercise of Congress's power under the Necessary and Proper

Clause.[12] Here, however, petitioners seek to expand that principle to the notion that Congress *has* passed a tax because it *could* pass a tax. They cite no authority for such a proposition.

Because the individual mandate is not currently a tax, it must be supported by some other enumerated power. *Morrison*, 529 U.S. at 617-18. The best and only remaining interpretation is that section 5000A commands Americans to buy insurance. And this Court has already held that "[t]he Federal Government does not have the power to order people to buy health insurance." *NFIB*, 567 U.S. at 575. Therefore, the mandate is unconstitutional.

III. The Mandate Is Not Severable.

Perhaps anticipating that this Court will hold the mandate unconstitutional, petitioners devote the greatest portion of their briefs (House Br. 38-50; States Br. 35-48) to urging this Court to sever the unconstitutional mandate from the ACA. But while this Court prefers to sever unconstitutional provisions from laws when possible, *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-29 (2006), the statutory text makes that impossible here. Congress deliberately designed the ACA and its goal of expanding healthcare coverage around the individual mandate. Without the mandate, the guaranteed-issue and community-rating provisions not only

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[12] Whether a delayed tax is itself constitutional under the taxing power is a closer question, but one the Court need not reach. State respondents' claim does not turn, as state petitioners suggest (at 34), on whether a tax that currently raises no revenue is still a tax. It turns on whether a something that never purported to be a tax, and which now raises no revenue, can nonetheless be interpreted as a tax in order to justify an otherwise impermissible congressional action. It cannot.

malfunction, but result in the opposite of what Congress intended. Reply Br. for Fed. Gov't on Severability 10, *NFIB v. Sebelius*, 567 U.S. 519 (2012). Without this operational core, the ACA's other major provisions shift healthcare benefits and burdens across the sector with little rhyme or reason. Moreover, the miscellaneous ACA provisions would bear no resemblance to what Congress passed in the first place.

To avoid this result, petitioners alternate between focusing on Congress's intent and the text of the ACA. While this Court typically turns to congressional intent when analyzing severability, *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018); *Alaska Airlines,* 480 U.S. at 684; *Champlin Ref. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234-35 (1932), the most important source to discern that intent is the text. *E.g.*, *Bostock*, 2020 WL 3146686, at *12 (rejecting argument based on Congress's decision *not* to amend text). And both intent and text show the mandate cannot be severed from (1) the ACA's community-rating and guaranteed-issue provisions, (2) its remaining major provisions, or (3) its minor or ancillary provisions.

A. The individual mandate is not severable from the guaranteed-issue and community-rating provisions.

1. Congress clearly expressed how it viewed the relationship between the individual mandate and the guaranteed-issue and community-rating provisions—and it did so in the ACA's text. For a decade, Congress has found that "[t]he requirement [to buy health insurance] is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." 42 U.S.C. § 18091(2)(I). This

Court takes such an inseverability clause as powerful evidence of Congress's intent and the appropriate remedy—here, refusing to sever the mandate. *See Hellerstedt v. Whole Women's Health*, 136 S. Ct. 2292, 2319 (2016).

For a decade, the United States has recognized section 18901 as "effectively . . . an inseverability clause." *NFIB* Reply Br. 10. With good reason. As the United States told this Court in *NFIB*, "the minimum coverage provision is necessary to make effective the [ACA's] guaranteed-issue and community-rating insurance market reforms." *NFIB* Br. 26. "Congress's findings expressly state that enforcement of [community rating and guaranteed issue] without a minimum coverage provision would restrict the availability of health insurance and make it less affordable—the opposite of Congress's goals in enacting the Affordable Care Act." *Id.* at 44-45. This is so because, "in a market with guaranteed issue and community rating, but without a minimum coverage provision, 'many individuals would wait to purchase health insurance until they needed care.'" *Id.* at 45 (quoting 42 U.S.C. § 18091(2)(I)). This "adverse selection" problem would cause premiums to "go up, further impeding entry into the market by those currently without acute medical needs, risking a 'marketwide adverse-selection death spiral.'" *Id.* (quoting Alan Monheit, et al., *Community Rating and Sustainable Individual Health Insurance Markets in New Jersey*, HEALTH AFFAIRS 167, 169 (July/Aug. 2004)); *see also* 42 U.S.C. § 18091(2)(J).

Congress based these findings on the States' significant experience. Prior to the ACA, "a number of States had enacted guaranteed-issue and community-rating requirements without a minimum coverage provision." *Id.* at 47. Overall, "premiums increased and coverage

decreased" in these States, the very adverse-selection problem the ACA expressly identifies. *NFIB* Br. at 48-50. Hence this grave warning in the Congressional Record: "'if [Congress] put' . . . guaranteed issue and community rating [on the insurance industry, it] 'must also mandate the individual to be insured or the market will blow up.'" *Id*. at 47 (quoting *Health Reform in the 21st Century: Insurance Market Reforms: Hearing Before the House Comm. on Ways & Means*, 111th Cong., 1st Sess. 9 (2009) (Prof. Uwe E. Reinhardt)); *id.* at 47-48 (collecting similar statements).

Sensibly, Congress concluded that the individual mandate's minimum-coverage requirement was "'essential'" to "the guaranteed-issue and community-rating reforms." *Id.* at 46-47. In sum, "without a minimum coverage provision, the guaranteed-issue and community-rating provisions would drive up costs and reduce coverage, the opposite of Congress's goals." *Id*. at 26. To prevent that result, the mandate orders "healthy individuals" into the health insurance market, "broaden[ing] the health insurance risk pool" to create "effective health insurance . . . products." 42 U.S.C. § 18091(2)(I). For that reason, the D.C. Circuit has described these three provisions as "like the legs of a three-legged stool[:] remove any one, and the ACA will collapse." *Halbig*, 758 F.3d at 409.

Section 18091 makes plain that Congress believed that the community-rating and guaranteed-issue provisions are "so interwoven" with the mandate "that they cannot be separated" or "stand" alone, *Hill v. Wallace*, 259 U.S. 44, 70 (1922), providing reason enough to declare those provisions inseverable based upon Congress's explicit statutory text. *NFIB*, 567 U.S. at 586 (Roberts, C.J.); *id.* at 645-46 (concurring op.); *see*

Bostock, 2020 WL 3146686, at *3, 12; *Zobel v. Williams*, 457 U.S. 55, 65 (1982). There could be no clearer statement of Congress's view that the mandate is not severable from the community-rating and guaranteed-issue provisions. That is what the district court concluded. So too should this Court.

2. Petitioners and their amici raise four arguments about why this Court should ignore Congress's intent as expressed in the text of the ACA. Each is meritless.

First, they assert that the "Court rendered the findings irrelevant" as a matter of law "when it held in *NFIB* that the minimum coverage provision as it was originally codified could not be sustained under the Commerce Clause." States Br. 42. That is contrary to the position taken by the United States for a decade, *NFIB* Reply Br. 26, and how this Court has treated congressional findings in the past—namely as fully operative parts of the statute. *See, e.g.*, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 590 (1999) (deriving definition of "disability" from congressional findings).[13]

Second, state petitioners assert (at 44) that congressional findings should be considered evidence of only the Congress's intent in 2010 because Congress often does not change legislative findings. State petitioners can hardly support this bold claim: They cite only a statute related to the Y2K bug, 15 U.S.C. § 6601(a), while overlooking that the statute sought to address the risks of

[13] *Yazoo & M.V.R. Co. v. Thomas*, 132 U.S. 174, 188 (1889), is not to the contrary because it addressed how statutory findings should be treated as a matter of *Mississippi* law. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 218 n.2 (2012) (citing 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 459, at 326 (2d ed. 1858)).

that potential glitch. Y2K Act, Pub. L. 106-37, 113 Stat. 185 (1999). Both the statutory findings *and* its operative provisions ceased to have meaning after the Y2K threat necessarily expired in 2000.

But congressional findings, when subject to constitutional requirements of bicameralism and presentment, become the law of the land. This Court treats them as such, turning to those findings even when Congress has since amended a challenged provision. *E.g.*, *Coleman v. Court of Appeals of Maryland,* 566 U.S. 30, 37-39 (2012) (plurality op.); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 29 (2010); *Gonzales v. Raich,* 545 U.S. 1, 20-21 & nn. 20 & 32 (2005); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 587-90 (2004); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 29 n.28 (1976). As a legal matter, petitioners' argument is an appeal to desuetude, which has been discredited as a means of statutory interpretation. SCALIA & GARNER, *supra*, at 337 (noting that only one state "hold[s] that desuetude invalidates"). Moreover, Congress *does* amend statutory findings where they are no longer relevant. *E.g.*, ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3554-55, § 3 (effective Jan. 1, 2009); Belarus Democracy and Human Rights Act of 2011, Pub. L. 112-82, 125 Stat. 1863.

Congress ostensibly agreed with these findings in 2017, as the TCJA changed the individual mandate while retaining these findings in full.[14] The TCJA merely reduced the individual mandate's associated tax-penalty formula to "[z]ero percent" and "$0," TCJA, Pub. L. 115-97, § 11081, 131 Stat. 2054, 2092 (2017). It did not alter the ACA's structure. Section 5000A(a) still requires "[a]n

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[14] At the very least, by acting through a mechanism that is reserved solely for budgetary questions, Congress (as an entity) did not express a collective *disagreement* with these findings.

applicable individual" to "ensure that the individual . . . is covered under minimum essential coverage." And the ACA's express statutory findings—including, notably, that the mandate to purchase insurance is "essential" to the ACA's operation, 42 U.S.C. § 18091(2)(I)—also remain. These laws do not expire by passage of time, SCALIA & GARNER, *supra*, at 337, nor do the United States' concessions in *NFIB*, *NFIB* Reply Br. 26, and again here, *see* JA.384.

Third, petitioners maintain that the Court should disregard Congress's findings because they were no longer true by 2017. House Br. 46; States Br. 44 & n.17. This Court has occasionally disregarded congressional fact findings because it concludes the facts found are contrary to the record. *Gonzales v. Carhart*, 550 U.S. 124, 165-66 (2007). However, petitioners do not cite—and state respondents are not aware of—a single case where this Court disregarded findings from Congress *about how it intended the statute to function*.[15]

Finally, petitioners and their amici disregard the best evidence of *Congress's* intent, as codified in the ACA, in favor of cherry-picked statements that individual members of Congress made. Statements of individual

[15] Petitioners and their amici further ask this Court to ignore Congress's findings based on economic studies neither raised before the district court nor included in the record. *E.g.*, House Br. 47-48 (citing Bipartisan Economic Scholars Cert-Stage Br. 20-21); Blue Cross Br. 7. As before, petitioners seek to add evidence to the record they declined to raise in district court; as before, this Court should refuse petitioners' attempt. *McCoy v. Massachusetts Inst. of Tech.*, 950 F.2d 13, 22 (1st Cir. 1991) ("It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal."); *see also, e.g.*, *Pac. R.R. v. Ketchum*, 101 U.S. (11 Otto.) 289, 296 (1879) ("We take a case on appeal as it comes to us in the record, and receive no new evidence.").

legislators cannot change the meaning of the text adopted by both chambers of Congress and signed by the President. SCALIA & GARNER, supra, at 369-90 (discussing "[t]he false notion" that "floor speeches are worthwhile aids in statutory construction"); *contra* House Br. 17-18 (misciting SCALIA & GARNER). The only text that passed *those* hurdles says that the individual mandate is essential. 42 U.S.C. § 18091(2)(I); *NFIB* Reply Br. 26. That text must prevail, *Bostock*, 2020 WL 3146686, at *3, and this Court should conclude it cannot sever these provisions from the mandate.

B. The individual mandate is not severable from the other major provisions of the ACA.

The broader statutory language demonstrates that the individual mandate is not severable from the other major provisions of the ACA. The Court makes two inquiries to determine if an unconstitutional provision is inseverable. *First*, provisions are inseverable if they would not "function in a *manner* consistent with the intent of Congress" absent the unconstitutional provision. *Alaska Airlines*, 480 U.S. at 685. If the operation of the unconstitutional provision is "so interwoven with" the intended operation of other provisions "that they cannot be separated," none will stand. *Hill*, 259 U.S. at 70.

Second, provisions are inseverable if "the Legislature would not have enacted [them] . . . independently of" the provisions found unconstitutional, even if those provisions operated in some otherwise meaningful way. *Alaska Airlines*, 480 U.S. at 684. In examining this question, the Court looks not (as petitioners would ask) to isolated floor statements by individual members of Congress. Instead, it looks to whether the statute at issue "embodie[s] a single, coherent policy" or a "predominant purpose," and whether the unconstitutional provisions

are necessary to that purpose. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999). To sever the "essential" individual mandate, 42 U.S.C. § 18091(2)(I), from the rest of the ACA's major provisions, both tests must be satisfied. *NFIB*, 567 U.S. at 692-94, 695 (dissenting op.).

The remaining major provisions are similarly inseverable because they effectuate the near-universal healthcare coverage that the mandate requires. These provisions are predominantly located in Title I of the ACA and are identified in detail in the *NFIB* dissent. 567 U.S. at 691-703. These provisions include "mandates and other requirements; comprehensive regulation and penalties; some undoubted taxes; and increases in some governmental expenditures, decreases in others." *NFIB*, 567 U.S. at 694 (dissenting op.). As the *NFIB* dissent noted, these provisions work "to balance the costs and benefits affecting each set of regulated parties." *Id.* Because that balance would be fundamentally altered by removing the individual mandate, the ACA's remaining major provisions are inseverable from that individual mandate. *Cf. Alaska Airlines*, 480 U.S. at 685; *New York*, 505 U.S. at 187.

C. The individual mandate is not severable from the minor provisions of the ACA.

Finally, for similar reasons, the district court correctly declared inseverable all minor provisions scattered throughout the 900-page ACA. *See NFIB*, 567 U.S. at 704-06 (dissenting op.). The ACA's minor provisions include, for example, a tax on medical devices, 26 U.S.C. § 4191(a), a mechanism for the Secretary to issue States compliance waivers, 42 U.S.C. § 1315a, regulations on the display of nutritional content at restaurants, 21 U.S.C. § 343(q)(5)(H), and "a number of provisions that

provide benefits to the State of a particular legislator"—which were "[o]ften . . . the price paid for [the legislator's] support of a major provision," *NFIB*, 567 U.S. at 704 (dissenting op.). Each of the ACA's minor provisions fails at least one part of the standard for assessing severability.

The first part of the severability analysis—whether the provisions would "function in a *manner* consistent with the intent of Congress" absent the invalid provisions, *Alaska Airlines*, 480 U.S. at 685—renders inseverable all miscellaneous "tax increases," like the medical-device tax, *NFIB*, 567 U.S. at 705 (dissenting op.). Without the ACA's major provisions, "the tax increases no longer operate to offset costs, and they no longer serve the purpose in [its] scheme of 'shared responsibility' that Congress intended." *Id.* This part also invalidates the ACA's lingering administrative measures, like provisions for States to obtain compliance waivers from the Secretary, *see* 42 U.S.C. § 1315a, since these would serve no meaningful purpose. *Cf. Williams v. Standard Oil Co. of La.*, 278 U.S. 235, 238, 243 (1929).

The second part of the standard—"whether Congress would have enacted the remaining provisions standing alone"—renders inseverable all other minor provisions, like the regulation of nutritional displays and the "provisions that provide benefits to the State of a particular legislator." *NFIB*, 567 U.S. at 693, 704 (dissenting op.). "There is no reason to believe that Congress would have enacted them independently," *id.* at 705, given that they are "mere adjuncts of the [main] provisions of the law," *Williams*, 278 U.S. at 243, and only (if at all) tangentially further the law's main purpose of near-universal affordable care.

The district court faithfully applied the above principles—including the statutory inseverability clause—to reach the correct conclusion: No portion of the ACA is severable from the mandate. The Fifth Circuit should have affirmed that judgment.

IV. The Declaratory Judgment Should Apply Nationwide.

The district court declared the individual mandate unconstitutional and inseverable from the remainder of the ACA. PA.232a. Consistent with state respondents' request for relief, that declaratory judgment carried nationwide effect. The Fifth Circuit should have affirmed that judgment in its entirety.

Instead, the Fifth Circuit vacated the district court's remedial determination based in part on a new argument that the federal government raised for the first time on appeal. In district court, the federal government expressly argued that the injunctive relief that state respondents had requested was not warranted because a declaratory judgment "would be adequate relief against the government," JA.337, and "a declaratory judgment is the functional equivalent of an injunction against the federal government," ROA.2722. At oral argument before the district court, the federal government again insisted that it would treat its declaration *like* the nationwide injunction that state respondents had requested.[16] That concession is consistent with how courts and commentators have viewed declarations against government actors. *Cf. Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344

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[16] *Cf.* Oral Argument at 50:25-38, *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019) (No. 19-10011), www.ca5.uscourts.gov/OralArgRecordings/19/19-10011_7-9-2019.mp3 (describing oral concession to the district court).

U.S. 237, 247 (1952); *Florida ex rel. Bondi v. U.S. Dep't of Health and Human Servs.*, 780 F. Supp. 2d 1307, 1315-16 (N.D. Fla. 2011); Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1093 & n.9 (2014) (citing *inter alia* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 14-15 (1983)).

On appeal, the federal government changed its position and argued for a narrower remedy. The Fifth Circuit remanded in part to allow the district court to address this new argument in the first instance. JA.447. It should not have done so because arguments about scope of remedy raised for the first time on appeal are not properly before the appellate court. *See* DOUGLAS LAYCOCK, ET AL., MODERN AMERICAN REMEDIES: CASES AND MATERIALS 955 (4th ed. 2010) ("[T]he court and the other litigants relied by continuing to litigate; courts will not retry a case to correct an error that could have been corrected when it was made.") (citing *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004)). Moreover, as Justice Thomas recently recognized in a different context, "it has long been the rule that a party may not appeal" from the conclusion of a district court if "the party consented to the judgment against it." *Microsoft v. Baker*, 137 S. Ct. 1702, 1717 (2017) (Thomas, J., concurring) (collecting cases). The Fifth Circuit should have affirmed the district court's remedial order rather than remanding to allow the United States to raise arguments that it could have raised—but did not raise—in district court.

Furthermore, the district court was correct to declare the entire ACA unconstitutional and unenforceable nationwide: Such a declaration is both equitable and necessary to "provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also*

Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994). Invalidating the ACA in a more limited geographic area would force citizens of the respondent States to heavily subsidize other States with their general tax dollars. For example, citizens and entities in the respondent States would have their tax dollars collected and spent in accordance with ACA programs such as the Prevention and Public Health Fund, *see* 42 U.S.C. § 300u-11, and the Community Health Center Fund, *see id.* § 254b-2. Yet none of those funds would be spent in the respondent States.

Less-than-nationwide relief would effectively allow a transfer of hundreds of millions of dollars from the prevailing States to either cross-respondent or non-party States. Far from redressing state respondents' injuries, such limited relief would *exacerbate* their injuries by forcing them to pay for programs and services they no longer receive because they prevailed in showing those programs and services to be inseverable from the unconstitutional individual mandate. Such a result is plainly inequitable.

CONCLUSION

The judgment of the court of appeals should be affirmed in part and reversed in part.

Respectfully submitted.

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JUNE 2020