No. 19-840

In the Supreme Court of the United States

State of California, et al., *Petitioners*,

v.

States of Texas, Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Utah, and West Virginia; Neill Hurley and John Nantz, *Respondents*.

On Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS HURLEY AND NANTZ

JOSH BLACKMAN
1303 San Jacinto Street
Houston, TX 77002
202-294-9003
josh@joshblackman.com

ILYA SHAPIRO
Counsel of Record
Cato Institute
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

July 2, 2020

Questions Presented

1. Whether the state and individual plaintiffs in this case have established Article III standing to challenge the minimum coverage provision in Section 5000A(a).

2. Whether reducing the amount specified in Section 5000A(c) to zero rendered the minimum coverage provision unconstitutional.

3. If so, whether the minimum coverage provision is severable from the rest of the ACA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation that advances individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutionalism that are the foundation of liberty. Toward those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Cato has been indefatigable in its opposition to laws and regulations that go beyond constitutional or statutory authority, regardless of underlying policy merits. It has been particularly active in litigation over the Affordable Care Act, including *NFIB v. Sebelius*, 567 U.S. 519 (2012), *King v. Burwell*, 576 U.S. 988 (2015), and *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

SUMMARY OF THE ARGUMENT

In 2010, the 111th Congress enacted the Patient Protection & Affordable Care Act ("ACA"). An ACA provision codified at 26 U.S.C. § 5000A(a) created a "[r]equirement to maintain minimum essential coverage," which has been "commonly referred to as the individual mandate." *NFIB v. Sebelius*, 567 U.S. 519, 539 (2012). And 26 U.S.C. § 5000A(b) codified the shared responsibility payment, which is also known as the "penalty" for not complying with the individual

---

[1] Rule 37 statements: All parties were timely notified and consented to this filing, or filed blanket consents to *amicus* briefs. No party's counsel authored any part of this brief and no person or entity other than *amicus* funded its preparation or submission.

mandate. Congress structured the individual mandate and the shared responsibility payment as separate provisions; some people were subject to the mandate, but were exempt from the penalty.

In *NFIB*, two private plaintiffs, Mary Brown and Kaj Ahlburg, challenged the constitutionality of the individual mandate; they did not challenge the shared responsibility payment. Brown and Ahlburg's Article III injuries were premised *solely* on the individual mandate, and not the penalty. *NFIB* considered, and apparently rejected, arguments that the mandate was "toothless" without the penalty.

Part III of *NFIB*'s controlling opinion considered the constitutionality of the individual mandate. Part III-A held that the mandate could not be sustained under the Commerce or Necessary and Proper Clauses. Part III-B held that the mandate could not be sustained under Congress's taxing power. Part III-C developed and applied the "saving construction." Chief Justice Roberts explained that "[t]he exaction the Affordable Care Act imposes on those without health insurance"—that is, the shared responsibility payment—"looks like a tax in many respects." *NFIB*, 567 U.S. at 563.

The saving construction read both parts of Section 5000A as a single entity: the mandate and the penalty, when fused together, presented an individual with "a *lawful choice* to do or not do a certain act, so long as he is willing to pay a tax levied on that choice." *Id.* at 574 (emphasis added). The saving construction may be treated as a *gloss* on the ACA. Outside the saving construction, however, "[t]he most straightforward

reading of the mandate is that [Section 5000A] commands individuals to purchase insurance." *Id.* at 562. The shared responsibility payment, as drafted by Congress, was *not* a tax. And Section 5000A, as drafted by Congress, did not offer a "lawful choice." Instead, it imposed—and to this day, still imposes—an unconstitutional mandate to purchase insurance.

In 2017, the 115th Congress enacted the Tax Cuts and Jobs Act ("TCJA"). Section 11801 of the TCJA reduced the shared responsibility payment to $0. As a result, Section 5000A can no longer be read as offering a "lawful choice" to purchase insurance or pay a tax. Congress thus peeled off the ACA's protective gloss, leaving only the unvarnished and unconstitutional individual mandate. Under the rule in *Frost v. Corporation Commission of Oklahoma*, the individual mandate cannot be severed from the ACA's guaranteed issue and community rating provisions ("GICR"). 278 U.S. 515, 528 (1929).

In this case, plaintiffs John Nantz and Neill Hurley challenge the constitutionality of the individual mandate, to which they are subject. They assert a greater Article III injury than the individual plaintiffs in *NFIB* did.

The courts should "fashion a remedy that actually redresses [Hurley and Nantz's] harms." *Collins v. Mnuchin*, 938 F.3d 553, 611 (5th Cir. 2019) (Oldham, J., joined by Ho, J., concurring in part and dissenting in part). Specifically, this Court can declare the individual mandate unconstitutional, and also declare GICR unenforceable for policies sold outside of government exchanges. This remedy would eliminate

the requirement to buy ACA-compliant insurance, and allow the plaintiffs to buy policies of their own choosing, or none at all. The Court need not touch the exchanges, group health plans, Medicaid, Medicare, and other elements of the ACA. Hurley and Nantz, meanwhile, and all those who object to being forced to buy unwanted policies, will have other options.

ARGUMENT

I. Congress Structured the Individual Mandate and the Shared Responsibility Payment as Separate Provisions of the ACA

Perhaps the two most prominent features of the Affordable Care Act (ACA) are provisions known as guaranteed issue and community rating ("GICR"). 42 U.S.C. §§ 300gg, 300gg-1, 300gg-3, 300gg-4, 18032(c), and some related provisions. Under these regulations, insurers (1) are required to issue policies to customers regardless of their pre-existing conditions, and (2) cannot charge customers higher rates because of their pre-existing conditions. GICR created perverse incentives: the uninsured could simply wait to buy insurance until they needed it. To counteract this moral hazard—known as "adverse selection"—the ACA included a "[r]equirement to maintain minimum essential coverage." 26 U.S.C. § 5000A(a). Section 5000A has seven subsections—(a) through (g).

Section 5000A(a) creates the "requirement" that has been "commonly referred to as the individual mandate." *NFIB*, 567 U.S. at 539. It provides, "[a]n applicable individual *shall* for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable

individual, is covered under minimum essential coverage for such month." 26 U.S.C. § 5000A(a) (emphasis added). Starting in 2014, covered individuals would be "require[d] to maintain "minimum essential coverage." *Id.* Section 5000A(f) defines what constitutes "minimum essential coverage"—that is, the minimum level of insurance needed to comply with the individual mandate. *Id.*

Congress included statutory findings about the importance of the individual mandate. 42 U.S.C. § 18091(2)(J). Specifically, Congress concluded that the "individual responsibility requirement," that is the individual mandate, was "*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." *Id.* at § 18091(2)(I) (emphasis added). Congress also found that the individual mandate was "*essential* to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs." *Id.* at § 18091(2)(J) (emphasis added). In short, the individual mandate was "essential" to GICR. Chief Justice Roberts cited these findings in his controlling opinion in *NFIB*. *See* 567 U.S. at 556.

However, certain categories of people were not "requir[ed] to maintain "minimum essential coverage." 26 U.S.C. § 5000A(a). Section 5000A(d) *exempts* three classes of people from the individual mandate: (a) people with religious-based conscious objections or members of health care sharing ministries; (b) aliens who were not lawfully present; and (c) incarcerated people. 26 U.S.C. § 5000A(d). These three categories of

people were not "applicable individual[s]" for purposes of § 5000A(a), and thus were not subject to the law's "requirement to maintain minimum essential coverage." 26 U.S.C. § 5000A(a).

Congress codified the shared responsibility payment at § 5000A(b). A covered individual who fails to obtain qualified insurance, and who is not exempt from the penalty (under subsection (e)), has to pay the "penalty." Section 5000A(c) provided the formula to calculate the "amount of [the] penalty" based on a taxpayer's income. *Id.* at § 5000A(c). Section 5000A(g) spells out the "administration and procedure" of how the penalty is to be collected. *Id.* at § 5000A(g).

In § 5000A(e), Congress exempted five categories of people from having to pay the shared responsibility payment: "no penalty shall be imposed" for (1) individuals who cannot afford coverage, (2) taxpayers with income below the filing threshold, (3) members of Indian tribes, (4) people with short gaps in coverage, and (5) those who have "suffered a hardship" as defined by the Secretary. *Id.* at § 5000A(e). The penalty exemptions in § 5000A(e) are *different* from the mandate exemptions in § 5000A(d). Individuals covered by § 5000A(e) are *still* subject to mandate, but are exempt from the penalty. *NFIB* observed that the "shared responsibility payment . . . does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code." 567 U.S. at 519. These individuals qualify for the exemption in § 5000A(e)(2) but are *still* subject to the mandate.

As a general matter, most people were subject to the mandate *and* the penalty. Some people were subject to the mandate *but* were exempt from the penalty, under § 5000A(e). And some people were exempt from both the mandate *and* the penalty, under § 5000A(d). Congress made explicit findings about why the mandate was "essential" to the operation of health care markets. 42 U.S.C. § 18091(2)(I). But Congress did *not* find that the shared responsibility payment was "essential" to the ACA. Indeed, the statutory findings make no express reference to the penalty at all. Congress structured the mandate and GICR as separate provisions of the ACA.

II. *NFIB v. Sebelius* Held That the Individual Mandate, Standing Alone, Is Unconstitutional

NFIB v. Sebelius declared the ACA's individual mandate, standing by itself, unconstitutional. Part III of Chief Justice Roberts's controlling opinion, which had four sections, warrants a careful review here. Part III-A held that the mandate could not be sustained the Commerce and Necessary and Proper Clause . Part III-B held that it could not be sustained under Congress's taxing power. Part III-C, which developed the "saving construction," considered the mandate together with the penalty as a fused unit. Part III-C cannot be viewed as a standalone analysis. Chief Justice Roberts had to first reject the government's primary defense of the mandate in Parts III-A and -B before applying his "saving construction."

Part III-C found 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" within the confines of the saving construction. *NFIB*, 567 U.S. at 574 (emphasis added). Under that saving construction, § 5000A can be read to "leave[] an individual with a *lawful choice* to do or not do a certain act, so long as he is willing to pay a tax levied on that choice." *NFIB*, 567 U.S. at 574. Outside the saving construction, however, "[t]he most straightforward reading of the mandate is that [§ 5000A] commands individuals to purchase insurance." *Id.* at 562. The shared responsibility payment, as drafted by Congress, was *not* a tax. And § 5000A, as drafted by Congress, did not offer a "lawful choice." Instead, it imposed—and still imposes—an unconstitutional mandate to buy insurance.

A. Parts III-A and -B held that the mandate cannot be sustained under the Commerce and Necessary and Proper Clause, or under the taxing power, respectively.

"In Part III-A, Chief Justice Roberts said that the individual mandate was most naturally read as a command to buy insurance, which could not be sustained under either the Interstate Commerce Clause or the Necessary and Proper Clause." *Texas v. U.S.*, 945 F.3d. 355, 387 n.32 (5th Cir. 2019). Congress could not mandate that people purchase insurance as a means to implement GICR. But Part III-A was "not the end of the matter." *NFIB*, 567 U.S. at 561.

In Part III-B, the chief justice considered if "the mandate may be upheld as within Congress's enumerated power to 'lay and collect Taxes.'" *Id.* at 561. He posited that "if the mandate is in effect just a tax hike on certain taxpayers who do not have health

insurance, it may be within Congress's constitutional power to tax." *Id.* at 563. If the individual mandate could be sustained under Congress's taxing power, then the Chief Justice's opinion should have ended with Part III-B. But the chief justice rejected that conclusion, explaining that "[t]he most straightforward reading of the mandate is that it commands individuals to purchase insurance." *Id.* at 562. Accordingly, the shared responsibility payment, as drafted by Congress, was *not* a tax. "In Part III-B, the Chief Justice wrote that even though the most natural reading of the individual mandate was unconstitutional, the Court still needed to determine whether it was 'fairly possible' to read the provision in a way that saved it from being unconstitutional." *Texas*, 945 F.3d. at 387 n.32.

B. Part III-C upheld § 5000A under a "saving construction."

In Part III-C, Chief Justice Roberts developed a "saving construction." *NFIB*, 567 U.S. at 575. He explained that "[t]he exaction the Affordable Care Act imposes on those without health insurance"—the shared responsibility payment—"looks like a tax in many respects." *Id.* at 563. He then listed three *guardrails* under which the "exaction" could be construed as a tax.

First, "[t]he '[s]hared responsibility payment,' as the statute entitles it, is paid into the Treasury by 'taxpayer[s]' when they file their tax returns." *Id.* (citation omitted). Second, "[f]or taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of

dependents, and joint filing status." *Id.* (citation omitted). Third, "[t]his process" of making the payments, "yields the *essential feature* of any tax: It produces at least some revenue for the Government." *Id.* at 564 (citation omitted) (emphasis added). These three guardrails are essential to the saving construction.

Only because § 5000A could be read to fit within those guardrails was the saving construction possible. "The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance *may reasonably be characterized* as a tax." *NFIB*, 567 U.S. at 574 (emphasis added). And "[b]ecause the Constitution permits such a tax," Section 5000A was constitutional as a whole. *Id.*

C. Part III-C, but not -B, held that § 5000A gave people a "lawful choice to do or not do a certain act."

Throughout the ACA litigation, only one judge found that the individual mandate on its own could be sustained by Congress's taxing power.[2] That argument did not look promising before this Court. As a result, the government advanced an alternate taxing-power argument: even if the individual mandate could not be sustained under Congress's taxing power, the Court should characterize the mandate as a choice between

---

[2] *Liberty Univ. v. Geithner*, 671 F.3d 391, 415 (4th Cir. 2011) (Wynn, J., concurring) ("I would uphold the constitutionality of the Affordable Care Act on the basis that Congress had the authority to enact the individual and employer mandates under its plenary taxing power").

maintaining insurance and paying a tax. The solicitor general contended that "Section 5000A imposes no consequence other than a tax penalty for a taxpayer's failure to maintain minimum coverage, and it thus establishes no independently enforceable legal obligation." Brief for Petitioners (Minimum Coverage Provision) at 60, *HHS v. Florida* (11-398), https://bit.ly/379EMaY.

Chief Justice Roberts adopted this alternate reading in Part III-C. Under the saving construction, § 5000A can be read to "leave[] an individual with a lawful choice" to purchase or forgo insurance, "so long as he is willing to pay a tax levied on that choice." *See NFIB*, 567 U.S. at 574. The chief justice added in a footnote, "[t]hose subject to the individual mandate" face a "lawful choice": they "may lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes." *Id.* at n.11. This holding expressly relied on the solicitor general's representation, which "confirm[ed] that if someone chooses to pay [the penalty] rather than obtain health insurance, they have fully complied with the law." *Id* at 568 (citing Brief for United States 60–61; Tr. of Oral Arg. 49–50 (Mar. 26, 2012)).

The saving construction treated § 5000A as a single entity: the mandate and the penalty, when fused together, presented some people with a "lawful choice." *See Texas*, 945 F.3d. at 389 (noting that Part III-C held that "the individual mandate *could be read in conjunction* with the shared responsibility payment in order to save the individual mandate from unconstitutionality") (emphasis added). This fusion, however, was inconsistent with Congress's design.

Some people were subject to the mandate, but not the penalty; the provisions were separate. This unnatural reading was permissible *only* for purposes of the saving construction.

Finally, Chief Justice Roberts expressly rejected the "lawful choice" argument in Part III-B. He stated that "[t]he most straightforward reading of the mandate is that it commands individuals to purchase insurance." *NFIB*, 567 U.S. at 563. *Amicus* agrees with both the chief justice and then-Judge Kavanaugh: "the statute as . . . written" did not present such a *lawful choice*. *See Seven-Sky v. Holder*, 661 F.3d 1, 47–48 (D.C. Cir. 2011) (Kavanaugh, J., dissenting as to jurisdiction). Section 5000A did "not just incentivize certain kinds of lawful behavior but [it] also *mandate*[d] such behavior." *Id.* (emphasis added). The mandate and the penalty are separate provisions. They cannot be fused together outside the confines of the saving construction.

D. Part III-D affirms that Part III-C's analysis is limited to the saving construction.

In her separate opinion, Justice Ginsburg criticized Chief Justice Roberts's decision. She found his "Commerce Clause essay"—that is, Part III-A—to be "puzzling." *NFIB*, 561 U.S. at 623 (Ginsburg, J., concurring in the judgment in part and dissenting in part). Why did the chief justice "strive so mightily to hem in Congress' capacity to meet the new problems arising constantly in our ever-developing modern economy?" *Id.* Why, she asked, did he have to decide that the individual mandate was beyond Congress's

power under the Commerce and Necessary and Proper Clauses if it was a valid exercise of the taxing power?

Chief Justice Roberts wrote a rejoinder in Part III-D, first noting that Justice Ginsburg "questions the necessity of rejecting the Government's commerce power argument, given that § 5000A can be upheld under the taxing power." *NFIB*, 567 U.S. at 574. The statute as written, however, cannot simply be "upheld under the taxing power" as she suggested. *Id.* The chief justice repeated that "the statute reads more naturally as a command to buy insurance than as a tax." *Id.* Courts usually adopt the most natural reading of statutes, rather than unnatural readings. "It is only because the Commerce Clause does not authorize such a *command* that it is necessary to reach the taxing power question." *Id* (emphasis added). He concluded that "it is only because we have a duty to construe a statute to save it, if fairly possible, that § 5000A can be interpreted as a tax." *Id.*

Justice Ginsburg returned the volley in a footnote. She acknowledged Chief Justice Roberts's statement that "the provision 'reads more naturally as a command to buy insurance than as a tax,'" but noted that he "ultimately concludes . . . that interpreting the provision as a tax is a 'fairly possible' construction." *NFIB*, 567 U.S. at 623 n.12 (Ginsburg, J.) (quoting *id.* at 563). Therefore, "a Commerce Clause analysis" was, to Justice Ginsburg, "not outcome determinative." *Id.*

Justice Ginsburg disagreed with the chief justice about *NFIB*'s precise judgment. If her characterization of the judgment were correct, then Parts III-A and -B would have been unnecessary. Chief Justice Roberts

could have jumped right to Part III-C and stated that § 5000A presented people with a "lawful choice."

In Part III-D, the chief justice explained why Justice Ginsburg's understanding was mistaken. He explained that he could only reach Part III-C after fully considering *and* rejecting the government's Commerce and Necessary and Proper Clause arguments in Part III-A. The saving construction was *only* permissible after the traditional methods of constitutional interpretation, based on the most natural reading of the statute, had failed. Likewise, the chief justice could only reach Part III-C after fully considering *and* rejecting the government's primary taxing power arguments in Part III-B. Justice Ginsburg did not fault Chief Justice Roberts for writing a "Taxing Power Essay," but her criticism of Part III-A would apply equally to Part III-B.

In short, Parts III-A and -B were necessary predicates for Part III-C. The chief justice did not unnecessarily decide constitutional questions, as Justice Ginsburg charged. Instead, he rejected the government's primary taxing power argument as inconsistent with the statute Congress drafted. Only after rejecting those arguments could he adopt an alternate reading that made § 5000A constitutional.

At the outset of her opinion, Justice Ginsburg wrote, "I agree with the chief justice that . . . the minimum coverage provision is a proper exercise of Congress' taxing power." *NFIB*, 567 U.S. at 589.[3] But

---

[3] In this litigation, California adopts Justice Ginsburg's characterization of *NFIB*. *See* Opening Brief for Petitioners, at 8

Chief Justice Roberts did not reach that conclusion. The proper holding is exactly as he described it in Part III-C: "The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance *may reasonably be characterized* as a tax" within the confines of the saving construction. *NFIB*, 567 U.S. at 574 (emphasis added).

But Part III-C is no longer available after the Tax Cuts and Jobs Act ("TCJA") zeroed out the penalty that Chief Justice Roberts had temporarily fused with the mandate. We are now left with only the holdings of Parts III-A and -B: the mandate cannot be supported by either the Commerce and Necessary Proper Clauses or Congress's taxing power. Those conclusions were true in 2012, and they remain true under the TCJA.

III. Plaintiffs Hurley and Nantz Assert the Same Injury that *NFIB*'s Private Plaintiffs Did

"The standing issues presented by the individual plaintiffs [Hurley and Nantz] are not novel." *Texas*, 945 F.3d at 378. Although *NFIB v. Sebelius* did not address standing, the Court would have had to find that the individual mandate inflicted an Article III injury on the two individual plaintiffs, Mary Brown and Kaj Ahlburg. Their injuries rested *entirely* on the individual mandate.

The individual plaintiffs here, Neill Hurley and

(citing *NFIB*, 567 U.S. at 574) ("The Chief Justice then announced the judgment of a majority of the Court that Section 5000A was lawful exercise of the taxing power.").

John Nantz, assert an even greater injury. Brown and Ahlburg had to take steps to obtain insurance before the mandate went into effect in 2014. Hurley and Nantz, however, are *currently* subject to the mandate. They do not merely anticipate a future injury.

Moreover, in *NFIB*, the chief justice considered, and apparently rejected, arguments that the mandate—standing alone, without the penalty—was "toothless." The command to purchase insurance is, by itself, sufficient to establish an Article III injury.

A. The private plaintiffs in *NFIB* asserted an Article III injury based on the mandate, not the penalty.

In *NFIB v. Sebelius*, the private plaintiffs provided the *sole* basis for standing to challenge the individual mandate. Mary Brown "object[ed] to being forced to obtain and maintain qualifying health insurance coverage for [herself] and [her] dependents, or to pay a penalty for failing to have such insurance." Declarations, *Florida v. HHS*, 3:10-cv-0091 (N.D. Fla. 2010), https://bit.ly/NFIBDeclarations. Brown stated that she would have to incur costs "[w]ell in advance of 2014" in order "[t]o comply with the individual mandate." *Id.* Despite these costs, she planned to obtain a qualifying policy, taking steps "to avoid being penalized for not complying when this requirement becomes effective" in 2014. *Id.* In other words, Brown would never pay the penalty. The *sole* basis of her injury was being subject to the individual mandate. Kaj Ahlburg submitted a similar declaration; he too planned to comply with the mandate, and would not have been subject to the penalty. *Id.*

Initially, the federal government argued that Brown and Ahlburg lacked standing, but the district court disagreed, finding that the individual mandate injured Brown. *Florida ex rel. Bondi v. HHS*, 780 F. Supp. 2d 1256, 1271 (N.D. Fla. 2011). On appeal, the government did "not dispute that plaintiff Brown's challenge to the minimum coverage provision is justiciable." *Florida ex rel. Att'y Gen. v. HHS*, 648 F.3d 1235, 1243 (11th Cir. 2011). Again, the Article III injury was based *solely* on the mandate.

Brown and Ahlburg maintained that posture before this Court. They were "not preemptively defending against the 'penalty' that § 5000A(b) would impose [in 2014] if they were to violate the mandate, but instead [were] attacking § 5000A(a)'s unconditional legal '[r]equirement' to purchase insurance in the first place." Brief for Private Respondents (Anti-Injunction Act) at 14, *HHS v. Florida* (11-398), https://bit.ly/AIABrief. The shared responsibility payment could not establish an Article III injury because the plaintiffs never planned to pay the penalty. Why? Brown and Ahlburg were "*law-abiding citizens* who intend[ed] to comply with the mandate unless it [was] invalidated." *Id.* (emphasis in original). They *only* challenged the mandate—and indeed, the penalty would not injure them.

B. Neill Hurley and John Nantz, the private plaintiffs here, assert an Article III injury based on the mandate, not the penalty.

There are two private plaintiffs here: Neill Hurley and John Nantz. Declarations, *Texas v. U.S.*, 4:18-cv-167 (N.D. Tex. 2018), https://bit.ly/TXDeclarations.

Since 2014, Nantz has been insured with ACA-compliant plans. *Id.* Nantz "enrolled in this plan because [he] was required by the ACA to do so; [he did] not believe it provide[d] sufficient value to warrant the cost." *Id.* Nantz "value[s] compliance with [his] legal obligations, and believe[s] that following the law is the right thing to do." *Id.* He added, "[t]he repeal of the associated health insurance tax penalty" by the TCJA "did not relieve [him] of the requirement to purchase health insurance." *Id.* Rather, he "continue[d] to maintain minimum essential health insurance coverage because [he was] obligated to comply with the Affordable Care Act's individual mandate, even though doing so is a burden to [him]." *Id.* Hurley submitted a similar declaration. *Id.*

Hurley and Nantz assert an Article III injury for the same reason that the *NFIB* plaintiffs asserted an Article III injury: the mandate imposes a legal obligation to buy insurance. Indeed, Hurley and Nantz have a more imminent injury: they need to maintain insurance *now*, whereas the *NFIB* plaintiffs had to make financial arrangements to buy insurance in the future. *Texas*, 945 F.3d at 380. Moreover, this injury is not self-inflicted, but flows directly from "[t]he most straightforward reading of the mandate," which "commands individuals to purchase insurance." *NFIB*, 567 U.S. at 562. This "novel course" is unlike other federal laws that have been challenged; the individual mandate took the unprecedented step of "directing individuals to purchase insurance." *Id.* at 572.

Hurley and Nantz are not alone. In 2008 and in 2017, the Congressional Budget Office (CBO) found that certain people would comply with an individual

insurance mandate, even without a penalty. *Texas*, 945 F.3d at 380 (citing CBO reports); *Texas v. United States*, 340 F. Supp. 3d 579, 602–03 (N.D. Tex. 2018) (same). This putative class could also assert the same Article III injury.

C. The TCJA did not render the individual mandate "toothless" for purposes of Article III standing.

The petitioning states ("California" for short) contend that "the TCJA rendered Section 5000A(a) toothless" because there are no longer any "'negative legal consequence[s]' of not buying health insurance."[4] This argument is also not novel. Indeed, *NFIB* considered and apparently rejected California's position in 2012.

During oral argument in *NFIB*, Chief Justice Roberts posed a question that largely presaged the jurisdictional inquiry here: "Why would you have a requirement that is completely toothless? You know, buy insurance or else. Or else what? Or else nothing." Transcript of Oral Arg. at 67, *HHS v. Florida* (Anti-Injunction Act), 567 U.S. 519 (2012), https://bit.ly/AIAArguments. Gregory Katsas, who represented plaintiffs Brown and Ahlburg, replied, "[b]ecause Congress reasonably could think that at least some people will follow the law precisely because it is the law." *Id.* His brief explained that the 2008 CBO report "readily confirms the common-sense

---

[4] Opening Brief for Petitioners, at 15, 38 (citations omitted). California raises this argument with respect to the merits, but it applies equally—and indeed primarily—to the standing inquiry.

proposition that the interest of law-abiding citizens in challenging burdensome legal requirements exists independently of the sanction that would be imposed for non-compliance." Brief for Private Respondents (Anti-Injunction Act), *HHS v. Florida*, at 15. Brief for the Federal Respondents, *Texas v. California*, at 34 ("Law-abiding citizens must comply with statutory commands whether or not any specific penalties are imposed for noncompliance."). This argument mirrors the one Hurley and Nantz advance. *See supra* Part III.B (discussing their declarations).

The Fifth Circuit highlighted another colloquy from *NFIB. Texas*, 945 F.3d at 378. Justice Kagan asked "whether [Katsas] thought 'a person who is subject to the [individual] mandate but not subject to the [shared responsibility payment] would have standing.'" *Id.* (citations omitted). Under Congress's design, some people were subject to the mandate, but were not subject to the penalty; for example, members of Indian tribes.[5] Katsas replied that such people would have standing, because they would be "injured by compliance with the mandate." *Id.* He explained, "when that person is subject to the mandate, that person is required to purchase health insurance. That's a forced acquisition of an unwanted good. It's a classic pocketbook injury." *Id.*

---

[5] *See supra* Part I (discussing five categories of people who were subject to the mandate but not the penalty). This structure further demonstrates that fusing the mandate and the penalty was not the most straightforward reading of Section 5000A, but was only permissible for purposes of the saving construction.

California argues that post-TCJA, Hurley and Nantz stand in a different position than did Brown and Ahlburg. On this reading, the two Texans are no longer subject to "any legal consequences." Opening Brief for Petitioners, at 31. California maintains that, because Hurley and Nantz no longer have to pay the penalty for failing to maintain insurance, they assert no cognizable injury.

This argument "conflates the merits" analysis from Part III-C of *NFIB* with the necessary "threshold inquiry of standing" in Part III-A. *See Texas*, 945 F.3d at 383. If the *NFIB* plaintiffs lacked an Article III injury, then the challenge to the mandate should have been dismissed for lack of subject matter jurisdiction. But *NFIB*'s standing analysis was apparently so obvious that Chief Justice Roberts did not even bother to address it. The plaintiffs asserted Article III injuries because they planned to purchase unwanted insurance policies to comply with the mandate, even though they would not be subject to the penalty. That analysis remains accurate, and reinforces the merits analysis: If the mandate creates a legal requirement, then it also creates an Article III injury. *Id.*

IV. The Individual Mandate Can No Longer Be Saved, Because the TCJA Zeroed Out the Shared Responsibility Payment

As explained above, *NFIB* did not uphold the constitutionality of the individual mandate by itself. Part III-A held that the mandate could not be sustained under the Commerce and Necessary and Proper Clause, while Part III-B held that it could not be sustained under Congress's taxing power. Instead,

the saving construction may be treated as a gloss on the ACA. The mandate and the shared responsibility payment were fused together in a way Congress did not intend. The mandate, standing by itself, was unconstitutional. Full stop.

Indeed, five justices found that the individual mandate was beyond Congress's enumerated powers. As a practical matter, because of the saving construction, this holding had very little salience. But this five-member bloc became quite important after the 115th Congress enacted the TCJA. Section 11081 of the TCJA reduced the penalty to $0. 131 Stat. 2054, 2092. As a result, § 5000A no longer complies with *NFIB*'s three guardrails.[6]

"Now that the shared responsibility payment amount is set at zero, the provision's saving construction is no longer available." *Texas*, 945 F.3d at 390. The 115th Congress peeled off the ACA's protective gloss. As a result, Section 5000A can no longer be treated as a single, fused entity. Instead, the unvarnished and unconstitutional individual mandate remains: "the 'most straightforward' reading of that provision [is] a command to purchase insurance." *Id.* (quoting *NFIB*, 567 U.S. at 562). Part III-C of *NFIB* is no longer controlling. Indeed, all citations to pages

---

[6] Some taxpayers may have deferred remittance of their shared responsibility payments. But "Chief Justice Roberts's saving construction was not a mere accounting exercise. . . . The opinion . . . was a constitutional framework based on certain reasonable assumptions and not an intricate balance sheet." Josh Blackman, *Undone: The New Constitutional Challenge to Obamacare*, 23 Tex. Rev. L. & Pol. 1, 18 (2018).

563–74 of Volume 576 of the U.S. Reports are not relevant here.

The TCJA's § 11081 did not create or restore or transform or resuscitate the individual mandate. Like the parrot from Monty Python's Flying Circus, the individual mandate remains dead to this day.

V. Under *Frost v. Corp. Comm'n of Oklahoma*, the Legislative "Will" of the 115th Congress That Enacted TCJA § 11081 Is a "Nullity"

Severability doctrine, which employs a purposivist analysis, does not neatly fit this case. Two Congresses, seven years apart, expressed different legislative wills. In 2010, the 111th Congress declared that the individual mandate was "essential" to GICR. *See supra* Part I. And in 2017, "with the benefit of hindsight," *Texas*, 945 F.3d at 400, the 115th Congress apparently found that the individual mandate was no longer "essential" to GICR.

If the Court were to defer to the legislative will of the 111th Congress, the severability analysis would consider the arguments presented in *NFIB*. On the other hand, if the Court were to defer to the will of the 115th Congress, the severability analysis would be straightforward: the unconstitutional individual mandate should be severed from the rest of the ACA.

Although California maintains that Congress's intent from 2010 is now irrelevant, *Frost v. Corporation Commission of Oklahoma*, 278 U.S. 515 (1929), instructs otherwise. *Frost* held that when a new statute renders an old statute unconstitutional, the "will" of the new legislature is treated as a

"nullity." *Id.* at 527–28. If the Court holds that TCJA § 11081 eliminated the saving construction, then the 115th Congress's actions are a "nullity." *Id.*

But the Court cannot enjoin § 11081 here. No party has challenged that provision; it is doubtful that *any* party would have standing to challenge a tax cut. In any event, California has waived this issue.

Frost cannot overcome the strictures of Article III, but it can inform the purposivist severability analysis. The legislative will of the 115th Congress, which flouted the saving construction, should be treated as a "nullity." Accordingly, the legislative will of the 111th Congress warrants deference with respect to severability.

A. Section 11081 of the TCJA Created a *Frosty* "Convergent Constitutional Violation" with Section 5000A of the ACA.

What should the Court do "when the original statute is held to be constitutional and a later Congress amends the statute in a way that makes a particular provision constitutionally infirm"? Opening Brief for Petitioners, at 40. *Frost*, a deeply rooted precedent, answers this question.

In *Frost*, an old Oklahoma "statute . . . was entirely valid." 278 U.S. at 526. When that original statute was "passed, it expressed the will of the Legislature which enacted it." *Id.* However, a subsequent "body sought to express its will by an amendment" that rendered the original statute unconstitutional. *Id.* at 526–27. The amendment by itself was valid; but when executed in conjunction with the original statute, a "convergent constitutional violation" was created. *See* James

Durling & E. Garrett West, *Severing Unconstitutional Amendments*, 86 U. Chi. L. Rev. Online 1, 8 (2018). The amendment thus had no legal effect: the later-in-time legislative "will" was deemed "a nullity" and the amendment was "powerless to work any change in the existing statute." *Id*. What is the "only valid expression of the legislative intent"? *Frost*, 275 U.S. at 527. The original "existing statute." *Id*.

Frost closely parallels *California v. Texas*. In 2012, this Court held ACA § 5000A to be constitutional because the shared responsibility payment resembled—but was not actually—a tax. In 2017, TCJA § 11081 zeroed out the shared responsibility payment. The 115th Congress thus eliminated the ACA's saving construction, such that only an unlawful mandate remains. And it cannot be saved.

In both *Frost* and *Texas*, there were two provisions that, standing alone, would be constitutional. And in both cases, when the provisions were combined, they clashed. These provisions cannot have legal force simultaneously. Either (1) the individual mandate is unconstitutional or (2) § 11081 is unconstitutional. *Frost* suggests that the proper result is the latter.

B. But the Court cannot enjoin TCJA § 11081.

In the abstract, *Frost* teaches that the way to resolve the "convergent constitutional violation" would be to enjoin § 11081 of the TCJA. But federal courts do not deal in abstractions. They can only decide concrete cases and controversies. And this case does not permit the Court to halt § 11081.

First, none of the parties in this case have Article III standing to challenge the tax cut. Section 11081 does not inflict a pocketbook injury; it eliminates one.

Second, the plaintiffs have not asked the Court to enjoin § 11081 to remedy the injury caused by the individual mandate.[7] Federal courts cannot flip through the U.S. Code with a "blue pencil" to strike out one statute, which was not challenged, to save another, even in the unique context of a *Frosty* "convergent constitutional violation." *See Murphy v. NCAA*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring).

Third, California has waived this issue. It did not seek leave to file a cross-complaint that challenged the constitutionality of § 11081.[8] Instead, California requested this alternate remedy in its opposition to a motion for preliminary injunction, and on appeal.[9] On remand, California can challenge § 11081 to preserve *NFIB*'s saving construction. But this case does not present such a claim.

---

[7] See Blackman, *Undone*, *supra* at 44–46 (discussing when the Court is bound by plaintiffs' requested relief).

[8] Maryland's attorney general—an *amicus* here—expressly sought such relief. Amended Complaint at 33, *Maryland v. U.S.*, 360 F. Supp. 3d 288 (D. Md. 2019), https://bit.ly/2YhRVen.

[9] Brief in Opposition at 24, *Texas v. U.S.* (N.D. Tex. 2018), https://bit.ly/2zj399X (citing *Frost*, 278 U.S. 515). State Defendants' Reply Brief at 16 n.10, *Texas v. U.S.* (5th Cir. 2019), https://bit.ly/2A98kd3 (same). *See Texas*, 340 F.Supp.3d at 718 n.34. California and its *amici* have not cited *Frost* here.

In sum, *Frost* cannot overcome the strictures of Article III. As a result, the menu of available remedies here is limited: to remedy the plaintiffs' injuries, and eliminate the "convergent constitutional violation," the Court can only declare unconstitutional the individual mandate. But if the individual mandate is declared unconstitutional, *Frost* can still inform the severability analysis.

C. The 115th Congress's legislative "will" should be deemed a "nullity" because it flouted *NFIB*'s saving construction.

When amending a statute, members of Congress must consider whether that change violates the Constitution. Perhaps creating an exception to a law would violate the Equal Protection Clause, which was the case in *Frost*. Or an amendment may render the original statute vague and thus violate the Due Process Clause. But when the TCJA amended the ACA, the normal constitutional calculus changed. A routine legislative change—reducing a penalty—was perfectly constitutional in the abstract. But that change ran afoul of *NFIB* itself, removing the only way to save the individual mandate.

Amicus is unaware of any other time when Congress amended a statute in a way that eliminated a constitutional saving construction. Members of the 115th Congress can be forgiven for not considering the unusual ramifications of their actions. *See Bostock v. Clayton County*, No. 17-1618, slip op. at 2 (U.S. June 15, 2020) ("Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them."). Senators and representatives, as

well as the president, could have believed in good faith that reducing the penalty to $0 would not affect any other portion of the ACA. And that understanding should be entitled to the due deference warranted to coordinate branches of government.

If the Court concludes that § 11081 did not affect the saving construction, then the legislative will of the 115th Congress should prevail. If the Court concludes that the TCJA eliminated *NFIB*'s saving construction, however, then deference to that Congress's judgment would be misplaced. Under *Frost*'s logic, a legislative "will" that flouts a saving construction must be treated as a "nullity." 278 U.S. at 527–28.

For now at least, the tax cut must remain on the books. Congress could certainly repeal § 11081, which would restore the saving construction.[10] But the will of the 115th Congress, at least for purposes of severability analysis, is not entitled to deference.

Instead, in this unique posture, the will of the 111th Congress "must stand as the only valid expression of the legislative intent." *Id.* at 527. The findings in 42 U.S.C. § 18091(2), which have not been repealed, provide a strong indication of that intent. *See supra* Part I. Indeed, these findings may be the *best evidence* of that intent: they are in the text of the statute, and not in amorphous legislative history.[11]

---

[10] *See* Blackman, *Undone*, *supra* at 28 (discussing Schrödinger's mandate).

[11] *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2148 (2016) (suggesting that "courts might institute a new default rule: sever an offending provision

Given those statutory findings, GICR cannot be enforced in the absence of the individual mandate. The Justice Department advanced that position in 2012, and at the outset of this litigation. Given the unique intervening saving-construction-destroying statutory amendment, *amicus* now agrees.

VI. The Individual Mandate Is Unconstitutional, So GICR Can Be Declared Unenforceable for Individual-Market, Off-Exchange Policies

The individual mandate is unconstitutional. Moreover, in light of *Frost* and the 111th Congress's statutory findings, the ACA's GICR provisions cannot be enforced without the individual mandate. But in this case, it is not necessary to permanently enjoin GICR in all contexts. Instead, courts can "fashion a remedy that actually redresses Plaintiffs' harms." *Collins v. Mnuchin*, 938 F.3d 553, 611 (5th Cir. 2019) (Oldham, J. joined by Ho, J., concurring in part and dissenting in part). And the Justice Department concurs with this approach. *See Texas*, 945 F.3d at 399; Brief for the Federal Respondents, *California v. Texas*, at 12 ("But the relief the Court orders should be limited to redressing the injury actually incurred—that is, the relief should reach only the enforcement of the ACA provisions that injure the individual plaintiffs."). To be sure, that analysis can be performed on remand, as the Fifth Circuit instructed, but it can also be done by this Court based on the record.

---

from the statute to the narrowest extent possible unless Congress has indicated otherwise in the text of the statute").

In his declaration, plaintiff Nantz stated that his "preferred insurance option" would include plans that do not meet the ACA's minimum standards: for example, "basic catastrophic insurance" or "reasonably-priced insurance coverage that is consumer-driven in accordance with [his] actuarial risk." Declarations, *Texas v. U.S.* (N.D. Tex. 2018), https://bit.ly/TXDeclarations. But purchasing some of these kinds of policies would not comply with § 5000A(a). These injuries flow directly from the individual mandate and GICR. Any remedy for the plaintiffs can be fashioned to address their precise Article III injury.

There are "four health care markets [that have been] reshaped by the ACA." Brief of AHIP as *Amicus Curiae* at 18. First, the ACA regulates "the individual market (on and off the exchanges)." *Id.* Second, the ACA regulates "large and small group health coverage" plans offered by "employers." *Id.* at 21. Third, "36 states and the District of Columbia have expanded Medicaid . . . pursuant to the ACA." *Id.* at 23. And fourth, the ACA modified Medicare. *Id.* at 27.

The second, third, and fourth markets are not relevant to plaintiffs Hurley and Nantz. They are not eligible for insurance through an employer, Medicaid, or Medicare. Declarations, *supra.* It would be inconsistent with Article III for courts to take any action with respect to those markets. *See NFIB*, 567 U.S. at 696–97 (joint dissent) ("[T]hose portions of the Act that none of the parties has standing to challenge cannot be held nonseverable."). The only relevant market in this case is the individual market.

The individual market has two segments: insurance purchased *on* the ACA exchanges and insurance purchased *off* the ACA exchanges. The remedy for the latter market is more straightforward: declare the individual mandate unconstitutional and, for off-exchange policies, the GICR unenforceable. This remedy would eliminate the requirement to buy ACA-compliant insurance and allow the plaintiffs to purchase policies of their own choosing, or none at all. Of course, insurance providers may voluntarily comply with GICR. There is no guarantee any company would even supply plans that meet Hurley and Nantz's demands. And states may impose their own GICR regulations on insurance. But a narrow remedy in this case would remedy the plaintiffs' injuries.

The analysis for individual market, on-exchange policies is different. Hurley and Nantz are not eligible for subsidies. Declarations, *supra*. But they could still purchase an unsubsidized plan on the exchanges. Halting GICR with respect to policies sold *on* the exchanges would be an unnecessarily overbroad remedy. So long as the plaintiffs can purchase off-market non-compliant plans, or none at all, their injuries will be remedied. Plaintiffs cannot demand a greater remedy to alter *all* policies offered on government exchanges. Moreover, people who seek to buy a government-sponsored product on a government exchange cannot complain about cumbersome regulations.[12] Courts need go no further than issue a

---

[12] This narrow remedy would address concerns raised by the Federal Respondents about creating a "potentially unstable insurance market." *See* Brief for the Federal Respondents at 44–

declaration with respect to individual market, off-exchange policies. "[T]he judicial power is, fundamentally, the power to render judgments in individual cases." *Murphy*, 138 S. Ct. at 1485 (Thomas, J., concurring). No more, and no less.

Hurley and Nantz, meanwhile, and all those who object to being forced to purchase unwanted policies, will have other options.

CONCLUSION

The judgment below should be affirmed in part and reversed in part, declaring the individual mandate unconstitutional and GICR unenforceable for individual market off-exchange policies. Unlike in 2012, this "scalpel"-like remedy is now a better legal fit than "no [ACA] at all." *Seila Law LLC v. CFPB*, No. 17-1618, slip op. at 35 (U.S. June 29, 2020).

Respectfully submitted,

JOSH BLACKMAN
1303 San Jacinto Street
Houston, TX 77002
202-294-9003
josh@joshblackman.com

ILYA SHAPIRO
Counsel of Record
Cato Institute
1000 Mass. Ave., NW
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

July 2, 2020

---

45. The executive branch could also require insurance providers on the exchanges to comply with the ACA's GICR provisions, regardless of the outcome of this litigation.