IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

TEXAS, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Civil Action No.: 4:18-cv-00167-O

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN ACADEMY OF FAMILY PHYSICIANS, THE AMERICAN COLLEGE OF PHYSICIANS, THE AMERICAN ACADEMY OF PEDIATRICS, AND THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Local Rule 7.2(b), the American Medical Association, the American College of Physicians, the American Academy of Family Physicians, the American Academy of Pediatrics, and the American Academy of Child and Adolescent Psychiatry respectfully move for leave to file an *amici curiae* brief in opposition to Plaintiffs' Application for Preliminary Injunction. This motion is unopposed.

1. The **American Medical Association** (AMA) is the largest professional association of physicians, residents and medical students in the United States. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all US physicians, residents and medical students are represented in the AMA's policy making process. AMA members practice in every state and in every medical specialty. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes.

2. The **American College of Physicians** (ACP) is the largest medical specialty organization in the United States with members in more than 145 countries worldwide. ACP membership includes 152,000 internal medicine physicians (internists), related subspecialists, and medical students. Internal medicine physicians are specialists who apply scientific knowledge and clinical expertise to the diagnosis, treatment, and compassionate care of adults across the spectrum from health to complex illness.

3. The **American Academy of Family Physicians** is the national medical specialty society representing family physicians. Founded in 1947, its members are physicians and medical students from every state.

4. Founded in 1930, the **American Academy of Pediatrics** (AAP) is a national, not-for-profit organization dedicated to furthering the interests of children's health. Since AAP's inception, its membership has grown from 60 pediatricians to over 66,000 primary care pediatricians, pediatric medical subspecialists, and pediatric surgical specialists. Over the past 80 years, AAP has become a powerful voice for children's health through education, research, advocacy, and the provision of expert advice.

5. The **American Academy of Child and Adolescent Psychiatry** (AACAP) is a medical membership association established by child and adolescent psychiatrists in 1953. Now over 9,300 members strong, AACAP is the leading national medical association dedicated to treating and improving the quality of life for the estimated 7-15 million American youth under 18 years of age who are affected by emotional, behavioral, developmental and mental disorders. AACAP's members actively research, evaluate, diagnose, and treat psychiatric disorders, and pride themselves on giving direction to and responding quickly to new developments in addressing the health care needs of children and their families.

6. This Court has broad discretion to accept *amicus* filings. *See Gudur v. Deloitte Consulting LLP*, 512 F. Supp. 2d 920, 927 (S.D. Tex. 2007). *Amicus* filings should be allowed when "the proffered information is timely and useful or otherwise necessary to the administration of justice." *Long v. GSD & M Ideal City LLC*, No. 3:11-cv-1154-O, 2014 WL 11321670, at *4 (N.D. Tex. Aug. 8, 2014). As the premier national association representing the medical profession, *amici* are in a unique position to provide the Court with insights and perspectives regarding the Affordable Care Act that are not available to the parties to the pending action.

7. Neither *amici* nor counsel received any monetary contributions intended to fund preparing or submitting this brief. No party's counsel authored this brief in whole or in part.

8. The proposed *amici* brief is being timely submitted within seven days of the Federal Defendants' Memorandum In Response to Plaintiffs' Application for Preliminary Injunction. *See Club v. Fed. Emergency Mgmt. Agency*, No. H-07-0608, 2007 WL 3472851, at *1 n.1 (S.D. Tex. Nov. 14, 2007) ("An amicus curiae must file its brief . . . no later than 7 days after the principal brief of the party being supported is filed"); *cf.* Fed. R. App. P. (a)(6) (in the appellate context, a motion for leave to file an amicus brief should be filed no later than seven days after the principal brief of the party being supported is filed).

9. Counsel to Federal Defendants consent to the filing of this motion and the *amici* brief. Counsel to Intervenor-Defendants consent to the filing of this motion and the *amici* brief. Counsel to Plaintiffs have no objection to this motion or the filing of the *amici* brief.

CONCLUSION

The Court should grant the motion for leave to file an amicus brief in opposition to Plaintiffs' motion for preliminary injunction.

DATED: June 14, 2018

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Counsel for Movants conferred by email on May 31, 2018, with Counsel to Federal Defendants, Counsel to Intervenor-Defendants, and Counsel to Plaintiffs regarding the relief sought in this motion. No counsel opposed the filing of this *amicus* brief.

/s/ Tiffanie S. Clausewitz

CERTIFICATE OF SERVICE

On June 14, 2018, a copy of the forgoing document was served on all counsel of record via the Court's CM/ECF system.

/s/ Tiffanie S. Clausewitz

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

TEXAS, WISCONSIN, ALABAMA, ARKANSAS, ARIZONA, FLORIDA, GEORGIA, INDIANA, KANSAS, LOUISIANA, PAUL LEPAGE, Governor of Maine, GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI, MISSOURI, NEBRASKA, NORTH DAKOTA, SOUTH CAROLINA, TENNESSEE, UTAH, WEST VIRGINIA, NEILL HURLEY, and JOHN NANTZ,

Plaintiffs

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ALEX AZAR, in his Official Capacity as SECRETARY OF HEALTH AND HUMAN SERVICES, UNITED STATES INTERNAL REVENUE SERVICE, and DAVID J. KAUTTER, in his Official Capacity as Acting COMMISSIONER OF INTERNAL REVENUE,

Defendants

Civil Action No.: 4:18-cv-00167-O

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN ACADEMY OF FAMILY PHYSICIANS, THE AMERICAN COLLEGE OF PHYSICIANS, THE AMERICAN ACADEMY OF PEDIATRICS, AND THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY AS *AMICI CURIAE* N OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTERESTS OF AMICI CURIAE

Amici are professional associations of physicians, residents, and medical students. *Amicus* American Medical Association is the largest such association in the United States. The other *amici* are national specialty medical societies that represent their members in matters of public concern. Descriptions of each *amicus* are included in their Motion for Leave to File.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under our Constitution, federal courts decide only "cases or controversies." U.S. Const. art. 3, § 2. The judicial power does not extend to settling policy disputes or exercising general supervision over the other branches of the federal government. Respecting these separation-of-powers constraints is vital to preserving the judiciary as an institution of law and not politics, and to ensuring that federal policy is made by a democratically accountable Congress and Executive.

The arguments advanced by Plaintiff-States (and the two individuals aligned with them) would effectively destroy those constraints. Having failed many times to persuade Congress to repeal the Affordable Care Act ("ACA" or "the Act"), Plaintiffs ask this Court to step in and do what Congress would not. *See* C. Stephen Redhead & Janet Kinzer, Cong. Research Serv., R43289, *Legislative Actions in the 112th, 113th, and 114th Congresses to Repeal, Defund, or Delay the Affordable Care Act* 14-20 (February 7, 2017) (cataloging dozens of examples in which Congress voted down attempts to repeal the ACA). But the outcome that Plaintiffs seek would do violence to multiple precepts that guide and limit the exercise of the judicial power.

To begin with, the individual Plaintiffs do not come close to satisfying the bedrock requirements of Article III standing. *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990) (because federal courts lack the power to act absent standing, they must independently consider it even if the parties fail to raise it). The ACA provision Plaintiffs challenge—26 U.S.C. § 5000A—does not injure them in any way. After 2018, the individual Plaintiffs can make any

choice they want about health insurance. Section 5000A will have no bearing on that choice, so it cannot injure them.

The States similarly lack any cognizable injury. Section 5000A does not even apply to the States. And the indirect harms they advance to establish standing are precisely the kinds of vague, speculative claims that the Supreme Court consistently rejects as inadequate. *See infra* at 10. The States insist that some unknown number of their citizens will misinterpret § 5000A as requiring them to have insurance and will enroll in Medicaid or the Children's Health Insurance Program (CHIP) based on that error, thus increasing the States' costs. But every one of these hypothetical new eligible enrollees has a legal entitlement to sign up for Medicaid or CHIP, irrespective of § 5000A, whatever their motivation. So even if one accepted the States' unsupported speculation that a few such people might behave in the manner the States hypothesize, any increased costs cannot possibly count as a cognizable injury. Nor can the States establish standing to challenge § 5000A by asserting that *other* provisions of the ACA injure them. Binding precedent forecloses that bank-shot approach to standing. *See infra* at 12-13; *Nat'l Fed'n of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202 (5th Cir. 2011). It should go without saying that because they have not been injured, Plaintiffs cannot invoke the power of an Article III court.

Indeed, it is difficult to imagine a case that more vividly confirms the importance of respecting Article III's standing requirements than this one. "Article III standing is built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 750 (1984). The standing requirement is "an apolitical limitation" that "promote[s] a conception that judicial power is properly limited in a democratic society." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993). It prevents political interests of whatever

stripe from resorting to the "unelected, life-tenured judiciary" when they cannot achieve their goals through the democratic process. *Id*. at 1220; *see* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983) (standing protects against "overjudicialization of the process of self-governance"). One does not have to dig far beneath the surface to see that the matter now before this Court is precisely what Article III standing limitations are designed to prevent. The plaintiffs do not seek redress for any real, concrete injury because they have suffered none. They simply seek to change the federal government's health care policy through the courts, rather than through the legislature.

Amici have acknowledged that the ACA has flaws and policymakers need to fix the problems, gaps, and unintended consequences of this law. They have consistently advocated that position before Congress. But they disagree with any attempt to erase key features of the ACA.[1] And more fundamentally, *amici* believe that these are judgments for Congress—not the courts.

The merits of Plaintiffs' challenges to § 5000A reflect a similar disregard for the limits of the judicial power. Striking down an Act of Congress "is the gravest and most delicate duty that [a] Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring). Here, however, Plaintiffs ignore binding Fifth Circuit precedent that *expressly rejected* Plaintiffs' contention that a law cannot be upheld as an exercise of Congress's tax power unless it actually raises revenue. *United States v. Ardoin*, 19 F.3d 177 (5th Cir. 1994). And

[1] *See* Joint Recommendations on Priorities for Coverage, Benefits and Consumer Protections Changes (February 2, 2017) (available at: https://www.aafp.org/dam/AAFP/documents/advocacy/campaigns/ST-CoveragePriorities-020217.pdf) ("[W]e urge Congress and the new administration to preserve essential coverage, benefits and consumer protections as established by current law, including the Affordable Care Act (ACA); we also acknowledge the need for additional reforms and improvements to address continued barriers to care and ensure a health care system optimized for patients and their physicians."); Press Release, American Medical Association, AMA Urges Senate to Reject Efforts to Repeal or Replace ACA (July 21, 2017) (available at: https://www.ama-assn.org/ama-urges-senate-reject-efforts-repeal-or-replace-aca) (same).

Plaintiffs' theory makes little sense. As Plaintiffs would have it, a tax law designed to deter particular conduct would become a constitutional victim-of-its-own-success if it achieved its aim of "definitely deter[ring] the activities" that Congress taxed. *United States v. Sanchez*, 340 U.S. 42, 44 (1950). Longstanding precedent forecloses that illogical position. *See infra* at 18.

Even if § 5000A were unconstitutional as a stand-alone matter, firmly-established and neutral principles of law dictate that § 5000A must be severed from the rest of the ACA, which can and should remain fully in force. The "touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature." *NFIB v. Sebelius*, 567 U.S. 519, 586 (2012) (citation omitted). Yet that is precisely what Plaintiffs ask this Court to do. The actions of the *2017* Congress leave no doubt about its intent: Congress reduced to zero the tax liability for failing to have minimum essential coverage, but it left the ACA otherwise unchanged. Congress has thus already decided that the remainder of the law's provisions—the protections for people with pre-existing conditions, the Medicaid expansion, and the rest of the law—should continue to be enforced as they were before the Tax Cut and Jobs Act of 2017 was enacted. That dispositively answers the severability question. Properly understood, "severability is fundamentally rooted in a respect for separation of powers and notions of judicial restraint." *Florida v. United States Dep't of Health and Human Servs.*, 648 F.3d 1235, 1320-21 (11th Cir. 2011). Respect for those principles requires that § 5000A be severed from the rest of the ACA. *See infra* at 19-23.

Congress declined to do what the Plaintiffs ask this Court to do for a reason: the consequences of repealing the ACA would be staggering. *Infra* at 24-25. The ACA "expand[ed] access to affordable, quality health insurance," and "millions of Americans have gained coverage" under the statute. American Medical Association, *Report of the Council on Medical*

Service: Health Insurance Affordability at 6 (2017). Plaintiffs' proposed remedies, however, would strip health care from tens of millions of Americans who depend on the ACA; produce skyrocketing insurance costs; and sow chaos in the nation's health care system. Each guardrail of judicial restraint addressed in this brief—standing, constitutional avoidance, and severability—ensures that the proper branch of government determines whether to impose serious consequences. *E.g.*, Neil Gorsuch, *Of Lions and Bears, Judges and Legislators, and The Legacy of Justice Scalia*, 66 Case W. Res. L. Rev. 905, 911, (2016) (noting that "the legislative and judicial powers [are] distinct by nature," and that "legislators may appeal to their own moral convictions and to claims about social utility to reshape the law as they think it should be in the future. But that judges should do none of these things in a democratic society").

As is appropriate, elected and accountable officials at the federal and state level continue to debate how best to ensure the provision of quality health care to the American people. *See, e.g.*, American Medical Association, *Report of the Council on Medical Service: Ensuring Marketplace Competition and Health Plan Choice* at 4–5 (2018) (listing bills proposed in Congress); *id.* at 3 (listing actions taken by state governments). It may well be that these critical objectives could be better met by amending the ACA or through an alternative approach. But invalidating the Act's protections against discrimination based on pre-existing conditions—or, even worse, invalidating the *entire* ACA—would jeopardize the "[h]istoric gains in health insurance coverage [that] have been achieved since the implementation of the Affordable Care Act," which have benefited millions of patients and the American health system alike.[2] Only now, these consequences would come about as a result of the actions of an unelected judiciary—

[2] Department of Health and Human Services, ASPE Issue Brief, *Affordable Care Act Has Led to Historic, Widespread Increase in Health Insurance Coverage* 1 (September 29, 2016) (available at: https://aspe.hhs.gov/system/files/pdf/207946/ACAHistoricIncreaseCoverage.pdf).

not through reasoned, democratic legislative debate. This Court should reject Plaintiffs' invitation to take that fateful step.

ARGUMENT

I. Plaintiffs Lack Article III Standing

"The doctrine of standing implements [the] fundamental principle of judicial restraint." *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 283 (5th Cir. 1996) (Jones, J., dissenting). It ensures that courts confine themselves to their properly limited role, and avoids embroiling courts in political disputes that our Constitution assigns to the democratically accountable branches of government. *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011) ("Continued adherence to the case-or-controversy requirement of Article III maintains the public's confidence in an unelected but restrained Federal Judiciary."). To establish Article III standing, a plaintiff must "prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). This inquiry is "especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819 (1997). Neither the individual Plaintiffs nor the States can satisfy these requirements.

A. The Individual Plaintiffs Lack Standing Because It Is Their Voluntary Choice to Purchase Minimum Essential Coverage

The individual Plaintiffs have no standing because they have suffered no cognizable injury from § 5000A. Plaintiffs may not "manufacture standing merely by inflicting harm on themselves." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013); *see Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (no standing where a plaintiff was "complain[ing] about

damage inflicted by its own hand"). Just four months ago, the Fifth Circuit reaffirmed that "standing cannot be conferred by a self-inflicted injury." *Zimmerman v. City of Austin*, 881 F.3d 378, 389 (5th Cir. 2018); *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 358 (5th Cir. 1999) ("An organization cannot obtain standing to sue in its own right as a result of self-inflicted injuries."). Yet that is exactly what the individual plaintiffs attempt to do here. They seek to leverage their own voluntary decisions to purchase minimum essential coverage into cognizable injuries-in-fact. But any costs incurred by their choices are entirely "self-inflicted" and therefore cannot give rise to Article III standing. *Clapper*, 568 U.S. at 419.

The individual Plaintiffs' *only* asserted basis for Article III standing is that § 5000A(a) "force[s them] to purchase . . . health insurance that they neither need nor want." Pl.'s Br. Prelim. Inj. 41 (Pl.'s Br.), Dkt. No. 40 (April 26, 2018); *id*. at 40 & n.5. "This is because," Plaintiffs insist, "even without an accompanying tax, the individual mandate is just that—a mandate." *Id*. But that is untrue. The Supreme Court has expressly held that § 5000A(a) does *not* require anyone to purchase minimum essential coverage, and the 2017 amendments do nothing to disturb that holding. In fact, the 2017 amendments reinforce the Court's conclusion that § 5000A(a) can be read to provide a choice—not a mandate.

NFIB held that the minimum essential coverage provision is *not* "a legal command to buy insurance." 567 U.S. at 563. Instead, *NFIB* held that every individual has "a lawful *choice*" to purchase or not purchase health insurance. *Id.* at 574 (emphasis added). The Court explained that, under the pre-2017 version of § 5000A, a person who elected not to purchase insurance would simply need to "make an additional payment to the IRS when he pa[id] his taxes." *Id.* at 562–63. Notwithstanding this financial disincentive, the Congressional Budget Office (CBO) estimated (before the original passage of the ACA) that four million people each year would

elect not to buy insurance and would instead pay the tax to the Internal Revenue Service. *Id.* at 568. Given these predictions, *NFIB* reasoned: "That Congress apparently regard[ed] such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws," but instead "merely impos[ing] a tax citizens *may lawfully choose* to pay in lieu of buying health insurance." *Id.* (emphasis added).

The 2017 amendments to the minimum coverage provision only reinforce *NFIB*'s determination that § 5000A(a) imposes a choice—not a mandate. As an initial matter, it is critical that *NFIB* "definitively and unambiguously" interpreted § 5000A as presenting covered individuals with a choice. *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514, 1520 (2017). As such, "the only question [this Court] must answer is whether Congress changed the meaning of [§ 5000A] when it amended [the provision governing the amount of the tax penalty]." *Id.* "When Congress intends to effect a change of that kind,"—*e.g.*, a "settled construction" of a statute—"it ordinarily provides a relatively clear indication of its intent in the text of the amended provision." *Id.* But here, the 2017 provision did not alter the core component of § 5000A(a)—the so-called "individual mandate." All Congress did was reduce the amount of tax that one must pay for choosing not to purchase minimum essential coverage. That amendment does not indicate—let alone clearly indicate—Congress's intent to overrule *NFIB* by transforming § 5000A from a choice to a mandate. Under bedrock principles of statutory interpretation, the individual Plaintiffs continue to have a choice whether to purchase minimum essential coverage.[3]

[3] *See Epic Sys. Corp. v. Lewis*, 2018 WL 2292444, at *8 (May 21, 2018) (Gorsuch, J.) ("[I]n approaching a claimed conflict, we come armed with the 'stron[g] presum[ption]' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute. *United States v. Fausto*, 484 U. S. 439, 452, 453 (1988). . . . Allowing judges to pick and choose between statutes risks transforming

Even more to the point, the 2017 amendments have only made the choice easier for those who wish not to purchase minimum essential coverage. By reducing to $0 the tax associated with choosing not to purchase minimum coverage, Congress removed the "*only* consequence" of not purchasing health insurance. *NFIB*, 567 U.S. at 562 (emphasis added). Come January 2019, the individual Plaintiffs can still "lawfully" elect not to have any health insurance at all, *id.* at 568, and suffer *no financial harm* from that choice. They are entirely free to "switch to alternative, less expensive plans that do not provide 'minimum essential coverage,'" Pl.'s Br. 42, and they will pay *no tax* as a result of doing so.[4] Put simply, the individual Plaintiffs will not pay a penny if they choose not to obtain minimum essential coverage. They may voluntarily decide to purchase that coverage, but the *only* specific statutory provision they challenge in their lawsuit will have no bearing on that choice. *See* Compl. ¶¶ 41, 52, 57 (Dkt. 1). If they nonetheless decide to pay for minimum essential coverage that they neither "need nor want," Pls.' Br. at 41, it is only because they are "choosing to" inflict those costs on themselves, *Clapper*, 568 U.S. at 402. Supreme Court and Fifth Circuit precedent hold that their voluntary choice cannot form the basis for Article III standing, and so the their claims must be dismissed.

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them from expounders of what the law is into policymakers choosing what the law should be. Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them."); Antonin Scalia & Bryan Garner, *Reading Law* 331 (2012) ("A clear, authoritative judicial holding on the meaning of a particular provision should not be cast in doubt and subjected to challenge whenever a related though not utterly inconsistent provision is adopted in the same statute or even in an affiliated statute").

[4] Plaintiffs contend that "the word 'shall' is mandatory," Pl.'s Br. 41–42, and its use in § 5000A(a) shows that they are "forced" to purchase health care by the statutory provision. But *NFIB* already rejected that interpretation of the meaning of "shall" in § 5000A(a). Relying on *New York v. United States*, 505 U.S. 144, 170 (1992), the Court read § 5000A(a)'s use of the word "shall" as imposing "'incentives,'" and not "commands." 567 U.S. at 568 & n.10; *see Gutierrez de Martinez v. Lamango*, 515 U.S. 417, 432 n.9 (1995) ("[L]egal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.'"). The fact that Congress chose to alter the incentive structure in 2017 does not require this Court to read § 5000A as imposing a command or to abandon the constitutional avoidance principles that the Court applied in *NFIB*.

B. The State-Plaintiffs Lack Standing Because Their Alleged Injury from the Minimum Essential Coverage Provision Is Even More Attenuated and Speculative Than That of the Individual Plaintiffs

The States seek to establish Article III standing to challenge § 5000A by claiming that they "will have to pay substantial and unrecoverable amounts in Medicaid and CHIP reimbursements because the individual mandate forces people into these programs." Pl.'s Br. 42. Critically, the States do *not* allege that § 5000A imposes any direct effects on them. The injury they claim is entirely derivative. It rests on what third parties may voluntarily elect to do. Article III, however, does not permit federal courts "to redress injury … that results from the independent action of some third party not before the court." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976).

The States appear to recognize the fatal flaw in their argument. They strain to contend that individual decisions to enroll in Medicaid and CHIP are "not a product of 'unfettered choices made by independent actors,'" Pl.'s Br. at 42 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989). Like the individual Plaintiffs, the States insist that they have standing because any costs they incur under the Medicaid and CHIP programs are a "necessary and intended consequence of the ACA, which requires covered individuals to secure health insurance." *Id.*

The ACA requires no such thing. *See supra* at 7-9. Section 5000A provides covered individuals with a *choice* whether to obtain minimum essential coverage. The fact that some of the States' citizens may freely decide to obtain such coverage, and that some subset may further choose to obtain minimum essential coverage by enrolling in Medicaid or CHIP, cannot confer standing on the States. Quite the contrary. If a State incurs higher costs through Medicaid and CHIP enrollment, those costs would be the result of independent choices of third parties, whose self-inflicted harm cannot manufacture standing for themselves—let alone for the once-removed States. *Clapper*, 568 U.S. at 416. And those who do choose to enroll in Medicaid or CHIP

would have the same legal entitlement to do so whether § 5000A remained on the books or not.[5] It is simply false to assert that § 5000A "forces" anyone to enroll in the programs.

The facts here thus provide an even weaker basis for Article III standing than in *Clapper*. There, the Court denied standing "based on costs [respondents] incurred in response to a speculative threat." *Id.* at 416. The Court explained that "if the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear." *Id*. Here, it is worse than that. Section 5000A imposes no financial cost on anyone. That the individual Plaintiffs—along with "only a small number of [other] people," Congressional Budget Office, *Repealing the Individual Health Insurance Mandate: An Updated Estimate* (November 2017)—might nevertheless choose to purchase minimum essential coverage does not enable them to "secure a lower standard for Article III standing," even if they made those purchases based on an incorrect understanding of the law. *Clapper*, 568 U.S. at 416. It simply makes their decision irrational. *See id*. ("As Judge Raggi accurately noted, under the Second Circuit panel's reasoning, respondents could, 'for the price of a plane ticket, . . . transform their standing burden from one requiring a showing of actual or imminent . . . interception to one requiring a showing that their subjective fear of such

[5] Section 5000A does not independently create eligibility for CHIP or Medicaid. All it does is provide that coverage under those programs satisfies the minimum essential coverage provision. *See* 26 U.S.C. § 5000A(f)(ii)-(iii). Thus, it is entirely speculative whether a State would incur costs because (1) their citizens feel compelled to sign up for Medicaid and CHIP based on their erroneous reading of the minimum coverage provision; or (2) those citizens are independently eligible for those programs and otherwise would have chosen to obtain coverage through those entitlements. Either way, the States offer *no evidence* that § 5000A itself causes increased enrollment in Medicaid or CHIP. All the States put forth is the conclusory assertion that "[i]t necessarily follows that many individuals will do just what Congress expected and comply with the mandate by applying for and enrolling (if eligible) in either Medicaid or CHIP." Pl.'s Br. 44. But that conjecture cannot give rise to Article III standing. *Simon*, 426 U.S. at 44 ("unadorned speculation will not suffice to invoke the federal judicial power"); *Crane v. Johnson*, 783 F.3d 244, 252 (5th Cir. 2015) ("Because Mississippi's claim of injury is not supported by any facts, we agree with the district court that Mississippi's injury is purely speculative.").

interception is not fanciful, *irrational, or clearly unreasonable*.'") (quoting *Amnesty Int'l USA v. Clapper*, 667 F.3d 163, 180 (2d Cir. 2011)) (internal quotation marks omitted and emphasis added). By the same token, an independent actor's unreasonable interpretation of the law cannot provide the States with more attenuated, derivative standing. *Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 456–57 (6th Cir. 2017) (Boggs, J.) (finding no Article III standing where "several of Plaintiffs' alleged harms arise not from [foreign financial institutions] acting under the command of [the Foreign Account Tax Compliance Act] or an [intergovernmental agreement]," but rather the third-party foreign financial institutions' voluntary "choice to go *above and beyond*" what the law actually requires). The States cite no case supporting such a vast expansion of Article III standing doctrine because none exists.

C. The States Cannot Compensate For Their Lack of Injury from the Minimum Essential Coverage Provision by Alleging Injuries From Other ACA Provisions

Perhaps recognizing the weakness of their asserted injury based on § 5000A itself, the States also assert Article III standing based on purported injuries from other ACA provisions. Pls' Br. 43-48. They rely on asserted injuries from the so-called "employer mandate," *id*. at 43, certain "mandatory Medicaid provisions," *id*. at 44, and, more generally, the ACA's "myriad requirements," *id*. at 45-48. In the States' view, they have standing because these *other* provisions are inseverable from § 5000A—the only specific ACA provision that they challenge as unconstitutional, Compl. §§ 41, 52, 57—and those injuries are sufficient to generate standing.

The States' sweeping view of standing cannot be squared with well-established Supreme Court and Fifth Circuit precedent. "[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). "[T]he standing inquiry requires careful judicial examination of . . . whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984); *DaimlerChrysler Corp. v. Cuno*, 547 U.S.

332 at 352 (2006) ("[A] plaintiff must demonstrate standing for each claim he seeks to press."); *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund,* 500 U.S. 72, 77 (1991) ("Standing does not refer simply to a party's capacity to appear in court. Rather, standing is gauged by the specific common-law, statutory or constitutional claims that a party presents."). "The actual-injury requirement would hardly . . . prevent[] courts from undertaking tasks assigned to the political branches . . . if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration." *Lewis*, 518 U.S. at 357.

The Fifth Circuit has properly applied these jurisdictional principles. It has unambiguously held that a plaintiff must establish standing as to *every* statutory provision that he wishes to challenge, regardless of whether the challenged provision is inseverable from other provisions that might injure the plaintiff. In *National Federation of the Blind of Texas v. Abbott*, 647 F.3d 202 (5th Cir. 2011), the Fifth Circuit considered a challenge to certain Texas statutes regulating charitable solicitations. The plaintiffs indisputably had standing to challenge certain portions of the statute, which applied when a for-profit entity paid a flat fee to a charity (the "(d) provisions"). But the plaintiffs wished to *also* challenge the statutory subsection that applied when proceeds from a sale would be given to a charity (the "(c) provisions").

The Fifth Circuit rejected that jurisdictional end-run. Recognizing that plaintiffs "bear the burden to demonstrate standing for *each claim* they seek to press," the court of appeals turned away Plaintiffs' contention that they had standing to challenge the (c) provisions because they were inseverable from the (d) provisions. *Id.* at 209. Although the two challenges would "raise[] similar constitutional concerns," it concluded that "a plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in

litigating conduct of another kind, although similar, *to which he has not been subject*." *Id.* (emphasis added). That the provisions were asserted to be inseverable was irrelevant to the standing analysis: The Fifth Circuit would not permit "the seemingly intertwined fates of the two provisions" to "eviscerate Article III's requirements." *Id.*

The States make an even more extreme standing argument than the one rejected in *National Federation of the Blind.* There, it was "undisputed" that the plaintiffs had standing to challenge some statutory provisions. *Id*. Here, the States *lack standing* to challenge § 5000A, and they seek to fill that void by asserting injuries based entirely on other allegedly inseverable statutory provisions. *National Federation of the Blind* therefore squarely foreclose the Plaintiff-States' attempt to invalidate other ACA provisions. The only "particular" claim that the States assert in their Complaint is that § 5000A is unconstitutional. *Allen v. Wright*, 468 U.S. at 752. Their Article III standing must be "gauged" only by that "specific . . . constitutional claim[]." *Intern'l Primate Prot. League*, 500 U.S. at 77. It is indisputable that each of the non-§ 5000A provisions is separate and distinct from the minimum essential coverage provision that the States challenge. Any injuries they assert based on these separate provisions, or some inchoate notion of the ACA's "adverse effects," Pl. Br. 47, cannot give rise to Article III standing to challenge § 5000A.[6] Yet again, the States cite no relevant authority to support their theory of wholesale

[6] At various points in their brief, the States ambitiously allege injuries derived from "*all* of the ACA[]." Pl.'s Br. 44. They likewise argue that the ACA *as a whole* "prevents them from applying their own laws and policies governing their own health-care markets," Pl.'s Br. 44, and that they are "being forced to take actions to fix problems . . . that are directly caused by the ACA," *id.* at 47 But the States do not even attempt to trace these injuries to § 5000A. And although the States characterize their actions "fix[ing] problems . . . caused by the ACA" as a "'forced choice between incurring costs' and changing the law," which is "itself an injury," Pl.'s Br. 47 (quoting *Texas v. United States*, 787 F.3d 733, 749 (5th Cir. 2015)), they do not explain how § 5000A—rather than the ACA as an inseverable whole—requires them to change any state law. What is more, the legal authority on which the States rely for their forced-change-of-law argument was limited to its facts by a later opinion. *Compare Texas*, 787 F.3d at 749, *with Texas*

standing based on inseverability.[7] Nor can they. Controlling Supreme Court and Fifth Circuit precedent preclude their expansive vision of standing and their impermissible attempt to "erode" the "'tripartite allocation of power' that Article III is designed to maintain." *DaimlerChrysler Corp.*, 547 U.S. at 353 (citation omitted).

II. The Minimum Essential Coverage Provision Remains a Constitutional Exercise of Congress's Taxing Power

Plaintiffs contend that the ACA's minimum essential coverage provision is unconstitutional following the Tax Cuts and Jobs Act of 2017 because it "now fails to raise at least 'some revenue'" and therefore "cannot be justified under Congress' authority under the Tax Clause." Pl.'s Br. 24. In making this argument, Plaintiffs place dispositive weight on whether a tax provision can be predicted to raise "some revenue" for the Government. *See id*. at 23. The Fifth Circuit, however, has rejected the "some revenue" requirement. Accordingly, not only do Plaintiffs lack standing to challenge § 5000A, their claims cannot succeed on the merits.

In *United States v. Ardoin*, 19 F.3d 177 (5th Cir. 1994), the Fifth Circuit held that Congress may constitutionally exercise its taxing power *without* actually raising "some revenue" for the government. *Ardoin* involved the intersection between the National Firearms Act of 1936 (NFA) and a subsequently-enacted statute, the Firearms Owners' Protection Act of 1986 (FOPA). The NFA regulated machine guns under Congress's taxing power; it barred the "making of machineguns without having filed a written application or paying the making tax."

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v. United States, 809 F.3d 134, 154–55 (2015) (emphasizing that "pressure to change state law may not be enough" to establish standing where the States have not "surrendered some of their control over immigration to the federal government").

[7] The States cite *Alaska Airlines v. Brock*, 480 U.S. 678 (1987), for their contention that alleged injuries caused by inseverable provisions are sufficient to establish standing. *See* Pl.'s Br. 43 n.7. But *Alaska Airlines* only addressed the severability of various provisions of the Airline Deregulation Act. It does not so much as mention the word "standing," *see Alaska Airlines*, 480 U.S. at 683–87, never mind undo decades of Supreme Court and Fifth Circuit precedent recognizing that the standing requirement must be enforced as to particular claims irrespective of a challenged provision's severability.

Id. at 179. FOPA made possession of machineguns illegal. *Id.* After FOPA was enacted in 1986, the Bureau of Alcohol, Tobacco, and Firearms refused to "accept applications to register or to pay the tax" on machineguns. *Id*. at 179. When the defendant was convicted of violating the NFA, he contended that the "constitutional authority for provisions of the NFA dealing with the registration and taxing of post-1986 machineguns [was] gone." *Id*.

The Fifth Circuit rejected this argument. It explained that "the basis for ATF's authority to regulate—the taxing power—still exists; it is merely not exercised." *Id.* at 180. In so doing, the Fifth Circuit held that the NFA could "be upheld on the preserved, *but unused*, power to tax." *Id.* (emphasis added). And in so holding, the Fifth Circuit flatly rejected the dissent's claim—*identical* to the Plaintiff's here—that "[t]o remain legitimate . . . a measure enacted under the tax power must raise some revenue." *Id.* at 187 (Wiener, J., dissenting).

Ardoin thus refutes Plaintiffs' arguments, and its unequivocal reasoning requires this Court to uphold the constitutionality of § 5000A. Under this controlling precedent, a law *need not* raise "some revenue" to qualify as a tax under Congress's taxing power. All that is required is that the authority to tax be *preserved*, even if no revenue is actually raised.

That is precisely what Congress did when it amended § 5000A. By keeping the minimum coverage requirement and its provisions imposing a tax, *see* 26 U.S.C. § 5000A(a), (b)(3), but only reducing *the amount of* that tax to $0, *see* 26 U.S.C. § 5000A(c), Congress preserved the statutory power to tax. It simply chose not to raise revenue because the regulatory disincentive for not purchasing minimum essential coverage could, in its view, be zeroed out. *Ardoin* holds that this is a constitutional exercise of Congress' taxing power. At the very least, *Ardoin* ensures that it remains "fairly possible" to interpret § 5000A as a lawful tax. *NFIB*, 567 U.S. at 563.

NFIB did not displace *Ardoin*'s holding that a law is constitutional where taxing authority "still exists, [but] is merely not exercised." 19 F.3d at 180. *First*, *NFIB* had no occasion to consider whether the minimum coverage provision could be reasonably interpreted as a tax if no revenue were raised. At that time, § 5000A was predicted to generate "some revenue," and so it was not necessary for the Court to rule on that question. *NFIB*, 567 U.S. at 563. Thus, when the Court noted that the "essential feature of any tax" is that it "produces at least some revenue for the Government," *id*., it was not faced with a law like the one at issue here, where the authority to tax is preserved within the express text of the statute, but no revenue will be raised. Until the Court faces a scenario like *Ardoin*'s, the Fifth Circuit's controlling decision remains good law.

Second, *NFIB* framed its discussion of whether § 5000A(a) could be reasonably interpreted as a tax by describing how it operated in practice: "it[] [was] paid into the Treasury by 'taxpayers' when they file[d] their tax returns;" "d[id] not apply to individuals who do not pay federal income taxes;" "[wa]s determined by such familiar factors as taxable income, number of dependents, and joint filing status;" "[wa]s found in the Internal Revenue Code and enforced by the IRS, which . . . assess[ed] and collect[ed] it in the same manner as taxes;" and "produce[d] at least some revenue for the Government." *Id.* at 563-564 (internal quotation marks omitted). Based on all of these features *taken together*, the Court observed that § 5000A functioned like a tax. Far from being a requirement, the Court's comment that the "shared responsibility payment" "produce[d] at least some revenue for the Government," *NFIB*, 567 U.S. at 564, was one of *several* descriptors, which *as a whole* illustrated that the shared responsibility payment operated like a tax. The Court did not hold that § 5000A could not stand *unless* it raised revenue.

Third, *NFIB* analyzed § 5000A through a very different lens than the one here. There, the Court was asked to consider whether § 5000A qualified as an unconstitutionally punitive

"penalty." It held that § 5000A was a lawful tax—not a penalty—because it did not share any of the coercive characteristics that doomed the penalty in the *Child Labor Tax Case (Bailey v. Drexel Furniture Co.*), 259 U.S. 20, 36–37 (1922). Section 5000A (1) did not impose an "exceedingly heavy [financial] burden" on individuals who chose not to purchase health care; (2) contained no scienter requirement; and (3) was collected by the IRS without the possibility of criminal sanction. *NFIB*, 567 U.S. at 565. Thus, the shared responsibility payment was a tax, supportable by Congress' taxing power, because it preserved individuals' choice not to purchase health insurance. That same choice still exists, especially after Congress amended § 5000A.

If all of that were not enough, Plaintiffs' "some revenue" requirement would lead to bizarre results. The Supreme Court has held that "a tax does not cease to be valid merely because it regulates, discourages, or even *definitely deters* the activities taxed." *Sanchez*, 340 U.S. at 44 (emphasis added). In other words, a law remains a tax if it *completely halts* the activity it aims to deter. At that point, however, the tax will raise no revenue. But under Plaintiffs' proposed "some revenue" test, that tax would cease to be a constitutional exercise of Congress' taxing power. That is nonsensical. The Supreme Court has made clear again and again that Congress's taxing power does not allow it to become a victim of its own success. Decades of Supreme Court precedent upholding tax laws designed to definitively deter certain activity foreclose Plaintiffs' illogical position. *See id*.; *Minor v. United States*, 396 U.S. 87, 98 n.13 (1969) ("A statute does not cease to be a valid tax measure because it deters the activity taxed, because the revenue obtained is negligible, or because the activity is otherwise illegal."); *United States v. Kahriger*, 345 U.S. 22, 28 (1953) ("[A] federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed"); *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937) ("On its face it is only a taxing measure, and we are asked to say that

the tax, by virtue of its deterrent effect on the activities taxed, operates as a regulation which is beyond the congressional power. . . . [I]t has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed.").

Similarly, Plaintiffs' argument would force courts to bestow dispositive constitutional significance on CBO predictions. Courts sometimes look to CBO reports for guidance on the possible future economic effects of legislative enactments. *E.g.*, *Murphy v. Nat'l Collegiate Athletic Assoc.*, 138 S. Ct. 1461, 1470 n.24 (2018); *NFIB*, 567 U.S. at 576. But CBO predictions are just that—predictions. If a legislative enactment was required to generate "some revenue" to be considered a constitutional exercise of Congress's taxing power, courts would be forced to give determinative weight to reports from the CBO or other non-constitutional actors to determine whether any revenue would be generated, and thus whether Congress's action was constitutional under the Taxing Clause. Under Plaintiffs' logic, if the CBO had predicted that every individual would choose to purchase health insurance rather than pay the tax, then § 5000A(a) would have generated no revenue, and thus could not have been sustained under the Taxing Clause. It is inconceivable that the constitutionality of congressional action would hinge on the pre-enactment predictions of a non-constitutional agency.

In the end, both *Ardoin* and *NFIB* make plain that § 5000A "may reasonably be characterized as a tax." 567 U.S.at 574. "Granting the Act the full measure of deference owed to federal statutes," § 5000A still may be read as "imposing a tax, if it would otherwise violate the Constitution." *Id*. "Because the Constitution permits such a tax, it is not" this Court's "role to forbid it, or to pass upon its wisdom or fairness." *Id*.

III. The Minimum Coverage Provision Is Severable from the Remainder of the ACA

Even if this Court concludes that Plaintiffs have Article III standing *and* that the

minimum coverage provision cannot be fairly interpreted as a lawful exercise of Congress' taxing power, that provision is severable from the reminder of the ACA. Plaintiffs insist, however, that the entire ACA must be enjoined because the minimum coverage provision cannot be severed from the remainder of the ACA. That argument is meritless.

Like Article IIII standing principles and the constitutional avoidance principles applied in *NFIB*, "severability is fundamentally rooted in a respect for separation of powers and notions of judicial restraint." *Florida v. U.S. Dep't of Health and Human Servs.*, 648 F.3d at 1320-21. Courts must "strive" "to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006).

The severability inquiry turns on congressional intent. In determining whether a particular provision is severable from other statutory provisions, courts "seek to determine what Congress would have intended in light of the Court's constitutional holding." *United States v. Booker*, 543 U.S. 220, 246 (2005) (internal quotation marks omitted). As the Court explained in *NFIB*, our "touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature." 567 U.S. at 586 (internal quotation marks omitted).

Here, Congress's intent with respect to the remainder of the ACA is crystal clear. When Congress reduced the tax to $0, it did not amend, address, or otherwise touch any other ACA provision. It therefore not only intended for those ACA provisions to remain valid in the absence of the minimum essential coverage provision, but it determined that those provisions could function with a zeroed-out tax. The text of the 2017 Tax Cuts and Jobs Act is the end of the matter for severability purposes. *Nixon v. United States*, 506 U.S. 224, 232 (1993) ("The

enacted text is the best indicator of intent.") (quoted in Def.'s Mem. Resp. Prelim. Inj. at 12).

Both the Plaintiffs and the Federal Defendants nonetheless argue that two ACA provisions—the guaranteed-issue and community rating requirements—are inseverable from § 5000A. But their entire analysis turns on a congressional finding from 2010—not 2017. *See* 42 U.S.C. § 18091(2)(I); Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 1501 (2010). While it is true that one Congress found that the "guaranteed issue and community rating requirements would not work without" the minimum essential coverage provision, *King v. Burwell*, 135 S. Ct. 2480, 2487 (2015), *a later* Congress manifestly disagreed. And *that* Congress' intent is the only one that matters.

The 2017 Congress concluded that the guaranteed issue and community rating provisions could and would function without the minimum coverage provision. Again, the best evidence of that determination is that it left those provisions in place while zeroing out the amount to be taxed. If the 2017 Congress was truly concerned about the effects of that amendment, it would have repealed those other provisions along with it. It did not. The 2017 Congress's intent is clear. Sahil Kapur & Erik Wasson, *Obamacare Legal Attack Seen as Gift From Trump to Democrats*, Bloomberg, June 8, 2018, at https://www.bloomberg.com/news/articles/2018-06-08/obamacare-legal-attack-seen-as-gift-from-trump-to-democrats (quoting Professor Jonathan Adler as stating: "Congress in 2010 may have thought that a mandate may have been an essential component of the ACA, but a subsequent Congress indicated otherwise by eliminating the penalty without altering the other parts of the law. This is why the states' arguments about severability (and that accepted by DOJ) is wrong.").[8]

[8] The Federal Defendants give short shrift to this clear evidence of congressional intent by arguing in a footnote (n.4) that the 2017 Congress was operating under the "restrictive reconciliation process" and "could not have revoked the guaranteed-issue or community rating

To the extent that there is any doubt about the 2017 Congress's intent, it is significant that it reduced the tax amount with its eyes wide open. Prior to enactment of the Tax Cuts and Jobs Act, Congress was well informed about how its decision to reduce § 5000A's tax would impact the guaranteed issue and community rating provisions (and the health insurance markets as a whole). The CBO concluded that "[i]f the individual mandate penalty was eliminated but the mandate itself was not repealed"—which is what the 2017 Congress did—"[n]ongroup insurance markets would continue to be stable in almost all areas of the country throughout the coming decade." Congressional Budget Office, *Repealing the Individual Health Insurance Mandate: An Updated Estimate* (November 2017). Thus, whatever concerns Congress might have had seven years earlier when it first enacted the ACA, this CBO report confirms Congress's conclusion that the guaranteed-issue and community rating provisions could "function[] independently," *Alaska Airlines*, 480 U.S. at 684, even after Congress removed any financial disincentive for choosing not to purchase minimum essential coverage.

As wrong as they are about the severability of the guaranteed-issue and community rating provisions, at least the Federal Defendants get one thing right. Their severability analysis would stop there. They rightly conclude that "the remainder of the ACA" is severable from § 5000A. DOJ Br. 16-19. The States and individual Plaintiffs, however, would go even further. They seek to invalidate *the entire* ACA as inseverable from the minimum essential coverage provision. But that argument fails for the same reasons as the severability arguments regarding the guaranteed-issue and community rating provisions: there is no evidence whatsoever that Congress intended to invalidate the entire ACA when it reduced § 5000A's tax amount to zero. In fact, there is

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provisions through reconciliation." But as the Federal Defendants *themselves* point out, Congress has since amended the ACA on "numerous occasions after the TCJA invalidated the individual mandate." Congress enacted those amendments *outside of* the reconciliation process. Yet Congress *still* has not repealed the guaranteed-issue and community rating provisions.

compelling evidence to the contrary in both the text (see above) and the legislative history. *See* Intervenor-Def's Br. at 43–44, Dkt. No. 91 (June 7, 2018) (reviewing the legislative history of the 2017 Tax Cuts and Jobs Act).

It is telling that Plaintiffs' arguments for total inseverability rely entirely on the *NFIB dissent*. Pl.'s Br. 35-39. That dissent was predicated on a particular understanding of the ACA: the "Act's major provisions are interdependent"; the Act refers to "these interdependencies as 'shared responsibility'"; and that "[a]bsent the invalid portions," the Act could not "operate as Congress intended" because the consequences "would be in absolute conflict with the ACA's design of 'shared responsibility.'" *NFIB*, 567 U.S. at 696-698. But the majority rejected the dissent's view of the ACA, as well as its overall approach to severability. Despite the interrelationships among the Act's provisions, the *NFIB majority* held that "we do not believe Congress would have wanted the whole Act to fall, simply because some [States] may choose not to participate" in the Medicaid expansion. *Id*. at 587. It explained: "The other reforms Congress enacted, after all, will remain 'fully operative as a law,' and will still function in a way 'consistent with Congress' basic objectives in enacting the statute.'" *Id*. at 587-588 (citations omitted). Confident that Congress would not have intended anything different, we conclude that the rest of the Act need not fall in light of our constitutional holding." *Id*.

If the *NFIB* dissent's position could not carry the day based on the 2010 Congress's intent, it surely cannot do so based on the 2017 Congress's intent. As explained above, there is no indication whatsoever that the 2017 Congress would have wanted the "rest of the Act [to] fall" when it zeroed out the amount to be taxed under § 5000A. *Id.* at 587. And as the Federal Defendants rightly explain, each of the remaining ACA provisions can "independently operate 'consistent with Congress' basic objectives in enacting the statute,' and therefore, this Court

'must retain' them." Fed. Defs. Br. at 16 (quoting *Booker*, 543 U.S. at 258–59)

IV. The Requested Remedies Will Wreak Havoc on American Health Care

Although these legal deficiencies are more than sufficient to defeat Plaintiffs' and Federal Defendants' severability arguments, a final word must be offered about the consequences of their proposed remedies. Invalidating the guaranteed-issue and community rating provisions—or the *entire* ACA—would have a devastating impact on doctors, patients, and the American health care system as a whole. Put simply, the consequences of any form of inseverability would eliminate the "[h]istoric gains in health insurance coverage have been achieved since the implementation of the Affordable Care Act."[9] The ACA's "nationwide protections for Americans with pre-existing health conditions" has played a "key role" in allowing *3.6 million people* to obtain affordable health insurance.[10] Severing those vital insurance reforms would leave millions without much-needed insurance. On top of that, the CBO estimated that repealing "major provisions" of the ACA would cause 32 million people to become uninsured and average premiums in the nongroup market to *double* by 2026. Congressional Budget Office, Cost Estimate for H.R. 1628: *Obamacare Repeal Reconciliation Act of 2017* 1 (July 19, 2017). The CBO also projected that, by 2026, three quarters of the Nation's population "would live in areas having no insurer participating in the nongroup market . . . because of downward pressure on enrollment and upward pressure on premiums." *Id.* And the nonpartisan Rand Corporation has concluded that "[r]epeal would increase the federal deficit by $33.1 billion annually compared

[9] Department of Health and Human Services, ASPE Issue Brief, *Affordable Care Act Has Led to Historic, Widespread Increase in Health Insurance Coverage* (September 29, 2016) (available at: https://aspe.hhs.gov/system/files/pdf/207946/ACAHistoricIncreaseCoverage.pdf).

[10] Department of Health and Human Services, ASPE Issue Brief, *Health Insurance Coverage for Americans with Pre-Existing Conditions: The Impact of the Affordable Care Act* (January 5, 2017) (available at: https://aspe.hhs.gov/system/files/pdf/255396/Pre-ExistingConditions.pdf)/

with the status quo."[11] Plaintiffs' and the Federal Defendants' requested remedies would cause *these same* devastating results—only without the appropriate deliberation within the democratically-accountable political branches.

Amici know better that anyone that "[m]edicine has long operated under the precept of *Primum non nocere*, or 'first, do no harm.'"[12] They respectfully submit that this Court should do the same. *Manuel v. City of Joliet*, 137 S. Ct. 911, 929 (2017) (Alito, J., dissenting) ("A well-known medical maxim—'first, do no harm'—is a good rule of thumb for courts as well."). "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, [this Court] must interpret the Act in a way that is consistent with the former, and avoids the latter." *King*, 135 S. Ct. at 2496. This straightforward principle of judicial restraint governs (1) whether this Court has Article III jurisdiction to hear this lawsuit; (2) how it should interpret § 5000A; *and* (3) any severability analysis. At every turn, this principle requires the Court to reject Plaintiffs' request for a preliminary injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs cannot succeed on the merits. Their request for a preliminary injunction should be denied.

[11] Rand Corporation, *The Future of Health Care: Replace or Revise the Affordable Care Act?* (available at: https://www.rand.org/health/key-topics/health-policy/in-depth.html).
[12] Press Release, American Medical Association, AMA Announces Opposition to Senate Health System Reform (June 26, 2017) (available at: https://www.ama-assn.org/ama-announces-opposition-senate-health-system-reform).

DATED: June 14, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

On June 14, 2018, a copy of the forgoing document was served on all counsel of record via the Court's CM/ECF system.

/s/ Tiffanie S. Clausewitz

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORTH WORTH DIVISION

TEXAS, *et al.*, Plaintiffs, v. **UNITED STATES OF AMERICA**, *et al.*, Defendants.	Civil Action No.: 4:18-cv-00167-O

[PROPOSED] ORDER

Before the Court is UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN ACADEMY OF FAMILY PHYSICIANS, THE AMERICAN COLLEGE OF PHYSICIANS, THE AMERICAN ACADEMY OF PEDIATRICS, AND THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (Doc. __), filed June __, 2018. Having considered the motion and noting that it is unopposed, the Court finds that it should be and is hereby **GRANTED**.

The Clerk is **DIRECTED** to file the Brief of Amici Curiae, attached as Doc. __-1, as a separate docket entry.

SO ORDERED on this **____** day of June, 2018.

The Honorable Reed O'Connor
United States District Judge