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.	Case No. 4:18-cv-00167-O

CONSENT MOTION OF
CITIZENS UNITED, CITIZENS UNITED FOUNDATION, DOWNSIZE DC FOUNDATION, DOWNSIZEDC.ORG, GUN OWNERS FOUNDATION, GUN OWNERS OF AMERICA, INC., CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, EBERLE COMMUNICATIONS GROUP, AND RESTORING LIBERTY ACTION COMMITTEE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

On the grounds and for the reasons set forth below, movants, through undersigned counsel, pursuant to F.R.Civ.P. 7 and Rule 7.2(b) of the local rules of this Court, move this Court for leave to file a brief *amicus curiae* in support of Plaintiffs' motion for preliminary injunction.

Counsel for Plaintiffs and Defendants have consented to this Motion and to the filing of the attached brief *amicus curiae*. This brief is being filed timely within seven days of the Plaintiffs' Motion, the same amount of time allowed for an *amicus curiae* brief under the Federal Rules of Appellate Procedure, F.R.App.P. Rule 29(a)(6).

Movants Citizens United Foundation, Downsize DC Foundation, Gun Owners Foundation, and Conservative Legal Defense and Education Fund are exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code ("IRC"). Movants

Citizens United, DownsizeDC.org, and Gun Owners of America, Inc. are exempt from federal income taxation under IRC Section 501(c)(4). Eberle Communications Group, Inc. is a for-profit corporation, headquartered in McLean, Virginia. Restoring Liberty Action Committee is an educational organization. Each organization participates actively in the public policy process, and has filed numerous *amicus curiae* briefs in federal and state courts.

Movants are organizations which defend U.S. citizens' rights against government overreach. Several of the movants previously filed *amicus curiae* briefs relating to the constitutionality of the Affordable Care Act as well various specific portions of it. *See* Brief *Amicus Curiae* at 1-2.

I. THIS CASE PRESENTS A CONSTITUTIONAL MATTER AND STATUTORY ISSUE OF GREAT IMPORTANCE.

The Supreme Court's 2012 decision in National Federation of Independent Businesses v. Sebelius found that the Affordable Care Act ("ACA") was a constitutional exercise of Congress' power to tax. In December 2017, Congress amended the ACA to set the tax penalty to $0 and 0 percent.

The present case involves a new challenge to the constitutionality of ACA as amended now that it does not meet the constitutional standard for exercise of the taxing power.

II. THE *AMICUS CURIAE* BRIEF RAISES RELEVANT ISSUES NOT ADDRESSED ADEQUATELY IN THE GOVERNMENT'S SUPPLEMENTAL RESPONSE.

The movants' *amicus curiae* brief submitted with this Motion supports the position of Plaintiffs. However, they provide relevant history and make arguments that may not be fully developed by Plaintiffs' Brief in support of the Motion for Preliminary Injunction. The *amicus* brief also argues that Congress had the power to remove the tax, and the ACA as amended is no longer justified by any of Congress' enumerated powers. Finally, the *amicus* brief discusses whether Congress has effected an implied repeal of the ACA by removing the constitutional justification for enacting it.

III. THE ACCEPTANCE OF BRIEFS *AMICUS CURIAE* HAS BEEN FOUND USEFUL IN CASES SUCH AS THIS.

District courts have inherent power to grant leave to file briefs *amicus curiae*, as they often "provide helpful analysis of the law[,] they have a special interest in the subject matter of the suit[,] or existing counsel is in need of assistance." Bryant v. Better Business Bureau of Greater Maryland, Inc., 923 F.Supp. 720, 728 (D. Md. 1996). For the reasons stated above, it is believed, particularly in bringing to the attention of the Court important principles and binding authorities not fully addressed by the parties, that this *amicus* brief will inform the Court's effort to resolve the question before it.

Given the nationwide significance of this case, and its profound implications for all Americans, movants respectfully request leave to file the accompanying brief *amicus curiae* in support of Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,

/s/ J. Mark Brewer

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae Citizens United, Citizens United Foundation, DownsizeDC.org, Downsize DC Foundation, Gun Owners Foundation, Gun Owners of America, Inc., and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Eberle Communications Group is a for-profit corporation. Restoring Liberty Action Committee is an educational organization.

Each of these *amici* is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law.

Some of these *amici* have filed *amicus curiae* briefs in the following recent cases challenging the Affordable Care Act:

- Virginia, *ex rel*. Kenneth T. Cuccinelli, II, Attorney General of Virginia v. Kathleen Sebelius, 656 F.3d 253 (4th Cir. 2011).[2]
- Virginia, *ex rel*. Kenneth T. Cuccinelli, II, Attorney General of Virginia v. Kathleen Sebelius, No. 11-420, On Petition for Certiorari (Nov. 3, 2011).[3]
- Dept. of Health and Human Services v. Florida (consolidated with NFIB v. Sebelius, 567 U.S. 519, 132 S.Ct. 2566 (2012)).[4]

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[1] All parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

[2] http://www.lawandfreedom.com/site/health/VA_v_Sebelius_Amicus.pdf.

[3] http://www.lawandfreedom.com/site/health/VA_v_Sebelius_Amicus_SC.pdf.

[4] http://www.lawandfreedom.com/site/health/DHHSvFlorida_Amicus.pdf.

- Conestoga Wood Specialties v. Sebelius, 573 U.S. ___, 134 S.Ct. 2751 (2014).[5]
- King v. Burwell, 576 U.S. ___, 135 S.Ct. 2480 (2015).[6]
- Sissel v. Department of Health and Human Services, *et al.*, 577 U.S. ___, 136 S.Ct. 925 (2016).[7]
- Zubik v. Burwell, 578 U.S. ___, 136 S.Ct. 1557 (2016).[8]

STATEMENT OF THE CASE

In December 2017, Congress enacted, and President Trump signed into law, the Tax Cuts and Jobs Act of 2017 ("TJA"). Contained in this voluminous law is an important provision repealing the penalty imposed by the 2010 Patient Protection and Affordable Care Act and the 2010 Health Care Education Reconciliation Act (together "ACA") on certain persons who failed to comply with the ACA's "individual mandate," requiring the purchase of health insurance as prescribed by law. The TJA amendment expressly removed any penalty for noncompliance, statutorily prescribing the penalty to be zero. In explanation, the Congressional Budget Office ("CBO") noted that, after discontinuation of the tax, the TJA is voluntary, and allows anyone to choose to obey the regulatory mandate "'because of a willingness to comply with the law.'" Plaintiffs' Br. at 15-16.

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[5] http://www.lawandfreedom.com/site/constitutional/Conestoga%20Wood%20Amicus%20Brief.pdf.

[6] http://www.lawandfreedom.com/site/constitutional/King%20Del%20Berg%20Amicus%20Brief.pdf.

[7] http://lawandfreedom.com/wordpress/wp-content/uploads/2015/11/Sissel-USJF-amicus-brief.pdf.

[8] http://lawandfreedom.com/wordpress/wp-content/uploads/2016/01/Zubik-Little-Sisters-Amicus-Brief.pdf.

Compliance with ACA's original individual mandate did not depend upon the "willingness" of the American people to buy health insurance. Rather, anyone who chose not to buy the qualifying insurance faced a stiff financial penalty, which the Supreme Court upheld as a tax in 2012. Additionally, the tax-enforced mandate did not dwell in the outermost parts of the ACA, but rather played a central role in the entire ACA system, in that the mandate was designed to reach three major goals, all of which are expressed in the statute: (i) "'near-universal [health insurance] coverage;'" (ii) "'lower health insurance premiums;'" and (iii) "'effective health insurance markets.'" Pl. Br. at 3-4.

Indeed, according to the ACA's legislative findings, "the individual mandate is critical to the functioning of the Act's major features." *Id*. at 8. The reason was simple. If there was no individual requirement to purchase the type of health insurance approved by the federal government, then many would defer purchasing any insurance until they needed care because the ACA prohibits denial for preexisting conditions. *Id*. at 9.

In federal elections held after 2010 and through 2016, the battle against the individual mandate has raged, now leading to the repeal of the penalty in the TJA. Plaintiffs contend in their Amended Complaint that the ACA now must be completely dismantled because the tax penalty undergirding the individual mandate is the *sine qua non* of the Supreme Court's prior ruling upholding the ACA as an exercise of the power to tax. And, because the individual mandate remains as ACA's linchpin, "[a]bsent the [original] individual mandate, the ACA is an irrational regulatory regime governing an essential market." Amended Compl. at 4.

ARGUMENT

It is the view of these *amici* that Plaintiffs should prevail on their motion for a preliminary injunction, for the reasons advanced by Plaintiffs, as supplemented in Section I, *infra*. These *amici* also advance two lines of authority in support of plaintiffs' motion in Sections II and III, *infra*.

I. Based on the Arguments Advanced by the Plaintiff States, and as Reinforced by the Historical Context of the ACA, a Preliminary Injunction Should Issue.

A. A Tax or a Penalty?

With the Patient Protection and Affordable Care Act, 124 Stat. 119-1045 (Mar. 23, 2010)[9] (a/k/a "Obamacare") (hereinafter "Affordable Care Act" or "ACA"), the federal government mandated (*i.e.,* ordered) that millions of Americans purchase a particular type of health insurance, even if that purchase was against their will or even against their conscience. Any American who failed or refused to obey that "individual mandate" was sanctioned. First scheduled to be imposed in 2014, that penalty was designed to escalate substantially after that first year. Calculated every month that disobedience continued, the amount was determined by a formula based on a "flat dollar amount," subject to a maximum based on "percentage of income." 26 U.S.C. § 5000A.

The nature of that sanction has legal significance. In the ACA, Congress consistently described the financial disincentive imposed on individual taxpayers to be a "penalty," (26 U.S.C. § 5000A(b) and (c)), yet the Supreme Court approved the sanction as a "tax" in

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[9] Portions of the statutory scheme were later supplemented by the Health Care and Education Reconciliation Act of 2010, 124 Stat. 1029 (2010), signed into law one week later.

National Federation of Independent Business v. Sebelius, 567 U.S. 519, 563-64 (2012). However that issue was decided previously, the sanction has now effectively been rescinded.

B. Historically, Congress Justified the Mandate as a Regulation of Commerce, Not a Tax.

Plaintiffs' brief explains that ACA was found by the Supreme Court to be a tax (Pl. Br. at 11), but making that conclusion even more curious was the degree to which Congress had denied the individual mandate was a tax. In fact, in imposing the individual mandate, Congress sought to justify its action exclusively on its power to "regulate interstate commerce." In a series of findings designed to establish the Affordable Care Act as an exercise of the Commerce Power, codified at 42 U.S.C. § 18091, Congress began:

> The individual responsibility requirement provided for in this section (in this section referred to as the "requirement") is commercial and economic in nature, and substantially affects **interstate commerce**.... [Emphasis added.]

In a section entitled "Effects on the National Economy and Interstate Commerce," Congress set out 10 reasons why it believed that virtually any legislation relating in any way to health insurance constituted an exercise of the commerce power, beginning with and illustrated by the following:

> The requirement regulates activity that is **commercial and economic in nature**: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased. In the absence of the requirement, some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers. [Emphasis added.]

Lastly, Congress demonstrated its reliance on the Commerce Clause by citing as its only authority for its action a Supreme Court Commerce Clause case:

> **Supreme Court Ruling**. In United States v. South-Eastern Underwriters Association (322 U.S. 533 (1944)),[10] the Supreme Court of the United States ruled that **insurance is interstate commerce** subject to Federal regulation. [Emphasis added.]

C. The Supreme Court Characterized the Mandate as a Tax.

However, when the Affordable Care Act was challenged as an illegitimate exercise of the Commerce power, five Justices agreed it was not a lawful regulation of commerce. That opinion wholly rejected Congress' purported rationale for the Act, establishing that a mandate to engage in commerce was not contemplated by a power to regulate commerce under Article I, Section 8, Clause 3. NFIB at 520-21. Nevertheless, the Act was upheld as an exercise of the Congressional Taxing authority under Article I, Section 8, Clause 1. NFIB at 563. The Court's constitutional analysis was, at best, curious, in that neither the President nor the Congress attempted to justify the law as a tax until litigation ensued. Additionally, it was generally understood that, if presented as a tax, the law would never have been enacted by Congress. Still, a different set of five justices found the penalty to be a tax, even though Obama adviser Professor Jonathan Gruber later explained that the bill was carefully drafted to preclude a finding that it was based on an exercise of the taxing power:

> You just can't do it politically… **This bill was written** in a tortured way **to make sure CBO did not score the mandate as taxes**. If CBO scored the mandate as taxes, the bill dies. Okay. So it was written to do that…. Lack of transparency is a huge political advantage. And basically, call it the stupidity of

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[10] When the Affordable Care Act was challenged, the Supreme Court cited South-Eastern Underwriters Association for the proposition that Congress may "eliminate the insurance industry's practice of charging higher prices or denying coverage to individuals with preexisting medical conditions," but did not cite that case as providing any authority whatsoever to support the individual mandate. *See* NFIB at 618-19 (citation omitted).

> the American voter, or whatever, but that was really, really critical to get the thing to pass…. I wish … we could make it all transparent, but I would rather have this law than not. [Professor Jonathan Gruber, "Why we need the individual mandate," Center for American Progress (Apr. 8, 2010) (emphasis added).][11]

The intentional deception undergirding the Affordable Care Act was made even more important by the fact that the specific language of the bill was hidden not just from the American people, but also from Congress. While House Speaker Nancy Pelosi made sure that, before voting, members of Congress would have 72 hours to read the 1,000-plus page, 163,000-word bill before voting,[12] a span of time that would virtually ensure that few members would actually read the bill and even fewer would understand what they were actually voting for. Indeed, who can forget her famous explanation of how the bill was written: "[W]e have to pass the bill so that you can find out what's in it….[13]

D. The Individual Mandate Is a Central Feature of the ACA.

Plaintiffs' brief asserts the centrality of the individual mandate to the entire ACA structure. See Pl. Br. at 30. This assertion is also supported by numerous other indicators. For example, the individual mandate was viewed as the centerpiece of the Affordable Care Act. As one of the Act's key architects, Professor Jonathan Gruber of the Massachusetts Institute of Technology explained:

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[11] *See* https://www.youtube.com/watch?v=Adrdmmh7bMo

[12] *See* A.D. Holan, "Speed-reading the health care reform bill?," Politifact (Oct. 7, 2009).

[13] *See* J. Capehart, "Pelosi defends her infamous health care remark," Washington Post (June 20, 2012).

> This new requirement to purchase insurance is … a central pillar of health reform. **Without the individual mandate, the entire structure of reform would fail**. ["Why We Need the Individual Mandate," *supra* (emphasis added).]

E. The Tax Cuts and Jobs Act Treats the Mandate as a Tax.

Opposition to Obamacare mounted over the ensuing years for many reasons, including the attention given to the impolitic comments delivered in multiple lectures by the irrepressible Professor Gruber, the vapid nature of the oft-repeated Presidential promise that "If you like your health care plan, you can keep it,"[14] followed by ever-escalating, seemingly out-of-control premium increases.[15] Finally, after the People made a change in the party in control of Congress and the Presidency, Congress acted to end the much hated individual mandate.[16]

The Tax Cuts and Jobs Act of 2017 included the following repeal of the penalty associated with the individual mandate, altering both the "flat dollar amount" and "percentage of income" provisions of the 2010 law:

> PART VIII—Individual mandate
> SEC. 11081. **Elimination** of shared responsibility payment for individuals failing to maintain minimum essential coverage.
> (a) In general.—Section 5000A(c) is amended—
> (1) in paragraph (2)(B)(iii), by striking "2.5 percent" and inserting "**Zero percent**", and
> (2) in paragraph (3)—
> (A) by striking "$695" in subparagraph (A) and inserting "**$0**", and

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[14] A.D. Holan, "Lie of the Year: "If you like your health care plan, you can keep it,'" Politifact (Dec. 12, 2013).

[15] *See* A. Adamczyk, "Here's How Much Obamacare Premiums Will Increase in 2018," Time (June 22, 2017).

[16] "Those [policy] decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them." NFIB at 538.

> (B) by striking subparagraph (D).
> (b) Effective date.—The amendments made by this section shall apply to months beginning after December 31, 2018. [Emphasis added.]

There were no other provisions of the 2017 Act which applied to any provision of the Affordable Care Act. Therefore, the penalty now being imposed for noncompliance with the individual mandate, which has been in effect since calendar year 2014, will, by act of Congress, cease at the end of the current calendar year.

F. As a Tax, the Mandate Is Governed by the "Some Revenue" Requirement.

Plaintiffs' brief asserts that the "some revenue" requirement is necessary to establish that a law is valid under the taxing authority, reporting from its research that it "has never been subject to any exceptions." Pl. Br. at 23. Plaintiffs explain that this requirement "flows directly" from the "constitutional text," providing that taxes raised would be used to pay debts and provide for the common defense. For this proposition, plaintiffs cite three cases regulating commerce which were justified as an exercise of the taxing power. *Id*.

- In In re Kolloch, 165 U.S. 526 (1897), the Supreme Court approved a tax on "oleomargarine" even though the tax also was designed to prevent deception. *Id*. at 536.
- In Sonzinsky v. United States, 300 U.S. 506 (1937), the Supreme Court approved an excise tax on dealers in firearms, even though the tax was also designed to impede some firearms dealings. *Id*. at 511-14.
- In United States v. Kahriger, 345 U.S. 22 (1953), the Supreme Court upheld a tax on wagering, even though the tax was also designed to discourage that practice. *Id*. at 28, n.4.

It is truly unnecessary to consider how the Supreme Court would have analyzed these regulatory measures had they, in the first instance, had a tax equal to zero. In that a tax equal to zero is no tax at all, none of these measures could ever have been approved under the taxing

power. Had Congress later amended each of these statutes to set each tax to zero, while leaving the remainder of the regulatory scheme in place. It is submitted, all of these statutes would have been invalidated.[17]

Again, a tax equal to zero is no tax at all. If the federal government were to attempt to enforce such regulations against individual manufacturers of oleomargarine, or firearms dealers, or gambling, would not each defendant raise a challenge based on the utter absence of Congressional authority to regulate that area apart from the taxing power? And, in an enforcement action, would not the courts be required to consider a defense that challenged the current enforcement action as an unlawful exercise of Congressional power? And would those courts be likely to simply declare the matter closed, relying on decisions rendered many years

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[17] In In re Kollock, the Supreme Court made clear that the regulatory scheme must aid the collection of revenue which, in this case, had not just an object, but the "primary object" of raising revenue: "The act before us is on its face an act for levying taxes and may operate in so doing to prevent deception in the sale of oleomargarine as and for butter **its primary object must be assumed to be the raising of revenue**. And, considered as a revenue act [its regulatory requirement] is merely **in the discharge** of an administration function…." *Id*. at 536. How does this language indicate that the Court that decided In re Kollock would have ruled on the constitutionality of an amended act which had no object of raising revenue, to say nothing of having it be its primary object, and where the regulations were not in aid of any tax?

In Sonzinsky, the Supreme Court observed that the statute under review was approved, and found to "contain[] no regulation other than the mere registration provisions, which are obviously supportable as **in aid of a revenue purpose**." *Id*. at 513 (emphasis added). How does this language indicate that the Sonzinsky Court would have viewed the constitutionality of an amended statute where all provisions of the law were "obviously" not in "support" of a "revenue purpose."

And, in Kahriger, the Supreme Court explained that, "[u]nless there are **provisions extraneous to any tax need**, courts are without authority to limit the exercise of the taxing power." *Id*. at 513. How does this language indicate that the Kahriger Court would have viewed the constitutionality of an amended statute where all provisions were "extraneous to any tax need…."? *Id*. at 31 (emphasis added).

before that were the result of a constitutional evaluation of very different statutes than those as amended?

In this case, the only difference is that the initiative is being taken by the states to seek injunctive relief to prevent the federal government from implementing a regulatory scheme which Congress has no authority to implement apart from the taxing power. Although the federal government's brief has not yet been filed, it would appear that the only plausible argument which could be raised was that the prior decision of the Supreme Court was binding for all time, and that the "some revenue" requirement applies only during the initial analysis of the statute when first challenged, but never thereafter. It is submitted that this "one bite at the apple" type of argument is not persuasive, but rather would could easily be abused, allowing the federal government to regulate areas beyond its constitutional authority.

II. The Individual Mandate Is Outside Congress' Spending Power.

In both their Amended Complaint and their Brief in Support of a Preliminary Injunction, Plaintiffs assume that the threshold question in this case is whether the individual mandate without the repealed ACA penalty nevertheless remains within Congress' constitutional power to tax. To that end, Plaintiffs review the 2012 conclusion of the U.S. Supreme Court that the original individual mandate "produces at least some revenue." And, in light of its past precedents upholding such "revenue" producing acts, the Court found it "'fairly possible' to save the mandate's constitutionality under Congress' taxing power." *See* Pl. Br. at 22-26. Applying this same analysis to the 2017 TJA amendment — wherein Congress repealed the penalty so that the mandate would produce zero revenue — Plaintiffs

contend that the amended individual mandate now cannot be defended as a constitutional exercise of Congress' power to tax.

As discussed in Section I, *supra*, the Plaintiffs are right, but their line of argument fails to take full advantage of the nature of the legislative powers vested in Congress and exercised by it and the President in the enactment and signing of the Tax Cuts and Jobs Act of 2017. Although Congress may choose, or may resign itself, to conform its policies to judicial precedents and their reasonings, the threshold question in every case — including this one — is whether the Act constitutes the exercise of one of the enumerated powers vested in Congress by the Constitution. Thus, the threshold question in the case of the penalty attached to the individual mandate is whether the 2017 repeal is within Congress' power to tax.

According to these *amici,* the initial question posed by this case is whether Article I, Section 8, Clause 1 of the Constitution, which vests the taxing power in Congress, includes the power to repeal the individual mandate's penalty — by reducing it to zero. Plain logic dictates that the power to tax includes the power to repeal a tax previously enacted into law. Article I, Section 8, Clause 1 further authenticates that logic by its text that inextricably ties the power to tax with the powers to pay the debts and provide for the general welfare. *See* United States v. Butler, 297 U.S. 1 (1936).

Indeed, as the Butler Court proclaimed nearly 100 years ago that "[t]he true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for the payment of nation's debts and making provision for the general welfare." *Id.* at 64. The government argued that the "decision as to what will promote such welfare rests with Congress alone…." *Id.* at 65. The Supreme Court disagreed, striking down

a scheme to stabilize production in agriculture by assuring farmers that their products will be sold at a fair price. The act at issue in that case imposed a tax on processors of specified agriculture products, the proceeds to be used to subsidize farmers who agreed to restrict their production. The Supreme Court struck down this spending scheme on the ground that it invaded the power of the States, and therefore, was not a valid exercise of Congress' power to spend for the general welfare.

Consistent with this principle, the Supreme Court ruled that the ACA's original "individual mandate" — that one must buy health insurance — lies outside the powers delegated to Congress under the Commerce Clause. *See* Pl. Br. at 21-22. The choice to purchase — or not to purchase — health insurance does not lie with Congress, but with the individual or perhaps with the States.

Does the repeal of the tax penalty attached to the individual mandate enable the federal government to bypass the Commerce Clause, leaving in place a mandate that is virtually voluntary now that the penalty has been repealed? According to Butler, the answer is no. Even if voluntary, such a mandate is subversive of the powers of the people and of the states reserved under the Tenth Amendment, and completely outside the enumerated powers of the national government. Therefore, the whole of the ACA's provisions should be stricken, not just the penalty.[18]

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[18] Once the entire individual mandate falls, so does the rest of ACA of which it is the centerpiece. As to the issue of severability, the arguments made by plaintiff states (*see* Pl. Br. at 27-40) are reinforced by the careful analysis contained in Justice Scalia's dissent in NFIB, where Justice Scalia analyzed each major provision of ACA and persuasively explained why they were inseverable. *See* NFIB at 691-707 (Scalia, J., dissenting).

III. The Tax Cuts and Jobs Act of 2017 Repeals the Affordable Care Act.

In addition to the reasons set out in Sections I and II, *supra*, the Tax Cuts and Jobs Act of 2017 easily could be viewed as effecting an implicit repeal of the ACA. As the plaintiffs have explained, the Supreme Court upheld the ACA as an exercise of Congress' taxing power under Article I, Section 8, Clause 1, but the 2017 act eliminated the "tax" by setting it to 0% and $0.

As the Supreme Court reiterated in NFIB, "the essential feature of any tax" is that "[i]t produce[] at least some revenue for the Government." NFIB at 564 (citing United States v. Kahriger, 345 U.S. 22, 28, n.4 (1953)). Now that Congress has removed that "essential feature" from the taxing power exercised in the ACA, what has Congress wrought?

It appears that what Congress has done should be viewed as having implicitly repealed the ACA by removing the statute from the constitutional authority for enacting it. Although there is a general rule against implicit repealer,[19] the Court has recognized such a repeal where there is irreconcilable conflict between two statutes:

> The Court has had frequent occasion to note that such indefinite congressional expressions [to repeal] cannot negate plain statutory language and cannot work a repeal or amendment by implication. "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are **irreconcilable**." *Morton v. Mancari*, 417 U.S. 535, 550 (1974).... [St. Martin at 787-88 (emphasis added).]

To be sure, the cases that have found an irreconcilable conflict that requires an implied repealer usually involve two substantive provisions, enacted at different times, the later of

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[19] *See* St. Martin Evangelical Lutheran Church v. S.D., 451 U.S. 772, 787-88 (1981); *see also* A. Scalia & B. Garner, Reading Law (West 2012) at 327, *et seq*.

which changes the application of some law. Here, however, the TJA could be seen as creating a conflict with the ACA that goes directly to the constitutional power of Congress to enact the law. All of the substantive provisions of the ACA were untouched by the TJA. Indeed, the penalty provision was left in the law; only the amount was changed, albeit to zero.

When Congress passed the TJA, it was presumed to know that the Supreme Court had ruled that it was valid under only one of Congress' enumerated powers under the Constitution: the power to tax. "We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-85 (1988). Thus, regardless of whether Congress implicitly repealed ACA, it repealed the constitutional predicate for Congress to enact the law, thus rendering it unconstitutional.

Thus, it is only logical that this Court consider the ACA as having been amended by TJA and now constituting one law, evaluating whether it is constitutional or not. *See* Reading Law at 252. To be sure, the new law does not exist in a vacuum, and *stare decisis* requires application of the constitutional principles articulated in NFIB to the new law. The Supreme Court in NFIB would not have upheld the ACA if it had appeared before the Court with the change effected by TJA. It applied the essential element test of Kahriger to determine whether the tax was indeed a tax, and since it raised some revenue, it upheld it as a tax. By kicking the only constitutional leg out from under the ACA, Congress has, in effect, created a new statute, one which it had no authority to impose on the states and the People, and therefore one which is unconstitutional. TJA effected an implicit repeal of ACA.

CONCLUSION

For the foregoing reasons, the Plaintiffs' motion for preliminary injunction should be granted.

Respectfully submitted,

/s/ J. Mark Brewer

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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.	Case No. 4:18-cv-00167-O

[proposed] ORDER

Upon consideration of the Consent Motion of Citizens United, Citizens United Foundation, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, Eberle Communications Group, and Restoring Liberty Action Committee for Leave to File Brief *Amicus Curiae* in Support of Plaintiffs' Motion for Preliminary Injunction, it hereby is ORDERED that the said motion is granted; and it is

FURTHER ORDERED, that such Brief *Amicus Curiae* will be filed by the Clerk.

SO ORDERED

Dated: May ____, 2018

_____
THE HONORABLE REED O'CONNOR
UNITED STATES DISTRICT JUDGE