No. 19-10011

In the
United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS; STATE OF WISCONSIN; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MISSISSIPPI, by and through Governor Phil Bryant; STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF NORTH DAKOTA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TENNESSEE; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF ARKANSAS; NEILL HURLEY; JOHN NANTZ,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; ALEX AZAR, II, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF INTERNAL REVENUE; CHARLES P. RETTIG, in his Official Capacity as Commissioner of Internal Revenue,

Defendants-Appellants,

STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF KENTUCKY; STATE OF MASSACHUSETTS; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF VIRGINIA; STATE OF WASHINGTON; STATE OF MINNESOTA,

Intervenor Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas
No. 4:18-cv-167-O
Hon. Reed O'Connor, Judge

Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, Eberle Communications Group, Inc.,

**60 Plus Association, 60 Plus Foundation,
Fitzgerald Griffin Foundation,
Downsize DC Foundation, DownsizeDC.org,
American Business Defense Foundation,
and Restoring Liberty Action Committee
in Support of Plaintiffs-Appellees and Affirmance**

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Case No. 19-10011

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, *et al.*,

Plaintiffs-Appellees,

v.

UNITED STATES, *et al.*,

Defendants-Appellants,

STATE OF CALIFORNIA, *et al.,*

Intervenor Defendants-Appellants.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

State of Texas, *et al*., Appellees

United States of America, *et al.*, Appellants

State of California, *et al.*, Intervenor Appellants

Citizens United, Citizens United Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, Eberle Communications Group, Inc., 60 Plus Association, 60 Plus Foundation, Fitzgerald Griffin Foundation, Downsize DC Foundation, DownsizeDC.org, American Business Defense Foundation, and Restoring Liberty Action Committee, *Amici Curiae*.

William J. Olson, Herbert W. Titus, Jeremiah L. Morgan, and Robert J. Olson, counsel for *Amici Curiae*.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and 5th Circuit Rule 28.2.1, it is hereby certified that *amici curiae* Citizens United, Citizens United Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, 60 Plus Association, 60 Plus Foundation, Fitzgerald Griffin Foundation, Downsize DC Foundation, DownsizeDC.org, and American Business Defense Foundation are non-stock, nonprofit corporations, have no parent companies, and no person or entity owns them or any part of them. *Amicus* Eberle Communications Group, Inc. is a for-profit corporation. *Amicus* Restoring Liberty Action Committee is an educational organization.

/s/ William J. Olson
William J. Olson
Attorney of Record for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*[1]

Citizens United, Citizens United Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, 60 Plus Association, 60 Plus Foundation, Fitzgerald Griffin Foundation, Downsize DC Foundation, DownsizeDC.org, and American Business Defense Foundation are nonprofit organizations, and each is exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Eberle Communications Group, Inc. 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 law.

Some of these *amici* filed an amicus brief in this case before the district court:

- Texas, *et al.* v. United States of America, *et al.*, 340 F. Supp. 3d 579 (N.D. Tex.) (May 3, 2018).

Some of these amici have also filed *amicus curiae* briefs in several earlier cases challenging the Patient Protection and Affordable Care Act:

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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.

- Virginia, *ex rel*. Kenneth T. Cuccinelli, II, Attorney General of Virginia v. Kathleen Sebelius, 656 F.3d 253 (4th Cir. 2011).
- Virginia, *ex rel*. Kenneth T. Cuccinelli, II, Attorney General of Virginia v. Kathleen Sebelius, No. 11-420, On Petition for Certiorari (Nov. 3, 2011).
- Dept. of Health and Human Services v. Florida (consolidated with NFIB v. Sebelius, 567 U.S. 519, 132 S.Ct. 2566 (2012)).
- Conestoga Wood Specialties v. Sebelius, 573 U.S. ___, 134 S.Ct. 2751 (2014).
- King v. Burwell, 576 U.S. ___, 135 S.Ct. 2480 (2015).
- Sissel v. Department of Health and Human Services, *et al*., 577 U.S. ___, 136 S.Ct. 925 (2016).
- Zubik v. Burwell, 578 U.S. ___, 136 S.Ct. 1557 (2016).

STATEMENT OF THE CASE

In December 2017, Congress enacted, and President Trump signed into law, the Tax Cuts and Jobs Act of 2017 ("TCJA"). 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 persons who failed to comply with the ACA's "individual mandate," requiring the purchase of certain health insurance as prescribed by law. The TCJA amendment expressly removed any penalty for

noncompliance with an unamended individual mandate, statutorily setting the penalty at zero. In explanation, the Congressional Budget Office noted that, after discontinuation of the obligation, the TCJA nevertheless allows anyone to choose to obey the regulatory mandate out "of a willingness to comply with the law." Congressional Budget Office, "Repealing the Individual Health Insurance Mandate: An Updated Estimate" (Nov. 2017).

Originally, compliance with ACA's individual mandate did not depend upon the "willingness" of the American people to obey the mandate. Rather, anyone who chose not to buy the prescribed insurance or have employer provided insurance faced a stiff financial penalty, which, in 2012, the Supreme Court upheld as an exercise of the taxing power. *See* NFIB v. Sebelius, 567 U.S. 519 (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, as the mandate was designed to fulfill three major goals, each of which was spelled out the statute: (i) "near-universal [health insurance] coverage;" (ii) "lower health insurance premiums;" and (iii) "effective health insurance markets." 42 U.S.C. § 18091.

Indeed, according to the ACA's legislative findings, "the individual mandate is critical to the functioning of the Act's major features." Brief of

Plaintiffs in Support of Application for Preliminary Injunction at 8 (N.D. Tex.) (Apr. 26, 2018). The reason was simple. Without an individual requirement to purchase the type of health insurance approved by the federal government, many persons would defer purchasing any insurance until they needed care because the ACA prohibits denial of coverage for preexisting conditions. *See* 42 U.S.C. § 18091(2)(I).

In federal elections held after 2010 and through 2016, the battle against the individual mandate raged, culminating in 2017 in the repeal of its penalty in the TCJA. In their Amended Complaint, Plaintiff States contended below that the ACA now must be completely dismantled because the tax penalty undergirding the individual mandate is its *sine qua non* in light of the Supreme Court's prior ruling upholding the ACA solely as a constitutional exercise of Congress's 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 Complaint (N.D. Tex.) (Apr. 23, 2018) at 4.

On December 30, 2018, the district court ruled in favor of the Plaintiff States and declared that the entirety of ACA is now unconstitutional. Texas v. United States, 2018 U.S. Dist. LEXIS 222345.

ARGUMENT

The assumption of those who would seek to save the so-called Affordable Care Act after the zeroing out of the tax is that the federal government has and should have authority to direct healthcare choices for Americans. That view may be widely held today, but was unknown at the time the Constitution was adopted.

In a work first completed in 1781, Thomas Jefferson sarcastically warned of the danger of giving the government control over matters of healthcare:

> Was the government to prescribe to us our medicine and diet, our bodies would be in such keeping as our souls are now. [T. Jefferson, Notes on the State of Virginia, p. 266 (1787 ed.).]

Likewise, physician and signer of the Declaration of Independence Dr. Benjamin Rush of Philadelphia warned against governmental interference on personal freedom to make health choices:

> 21st. The interference of governments in prohibiting the use of certain remedies, and enforcing the use of others by law. The effects of this mistaken policy has been as hurtful to medicine as a similar practice with respect to opinions, has been to the Christian religion. [Benjamin Rush, M.D., Introductory Lectures: Institutes and Practice of Medicine at 149 (Philadelphia: 1801).]

See generally, Larrey Anderson, "No Health Care in the Constitution," *American Thinker* (Nov. 2, 2009); Ben Domenech, "Constitution Day: What Does the Constitution Say About Healthcare," *RedState* (Sept. 17, 2010).

Although the Federalist Papers do not speak of any role of the central government over health or medical matters, in Federalist No. 38, James Madison included an instructive comparison between the situation faced by an American pondering the choice of ratification with the situation faced by an individual who was assumed to have complete control to make decisions about his own healthcare.

> A patient, who finds his disorder daily growing worse, and that an efficacious remedy can no longer be delayed without extreme danger; after coolly revolving his situation, and the characters of different physicians, selects and calls in such of them as he judges most capable of administering relief, and best entitled to his confidence.... [Federalist No. 38, reprinted in The Federalist (G. Carey & J. McClellan, eds.) (Liberty Fund: 2001) at 188.]

In sum, these three founders had no doubts but that the patient had plenary authority over his own healthcare choices.

While today one can only imagine healthcare absent the role the national government plays, 230 years ago, one could never have imagined the role that the national government now plays — with or without the Affordable Care Act. In 2010, the ACA was said to have asserted control over one-seventh of the U.S. economy. Jon N. Hall, "ObamaCare's Real Price Tag," American Thinker (Apr. 14, 2012). Since then, healthcare spending has only increased:

> U.S. health care spending grew 3.9 percent in 2017, reaching $3.5 trillion or $10,739 per person. **As a share of the nation's Gross Domestic Product, health spending accounted for 17.9 percent**. [Centers for Medicare & Medicaid Services, National Health Expenditure Data (emphasis added).]

I. THE LEGISLATIVE HISTORY OF THE TCJA PROVIDES NO SUPPORT FOR THE CLAIM THAT THE ACA IS STILL CONSTITUTIONAL.

The Intervenor House of Representatives attempts to rely on the legislative history of the 2017 TCJA amendment to buttress its position that the ACA should be allowed to continue in full force, even with the tax being zeroed out. In support, the Brief of Intervenor House contends: "Numerous legislators made clear that their support for the 2017 amendment was contingent on their understanding that all other provisions of the Act, including the protections for individuals with preexisting conditions, would remain in force." Brief of Intervenor House at 8. Yet, Appellees do not appear to believe legislative history is useful, as they provide none of the circumstances surrounding the legislative history that led to the penalty repeal being inserted into the bill while it was

pending.[2] *See* Brief of Federal Defendants at 13-14 and Brief of Plaintiff States at 15-16.

It is not persuasive to quote individual members of Congress for what the majority that passed a bill thought: "A reliance on legislative history also assumes that the legislature even *had* a view on the matter at issue. This is pure fantasy. In the ordinary case, most legislators could not possibly have focused on the narrow point before the court." A. Scalia & B. Garner, Reading Law at 376 (West: 2012).

Quoting Senator Orrin Hatch (R-UT) — who introduced the 2017 amendment to the individual mandate penalty — the Intervenor House claims support for its position that the Tax Cuts and Jobs Act does nothing to the remainder of the ACA. Brief of Intervenor House at 44. However, as with most legislation, the legislative history is not at all clear. For example, the Intervenor House brief does not mention that in the same month H.R. 1 was enacted, Senator

[2] The Individual Plaintiffs look at the legislative intent and history with respect to severability, but that is only about the history of the ACA, not the Tax Cuts and Jobs Act. *See* Brief of Individual Plaintiffs at 48-50.

Hatch wrote an op-ed stating that "[r]epealing the individual mandate tax is the beginning of the end of the ObamaCare era...."[3]

These *amici* urge this Court not to base its decision on a search for the legislative history of the Tax Cuts and Jobs Act, but rather to apply the "'no-recourse doctrine' — that in the interpretation of a text, no recourse may be had to legislative history." Reading Law at 369. But should the Court choose to examine legislative history, it offers no meaningful support for appellants' position.

In truth, there is not much legislative history regarding the 2017 amendment that actually sheds light on Congress's motivation when it passed this law. The Tax Cuts and Jobs Act was introduced in the House of Representatives as H.R. 1 without any provisions relating to the individual mandate. After H.R. 1 reached the Senate, Senator Hatch introduced an amendment in the nature of a substitute, repealing the tax associated with the individual mandate, and the Senate passed that version of H.R. 1 on December 2, 2017. There is only one Committee report in either chamber on this bill, from the House Committee on Ways and Means — but that report accompanied the House version before the Senate amendment. *See* Tax Cuts and Jobs Act, House Report 115-409 (Nov. 13, 2017). The two houses

[3] O. Hatch, "Repealing the Individual Mandate Tax Is the Beginning of the End of the ObamaCare Era," FoxNews.com (Dec. 20, 2017).

then appointed a conference committee to resolve differences between the two versions of the bill. The conference report merely noted that the original House version of H.R. 1 had made no changes to the individual mandate penalty, that the Senate version amended the penalty to $0, and that the conference committee adopted the Senate version of that provision — with no further comment. *See* 115 Cong. Rec. H10028 (Dec. 15, 2017). Both houses then acceded to the conference report with only a minor amendment required to comply with Senate rules.

When it zeroed out the tax, Congress was presumed to know that the U.S. Supreme Court previously had ruled that the ACA was valid under only one of Congress's enumerated powers under the Constitution: the power to tax. *See* Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."). Thus, regardless of how a few individual members of Congress may have sought to pepper the record with their hopes as to how the Tax Cuts and Jobs Act later would be viewed as affecting the ACA, Congress was charged with knowledge that the 2017 act repealed the very penalty that the Supreme Court relied on to find a valid use of the taxing power. With the constitutional predicate for Congress to enact the ACA law removed, the ACA was rendered unconstitutional.

It should be noted that the Brief of Intervenor House was filed in 2019 by the now Democrat-led House of Representatives during the current the 116th Congress, arguing to this Court what the House — led by Republicans in the last Congress — intended. That would be a remarkable feat, but it is rendered impossible by the fact that not one Democrat member of the House or the Senate voted for H.R. 1 in December 2017. Thus, the Brief of Intervenor House should be viewed as the equivalent of a minority report — the voice of the loyal opposition — relitigating their loss in the 115th Congress.

The Intervenor States point out, as support for their position, that "[t]he 2017 Congress amend [sic] Section 5000A through budget reconciliation, a specialized procedure that allows the Senate to consider certain tax, spending, and debt-limit legislation on an expedited basis, but which may not be used to pass laws unrelated to reducing the deficit." Brief of Intervenor States at 38. However, this procedural rule cuts against their position, not for it. The Senate rules would not have permitted a frontal repeal of the ACA in the Tax Cuts and Jobs Act. Any such attempt properly would have been ruled out of order. However, repealing the individual mandate penalty — previously ruled to be a tax — was entirely in order for the 2017 act. And since Congress is charged the knowledge that the tax accompanying the individual mandate was the constitutional foundation on which

the mandate was based, once that tax was removed, all of the ACA falls like a row of dominos.

II. THE PLAINTIFF STATES' ARGUMENTS REGARDING THE CONSTITUTIONALITY OF THE ACA ARE NOT PERSUASIVE.

The Opening Brief of the Intervenor States characterizes the 2017 congressional amendment to Section 5000A — which reduced the penalty for failure to comply with the individual mandate to zero — as providing only an "encourage[ment to] Americans to buy health insurance." Brief of Intervenor States at 28. It describes the revised statute as "precatory," as it "imposes no legal obligation to do so." *Id*. Under the 2017 amendment, the Brief of Intervenor States argues, "individuals may freely choose between having health insurance and not having health insurance, without paying any tax if they make the latter choice." *Id*. Because "Congress has eliminated any form of compulsion" (*id*. at 29), the Intervenor States purport to find the amended statute authorized under either the Commerce Clause or the Taxing Power. They are wrong in both respects.

A. Commerce Clause

The Intervenor States boldly assert that, without a sanction, "[t]here can be no concern that Section 5000A(a) violates the Commerce Clause." *Id*. at 29.

With that assertion, the Intervenor States seek to circumvent the holding of the five-vote majority in NFIB, that the law imposing the individual mandate was invalid as an exercise of the commerce power. To support their argument, the Intervenor States falsely analogize the amended Section 5000A to a "sense of the Congress" resolution. However, neither House Resolutions, nor Senate Resolutions, nor Concurrent Resolutions are presented to the President for signing, and none have the force of law. But apparently the Intervenor States even would view Congressional commands contained in bills and Joint Resolutions signed by the President to be valid so long as they do not contain a sanction no matter what subject area they address.

The Intervenor States apparently would yield state authority to all national assertions of control, viewing any sanctionless law or resolution to be within the authority of Congress, even though the subject matter was wholly outside the authority of Congress. No enumerated power need be exercised. Not even an elastic reading of the "Necessary and Proper Clause" is required. Not even the Tenth Amendment's reservation of authority to the People and the States would be an impediment. Thus, the Intervenor States would seem to have no constitutional objection to Congress, say, enacting a law prohibiting any state to charge a sales

tax, or mandating that every state allow "constitutional carry" of handguns, so long as there was no specific sanction imposed for violation of those measures.

Yet, fearing their new constitutional theory may later be used against them, the Intervenor States suggest one limitation for this new and extraordinary congressional power to direct matters not within its constitutional authority — that "Congress may not adopt even precatory provisions that violate one of the Constitution's express prohibitions" — using the Establishment Clause[4] as its only example. Brief of Intervenor States at 29, n.24.

Assessments of the national government's authority to take a particular action focus first on whether that power was granted to Congress, followed by an examination of whether an exercise of that power is prohibited by any other constitutional provision — primarily in the Bill of Rights. But under the radical principle advanced by the Intervenor States, Congress would be free to ignore constitutional limitations on its powers, being required only to respect what they

[4] The reason for this specific exception for the Establishment Clause, no doubt, is the fear that the expansive principle of constitutional law advanced by these states could be used by a Congress to adopt a nonbinding resolution or law based on religious principles they reject — primarily Christian principles. Of course, those in charge of many of the largely leftist Intervenor States view the Establishment Clause as prohibiting only laws consistent with the Christian faith, while presenting no barrier to their efforts to base their legislation on religions opposing the Christian faith, such as secular humanism. *See*, *e.g.*, Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

would consider "express prohibitions." These Intervenor States distinguish between grants of power and limits of power in a manner that rejects Alexander Hamilton's argument in Federalist No. 85, that a Bill of Rights was not necessary — actually redundant — because the areas of protection were already guarded against intrusion by the limitations on congressional power. *See* The Federalist at 452-58. Thus, according to the dangerous theory advanced in the Brief of Intervenor States, the federal government would be transformed from a government of limited powers into one of unlimited powers, so long as its directives omit sanctions and respect the Constitution's "express prohibitions" other than the Tenth Amendment.

B. Taxing Power

After attempting to limit NFIB's ruling, denying Commerce Clause authority for a mandate to engage in commerce, the Intervenor States seek to expand NFIB's Taxing Power holding in ways that violate the "essential" requirement that the tax generate "some revenue," as explained by the Court's five-vote majority authored by Chief Justice Roberts. The Intervenor States summarize their view as follows: Section 5000A, as a statute that imposes no tax "may, **if necessary**, be fairly interpreted as a lawful exercise of Congress's **taxing powers**...." Brief of Intervenor States at 29 (emphasis added). The phrase "if

necessary" accurately describes the dilemma faced by the Intervenor States: unless a non-tax is considered a tax, their position fails.

First, the Intervenor States assert that taxes may be "temporarily ... suspended" and Section 5000(a) could be amended so that taxpayers "could **at some point** be directed to pay a tax for choosing not to maintain minimum healthcare coverage." *Id*. (emphasis added). However, no statute exists which could not be, "at some point," amended to direct the payment of a tax. If the possibility that a future Congress might "at some point" amend it to attach a tax to an otherwise unlawful exercise of congressional power, then any statute — by virtue of what we might describe as the "hypothetical future taxing power" — could be deemed a constitutional exercise of the taxing power.

The case law relied on by the Intervenor States does not help them at all. United States v. Ardoin, 19 F.3d 177 (5th Cir. 1994) is suggested as an authority as a "defendant was convicted for failing to pay a tax on the manufacture of machineguns — even though Congress had made it illegal to possess machineguns." Brief of Intervenor States at 30. The Intervenor States boldly assert that the Ardoin case "forecloses any argument that Section 5000A must generate revenue at all times to remain a valid exercise of Congress's taxing

power." Brief of Intervenor States at 30-31. This very argument was raised in the district court, which had no trouble distinguishing that case.

In Ardoin, a prosecution was permitted for failure to pay a tax where the activity being taxed (manufacturing a machinegun) had been made illegal, causing the agency in question to refuse to accept payment of the existing tax. The district court began with the proposition that the Ardoin decision "does not abrogate the Supreme Court's holding that the generation of revenue is the essential feature of a tax — and not only because a Fifth Circuit opinion ought not be read to contravene Supreme Court precedent." Texas v. United States, 2018 U.S. Dist. LEXIS 222345 at *31, n.35. This point was left undeveloped by the lower court, but deserves some further comment. Chief Justice Roberts' opinion in the NFIB decision, coming 18 years after Ardoin, made clear:

> The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which ... must **assess and collect** it "in the same manner as taxes." This process yields **the essential feature of any tax**: It **produces at least some revenue** for the Government. Indeed, the payment is expected to raise about $4 billion per year by 2017. [NFIB at 563-64 (citations omitted) (emphasis added).]

Applying the standard used by the Chief Justice, the only characteristic that the original law analyzed in the NFIB case and the amended law today have in common is that both are found in the Internal Revenue Code. Beyond that,

today's law has none of the characteristics the Chief Justice found critical. The amended law does not result in taxes "assess[ed]" by the IRS, or "collect[ed]" by the IRS, and consequently it does not meet "the essential feature of any tax" — it fails to "produce[] at least some revenue." *Id.* Thus, the Intervenor States essentially are asking this Court to disregard a controlling holding of the U.S. Supreme Court evaluating the same law (albeit in its unamended form) in favor of an 18-year-old opinion of this Court which addressed a very distinguishable factual scenario.[5] The district court demonstrated that its decision follows the essential holding of Ardoin:

> *Ardoin* confirms that legislative text is the proper object of any analysis of legislative activity — Executive actions do not constitutionalize or de-constitutionalize Legislative actions. And here, Congress itself *legislatively eliminated* the shared-responsibility payment. [2018 U.S. Dist. LEXIS at *31, n.35.[6]]

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[5] The district court further explained the Ardoin decision as deciding that "[t]he illegality of the activity did not render the legislation a nullity" (2018 U.S. Dist. LEXIS at *31, n.35), but here, refusal to purchase insurance was never criminalized. Further, while ATF continued to have authority to tax machineguns, even if not enforced, here the IRS has no such authority impose a non-existent tax on persons not purchasing insurance — because "the IRS's authority to tax noncompliance is gone." *Id.*

[6] The Intervenor States' other arguments, such as their argument that a "delayed start" date on, or a temporary suspension of, a revenue generating tax would render that real tax, producing real revenue, to be a nullity, demonstrates how little authority could be found to violate the common-sense principle that a tax set at zero dollars is no tax at all. All taxes with delayed starts or all

The Intervenor States seek to circumvent what the Supreme Court said was the "essential" requirement — that the statute "produces at least some revenue" — on the theory that a tax need only have the "**potential** to generate revenue **at some point**." *Id*. at 30 (emphasis added). But, of course, this argument is just a variant of the "hypothetical future taxing power" theory suggested by the Intervenor States and addressed, *supra*. Any law has the "potential" to be amended to impose a tax — but that does not make the law without the tax a constitutional exercise of the taxing power.[7]

III. AS A MATTER OF STATUTORY CONSTRUCTION, THE TAX CUTS AND JOBS ACT OF 2017 IMPLIEDLY REPEALED THE ENTIRE ACA.

The issue before this Court may be viewed as one of statutory interpretation — focusing on that portion of the 2017 Tax Cuts and Jobs Act that amends the

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temporarily suspended taxes impose a tax that is not zero.

[7] Furthermore, in Ardoin, over a strong dissent, the panel took a generous position on the scope of Congressional authority, upholding the National Firearms Act not only under the taxing power, but also the Commerce Clause even though Congress had relied only on the taxing power. *See* Ardoin at 180. (*Amici* do not concede that the Ardoin Court was correct that Congress could pass the NFA pursuant to the Commerce Clause.) Of course, the Supreme Court upheld the ACA under only the taxing power, even though it was enacted under the Commerce Clause.

individual mandate enacted as ACA's Section 5000A.[8] All parties agree that, by passage of "the Tax Cuts and Jobs Act, Congress reduced to zero the amount of the tax imposed ...which ... individuals could pay as a lawful alternative to maintaining healthcare coverage otherwise called for by Section 5000A(a)." *See* Brief of State Intervenors at 16. But the parties part ways, disagreeing about the impact that this change has on the individual mandate itself and the remaining provisions of ACA. *Compare, e.g.,* Brief of Individual Plaintiffs at 8-12 *with* Brief of State Intervenors at 21-25.

According to the State Intervenors, "the 2017 Congress's intent is evident from what it did: eliminating any legal consequences for not maintaining minimum healthcare coverage, while preserving every other provision of the Act." Brief of State Intervenors at 25. In contrast, the Individual Plaintiffs contend that the Intervenors "miss the mark," in a futile search of legislative motivations, instead of "anchor[ing] its analysis to the actual text of the statute." Brief of Individual Plaintiffs at 12.

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[8] Indeed, in light of the doubts expressed about the continuing constitutionality of the ACA after the 2017 amendment (*supra*, pp. 11-19), the Constitutional-Doubt canon would dictate examination of the statutory question first lest the Court unnecessarily resolve the question of the constitutionality and severability of the ACA individual mandate. *See* Reading Law at 247-51.

The State Intervenors persist in their view that "[w]ith the amount of the tax set at zero, the remaining minimum coverage provision becomes simply precatory — precisely as the amending Congress intended." Brief of State Intervenors at 22. Thus, State Intervenors argue that the amendment serves the individual mandate by nothing more than words of "encourage[ment] [for] Americans to buy health insurance, but it imposes no legal obligation to do so." *Id.* at 28. The Brief of Intervenor House echoes this sentiment, stating that "Section 5000(A) provides a choice between two lawful options: buying health insurance or making a 'shared responsibility payment.'" Brief of Intervenor House at 9; *see also* at 16.

Thus, the House Brief concludes that the 2017 amendment "remove[d] any coercive force the mandate might have had...." *Id.* at 17. Reflecting this view, the State Intervenors chime in with the observation that "[w]ith the amount of the alternative tax set at zero, Section 5000A no longer compels any individual to maintain healthcare coverage ...." Brief of State Intervenors at 3.

While their precatory position might find favor when measured by the ordinary-meaning canon, the intervening defendants have committed a common error, having ignored the whole-text canon, "which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Reading Law at 167. And as Justice Benjamin

Cardozo emphasized: "'[T]he meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view.'" *Id.* at 168 (citing Panama Ref. Co. v. Ryan, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting)). Beginning with the individual mandate itself, the Brief of Intervenor House takes special note that the "2017 amendment made a single change to Section 5000(A)[,] reduc[ing] the amount of the payment provided in Section 5000A(c) to zero." Brief of Intervenor House at 16. Summarizing, the Intervenor House continued:

> The amendment did not alter the text of the **mandate** or shared-responsibility subsections ... [n]or ... alter the provision's structure. Section 5000A(a) remains the '**mandate**'; Section 5000A(b) continues to **require** a '**shared responsibility payment**' in the **amount prescribed** in Section 5000A(c); and Section 5000A(c) **continues to prescribe the amount** of that payment (**now zero**). [Brief of Intervenor House at 16 (emphasis added).]

The House brief's description is correct — but the language however, is not "precatory." As the Individual Plaintiffs have argued, "[e]ven though there is no monetary penalty for noncompliance," the individual plaintiffs "are still harmed by being **legally mandated** to purchase unwanted insurance." Brief of Individual Plaintiffs at 29 (emphasis added).

Refuting the claim of the Brief of Intervenor House that "'the Act imposes no legal requirement to obtain insurance ... without breaking the law,'" Plaintiffs

assert that "[t]his reasoning is not only legally incorrect, but also undermines the rule of law that is so fundamental to our system of governance" — "that members of society are duty-bound to follow the law." Brief of Individual Plaintiffs at 39-40 (quoting Brief of Intervenor House at 21). While this civic duty is most often accompanied by some sort of physical compulsion such as the payment of a tax, it has been long understood "that human laws are binding upon men's consciences." 1 Blackstone's Commentaries on the Laws of England at 57 (U. Chi. Press, Facsimile ed.: 1765).

Thus, the Apostle Paul taught that one should obey higher authorities — not only because, as God's ministers, they are imbued with the power to punish, but "also for conscience sake." Romans 13:5. Indeed, as the Apostle Peter witnessed, failure to perform one's civil duties is fully sanctionable by God Almighty, regardless of what Congress or the IRS or other agencies may or may not do. *See* 1 Peter 2:13-17. In the Pauline example, one's legal duty can be discharged by the payment of a tax. Romans 13:6-7. In Peter's case, one's duty can only be discharged by "[s]ubmit[ting] ... to every ordinance of man for the Lord's sake." 1 Peter 2:13. Instead of alleviating the moral duty of paying a tax, the 2017 amendment actually exacerbates the moral harm. Under the original ACA, the tax

can be paid without doing harm to conscience. Under the amended ACA, that option is removed.

The Intervenor States' view that there is no duty to obey the mandate without a penalty reflects the view of late nineteenth and early twentieth-century "legal realists" like Oliver Wendell Holmes who famously spoke:

> What constitutes the law? You will find some text writers telling you ... that it is a system of reason, that it is a deduction from principles.... But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact ... and nothing more pretentious, are what I mean by the law. [O. W. Holmes, "The Path of the Law," Collected Legal Papers at 172-73 (Harcourt, Brace & Co.: 1920).)

Under the Holmes's view, there is no moral content in the rule of law, just force. Implicitly adopting that view, the State Intervenors assume that the 2017 amendment imposes no new legal obligation from the one imposed by the original ACA. The Individual Plaintiffs have demonstrated otherwise, adopting the view of both Blackstone and the Bible. Both parties seek to resolve the matter by adjudicating the continuing question: whether the ACA is constitutional after the 2017 amendment reducing the tax to zero.

In Reading Law, Scalia and Garner have grouped several canons as "stabilizing," the last of which is the presumption against implied repeal. Reading

Law at 327. While the presumption is a strong one, it should not stand in the way of meeting "the need for a code of laws whose application — or at least whose very existence — is clear." *Id.* at 328. Rather, under the implied repeal canon, it is the role of the judicial branch, not the legislative, "'to make sense rather than nonsense out of the *corpus juris.*'" *Id.* at 331 (quoting West Virginia Univ. Hosp. v. Casey, 499 U.S. 83, 100-01 (1991)).

With the passage of the Tax Cuts and Jobs Act, zeroing out the individual mandate, the ACA constitutional *corpus* is in shambles. From its very passage, the entire ACA was constitutionally suspect, wholly dependent upon the nature of the individual mandate. At first, it appeared that the ACA was unconstitutional because "as an enforceable, stand-alone mandate requiring individuals to purchase health insurance," it could not be sustained as an exercise of power under the Commerce Clause. Then, re-characterizing the mandate as a provision "affording individuals a 'lawful choice' between buying insurance or paying a tax," the ACA was upheld as a constitutional exercise of Congress's power to tax. Brief of Intervenor States at 1.

By zeroing out the revenue generated by the individual mandate, Congress repealed its previous exercise of its taxing power, returning the constitutional justification of the ACA to its original source, the Commerce Clause — a stand-

alone mandate requiring individuals to purchase health insurance. Thus, by zeroing out the individual mandate, Congress impliedly repealed the entire ACA.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Citizens United, *et al*. in Support of Plaintiffs-Appellees and Affirmance, was made, this 8th day of May, 2019, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Citizens United, *et al*. in Support of Plaintiffs-Appellees and Affirmance complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 5,755 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as well as Circuit Rule 32.1, because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 14-point Times New Roman.

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