

Nos. 19-840, 19-841

**In The
Supreme Court of the United States**

CALIFORNIA, ET AL.,
Petitioners,

v.

TEXAS, ET AL.,
Respondents.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

v.

TEXAS, ET AL.,
Respondents.

*On Petitions for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit*

**BRIEF OF SMALL BUSINESS MAJORITY
FOUNDATION AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT.....	4
Immediate Review Is Warranted Because Small Businesses Need Certainty About The Validity Of Crucial ACA Reforms.	4
A. ACA’s Distinct Reforms Have Made Affordable Health Coverage Available to Small Businesses, Freeing Individuals to Make Entrepreneurial Choices that Fuel the Economy.	4
B. Uncertainty About ACA’s Validity Eviscerates the Act’s Benefits and Harms Small Businesses and Their Employees.....	11
CONCLUSION	13

TABLE OF AUTHORITIES

STATUTES AND REGULATIONS

26 U.S.C. § 45R.....	11
Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).....	1
45 C.F.R. § 156.80.....	9

OTHER AUTHORITIES

Assoc. for Enter. Opportunity, <i>Bigger Than You Think: The Economic Impact of Microbusinesses</i> (2019)	9
Cong. Budget Office, Econ. & Budget Issue Brief, <i>Effects of Changes to the Health Insurance System on Labor Markets</i> (2009)	5
Sabrina Corlette et al., Urban Inst. & the Robert Wood Johnson Foundation, <i>Small Business Health Insurance and the ACA: Views from the Market 2017</i> (2017)	10
Paul Fronstin, Emp. Benefit Research Inst., <i>Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2012 Current Population Survey</i> (2012)	4
Health & Disability Advocates, <i>Small Businesses and the Affordable Care Act</i> (2014)	10
Bradley T. Heim & Lang Kate Yang, <i>The Impact of the Affordable Care Act on Self-Employment</i> , 26 Health Econ. 256 (2017)	12

Kaiser Family Foundation, <i>Health Reform Glossary</i>	6
Kaiser Family Foundation, <i>The Uninsured: A Primer</i> (2016)	7
Sean Lowry & Jane G. Gravelle, Cong. Research Serv., R43181, <i>The Affordable Care Act and Small Business: Economic Issues</i> (2015)	9
Sarah Lueck, <i>Health Coverage Gains for Small-Business Workers at Risk</i> , Ctr. on Budget & Pol’y Priorities (Jan. 9, 2017)	7
Karin McKie, Letter to the Editor, <i>Obamacare a Lifesaver for the Self-Employed</i> , Chicago Sun-Times (July 23, 2017)	8
Harris Meyer, <i>Self-Employed Fear ACA Repeal Means ‘Job Lock’</i> , Modern Healthcare (Dec. 28, 2016).....	8
Ron Nelson, Opinion, <i>One View: Obamacare Helped Me to Provide Insurance for Employees, Family</i> , Reno Gazette J. (Jan. 23, 2017)	11
Stephanie O’Neill, <i>Some Obamacare Enrollees Emboldened to Leave Jobs, Start Businesses</i> , Kaiser Health News (Apr. 29, 2014)	8
Small Bus. Majority Foundation, <i>Number of Small Business Owners, Self-Employed People and Small Business Employees in the ACA Marketplaces</i>	6
Ellyn E. Spragins, <i>How to Beat Job Lock</i> , Newsweek (Dec. 14, 1998)	5
Autumn Theodore, Letter to the Editor, <i>AHCA Would Not Be Good for Small Business</i> , Columbus Dispatch (June 29, 2017).....	7

U.S. Dep't of Health & Human Servs., *Fiscal Year
2017 Budget in Brief* (2016) 10

U.S. Gov't Accountability Off., GAO-12-166R, *Health
Care Coverage: Job Lock and the Potential Impact
of the Patient Protection and Affordable Care Act
(2011)* 4, 5

INTEREST OF *AMICUS CURIAE*¹

The Small Business Majority Foundation, Inc. is a national, nonpartisan organization founded and run by small business owners across the United States. The organization researches policy issues related to job creation and maximizing business opportunities and competitiveness for small businesses across the United States. It also educates small business owners about their health care options through events and online resources. In addition, the organization represents the interests of small businesses before Congress and state legislatures, the Executive Branch, and the courts. In recent years, it has focused on policies that address rising health care costs, which can limit workforce mobility and disproportionately burden small businesses. *See, e.g.*, Br. for Small Bus. Majority Foundation, Inc., et al., *Dep't of Health and Human Servs., et al. v. Florida*, 567 U.S. 519 (2012); Br. for Small Bus. Majority Foundation, Inc., *King v. Burwell*, 135 S. Ct. 2480 (2015).

The Foundation's considered view is that the reforms established by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA" or "the Act"), have provided substantial benefits for small businesses, their employees, and the self-employed, by providing a means of acquiring affordable health insurance. The

¹ Counsel of record for all parties received timely advance notice of the intent to file this brief and consented to the filing of the brief. S. CT. R. 37.2(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

Foundation agrees with Petitioners that the Fifth Circuit was wrong to find that zeroing out the shared responsibility payment rendered that provision unconstitutional and likewise agrees with Petitioners that Congress plainly intended the rest of the Act to stand, regardless. *See* Pet. in 19-840 at 21-26; Pet. in 19-841 at 27-34. Most crucially, however, the Foundation writes to urge immediate review because the remand ordered by the Fifth Circuit has prolonged paralyzing uncertainty about the status of the Act. The Nation’s small businesses and would-be entrepreneurs require clear rules and predictability to make critical choices about changing jobs, starting businesses, hiring employees, and setting budgets. There is no good reason to permit one of the most significant reforms of this century—which has assured crucial health coverage for millions of small business owners and self-employed Americans—to linger in limbo, potentially for years.

INTRODUCTION AND SUMMARY OF ARGUMENT

For the Nation’s small businesses—and entrepreneurs seeking to start them—few questions loom larger than health insurance. Before the Affordable Care Act, the answers were often negative: health insurance was too costly or unobtainable at any price, and out of reach for many self-employed people and small business owners. Many entrepreneurs went uninsured. Others clung to jobs with affordable health coverage rather than move to otherwise attractive jobs with small firms or pursue their dreams of starting a business—a phenomenon known as “job lock.”

The Act changed that, through a myriad of different means, some wholly unconnected to the individual market where the shared responsibility payment applied. These measures have freed individuals throughout the Nation to make life choices about employment and entrepreneurship without forgoing affordable health care, dramatically increased the insurance rates among the self-employed, and made it easier for small businesses to provide comprehensive health care coverage to employees and their families.

But the freedom and ability to make informed choices about whether to start a business, change jobs, or purchase coverage for employees depends upon the certainty of ACA's guarantees. Health care made available through a constellation of reforms that might be invalidated (or not) in a piecemeal fashion at some undetermined point in time, this year or the next (or beyond), is not really available at all. From a decision-making perspective, the Nation's small businesses cannot rely on it. Whatever the result, individuals making life-changing decisions about their careers—and small businesses making competitive choices—need to know whether or not (or to what extent) the Act stands. Only this Court can definitively answer that question, and no answer will be certain until this Court speaks. There is no reason to wait, and every reason not to.

ARGUMENT

Immediate Review Is Warranted Because Small Businesses Need Certainty About The Validity Of Crucial ACA Reforms.

A. ACA's Distinct Reforms Have Made Affordable Health Coverage Available to Small Businesses, Freeing Individuals to Make Entrepreneurial Choices that Fuel the Economy.

1. Before many of ACA's reforms took effect in 2014, small business employees and the self-employed comprised a disproportionate share of the working uninsured. In 2011 roughly two-thirds of the nation's uninsured workers were self-employed or working at a company with fewer than 100 employees. Paul Fronstin, Emp. Benefit Research Inst., *Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2012 Current Population Survey* 15 (2012), <https://tinyurl.com/t512qah>. Small businesses were "less likely to offer their employees health coverage, citing the cost of coverage as a key reason." U.S. Gov't Accountability Off., GAO-12-166R, *Health Care Coverage: Job Lock and the Potential Impact of the Patient Protection and Affordable Care Act* 3 (2011) ("GAO Report"). And when small businesses did offer insurance, it was more expensive. Small business employees typically paid "nearly 30 percent" of "the average share of ... policy premiums," as compared to employees of larger firms who pay "about 7 percent." Cong. Budget Office, Econ. & Budget Issue Brief,

Effects of Changes to the Health Insurance System on Labor Markets 1 (2009).

Because coverage options were both limited and undesirable for small businesses before ACA's reforms, many individuals stayed in jobs with large companies that provided affordable health insurance, rather than start their own ventures or take jobs with small businesses—a phenomenon economists refer to as “job lock.” GAO Report at 3. Job lock harms not only those “frozen in a job [they] hate because leaving it means losing key health benefits.” Ellyn E. Spragins, *How to Beat Job Lock*, Newsweek, at 98 (Dec. 14, 1998). It also creates inefficiencies that ripple through the entire economy. Worker mobility, which is stymied by job lock, “promotes efficiencies in the labor market and provides benefits to the overall economy.” GAO Report at 3. Due to the greater difficulty small businesses faced in obtaining affordable health coverage pre-ACA, small businesses in particular bore much of the brunt of the harms, both on a personal level—reflected in the high uninsured rate among the self-employed—and in their diminished ability to attract employees.

2. Several ACA reforms made things better for small businesses, both by enabling access to affordable health insurance irrespective of employment and by providing small businesses the opportunity to obtain comprehensive health care coverage for their employees at lower costs and with greater price stability than ever before. These reforms, operating through distinct pathways and in different insurance

markets,² have freed people to make decisions about employment and entrepreneurship with confidence that their access to health care is secure.

a. Several independent ACA individual-market reforms spurred a dramatic increase in health insurance coverage for small business employees and self-employed workers, delivering peace of mind and economic freedom to millions of Americans. These reforms—like the formation of ACA’s exchanges and the associated premium tax credits, the ban on pre-existing condition exclusions, and the expansion of Medicaid in some States—have meaningfully increased individual choice, job mobility, and flexibility.

In particular, the individual exchanges have allowed millions more self-employed workers and small business employees to obtain health coverage than before the ACA’s passage. In total, over 5.7 million small business employees and self-employed workers are enrolled in the ACA individual marketplaces, and more than half of all ACA marketplace enrollees are small business owners, self-employed people, or small business employees. Small Bus. Majority Foundation, *Number of Small Business Owners, Self-Employed People and Small Business*

² Many ACA provisions of importance to the self-employed apply only in the individual market. Others apply to the group market, which involves employer-sponsored health insurance. See Kaiser Family Foundation, *Health Reform Glossary*, available at <https://goo.gl/n3J7AR> (entry for “Group Health Insurance”). The small group market is generally for employers with 2-50 employees, although the precise numbers can differ by State. See *id.* (entry for “Small Group Market”).

Employees in the ACA Marketplaces,
<https://goo.gl/d7Bzjk>.

Separate and apart from the exchanges, the Act's Medicaid expansion has also made coverage available to millions more small business employees, in those States that have chosen to participate. See Sarah Lueck, *Health Coverage Gains for Small-Business Workers at Risk*, Ctr. on Budget & Pol'y Priorities (Jan. 9, 2017), <https://goo.gl/MYExdS> (estimating that 1.7 million small business employees gained coverage through the expansion of Medicaid).

Collectively, these reforms substantially reduced the uninsured rate for the tens of millions of people who own or work for small businesses. Within two years of most ACA reforms taking effect, more than a third of previously-uninsured small business workers had found health coverage. Kaiser Family Foundation, *The Uninsured: A Primer* 8–9 (2016), <https://goo.gl/65jjMH> (reporting that 20% of the tens of millions of people working at a small business were uninsured in 2015, down from 31% in 2012). These numbers alone suggest that ACA has greatly reduced “job lock.”

Beyond the statistics, individual anecdotes also show how the Affordable Care Act's different reforms have proved decisive for people looking to leave a job to create small businesses or to become self-employed. Autumn Theodore, for example, was able to leave a “corporate job that offered health benefits” to start a photography business due to the ability to access coverage under Ohio's expansion of Medicaid. See Autumn Theodore, Letter to the Editor, *AHCA Would*

Not Be Good for Small Business, Columbus Dispatch (June 29, 2017), <https://goo.gl/k9msKf>. For other entrepreneurs, the Act's provisions regarding pre-existing conditions have proved crucial. Karin McKie, a small business owner in Chicago, reported that she has "endured several serious health issues, which now qualify as pre-existing conditions," and that without the Act, she "would have had huge financial strain, been forced to abandon [her] business to find employer-sponsored coverage and, in a worst-case scenario, declared bankruptcy." Karin McKie, Letter to the Editor, *Obamacare a Lifesaver for the Self-Employed*, Chicago Sun-Times (July 23, 2017), <https://goo.gl/xViDqB>. Other entrepreneurs have found the exchanges and associated tax credits essential. See, e.g., Stephanie O'Neill, *Some Obamacare Enrollees Emboldened to Leave Jobs, Start Businesses*, Kaiser Health News (Apr. 29, 2014), <https://goo.gl/pL9wdn> (describing how ability to purchase a subsidized health plan on an exchange enabled Rebecca Murray to start a company that helps other women care for their sick relatives); Harris Meyer, *Self-Employed Fear ACA Repeal Means 'Job Lock'*, Modern Healthcare (Dec. 28, 2016), <https://goo.gl/SWvMTf> (same for Joshua Lapp, who started a three-person urban planning firm).

Whichever ACA program has enabled them to obtain individual coverage, the Act has freed workers to make employment choices without the burden of forgoing affordable health coverage, by removing barriers like pre-existing condition exclusions or lack of affordable health coverage options. The resulting new business creation plays a powerful role in the U.S.

economy. Microbusinesses alone—businesses with fewer than five workers, including the owner—generate nearly \$5 trillion in economic activity each year. See Assoc. for Enter. Opportunity, *Bigger Than You Think: The Economic Impact of Microbusinesses* 7 (2019), <https://tinyurl.com/rbqvfkc>.

The ability of millions of Americans to leave their current employment and start new businesses, work as independent contractors, or pursue other endeavors on account of one or more of ACA’s reforms is thus not only a victory for individual choice and productivity. It has yielded increased productivity for the entire national economy.

b. The Act’s small group reforms, too, have helped small businesses provide affordable health benefits to employees, fostering growth and economic opportunity. These changes stand apart from the individual market reforms (to which the shared responsibility payment relates),³ yet they have also significantly benefitted small businesses and their employees. Relevant here, the Act has stabilized health care costs for small businesses that provide group coverage, reducing the disparity between large employers and small employers for those costs.

Before the Act was implemented, small businesses paid substantially more for health coverage than larger companies, usually for less comprehensive plans. Sean Lowry & Jane G. Gravelle, Cong. Research Serv., R43181, *The Affordable Care*

³ The individual market and small group risk pools are generally distinct. See 45 C.F.R. § 156.80.

Act and Small Business: Economic Issues 4 (2015), <https://goo.gl/CcXgN4>. And small business owners operating in tight labor markets often had no choice but to bear these costs. Because health care benefits are important to employees, ensuring employee access to health care is a significant factor in determining a small business's ability to attract top talent. See Health & Disability Advocates, *Small Businesses and the Affordable Care Act* 3 (2014), <https://goo.gl/ZxjYbh> (noting 71.8% of small business respondents reported that "providing health insurance benefits helps them recruit new employees").

The Act's small group reforms, including the small group exchanges (known as "SHOP," for "Small Business Health Options Program"), have significantly improved health care costs for small businesses (and their employees). Many small businesses offering health insurance coverage have seen their premium increases stabilize under the ACA, with premium increases dropping to their lowest level in years. Between 2008 and 2010, the average yearly premium increase in the small group market was 10.4%. U.S. Dep't of Health & Human Servs., *Fiscal Year 2017 Budget in Brief* 115 (2016), <https://goo.gl/kZ2RJw>. But after ACA, that rate has dropped by half or more. See *id.* (reporting average yearly premium increase in small group market of 5.2% between 2011 and 2015); Sabrina Corlette et al., Urban Inst. & the Robert Wood Johnson Foundation, *Small Business Health Insurance and the ACA: Views from the Market 2017*, at 5 (2017), <https://goo.gl/UTLVjN> (reporting 3.1% annual increase for businesses with fewer than 50 employees).

Beyond this stabilization in the small group market, another ACA program designed for newer, smaller businesses provides a tax credit to small businesses with fewer than 25 employees. This credit, up to 50% of the employer's share of qualifying health insurance premiums, is available for up to two consecutive years. *See* 26 U.S.C. § 45R. As one business owner reported, in addition to the "peace of mind" from "minimal" annual premium increases, he has received about \$2,200 per year for offering group health coverage to his employees, which "goes a long way toward reducing . . . costs." Ron Nelson, Opinion, *One View: Obamacare Helped Me to Provide Insurance for Employees, Family*, Reno Gazette J. (Jan. 23, 2017), <https://goo.gl/7YW9u7>. Programs like this, alongside other ACA reforms, not only increase the freedom for individuals to start or join small businesses, but also increase the opportunity for those individuals and businesses to thrive.

B. Uncertainty About ACA's Validity Eviscerates the Act's Benefits and Harms Small Businesses and Their Employees.

Put yourself in the place of a worker trying to decide whether to leave a steady job with employer-sponsored health insurance and start a new venture. Let's say you have a pre-existing condition. Would you shop on an ACA exchange, find an affordable health plan, and make the leap knowing that the premium tax credits are available today, but they might not exist next year or the year after, with no warning? What if you were a small business owner deciding whether to start providing health coverage for your

employees, knowing that it will be hugely unpopular if you extend coverage this year and have to drop it the next. In drawing up your business plan to determine future investments, would you rely on your ability to mitigate your costs with the small business tax credit? Likely not. Because who could be sure whether the small employer tax credit will be caught up in the “finer-tooth comb” employed by a district court in Texas, Pet. App. in No. 19-840 at 68a, during a lengthy (re-)evaluation of severability, given that the same court has already found the entire 900-plus-page Act inseverable.

Such decision-paralysis in the face of uncertainty over the Act’s ultimate fate harms the worker who, unwilling to risk losing health coverage, stays put in the health-care providing job. It harms the small business owners and employees who cannot plan and budget for employer-sponsored coverage. It harms the self-employed business owner who cannot know if, or how, she will obtain health care if the Act’s many reforms—or some indeterminate, unpredictable number of them—fall by the wayside. And it harms the economy as a whole.

Research confirms the common sense notion that uncertainty about the costs and availability of health care coverage means fewer people creating new small businesses and expanding existing ones. *See* Bradley T. Heim & Lang Kate Yang, *The Impact of the Affordable Care Act on Self-Employment*, 26 Health Econ. 256, 258 (2017) (finding statistically significant increase in self-employment only in the second year of ACA exchanges, when (among other factors), “the uncertainty surrounding the exchanges was

sufficiently reduced” and “individuals had time to adjust”).

While the costs of waiting are enormous, there is no downside to immediate review. There is no need to wait for a drawn out remand process because severability is a legal question, subject to de novo review, that has already been fully aired in the courts below. *See* Pet. in 19-840 at 17-18. And whatever the outcome on remand, precisely the same questions presented will inevitably return to this Court. A long delay for a “do-over,” Pet. App. in 19-840 at 98a (King, J., dissenting), will not change that. In the meantime, the millions of Americans who are self-employed or small business owners—or who would like to be—will suffer while awaiting the Act’s uncertain fate. The Court’s review is urgently needed now.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted.

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