Nos. 19-840, 19-1019

In the Supreme Court of the United States

STATE OF CALIFORNIA, ET AL.,
Petitioners,
v.
STATE OF TEXAS, ET AL.,
Respondents.

STATE OF TEXAS, ET AL.,
Petitioners,
v.
STATE OF CALIFORNIA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE JEREMY C. DOERRE SUGGESTING REVERSAL

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Jeremy C. Doerre is an individual attorney who believes that this case involves issues of exceptional importance to all Americans. Amicus' only interest is in highlighting a point that may have been overlooked in the lower court opinion in case it will be helpful to this Court's consideration. Amicus has no stake in any party or in the outcome of this case.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae or amicus curiae's counsel made such a monetary contribution to the preparation or submission of this brief. All parties have provided written consent to the filing of this brief. Counsel for California et al. provided written consent to the filing of this brief. Counsel for the U.S. House of Representatives filed a statement of blanket consent to the filing of amicus briefs. Counsel for the Federal Respondents filed a statement of blanket consent to the filing of amicus briefs. Counsel for Texas et al. filed a statement of blanket consent to the filing of amicus briefs. Counsel for the individual Respondents provided written consent to the filing of this brief. A copy of written consent from the Petitioners and Respondents who did not file a statement of blanket consent was provided to the Clerk upon filing.

SUMMARY OF THE ARGUMENT

In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), this Court held that 26 U.S.C. "§ 5000A need not be read to do more than impose a tax." *NFIB*, 567 U.S. at 570.

In the present case, the Fifth Circuit concluded that "[n]ow that the shared responsibility payment amount is set at zero, the provision's saving construction is no longer available." Pet. App. 44a.[2]

However, the Fifth Circuit's premise (that "the shared responsibility payment amount is set at zero") overlooks that "the shared responsibility payment amount is [not] set at zero" for all tax years, as § 5000A as amended still specifies a non-zero shared responsibility payment amount for some tax years. Pet. App. 44a.

Similarly, the Fifth Circuit's suggestion that "the provision no longer yields the 'essential feature of any tax' because it does not produce 'at least some revenue for the Government'" overlooks that § 5000A as amended is revenue-producing for the tax years for which "the shared responsibility payment amount is [not] set at zero." Pet. App. 44a.

First, § 5000A as amended is clearly revenue-producing in that it undisputedly produced revenue collected by the IRS under unamended portions of the

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[2] All references herein to Pet. App. refer to the Petition Appendix in No. 19-840.

statute. Texas et al.'s response to Amicus suggesting that it is permissible to ignore revenue recognized or collected "before the amendment took effect" (Brief in Opposition of Texas et al. in No. 19-840 at 24, n. 7) fails to take into account unamended portions of the statute, and improperly disregards revenue collected under such unamended portions of the statute which have continuously been in effect since "before the amendment took effect." *Id.*

Second, § 5000A as amended is also revenue-producing in that it is currently still applicable to produce revenue from delinquent taxpayers. Texas et al.'s response to Amicus that this argument is "without merit" because "the United States has used accrual accounting for decades" (Brief in Opp. of Texas et al. in No. 19-840 at 24, n. 7) overlooks that although "[e]xchange (earned) revenue is recognized when the government provides goods and services to the public for a price," "[n]on-exchange revenue, including taxes, duties, fines, and penalties, are recognized when collected." Dep't of Treasury FY 2018 Financial Rep. of the U.S. Gov't 67 (2019).[3] Thus, for example, delinquent shared responsibility payments for 2015 that are collected in 2020 are non-exchange revenue

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[3] Available at https://www.fiscal.treasury.gov/reports-statements/financial-report/2018-report.html; see also Dep't of Treasury FY 2019 Financial Rep. of the U.S. Gov't 67 (2020), available at https://www.fiscal.treasury.gov/reports-statements/financial-report/2019-report.html.

recognized in 2020. The negligible nature of this revenue does not undermine classification as a valid exercise of the taxing power. See *United States v. Sanchez*, 340 U.S. 42, 44 (1950)) ("a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. … The principle applies even though the revenue obtained is obviously negligible." (citing *Sonzinsky v. United States*, 300 U.S. 506, 513-514 (1937)).

Overall, § 5000A's "requirement that certain individuals pay a financial penalty for not obtaining health insurance [still] may reasonably be characterized as a tax," *NFIB*, 567 U.S. at 574, because "the shared responsibility payment amount is [not] set at zero" for all tax years and is revenue-producing. Pet. App. 44a.

Further, "§ 5000A [still] need not be read to do more than impose a tax" because analogously to *NFIB*, "the individual mandate … need not be read to declare that failing to [purchase health insurance] is unlawful" even if "individuals who are subject to the mandate are nonetheless [effectively] exempt from the penalty" for some tax years because it is zero dollars. *NFIB*, 567 U.S. at 570, 567-568, 539-540.

ARGUMENT

I. § 5000A's "requirement that certain individuals pay a financial penalty for not obtaining health insurance [still] may reasonably be characterized as a tax," *NFIB*, 567 U.S. at 574, because "the shared responsibility payment amount is [not] set at zero" for all tax years and is revenue-producing. Pet. App. 44a.

A. The Fifth Circuit overlooked that "the shared responsibility payment amount is [not] set at zero" for all tax years. Pet. App. 44a.

In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), this Court held that "[t]he Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax." *Id.* at 574.

Subsequently, "[i]n December 2017," Congress amended 26 U.S.C. § 5000A to modify, for some but not all tax years, calculation of "the 'shared responsibility payment' amount—the amount a person must pay for failing to comply with the individual mandate." Pet. App. 9a. In particular, Congress left in place the existing framework for calculating non-zero shared responsibility payments for 2014 and 2015, but modified the statute such that

the calculated shared responsibility payment for any taxpayer for "taxable years beginning after 2015" will be zero dollars. 26 U.S.C. § 5000A(c)(2)(B)(iii).

In the present case, the Fifth Circuit concluded that "[n]ow that the shared responsibility payment amount is set at zero, the provision's saving construction is no longer available." Pet. App. 44a.

Amicus urges that the Fifth Circuit's premise (that "the shared responsibility payment amount is set at zero") overlooks that "the shared responsibility payment amount is [not] set at zero" for all tax years. Pet. App. 44a.

In amending 26 U.S.C. § 5000A, Congress could have chosen to have "the shared responsibility payment amount [] set at zero" for all taxpayers for all taxable years. Pet. App. 44a. Indeed, although the amendments are "effective January 2019," Congress chose to retroactively alter statutory calculation of the shared responsibility payment amount for some prior years, namely "taxable years beginning after 2015." 26 U.S.C. § 5000A(c)(2)(B)(iii).

Importantly, however, Congress left in place the pre-existing framework for calculation of the shared responsibility payment amount for some tax years, namely 2014 and 2015, and § 5000A as amended still provides for calculation of non-zero amounts for taxpayers for these years.[4] That is, Congress left the

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[4] The statute as amended still provides for calculation of non-zero amounts under both prongs of 26 U.S.C. §

shared responsibility payment at a non-zero amount for some taxable years, specifically years 2014 and 2015.

The Fifth Circuit's premise that "the shared responsibility payment amount is set at zero" does not take this into account. Pet. App. 44a.

B. § 5000A as amended is revenue-producing for the tax years for which "the shared responsibility payment amount is [not] set at zero." Pet. App. 44a.

Similarly, the Fifth Circuit's suggestion that "the provision no longer yields the 'essential feature of any

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5000A(c)(2): the "Flat dollar amount" prong of (c)(2)(A); and the "Percentage of income" prong of (c)(2)(B). Under the "Flat dollar amount" prong, although Congress amended § 5000A(c)(3)(A) to indicate that "Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $0," subparagraph (B) still provides that "The applicable dollar amount is $95 for 2014 and $325 for 2015." § 5000A(c)(3)(B). Similarly, under the "Percentage of income" prong, although Congress amended § 5000A(c)(2)(B) to specify a percentage of "Zero percent for taxable years beginning after 2015," the statute as amended still specifies a percentage of "1.0 percent for taxable years beginning in 2014" and a percentage of "2.0 percent for taxable years beginning in 2015." § 5000A(c)(2)(B).

tax' because it does not produce 'at least some revenue for the Government'" overlooks that § 5000A as amended is revenue-producing for the tax years for which "the shared responsibility payment amount is [not] set at zero." Pet. App. 44a-45a (quoting *NFIB*, 567 U.S. at 564).

1a. § 5000A as amended is clearly revenue-producing in that it undisputedly produced revenue collected by the IRS under unamended portions of the statute.

As a first matter, the Fifth Circuit's suggestion that § 5000A cannot be characterized as a tax "because it does not produce 'at least some revenue for the Government'" overlooks that § 5000A as amended is clearly revenue-producing in that it undisputedly *already produced revenue* collected by the IRS under portions of the statute which have not been amended. Pet. App. 44a-45a (quoting *NFIB*, 567 U.S. at 564).

Specifically, § 5000A already produced revenue for the Government collected by the IRS for tax years 2014 and 2015, and the amendment to reduce the shared responsibility payment to zero for "taxable years beginning after 2015" did not change the portions of the statute pertaining to calculation for tax years 2014 and 2015. 26 U.S.C. § 5000A(c)(2)(B)(iii). Indeed, as this revenue was collected under portions

of the statute which have not been amended, the amendments did not alter the calculated amounts of these shared responsibility payments that were paid. 26 U.S.C. § 5000A(c)(2)(B)(iii).

Thus, the amendment to reduce the shared responsibility payment to zero for "taxable years beginning after 2015," 26 U.S.C. § 5000A(c)(2)(B)(iii), does not change the fact that revenue in the form of shared responsibility payments has been properly collected under unamended portions of § 5000A for tax years 2014 and 2015, or undermine this Court's prior conclusion that such shared responsibility payments "may reasonably be characterized as a tax." *NFIB,* 567 U.S. at 574.

1b. *Contra* Texas et al.'s response to Amicus, it is improper to disregard revenue collected under unamended portions of the statute which have continuously been in effect since "before the amendment took effect."

In responding to a related point raised by Amicus, Texas et al. seemed to suggest that some revenue may be ignored for purposes of analyzing whether a statute "produces at least some revenue for the Government" and thus "yields the essential feature of any tax." *NFIB*, 567 U.S. at 564. Specifically, Texas et al. seemed to suggest that in

analyzing a statute that has been amended, it is permissible to ignore revenue recognized or collected "before the amendment took effect." Brief in Opposition of Texas et al. in No. 19-840 at 24, n. 7.

Amicus would urge, however, that this approach improperly disregards the effect of unamended portions of the statute. The statute as amended includes both amended and unamended portions. These unamended portions have been in continuous effect since well "before the amendment took effect," *Id.*, and cannot be disregarded in evaluating whether the statute is revenue-producing. Indeed, the unamended portions are undisputedly revenue-producing.

In particular, while § 5000A as amended obviously still includes the unamended portions of the statute, Texas et al.'s approach spuriously disregards revenue properly collected under unamended portions of § 5000A in evaluating whether § 5000A as amended is revenue-producing.

Amicus urges that the proper analysis should consider whether the whole of the statute as amended "produces at least some revenue for the Government." *NFIB*, 567 U.S. at 564. Here, § 5000A as amended is clearly revenue-producing in that it undisputedly produced revenue collected by the IRS under unamended portions of the statute which have continuously been in effect since "before the

amendment took effect." Brief in Opposition of Texas et al. in No. 19-840 at 24, n. 7. [5]

2a. § 5000A as amended is also currently still applicable to produce revenue from delinquent taxpayers

Moreover, the Fifth Circuit's suggestion that § 5000A cannot be characterized as a tax "because it does not produce 'at least some revenue for the Government'" does not take into account that § 5000A as amended is currently still applicable to produce revenue from delinquent taxpayers. Pet. App. 44a-45a (quoting *NFIB*, 567 U.S. at 564).

Specifically, given that the IRS normally enforces delinquency procedures for up to six years,[6]

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[5] Notably, under the approach proposed by Texas et al., any amended statute sunsetting a tax could be argued to be unconstitutional by ignoring revenue collected "before the amendment took effect," Brief in Opposition of Texas et al. in No. 19-840 at 24, n. 7, and arguing that the amended statute does not "produce[] at least some revenue for the Government." *NFIB*, 567 U.S. at 564. This would potentially have the effect of allowing delinquent taxpayers to avoid paying taxes even for tax years for which the tax has not been sunset, simply by arguing that the amended statute is not a valid exercise of Congress's power to tax.

[6] See Internal Revenue Manual 1.2.1.6.18, IRS Policy Statement 5-133, Delinquent returns—enforcement

§ 5000A as amended is currently still applicable to enable revenue collection in the form of shared responsibility payments from delinquent taxpayers, e.g. for 2015. Just as this Court detailed in *NFIB*, such shared responsibility payments are to be "paid into the Treasury by 'taxpayer[s]' when they file their tax returns," *NFIB*, 567 U.S. at 563 (quoting 26 U.S.C. § 5000A(b)), are "determined by such familiar factors as taxable income, number of dependents, and joint filing status," *NFIB*, 567 U.S. at 563 (citing §§ 5000A(b)(3), (c)(2), (c)(4)), and are "enforced by the IRS, which…must assess and collect it in the same manner as taxes." *NFIB*, 567 U.S. at 563-564 (internal quotation omitted).

Amicus urges that the continued ability to collect tax revenue, e.g. in the form of delinquent shared responsibility payments for 2015 which are still non-zero under the amended statute, evidences that the shared responsibility payment still "may reasonably be characterized as a tax." *NFIB,* 567 U.S. at 574. [7]

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of filing requirements, available at https://www.irs.gov/irm/part1/irm_01-002-001 ("Normally, application of the above criteria will result in enforcement of delinquency procedures for not more than six (6) years. … Also, if delinquency procedures are not to be enforced for the full six year period of delinquency, prior managerial approval must be secured.")

[7] Amicus would urge that this continued ability to collect tax revenue under § 5000A should be sufficient to allow the

Indeed, invalidating § 5000A as unconstitutional would eliminate the ability of the IRS to collect revenue in the form of delinquent shared responsibility payments.

Importantly, the negligible nature of this revenue does not undermine classification as a valid exercise of the taxing power. In this regard, with respect to the principle that "a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed," this Court has made clear that "[t]h[is] principle applies even though the revenue obtained is obviously negligible." *United States v. Sanchez*, 340 U.S. 42, 44 (1950) (citing *Sonzinsky v. United States*, 300 U.S. 506, 513-514 (1937)). This Court also made clear that "[t]h[is] principle applies even though … the revenue purpose of the tax may be secondary." *Sanchez*, 340 U.S. at 44 (citing *Hampton Co. v. United States*, 276 U.S. 394 (1928)).

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shared responsibility payment to "reasonably be characterized as a tax," *NFIB*, 567 U.S. at 574, irrespective of whether any delinquent taxpayers actually pay their delinquent owed shared responsibility payment amount, as the classification of a particular exaction as a tax should not be dependent on whether an owed amount is actually paid. Moreover, it is a challenger's burden to "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

2b. Texas et al.'s response to Amicus that "the United States has used accrual accounting for decades" overlooks that "[n]on-exchange revenue, including taxes, duties, fines, and penalties, are recognized when collected." Dep't of Treasury FY 2018 Financial Rep. of the U.S. Gov't 67 (2019).

At the petition stage, Texas et al. was gracious enough to respond to this point raised by Amicus that § 5000A as amended is currently still applicable to produce revenue from delinquent taxpayers. In particular, Texas et al. suggested that this is "without merit" because "the United States has used accrual accounting for decades," and "[t]his revenue was recognized before the amendment took effect." Brief in Opp. of Texas et al. in No. 19-840 at 24, n. 7 (citing Dep't of Treasury FY 2018 Financial Rep. of the U.S. Gov't 8 (2019)[8]).

As a first matter, as discussed above, even if "[t]his revenue was recognized before the amendment took effect," it is improper to disregard revenue collected under unamended portions of the statute which have continuously been in effect since "before

[8] Available at https://www.fiscal.treasury.gov/reports-statements/financial-report/2018-report.html.

the amendment took effect." Brief in Opp. of Texas et al. in No. 19-840 at 24, n. 7.

Here though, *contra* the suggestion of Texas et al,. "[t]his revenue was [not] recognized before the amendment took effect." Brief in Opp. of Texas et al. in No. 19-840 at 24, n. 7.

Texas et al. appears to overlook that although "[e]xchange (earned) revenue is recognized when the government provides goods and services to the public for a price," "[n]on-exchange revenue, including taxes, duties, fines, and penalties, are recognized when collected." Dep't of Treasury FY 2018 Financial Rep. of the U.S. Gov't 67 (2019).[9] Thus, for example, delinquent shared responsibility payments for 2015 that are collected in 2020 are non-exchange revenue recognized in 2020. Invalidating § 5000A as unconstitutional would eliminate the ability of the IRS to collect 2020 revenue in the form of delinquent shared responsibility payments.

As noted above, the negligible nature of this revenue does not undermine classification as a valid exercise of the taxing power. See *Sanchez*, 340 U.S. at 44 ("a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the

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[9] Available at https://www.fiscal.treasury.gov/reports-statements/financial-report/2018-report.html; see also Dep't of Treasury FY 2019 Financial Rep. of the U.S. Gov't 67 (2020), available at https://www.fiscal.treasury.gov/reports-statements/financial-report/2019-report.html.

activities taxed. … The principle applies even though the revenue obtained is obviously negligible." (citing *Sonzinsky*, 300 U.S. at 513-514)).

In sum, the point remains that not only did § 5000A undisputedly produce revenue collected by the IRS under unamended portions of the statute, but additionally § 5000A as amended is currently still applicable to produce revenue from delinquent taxpayers. Accordingly, § 5000A's "requirement that certain individuals pay a financial penalty for not obtaining health insurance [still] may reasonably be characterized as a tax," *NFIB*, 567 U.S. at 574, because "the shared responsibility payment amount is [not] set at zero" for all tax years and is revenue-producing. Pet. App. 44a.

II. "§ 5000A [still] need not be read to do more than impose a tax" that sunsets because, analogously to *NFIB*, "the individual mandate … need not be read to declare that failing to [purchase health insurance] is unlawful" even if "individuals who are subject to the mandate are nonetheless [effectively] exempt from the penalty" for some tax years because it is zero dollars. *NFIB*, 567 U.S. at 570, 567-568, 539-540.

In *NFIB*, this Court reasoned that "[w]hile the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to

declare that failing to do so is unlawful[,] [as] [n]either the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS." *NFIB*, 567 U.S. at 567-568. Accordingly, this Court concluded "that § 5000A need not be read to do more than impose a tax." *Id.* at 570.

The amendment to § 5000A to set the shared responsibility payment to zero for some but not all tax years did not change this reality that "[n]either the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond [for some years] requiring a payment to the IRS." *NFIB*, 567 U.S. at 567-568. Indeed, the Federal Respondents have suggested that "noncompliance with the individual mandate no longer carries any significant real-world consequence." Brief for the Federal Respondents in Opposition in No. 19-840 at 15.

However, the Fifth Circuit has alleged that "[n]ow that the shared responsibility payment has been zeroed out, the only logical conclusion under *NFIB* is to read the individual mandate as a command." Pet. App. 48a. [10]

The Fifth Circuit's reasoning appears to be based on a concern that "individuals who are subject to the

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[10] As detailed above, the Fifth Circuit overlooked that "the shared responsibility payment amount is [not] set at zero" for all tax years. Pet. App. 44a.

mandate are nonetheless [effectively] exempt from the penalty." *NFIB*, 567 U.S. at 539-540. The Fifth Circuit appears to reason that because "individuals [] are subject to the mandate [but] nonetheless [effectively] exempt from the penalty," *Id.*, "the only logical conclusion under *NFIB* is to read the individual mandate as a command" to these individuals. Pet. App. 48a.

The Fifth Circuit's reasoning overlooks that, as this Court explicitly recognized in *NFIB*, even prior to the amendment to § 5000A it was already the case that "individuals who are subject to the mandate are nonetheless exempt from the penalty—for example, those with income below a certain threshold and members of Indian tribes." *NFIB*, 567 U.S. at 539-540 (citing 26 U.S.C. § 5000A(e)). Despite explicitly recognizing that "individuals who are subject to the mandate [are] nonetheless exempt from the penalty," *NFIB*, 567 U.S. at 539-540, this Court in *NFIB* did not decide that "the only logical conclusion … is to read the individual mandate as a command" to these individuals. Pet. App. 48a. Instead, as noted above, this Court concluded that "[w]hile the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful." *NFIB*, 567 U.S. at 567-568.

Thus, the Fifth Circuit's reasoning overlooks that this Court in *NFIB* already determined that "the individual mandate … need not be read to declare that failing to [purchase health insurance] is unlawful"

NFIB, 567 U.S. at 567-568, even when "individuals who are subject to the mandate are nonetheless exempt from the penalty," e.g. are exempt for some tax years because of "income below a certain threshold." *NFIB*, 567 U.S. at 567-568, 539-540 (citing 26 U.S.C. § 5000A(e)).

Analogously, "the individual mandate … need not be read to declare that failing to [purchase health insurance] is unlawful" even if "individuals who are subject to the mandate are nonetheless [effectively] exempt from the penalty" for some tax years because the shared responsibility payment is zero dollars. *NFIB*, 567 U.S. at 567-568, 539-540.

Accordingly, "§ 5000A [still] need not be read to do more than impose a tax" that Congress has chosen to sunset for tax years after 2015. *NFIB*, 567 U.S. at 570. Amicus urges that, as in *NFIB*, this remains true even if "the statute reads more naturally as a command to buy insurance than as a tax," *NFIB*, 567 U.S. at 574, because "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895).

Thus, just as in *NFIB*, "Congress had the power to impose the exaction in § 5000A under the taxing power, and [] § 5000A need not be read to do more than impose a tax, [and] [t]hat is sufficient to sustain it." *NFIB*, 567 U.S. at 570.

CONCLUSION

For the foregoing reasons, Amicus urges this Court to follow the path of *NFIB* and hold that "§ 5000A [still] need not be read to do more than impose a tax" that Congress has chosen to sunset for tax years after 2015, *NFIB*, 567 U.S. at 570, and reverse the judgment of the Court of Appeals for the Fifth Circuit.[11]

Respectfully submitted,

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May 2020

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[11] Amicus submits this brief in No. 19-1019 in addition to No. 19-840 because Petitioner Texas et al. in No. 19-1019 has asked "[w]hether the district court properly declared the ACA invalid in its entirety," and Amicus urges that this declaration of invalidity was improper.