Nos. 19-840 & 19-1019

In the Supreme Court of the United States

THE STATE OF CALIFORNIA, *ET AL.*,
Petitioners,

v.

THE STATE OF TEXAS, *ET AL.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* STATES OF OHIO AND MONTANA IN SUPPORT OF NEITHER PARTY

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STATEMENT OF AMICI INTEREST

This case involves a constitutional challenge to a controversial provision of a controversial law. But the subject matter ought not change the analysis. No matter the topic, courts adjudicating constitutional disputes "must never forget, that it is a constitution" they "are expounding." *McCulloch v. Maryland*, 4 Wheat. 316, 407 (1819). Any principles expounded in this case will apply in the next one, the one after that, and so on down the line. The Constitution does not permit decisions good for one day and one day only.

The parties' arguments rest on principles at odds with the Constitution; principles that *all* the States would come to regret if expounded as constitutional law. The petitioner States, for their part, argue that Congress validly enacted the Affordable Care Act's individual mandate, which requires most Americans to purchase health insurance. But the only enumerated powers that even conceivably permitted Congress to enact the mandate in its current form are the Commerce Clause and the Necessary and Proper Clause. Reading either clause as permitting Congress to command that individuals purchase products and services for their own good and the good of society generally—which is what the individual mandate does—would give Congress what amounts to a general police power. If Congress had such a power, little would be left exclusively to the States—a proposition at odds with our federalist structure. The Constitution does not vest such immense power in Congress.

The respondent States appreciate the limits of congressional power, and thus correctly argue for the

individual mandate's unconstitutionality. But they lose sight of limits on the *judiciary's* power in a manner that will inevitably harm the States themselves. In particular, they argue that the Court may throw out the entire Affordable Care Act based on the individual mandate's unconstitutionality. That is wrong. Article III empowers courts to "decline to enforce" unconstitutional laws and to "enjoin" the "future enforcement" of such laws. *Collins v. Mnuchin*, 938 F.3d 553, 611 (5th Cir. 2019) (*en banc*) (Oldham and Ho, JJ., concurring in part and dissenting in part) (emphasis added). It does not, however, empower courts to strike down *constitutional* provisions in *partially* unconstitutional laws. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring). True, this Court's cases permit judicial dabbling in the quintessentially legislative task of deciding which parts of a partially unconstitutional law to retain. *Id.* None of those cases, however, permits striking down an entire act based on the unconstitutionality of a single, insignificant provision. That matters here because the individual mandate is insignificant indeed. In 2017, Congress amended it to make the penalty for non-compliance $0, thus turning the mandate into an entirely toothless command. Striking down the entire Affordable Care Act on the basis of a toothless mandate would require vastly expanding the severability doctrine—a doctrine that, even in its current form, permits undue interference with state legislatures' authority to make state law. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016).

The State Attorneys General who signed this brief oppose much of the Affordable Care Act. But the task of repealing and replacing it falls to Con-

gress, not the courts. That allocation of responsibility ought to come as a relief to the American people. After all, Congress, not the courts, can weigh the policy arguments for and against discrete parts of the Act. And Congress, not the courts, can modify the Act with a scalpel instead of a sledgehammer, devising ways to protect those who have come to rely on the Act's provisions—in particular, the millions of Americans who now rely on the Act's protections for individuals with preexisting conditions.

Ultimately, however, this is not a case about healthcare policy. It is a case about the Constitution. If that Constitution is to endure, its meaning cannot shift to suit the policy desires of the moment. The *amici* States are submitting this brief under Rule 37.4 to say so.

SUMMARY OF ARGUMENT

I. The Affordable Care Act's individual mandate obligates most Americans to maintain a "minimum" level of "essential coverage." 26 U.S.C. §5000A. Does anything in Article I of the Constitution empower Congress to pass such a law?

No. The last time this Court assessed the mandate's constitutionality, *National Federation of Independent Business v. Sebelius* ("*NFIB*"), 567 U.S. 519 (2012), it upheld the mandate as a permissible exercise of Congress's power to "lay and collect Taxes," U.S. Const. art. I, §8, cl. 1. Whatever the merits of that argument at the time, it has none today. As originally enacted, the Affordable Care Act imposed a monetary "penalty" on anyone who violated the mandate. *See* 26 U.S.C. §5000A(c), (g)(1) (2012). *NFIB* upheld the law as a tax based on this revenue-raising feature. *NFIB*, 567 U.S. at 563–74. In 2017,

however, Congress amended the Affordable Care Act, reducing to $0 the penalty for non-compliance with the individual mandate. *See* 115 P.L. 97, 131 Stat. 2054, §11081 (Dec. 22, 2017). This means the mandate does not, and cannot, raise revenue. The mandate thus lacks the "essential feature" of a tax, *NFIB*, 567 U.S. at 564, and can no longer be upheld as a valid exercise of Congress's taxing power, *see* JA.419–20.

Nothing else in Article I permitted Congress to pass the mandate. Consider first the Commerce Clause, which empowers Congress "[t]o regulate Commerce … among the several States." U.S. Const. art. I, §8, cl. 3. This argument fails because the "power to *regulate* commerce presupposes the existence of commercial activity to be regulated." *NFIB*, 567 U.S. at 550 (opinion of Roberts, C.J.); *accord id.* at 649 (Scalia, Kennedy, Thomas, Alito, JJ, dissenting). Congress's power to regulate commercial activity does not reach the commercial *inactivity* of those who fail to purchase insurance.

The Necessary and Proper Clause does not change the analysis. That clause permits Congress to "make all Laws which shall be necessary and proper for carrying into Execution" Congress's enumerated powers. U.S. Const. art. I, §8, cl.18. This "is not itself a grant of power," but rather a confirmation that "Congress possesses all the means necessary to carry out the" powers "specifically granted" elsewhere in the Constitution. *Kinsella v. United States*, 361 U.S. 234, 247 (1960). Thus, while the Clause makes express what would otherwise be implicit—Congress has the power to pass laws "incidental to" an enumerated power and "conducive to its beneficial exercise," *McCulloch v. Maryland*, 4 Wheat. 316, 418

(1819)—it does not "license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated," *NFIB*, 567 U.S. at 559 (opinion of Roberts, C.J.) (alteration in original) (quoting *McCulloch*, 4 Wheat. at 411).

The individual mandate is an exercise of great substantive and independent power that the Constitution nowhere gives to Congress. It "vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power." *Id.* at 560. Reading the Necessary and Proper Clause to permit laws like this "would work a substantial expansion of federal authority." *Id.* It would transform the Clause from a mere caveat into a grant of immense power—a grant of authority that enables Congress to "reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it." *Id.* The Court should not bless an interpretation of the Clause that would give to Congress nearly absolute power over the daily lives of Americans.

II. The individual mandate's unconstitutionality has no bearing on the rest of the Affordable Care Act.

This follows, first and foremost, from binding doctrine. This Court's severability cases permit courts to strike down entire laws based on the unconstitutionality of a single provision. But courts may do so only if the remainder of the law is "incapable of functioning independently," or if it is otherwise "evident" that Congress would have preferred no law at all to a law without the unconstitutional provision. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010) (citations omitted). This severability analysis usually entails asking about the hy-

pothetical intent of a hypothetical Congress. Not here. Congress's 2017 amendment made the individual mandate impotent by reducing the penalty for non-compliance to $0. Congress therefore concluded that the Affordable Care Act is capable of functioning without an operative mandate (it already functions with an impotent one), and that Congress would have preferred such a law (the one it enacted) to no law at all. The mandate is therefore severable, and its unconstitutionality has no bearing on the rest of the Affordable Care Act.

The District Court in this case did indeed invalidate the entire Act based on the individual mandate's unconstitutionality. But as the Fifth Circuit recognized, the District Court's analysis does not withstand the slightest scrutiny. Instead of asking whether the now-imponent mandate is essential to the Affordable Care Act as *currently* codified (how could it be?), the District Court asked whether the *original* version of the individual mandate—the one that Congress made enforceable with a penalty—was central to the *original* version of the Affordable Care Act. The Court thus invalidated the current version of the Affordable Care Act based on the importance of an earlier version of the mandate to an earlier version of the Act. To describe the approach is to refute it.

In any event, courts should not be in the business of deciding whether to strike down constitutional provisions of partially unconstitutional laws "based on open-ended speculation" about what Congress would have wanted. *Collins v. Mnuchin*, 938 F.3d 553, 611 (5th Cir. 2019) (*en banc*) (Oldham and Ho, JJ., concurring in part and dissenting in part). Article III vests federal courts with "[t]he judicial Pow-

er," and permits them to exercise that power in "Cases" and "Controversies." U.S. Const. art. III, §§1,2. Resolving these cases and controversies entails judicial review; because the Constitution "is superior to any ordinary act of the legislature," courts must refuse to enforce laws that contradict it. *Marbury v. Madison*, 1 Cranch 137, 178 (1803). Nothing about judicial review, however, requires asking whether to keep or throw out the *constitutional* provisions in a partly unconstitutional law. And, for much of our nation's history, the question whether to "sever" an unconstitutional provision of an otherwise-constitutional law never arose. Instead, when courts "determined that a statute was unconstitutional, they would simply decline to enforce it in the case before them." *Murphy v. NCAA*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring). "There was no 'next step' in which courts inquired into whether the legislature would have preferred no law at all to the constitutional remainder." *Id.* (alteration omitted) (quoting Kevin C. Walsh, *Partial Unconstitutionality*, 85 NYU L. Rev. 738, 777 (2010)). To the contrary, courts hewed to the rule that statutes "are invalid so far as they are repugnant to superior law, but no further." Walsh, *Partial Unconstitutionality*, 84 NYU L. Rev. at 768.

This approach makes sense. The decision whether to "excise" a duly enacted, constitutional provision is an inherently *legislative* act. Courts "cannot take a blue pencil to statutes." *Murphy*, 138 S. Ct. at 1486. (Thomas, J., concurring). That "editorial freedom … belongs to the Legislature, not the Judiciary," *Free Ent. Fund*, 561 U.S. at 510. The task becomes even more legislative if it turns on "a nebulous inquiry into hypothetical congressional intent." *Mur-*

phy, 138 S. Ct at 1486 (Thomas, J., concurring) (internal quotation omitted). It is rare that Congress will have had any intent regarding what to do upon a finding of partial unconstitutionality, and rarer still that the courts will be able to decipher that intent. "Without any actual evidence of intent, the severability doctrine invites courts to rely on their own views about what the best statute would be." *Id.* That is legislating, plain and simple.

Even if it is too late in the nation's history to restore the traditional approach that eschews the severability question altogether, the Court can bring the modern severability doctrine more in line with Article III by treating severability as "an exercise in statutory interpretation." *Id.* The Court should clarify that courts lack "a blue-penciling remedy," *Collins*, 938 F.3d at 610 (Oldham and Ho, JJ., concurring in part and dissenting in part), and that they may not "excise parts of statutes" based on speculation about what Congress would have wanted. John C. Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 Geo. Wash. L. Rev. 56, 88 (2014). Instead, upon finding a statute partially unconstitutional, courts must apply standard tools of statutory interpretation to determine whether the remaining "parts of [the] statutes are ineffective as written." *Id.* at 88–89. Applied in this manner, severability analysis leaves the question of severability to legislatures: the constitutional remainder of a partially unconstitutional act will remain in force unless the act itself, either expressly or implicitly, says otherwise.

ARGUMENT

I. THE INDIVIDUAL MANDATE IS UNCONSTITUTIONAL.

The individual mandate in the Affordable Care Act "requires individuals to purchase a health insurance policy providing a minimum level of coverage." *National Federation of Independent Business v. Sebelius* ("*NFIB*"), 567 U.S. 519, 530–31 (2012). In the Act's less-eloquent terms: "An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month." 26 U.S.C. §5000A(a).

When it passed the Act, Congress ensured compliance with the mandate by imposing a monetary "penalty" on those who failed to purchase insurance. 26 U.S.C. §5000(A)(b) (2012). It charged the IRS with collecting and enforcing the penalty "in the same manner as" a tax. 26 U.S.C. §5000A (g)(1) (2012). In *NFIB*, the Court held that Congress's power to "lay and collect Taxes," U.S. Const. art. I, §8, cl.1, empowered it to enact this version of the individual mandate. *See NFIB*, 567 U.S. at 564 (majority). The Court conceded that "the statute reads more naturally as a command to buy insurance than as a tax." *Id.* Still, because the law imposed a monetary penalty on those who failed to buy insurance, it could be "regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS." *Id.* at 563. Most critical of all, the mandate had "the essential feature of any tax: It produce[d] at least some revenue for the Government." *Id.* at 564. Therefore, *NFIB* held, the

mandate qualified as a tax for constitutional purposes.

The individual mandate can no longer be upheld as an exercise of Congress's taxing power. In 2017, Congress amended the Act to set the "penalty" for violating the individual mandate at $0. *See* 115 P.L. 97, 131 Stat. 2054, §11081 (Dec. 22, 2017); 26 U.S.C. §§5000A(c)(2)(B)(iii) & (c)(3)(A). Because the penalty is now $0, the mandate is no longer capable of producing "at least some revenue for the Government," and thus no longer bears "the essential feature" of a tax. *NFIB*, 567 U.S. at 564. It cannot, therefore, be upheld as an exercise of Congress's power to lay and collect taxes. *See* JA.419–20.

The question becomes whether anything else in Article I permitted Congress to enact the individual mandate. The only conceivable options are the Commerce Clause and the Necessary and Proper Clause. This brief considers each in turn.

Before getting to that, it is important to address a counterargument. The petitioner States, along with the House of Representatives, say that the mandate is now merely an "advisory" request to purchase insurance, not a command, and that Congress therefore needed no Article I power to enact it. U.S. House Br.34; *accord* Petr's Br.26, 31–35. Every part of that argument is wrong. First, the mandate does not merely *request* that citizens purchase insurance; it states that they "shall" purchase insurance. The fact that the command is not backed up with a meaningful punishment does not make it any less of a command. Second, Congress can legislate *only* pursuant to its enumerated powers. *See* U.S. Const. am. 10; *NFIB*, 567 U.S. at 535 (opinion of Roberts, C.J.).

So whether the mandate is merely "advisory" or not, Congress could enact it only if something in Article I permitted it to do so. The petitioner States are simply wrong that Congress can enact some laws even without an enumerated power, provided it does not "violate[] one of the Constitution's express prohibitions." Petr's Br.32 n.14.

A. The individual mandate cannot be upheld under the Commerce Clause.

The Commerce Clause empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, §8, cl.3. Neither the original meaning of this clause, nor this Court's precedents interpreting it, permit Congress to mandate the purchase of health insurance.

1. Original meaning.

a. The individual mandate does not "regulate Commerce" if those words are given their original meanings.

Start with the meaning of "regulate." When the People ratified the Constitution, "'to regulate' meant … '[t]o adjust by rule or method,'" to "adjust, to direct according to rule,'" or to "'put in order, set to rights, govern or keep in order.'" *NFIB*, 567 U.S. at 649 (Scalia, Kennedy, Thomas, Alito, JJ, dissenting) (quoting 2 S. Johnson, A Dictionary of the English Language (7th ed. 1785); J. Ash, New and Complete Dictionary of the English Language (1775); T. Dyche & W. Pardon, A New General English Dictionary (16th ed. 1777)). It did not mean "to direct that something come into being." *Id.* at 650. Thus, the "power to *regulate* commerce presupposes the exist-

ence of commercial activity to be regulated." *Id.* at 550 (opinion of Roberts, C.J.). Because the individual mandate compels Americans to engage in commerce by requiring them to purchase health insurance, it does not "regulate Commerce."

Even putting aside the meaning of "regulate," those who decide not to purchase insurance are not engaged in "commerce" over which Congress has any authority. "At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring). Congress lacked authority under the Commerce Clause to regulate even other economic activities, "such as manufacturing and agriculture," as these activities were not considered "commercial" in the relevant sense. *Id.* at 586; *accord United States v. E. C. Knight Co.*, 156 U.S. 1, 12 (1895); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387 (1987). Those who elect *not* to buy insurance are not engaged in selling, buying, bartering, or transporting goods for these purposes. To the contrary, they are *refusing* to engage in these activities. Their inactivity does not constitute "commerce" subject to congressional regulation.

b. To the extent there is any doubt whether the individual mandate falls outside the original scope of the Commerce Clause, the Constitution's structure dispels it.

The "Framers split the atom of sovereignty." *United States Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). "It was the genius of their idea that our citizens would have two

political capacities, one state and one federal, each protected from incursion by the other." *Id.* The Constitution protects against federal incursion into state affairs by enumerating limited federal powers and reserving all other powers "to the States respectively, or to the people." U.S. Const. am. 10. In this way, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992) (internal quotation omitted).

Limiting the federal government to its enumerated powers would not accomplish much if the enumerated powers were interpreted to permit Congress to regulate "the facets of governing that touch on citizens' daily lives." *NFIB*, 567 U.S. at 536 (opinion of Roberts, C.J.). Accordingly, none of Congress's powers can be read so broadly that they confer a broad, general power "to enact legislation for the public good." *Bond v. United States*, 572 U.S. 844, 854 (2014). That power—the so-called "police power"—belongs exclusively to the States.

Although this interpretive principle is implicit in the Constitution's design, the founding generation did not leave the matter to implication. Instead, the People ratified the Ninth Amendment to *forbid* overbroad interpretations of federal power. That amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." To the founding generation, the rights "retained by the people" included a collective right to local self-government. Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Tex. L. Rev. 331, 395 (2004). Although the Constitution nowhere enumerates this power expressly, the Ninth Amendment

forbids interpreting the absence of any such enumeration to imply that Congress may exercise *its* enumerated powers in a way that interferes with the retained rights of the People, *see* 3 Joseph Story, *Commentaries on the Constitution* §1898, p.751 (1833)—including the right of local self-government. Accordingly, at the time of its ratification, the Ninth Amendment was widely understood as "a federalism-based rule of construction"; it guarded against broad interpretations of congressional authority that would expand "federal power into matters properly belonging under state control." Lash, *The Lost Original Meaning*, 83 Tex. L. Rev. at 394 (alterations omitted). The Ninth and Tenth Amendments are thus two sides of the same coin. While the Tenth Amendment ensures that the federal government exercises only its enumerated powers, the Ninth prohibits "an expanded interpretation of those enumerated powers." *Id.* at 399; *accord* Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 Tex. L. Rev. 597, 610 (2005).

Whether derived from the Constitution's structure or the Ninth Amendment's express command, the principle is the same: courts must not construe Congress's enumerated powers, including its Commerce Clause power, to vest the federal government with what amounts to a general police power.

That principle defeats any attempt to ground the individual mandate in Congress's power to regulate interstate commerce. "Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority." *NFIB*, 567 U.S. at 552 (opinion of Roberts, C.J.). After all, individuals "do not do an infi-

nite number of things" every day. *Id.* "Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and … empower Congress to make those decisions for him." *Id.* It would, in other words, transform the Commerce Clause into a plenary power to compel whatever purchases the government deems to be in the best interest of individuals or society at large. Understood in that manner, the Commerce Clause would be tantamount to a general police power, and would leave almost none of economic life exclusively to the States and the People. That reading of the Commerce Clause is incompatible with our Constitution's federalist design. *United States v. Morrison*, 529 U.S. 598, 618 (2000); *Lopez*, 514 U.S. at 566.

2. Precedent.

This Court's precedent leads to the same conclusion. That precedent, to be sure, gives the Commerce Clause a very broad reading. But no case justifies reading the Commerce Clause so broadly that it permits the regulation of economic inactivity.

For much of the nation's history, this Court interpreted the Commerce Clause in accord with its original meaning. *See, e.g.*, *E. C. Knight*, 156 U.S. at 14; *Coe v. Errol*, 116 U.S. 517, 525 (1886). That changed around the time of the New Deal. At that point, the Court began giving the Clause an exceptionally broad reading, under which Congress had authority to regulate even "activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it." *United States v. Darby*, 312 U.S. 100, 119–20 (1941).

The radical nature of this jurisprudential shift is best illustrated by *Wickard v. Filburn*, 317 U.S. 111 (1942). Roscoe Filburn, an Ohio farmer, found himself in the federal government's crosshairs because of a rather quotidian act: he planted and harvested wheat, in part for personal consumption and to feed his livestock. *Id.* at 114. Filburn's legal troubles arose because of the Agricultural Adjustment Act, which set caps on the amount of wheat each farmer could grow. *Id.* at 115–16. Filburn planted more than the law allowed. He argued that the Commerce Clause did not permit the federal government to regulate agricultural products grown for personal use. Thus, he said, he could not lawfully be punished based on wheat he grew to feed his family and his animals. *Id.* at 118. This Court disagreed. It noted that the production of wheat for self-consumption can affect the market for wheat because those who grow wheat for themselves need not purchase it. *Id.* at 127–28. And because the aggregate effect of home-grown wheat was "far from trivial," Congress could regulate it under the Commerce Clause. *Id.* at 128.

Wickard and cases like it, *see, e.g.*, *Perez v. United States*, 402 U.S. 146 (1971), threatened to transform the Commerce Clause into a police power. In recent decades, this Court responded by refusing to extend its Commerce Clause precedents one inch further. *See Lopez*, 514 U.S. at 567. In *Morrison*, for example, the Court held that Congress's power to regulate interstate commerce does not permit it to create "a federal civil remedy for the victims of gender-motivated violence." *Morrison*, 529 U.S. at 601–02. And in *Lopez*, the Court held that the Commerce Clause does not empower Congress to regulate the

carrying of firearms in school zones. *Lopez*, 514 U.S. at 551.

Lopez and *Morrison* reflect the principle that questions "about the scope of" this Court's "precedents" should be answered "in light of and in the direction of the constitutional text and constitutional history." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). In other words, while *stare decisis* might sometimes compel the Court to retain a wrongly decided precedent, nothing justifies the Court in *extending* a wrongly decided precedent.

That same logic requires holding the individual mandate unconstitutional. "As expansive as" the Court's "cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching 'activity.'" *NFIB*, 567 U.S. at 551 (opinion of Roberts, C.J.). Even *Wickard* dealt with a law regulating activity (the production of wheat) rather than inactivity. That case likely would have, and certainly *should have*, come out differently if, instead of driving up prices by limiting the growing of wheat, the Agricultural Adjustment Act drove down prices by requiring anyone with sufficient acreage to grow wheat for sale on the open market. The individual mandate resembles this hypothetical version of the Agricultural Adjustment Act; it regulates inactivity by compelling private citizens to purchase health insurance in order to support the market for such insurance. Upholding the individual mandate would therefore require extending *Wickard*, moving the high-water mark of Commerce Clause authority a bit higher still. The Court should refuse to take any more

"steps down [the] road" to giving Congress a general police power. *Lopez*, 514 U.S. at 567.

B. The Necessary and Proper Clause did not empower Congress to pass the individual mandate.

The Necessary and Proper Clause does not save the individual mandate from a finding of unconstitutionality.

That clause permits Congress to "make all Laws which shall be necessary and proper for carrying into Execution" Congress's other powers. U.S. Const., art. I, §8, cl.18. This is no more than a clarification; the Clause "is not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out the" powers "specifically granted" elsewhere in the Constitution. *Kinsella v. United States*, 361 U.S. 234, 247 (1960). This caveat would have been implicit in the Constitution without the Clause. "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorised." The Federalist No. 44, at 304 (J. Madison) (Cooke, ed., 1961). Thus, each enumerated power implicitly includes "the means of carrying" that power "into execution." *Kinsella*, 361 U.S. at 247 (quoting VI Writings of James Madison 383 (Hunt, ed.)). But to avoid any ambiguity on this score, the Framers included the Necessary and Proper Clause among Congress's Article I powers. *Id.*; *accord* The Federalist No. 33, at 205 (A. Hamilton).

Because the Necessary and Proper Clause simply makes express Congress's already-implicit power to pass laws "incidental" and "conducive to" the "beneficial exercise" of enumerated powers, *McCulloch v.*

Maryland, 4 Wheat. 316, 418 (1819), it "does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated." *NFIB*, 567 U.S. at 559 (opinion of Roberts, C.J.) (alteration in original) (quoting *McCulloch*, 4 Wheat. at 411); *accord Bond v. United States*, 572 U.S. 844, 879 (2014) (Scalia, J., concurring in the judgment). Just as Congress does not hide elephants in mouseholes, constitutions do not hide broad powers in caveats. *See Cal. Redevelopment Ass'n v. Matosantos*, 53 Cal. 4th 231, 260 (2011); Will Baude, *Rethinking the Eminent Domain Power*, 122 Yale L. J. 1738, 1748 (2013). This distinction between incidental and substantial powers was widely understood at the time of ratification. *See, e.g.*, Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in The Origins of the Necessary and Proper Clause 84, 115–19 (Gary Lawson, *et al.*, eds. 2010); Baude, *Rethinking the Eminent Domain Power*, 122 Yale L. J. at 1748. And the Court noted the distinction in its most important early case addressing the Clause's meaning. *McCulloch*, 4 Wheat at 418.

The Court has never wavered in the years since. While the Clause "leaves to Congress a large discretion as to the means that may be employed in executing a given power," *Lottery Case*, 188 U.S. 321, 355 (1903); *see, e.g.*, *United States v. Comstock*, 560 U.S. 126, 135 (2010), it does not permit Congress to *expand* the scope of its specifically granted powers. Any law purporting to do that "is 'merely [an] act of usurpation' which 'deserves to be treated as such.'" *Printz v. United States*, 521 U.S. at 924 (alteration in original) (quoting The Federalist No. 33, at 204 (A. Hamilton) (C. Rossiter ed., 1961)). Thus, all laws

passed under the Necessary and Proper Clause must be "derivative of, and in service to, a granted power." *NFIB*, 567 U.S. at 560 (opinion of Roberts, C.J.).

The individual mandate deserves to be treated as a usurpation. To hold otherwise would give Congress "the extraordinary ability to create the necessary predicate to the exercise of an enumerated power." *Id.* The mandate compels private citizens to purchase insurance so that it may regulate their doing so; the law reaches "beyond the natural limit of [Congress's] authority and draw[s] within its regulatory scope those who otherwise would be outside of it." *Id.* The power of one branch of government to enlarge its own authority is a great and substantial independent power—it is not "incidental" to and "derivative of" a pre-existing power. Because the individual mandate exercises such authority, it cannot be upheld under the Necessary and Proper Clause. *NFIB*, 567 U.S. at 560 (opinion of Roberts, C.J.); *id.* at 652–55 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

II. THE UNCONSTITUTIONALITY OF THE INDIVIDUAL MANDATE DOES NOT JUSTIFY "STRIKING DOWN" THE AFFORDABLE CARE ACT IN ITS ENTIRETY.

The individual mandate's unconstitutionality has no bearing on the rest of the Affordable Care Act.

A. The individual mandate is "severable" from the rest of the Act.

1. In cases of partial unconstitutionality, this Court's precedents require asking whether "the unconstitutional … provisions are severable from the

remainder of the statute." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd*, 561 U.S. 477, 508 (2010). Courts must "invalidate" or "strike down" not only the unconstitutional provisions, but also any other provisions from which the unconstitutional ones cannot be "severed." Courts "*try* to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Id*. at 508 (internal quotation omitted; emphasis added). But they will invalidate *all* of a *partially* unconstitutional law when it is "evident that [Congress] would not have enacted" the remaining provisions without the unconstitutional ones. *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018) (internal quotation omitted). Two questions guide the severability inquiry: *First*, will the law, without its unconstitutional subparts, "function in a manner consistent with the intent of" the legislature? *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (emphasis omitted). *Second*, would the legislature have "preferred what is left of its statute to no statute at all?" *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006)

Here, the answer to both of these questions is "yes," and the individual mandate is therefore severable. Indeed, the severability analysis in this case does not even require a "nebulous inquiry into hypothetical congressional intent." *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring) (citation omitted). To the contrary, the Court can see for itself what Congress wanted by looking to what it did. When Congress passed the Tax Cuts and Jobs Act in 2017, it reduced to $0 the "penalty" for failure to comply with the individual mandate. This amendment rendered the mandate entirely toothless. Since a toothless

mandate is practically indistinguishable from no mandate at all, we *know* that the Act without a mandate will "function in a manner consistent with the intent of Congress," *Alaska Airlines*, 480 U.S. at 685 (emphasis omitted), and that Congress "would have preferred what is left of its statute to no statute at all." *Ayotte*, 546 U.S. at 330. The Affordable Care Act with no enforceable mandate is the law Congress already passed.

2. In its decision striking down the Act in full, the District Court relied on legislative findings, passed in 2010 with the rest of the Affordable Care Act, that deemed the mandate "essential" to the Act's success. *See* Pet.App.208a–11a (citing 42 U.S.C. §§18091(2)(H), (I), (J)). This argument fails because it ignores the Affordable Care Act's statutory history. (By "statutory history," we mean "the record of *enacted* changes Congress made to the relevant statutory text," as opposed to the "unenacted legislative history." *Burlington N. Santa Fe Ry. v. Loos*, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., dissenting).) That history shows that, when Congress enacted its findings about the individual mandate's importance in 2010, it did so with respect to the penalty-imposing mandate that it included within the same legislation. It did not make—it could not possibly have made—findings about a toothless mandate that would not exist for another seven years. Congress's findings relating to the importance of an individual mandate that no longer exists have no bearing on whether the mandate that exists today is "essential" to the Act as it exists today.

What is more, this "essential" language must be read in light of the law as a whole, including the 2017 amendments. *See Util. Air Regulatory Grp. v.*

EPA, 573 U.S. 302, 321 (2014). There are two ways of doing that. The first is to read the language to describe the now-toothless mandate as "essential." Whatever it means to call the mandate in its current form "essential," it does *not* mean that the mandate is "essential" in the sense relevant to the severability doctrine—it does not mean that the Act would be incapable of functioning without the mandate. After all, Congress passed its 2017 amendments against the backdrop of a presumption strongly favoring severability. *Free Enter. Fund*, 561 U.S. at 508. In light of that background presumption, Congress needed to be crystal clear if it wanted to do something as extreme as making the entire Affordable Care Act rise or fall with the constitutionality of an effectively inoperative provision. That it made no such clear statement suggests the mandate is not "essential" in the relevant sense; again, Congress tends not to "hide elephants in mouseholes." *Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 468 (2001).

The other way to read the Act as a whole is to recognize that the findings and the amended mandate are in irreconcilable conflict. Under this reading, there is simply no way to square Congress's findings about the mandate's essential importance with its later decision to make the mandate toothless. But if the two are in irreconcilable conflict, then the later-enacted amendments get preference over—they impliedly repeal—the earlier findings. *EC Term of Years Trust v. United States*, 550 U.S. 429, 435 (2007). As a result, those findings have no bearing on the meaning of the law as it exists today.

B. The Court should restore objectivity to the severability analysis by treating severability as a matter of statutory interpretation.

The Fifth Circuit correctly vacated the District Court's severability ruling, remanding the case for a more thoughtful analysis. *See* JA.429–45. Whether the Court affirms the remand order or instead resolves the severability question on its own, it should take this opportunity to clarify the severability doctrine's contours. In so doing, it could bring the severability doctrine more in line with Article III of the Constitution. As it exists today, the doctrine allows courts to rewrite federal and state law based on the results of a "nebulous inquiry into hypothetical congressional intent." *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring). That hypothetical-intent-focused approach invites courts "to exercise Will instead of Judgment." The Federalist No. 78, at 526 (A. Hamilton). This case provides an opportunity to hold that severability is not an exercise in speculation about hypothetical intentions, but rather "an exercise in statutory interpretation"—one in which courts apply standard interpretative tools to "decide how a statute operates once they conclude that part of it cannot be constitutionally enforced." *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring). Thought of in that way, an unconstitutional statutory provision is deemed inseverable only when Congress (or a state legislature) makes it inseverable. This approach better comports with Article III. And it is not so different from what the Court, in many cases, is doing already.

1. Neither the text of the Constitution, nor its history, empowers courts to "strike down" or "invali-

date" constitutional provisions of partially unconstitutional laws.

Article III of the Constitution vests the "judicial Power" in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, §1. The same article empowers courts to exercise the judicial power in "Cases" and "Controversies." *Id*. §2. Thus, the Constitution empowers courts to "resolve legal disputes between parties and order remedies to redress injuries"—no more, and no less. *Collins*, 938 F.3d at 611 (Oldham and Ho, JJ., concurring in part and dissenting in part).

Judicial review is a necessary "byproduct" of the courts' power to resolve discrete cases and controversies. *Murphy*, 138 S. Ct. at 1485 (Thomas, J., concurring). The Constitution "is superior to any ordinary act of the legislature." *Marbury v. Madison*, 1 Cranch 137, 178 (1803). Thus, when a statute conflicts with the Constitution, the courts must give effect to the Constitution and deny effect to the unconstitutional statute. *Id*. That is what Chief Justice Marshall meant when he declared it "emphatically the province of the judicial department to say what the law is." *Id*. at 177. His point was not that courts have a freestanding power to assess statutes' constitutionality. It was that, in resolving discrete cases and controversies, courts must evaluate the constitutionality of statutes to know whether those statutes can be given effect. *See* Kevin C. Walsh, *Partial Unconstitutionality*, 85 NYU L. Rev. 738, 755–57 (2010); John C. Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 Geo. Wash. L. Rev. 56, 86 (2014).

It is critical to recognize that courts "have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). They have no power, in other words, "to erase duly enacted statutes." *Collins*, 938 F.3d at 611 (Oldham and Ho, JJ., concurring in part and dissenting in part). It is thus a misnomer to say that a law held unconstitutional has been "'struck down' or rendered 'void.'" Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 935 (2018). Instead, judicial review "amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right." *Massachusetts*, 262 U.S. at 488. Upon deeming a law unconstitutional, courts may fashion a remedy sufficient to address the plaintiff's injury. *See Collins*, 938 F.3d at 611 (Oldham and Ho, JJ., concurring in part and dissenting in part). For example, they may enjoin an unconstitutional provision's application against a plaintiff who would be injured by its enforcement. *See id*; *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). But "judicial review" never consists of amending the statute books to eliminate the provision deemed unconstitutional. The *entire statute,* including the unconstitutional provision, remains on the books, and the constitutional remainder is enforceable.

For much of American history, judicial review reflected the limited scope of judicial power. *See Murphy*, 138 S. Ct. at 1485–86 (Thomas, J., concurring); *see also* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 914 (2003); Walsh, *Partial Unconstitutionality*, 85 NYU L. Rev. at 755–57. From the founding through

the middle-to-late 19th century, judicial review involved the application of the following "basic principle": "Statutes are invalid so far as they are repugnant to superior law, but no further." Walsh, *Partial Unconstitutionality*, 84 NYU L. Rev. at 768. There "was no 'next step' in which courts inquired into whether the legislature would have preferred no law at all to the constitutional remainder." *Id.* at 177; *see also United States v. Sineneng-Smith*, 590 U.S. __, slip op. 5–6 (U.S., May 7, 2020) (Thomas, J., concurring). Courts left that legislative question for the legislators.

This approach to judicial review worked well. "Operating within an intellectual framework in which judicial review consisted of a refusal to give effect to inferior law that was repugnant to superior law, federal and state courts were able to vindicate" numerous constitutional provisions "without massive displacement of partially unconstitutional" laws. Walsh, *Partial Unconstitutionality*, 84 NYU L. Rev. at 757–58. Courts thus succeeded in checking legislative overreach by denying effect to unconstitutional laws. But they also avoided the *judicial* overreach that comes with nullifying constitutional aspects of a legislature's work.

2. Times have changed. "Despite this historical practice," the Supreme Court's "modern cases treat the severability doctrine as a 'remedy' for constitutional violations and ask which provisions of the statute must be 'excised.'" *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring). And courts address severability by asking a counterfactual question about what Congress would have wanted if it had known that some discrete part of its legislative act would later be held unconstitutional. If courts de-

termine that Congress would have wanted the entire act scrapped, courts will "strike down" the whole thing.

There are any number of problems with this approach. The first is that it contradicts the Court's decisions disclaiming the power to "blue-pencil" provisions of a partly unconstitutional law, *Free Enter. Fund*, 561 U.S. at 509–10, and recognizing that judicial review "amounts to little more than the negative power to disregard an unconstitutional enactment." *Massachusetts*, 262 U.S. at 488. These cases recognize that the "editorial freedom" to rewrite statutes "belongs to the Legislature, not the Judiciary." *Free Enter. Fund*, 561 U.S. at 510. That is no doubt true. But if blue-penciling is a legislative act, so is deleting a duly enacted, constitutional provision based on some *other* provision's unconstitutionality. *See* Mark L. Movsesian, *Severability in Contracts and Statutes*, 30 Ga. L. Rev. 41, 58 (1995). Either way, the Court is doing the legislature's work, and going well beyond the judicial task of interpreting the law and applying it to a concrete case. The appropriate *judicial* response would be to leave the "fate of the remainder of the partially invalid law" to be settled in "the political arena, where it properly belongs on the court's understanding of Article III." Brian Charles Lea, *Situational Severability*, 103 Va. L. Rev. 735, 803–04 (2017).

That suggests another problem: the practice of striking down entire laws bumps up against Article III's standing requirements. Again, Article III permits courts to exercise the judicial power only in "Cases" and "Controversies," thereby prohibiting them from issuing advisory opinions or resolving legal questions unrelated to a concrete dispute. The

standing requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982). More fundamentally, it keeps "the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Modern severability doctrine runs contrary to these principles, because it "often requires courts to weigh in on statutory provisions that no party has standing to challenge, bringing courts dangerously close to issuing advisory opinions." *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring); *see also* Lea, *Situational Severability*, 103 Va. L. Rev. at 790–805. Here, for example, the respondent States seek to have the entire Affordable Care Act struck down—even provisions that indisputably do not harm them, and that they therefore have no standing to challenge.

The modern severability doctrine, resting as it does on speculation about what a hypothetical legislature would want, is also vulnerable to all the classic criticisms of relying on legislative purpose. The most fundamental is this: the People agreed to be bound by the enacted laws of Congress, not by the unenacted intentions of that body's members. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359 (2018); *Lawson v. FMR LLC*, 571 U.S. 429, 459–60 (2014) (Scalia, J., concurring in part and concurring in the judgment). Certainly the People did not agree to be bound by the purposes that courts *think* elected representatives *would have had* about issues they likely

never considered. By giving effect to unenacted intentions, the severability doctrine contravenes the rule of law.

There are also practical problems with the severability doctrine's appeals to legislative purpose. Congress is a "they," not an "it," and so the body as a whole has no intent. *United States v. Mitra*, 405 F.3d 492, 495 (7th Cir. 2005). While individual legislators who voted to pass a law presumably meant to accomplish *something*, it is magical thinking to suggest that courts can ascertain and meaningfully aggregate the intentions of 535 individuals. What is more, any individual legislator's goals might have nothing to do with the bill's substance. Perhaps the legislator voted "yes" in a compromise that helped win another legislator's vote on an unrelated matter. There is no way to know.

Even supposing there is such a thing as congressional intent, and even assuming courts can *sometimes* discern it, Congress's intent on severability will usually be undiscoverable. It is "unlikely that the enacting Congress had any intent" regarding severability. "Congress typically does not pass statutes with the expectation that some part will later be deemed unconstitutional." *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring). It is impossible for a court to say anything about what Congress "would have done with a proposal it did not consider in fact." Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 548 (1983).

To make matters worse, this Court's precedents permit ignoring the very best evidence of what Congress would have wanted: severability clauses. A "severability clause," the Court has held, "is an aid

merely; not an inexorable command." *Reno v. ACLU*, 521 U.S. 844, 884–85 n.49 (1997) (internal quotation omitted). This principle gives courts great leeway to undo legislatures' work. In one recent case, this Court struck down a severability-clause-containing law in its entirety because it determined that identifying the law's constitutional applications would be too time consuming and too difficult. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016). Whatever the merits of that approach, it does not even pretend to have anything to do with legislative intent. Nor can this approach be justified as a means of keeping the courts from engaging in "quintessentially legislative work." *Id.* (quoting *Ayotte*, 546 U.S. at 329). To the contrary, courts engage in quintessentially legislative work when they effectively repeal an entire law by deciding to "strike it down" based on its *partial* unconstitutionality.

The freewheeling nature of the severability inquiry leads inevitably to judicial policymaking. Without "actual evidence of intent, the severability doctrine invites courts to rely on their own views about what the best statute would be." *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring); *see also* David H. Gans, *Severability as Judicial Lawmaking*, 76 Geo. Wash. L. Rev. 639, 663 (2008). In other words, the severability doctrine winds up giving courts exactly what the doctrine is supposed to withhold: the "editorial freedom" to rewrite statutes. *Free Enter. Fund*, 561 U.S. at 510.

This editorial freedom is especially problematic as applied to *state* laws. "States are not mere political subdivisions of the United States," and their "governments are neither regional offices nor administrative agencies of the Federal Govern-

ment." *New York*, 505 U.S. at 188. To the contrary, the States are sovereigns all their own. So when courts invalidate constitutional portions of a partially unconstitutional state law, they not only exceed the bounds of judicial power, they also interfere with the prerogatives of another sovereign.

3. Even if the Court is unwilling to ditch its modern severability doctrine altogether, it can refine it so that the doctrine better accords with Article III. More precisely, the Court can ground the severability doctrine's applications in traditional principles of statutory interpretation.

As detailed above, "the judiciary's limited powers" do not include the power to "'sever' a statute based on open-ended speculation about how Congress would have" reacted to a finding of partial unconstitutionality. *Collins*, 938 F.3d at 611 (Oldham and Ho, JJ., concurring in part and dissenting in part). There is no blue pencil in the judicial toolkit. *Id.* at 610; *Free Enter. Fund*, 561 U.S. at 509–10. But while the judiciary lacks the power to rewrite statutes, it has a *duty* to apply statutes as written. That generally requires continuing to give effect to constitutional provisions in partially unconstitutional laws. But Congress or a state legislature may dictate a different result: the legislature may write its statute in such a way that one provision's unconstitutionality either expressly or implicitly renders other parts of the same statute inoperative.

That insight points the way to reconciling the Constitution and this Court's severability doctrine. As Justice Thomas recently noted, one *could* think of the severability doctrine as requiring "courts [to] decide how a statute operates once they conclude that

part of it cannot be constitutionally enforced." *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring) (citing Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1333–34 (2000); Harrison, *Severability,* 83 Geo. Wash. L. Rev. at 88). Conceived of in this way, courts conducting the severability analysis would not purport to "excise parts of statutes on grounds of inseverability"; they would instead "determine that parts of statutes are ineffective as written" upon a finding that some other part is unconstitutional. Harrison*, Severability*, 83 Geo. Wash. L. Rev. at 88–89. This approach to severability would permit courts to go on treating severability as a remedy for partial unconstitutionality. All the while, this statute-focused approach to severability would better respect our Constitution's separation of powers, as it would leave to Congress and the state legislatures the task of writing the laws, while leaving to the courts the task of interpreting those laws.

Many of the Court's severability precedents already engage in this text-focused approach without saying so. For example, despite the cases saying that severability clauses are not dispositive, courts typically give them effect. *NFIB*, 567 U.S. at 575–86 (opinion of Roberts, C.J.); *id.* at 645–46 (opinion of Ginsburg, J.); *see also INS v. Chadha*, 462 U.S. 919, 932 (1983); *Elec. Bond & Share Co. v. SEC*, 303 U.S. 419, 434–35 (1938). This reflects the recognition that, because Congress generally "says in a statute what it means and means in a statute what it says there," *Dodd v. United States*, 545 U.S. 353, 357 (2005) (internal quotation omitted), there is no need to go beyond the text if it definitively establishes a

preference for severability (or non-severability) on its face.

Because the best way to "determine[] what Congress would have done [is] by examining what it did," *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 560 (2001) (Scalia, J., dissenting), grounding the severability question in the statutory text would not require much of a doctrinal shift. It *would*, however, greatly limit the power of courts to legislate in the guise of judicial review. If courts had to justify their severability decisions using standard principles of statutory interpretation rather than by positing what lawmakers would have said about a problem they never considered, the inquiry would be significantly less subjective and significantly less susceptible to abuse.

CONCLUSION

The individual mandate is unconstitutional, but its unconstitutionality does not affect the rest of the Affordable Care Act.

Respectfully submitted,

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