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 FOR FIRST FOCUS ON CHILDREN AND THE CHILDREN'S PARTNERSHIP AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are organizations dedicated to advancing healthcare for children.

First Focus on Children is a national bipartisan children's advocacy organization dedicated to making children and families the priority in federal policy and budget decisions related to healthcare. First Focus on Children leads a comprehensive advocacy strategy to identify and implement real-world solutions to improve the lives of children and families.

The Children's Partnership is a California-based nonprofit child advocacy organization working to ensure every child, no matter their background, has the resources and opportunities they need for a bright and healthy future. The Children's Partnership ("TCP") improves the lives of marginalized children where they live, learn, and play with breakthrough solutions at the intersection of community engagement, research, and policy.

First Focus and The Children's Partnership are committed to supporting the benefits the Affordable Care Act extended to America's children and young adults. First Focus on Children and TCP both have a strong interest in defending the vast improvement to the nation's healthcare system under the Affordable Care Act ("ACA") and ensuring that children across

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation. The United States, the State of Texas, and the United States House of Representatives have filed blanket consents to *amicus* briefs in this action. The State of California received timely notice and consented to the filing of this brief.

America obtain quality health insurance coverage and healthcare.

SUMMARY OF ARGUMENT

The current COVID-19 crisis has put into sharp relief what Congress knew when it passed the ACA: Access to quality healthcare is critical to the health and well-being of American families. The ACA revolutionized the healthcare system for every American, especially the millions of children and their families who without its protections would be excluded from the health insurance market or receive inferior care. One of the ACA's primary achievements was improving access to and quality of healthcare for children—through provisions that protected children with preexisting conditions, extended dependent coverage, and eliminated annual and lifetime limits on benefits. These protections are not simply one-off minor improvements that helped a few sick children get better. The ACA allows children across the country to lead healthy, productive lives by giving them early access to effective healthcare at affordable prices, often saving them and their families from financial ruin. These benefits are real, and they have been transformative.

As part of its reform of the individual health insurance market, the ACA included what is commonly known as the Individual Mandate: the requirement that most Americans either obtain health insurance or pay a "shared responsibility payment." Pub. L. No. 111-148, 124 Stat. 244, § 5000A (2010). In 2012, this Court upheld the Individual Mandate against a constitutional challenge as an exercise of Congress's taxing power. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 588 (2012) ("*NFIB*"). It also concluded that,

although certain mandatory Medicaid expansion requirements exceeded Congress's authority, states could expand Medicaid on a voluntary basis. *Ibid.* In its sole severability determination concerning the ACA, this Court wrote that it was "confident that Congress would have wanted to preserve the rest of the Act" even absent the mandatory Medicaid expansion. *Id.* at 587.

In the years since *NFIB* was decided, Congress repeatedly considered whether to repeal the ACA in its entirety, but it always voted to *maintain* the ACA and its protections for millions of Americans. Then, in December 2017, Congress passed the Tax Cuts and Jobs Act ("TCJA"). True to its name, the vast majority of the TCJA concerned amendments to the Tax Code. The TCJA never mentioned the ACA by name, but it did reduce the ACA's shared responsibility payment to zero. *See* Pub. L. No. 115-97, 131 Stat. 2092, § 11081 (2017). Based on that reduction, Respondents contended that the Individual Mandate is (a) unconstitutional because Congress no longer collects a tax through the shared responsibility payment and (b) as a result, the entire ACA should be invalidated, despite the chaos that would cause for the nation's healthcare system and the harm that would flow to children and families across the country. The district agreed on both counts and thus struck down the whole statute. *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018).

The court of appeals largely affirmed the district court's order, holding that "the individual mandate is unconstitutional because it can no longer be read as a tax, and there is no other constitutional provision that justifies this exercise of congressional power." *Texas*

v. United States, 945 F.3d 355, 369 (5th Cir. 2019). However, "on the severability question, [it] remand[ed] to the district court to provide additional analysis of the provisions of the ACA as they currently exist." *Ibid.*

The court of appeals' order is fundamentally wrong and should be reversed, even assuming, *arguendo*, the court of appeals was correct about the impact of the TCJA on the Individual Mandate. *Cf.* U.S. House of Representatives' Opening Br. 14–19 (arguing that the Individual Mandate remains constitutional); State Defs.' Opening Br. 25–35 (same). The "'touchstone for any decision about [a severability] remedy is legislative intent,'" *NFIB*, 567 U.S. at 586 (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006)), and Congress most definitely did not intend to eliminate the ACA—a once-in-a-generation piece of landmark legislation that has insured 20 million Americans and improved quality of care for many more—if any one aspect were excised. On the contrary, Congress demonstrated its unequivocal intent to maintain the ACA even without the Individual Mandate. There is no need for the provision-by-provision review ordered by the court of appeals to divine congressional intent on severability. The simple answer is provided by what Congress actually did: In 2017, Congress voted to reduce the shared responsibility payment to zero in the TCJA but left the rest of the ACA intact.

It is no surprise that Congress consistently has retained the ACA despite the repeated efforts to repeal it. For a decade, millions of children have received life-changing (and, in many cases, life-saving) health

insurance coverage and substantive protections to ensure the quality of the services and care they receive. Make no mistake about what is at stake here: striking down the ACA would wreak grievous harm on children and families by eliminating these bedrock ACA provisions at a time of great risk to public health.

ARGUMENT

I. The ACA Has Transformed Healthcare For Millions Of Children And Their Families

Congress enacted the ACA to provide "Quality, Affordable Health Care for All Americans," Pub. L. No. 111-148, 124 Stat. 130 (2010), and, critically, "to increase the number of Americans covered by health insurance and decrease the cost of health care," *NFIB*, 567 U.S. at 538. It expanded coverage to millions of children and young adults. It increased the quality of children's healthcare by ensuring that patients cannot be denied insurance or be charged higher premiums because they have preexisting conditions—in other words, because they are already sick and need healthcare. And it provided financial security to millions of families with very sick children by eliminating annual and lifetime limits on insurance benefits. In these and many other ways, the ACA has been resoundingly successful, and has become essential for the health and well-being of children and their families across the country.

A. The ACA Provides Millions Of Children Access To Healthcare

Prior to the ACA, 46.5 million nonelderly Americans lacked health insurance. Jennifer Tolbert et al., *Key Facts About the Uninsured Population*, Henry J.

Kaiser Family Found. (Dec. 13, 2019), http://tinyurl.com/y79q6mp8 ("*Key Facts*"). Being uninsured can have dire consequences: the uninsured are less likely to receive preventive care, more likely to go without necessary care due to cost, and more likely to be hospitalized for otherwise avoidable conditions. *Ibid.* For children, early and regular preventive care is especially critical to healthy childhood development. Avoidable conditions are often much more expensive to treat than to prevent, severely straining healthcare providers, and even leading to hospital closures. *Ibid.* Hospitals are required by law to provide a minimum level of care regardless of a patient's ability to pay. *NFIB*, 567 U.S. at 547. To recoup these losses, hospitals pass the cost to insurers, which in turn raise premiums on policyholders. *Ibid.*

The ACA alleviates these risks for millions of children and young adults. For example, the ACA expanded access to the private health insurance market through exchanges by granting tax credits to purchase health insurance for those between 100% and 400% of the Federal Poverty Line ("FPL"). 26 U.S.C. § 36B(c). Individuals who do not meet the income restrictions for Medicaid can, thanks to the ACA, purchase insurance policies through the federal or state exchanges. Parents can buy dependent coverage policies that cover their children as well. In 2016, 10 million people received their healthcare policies through an individual market exchange created by the ACA, many of them children. Rachel Fehr et al., *Data Note: Changes in Enrollment in the Individual Health Insurance Market Through Early 2019*, Henry J. Kaiser Family Found. (Aug. 21, 2019), https://tinyurl.com/stmr8vd.

As a result of the ACA's Medicaid expansion for adults, 5.5 million previously uninsured children now receive coverage. Medicaid & CHIP Payment & Access Comm'n, *MACStats: Medicaid & CHIP Data Book* 94 (Dec. 2019), https://tinyurl.com/tgddsyq ("*MACStats*"). And the ACA allows young adults, including those leaving foster care, to retain their childhood insurance until age 26, extending coverage to a largely un- or under-insured population.[2]

1. More Covered Parents Results In More Covered Children

Health insurance plans often have dependent child options under which children can receive coverage from their parents' insurance. In light of this, children and parents very often have the same insurance status—if the parent is insured, then so is their child, and if the parent is uninsured, their child is too.

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2 Unfortunately, these trends are reversing. After reaching its lowest level in 2016, the uninsured population has increased under the current administration. *Key Facts*. In 2018, for example, the number of uninsured Americans increased for the second straight year when 500,000 additional Americans went without insurance, including over 100,000 additional children. *Ibid.* The Kaiser Family Foundation found this decrease could be a result of the reduction in outreach and consumer assistance for HealthCare.gov, as well as the repeal of the Individual Mandate. *Ibid.*; Rachel Fehr et al., *Data Note: Changes in Enrollment in the Individual Health Insurance Market through Early 2019*, Henry J. Kaiser Family Found. (Aug. 21, 2019), https://tinyurl.com/stmr8vd. Despite these trends, the healthcare market remains robust: uninsured rates are far below pre-ACA levels, premium rates in 2019 held steady, and the private insurance market has not entered into a "death spiral" from the zeroing out of the individual mandate. Rachel Fehr & Cynthia Cox, *Individual Insurance Market Performance in Late 2019*, Henry J. Kaiser Family Found. (Jan. 6, 2020), https://tinyurl.com/ybcbxpqb.

A Government Accountability Office study found that 84% of children shared the insurance status of their parents. U.S. Gov't Accountability Off., GAO-11-264, *Medicaid & CHIP: Given the Association Between Parent & Child Insurance Status, New Expansion May Benefit Families* 8 (Feb. 2011), http://tinyurl.com/y5umkmth. Further, children were *eight times* more likely to have public insurance if their parents also had public insurance, as compared to children of parents who were uninsured. *Id.* at 9–10 ("All 13 articles we reviewed that examined a parent's and a child's insurance status identified significant associations.").

Coverage discrepancies between parents and their children arise, however, when children are eligible for public health insurance (through Medicaid or the Children's Health Insurance Program ("CHIP")) but their parents are not. Parents who are not eligible for public health insurance often are unaware of their children's eligibility and thus fail to enroll their eligible children. Leighton Ku & Matt Broaddus, *Coverage of Parents Helps Children, Too*, Center on Budget & Policy Priorities 4 (Oct. 20, 2006), http://tinyurl.com/y32kwoma. The greater the discrepancy between parent and child income eligibility, the greater the chance that ineligible parents do not apply for coverage for their otherwise eligible children.

Income eligibility cut-offs between adults and children—and the resulting potential for eligible children to remain uninsured—can be stark. For example, as of April 2019, parents of dependent children in Alabama, a state that did not adopt the Medicaid expansion option from the ACA, were only eligible for

Medicaid if they earned up to 13% of the FPL. *MACStats* 106. Children, on the other hand, were eligible for Medicaid if their family made up to 141% of the FPL and eligible for CHIP if their family made up to 312% of the FPL. *Id.* at 103. This meant that Alabaman parents of a family of four who made more than $3,347 but less than $80,340 were not eligible for public health insurance even though their children were eligible. *Id.* at 112.

By 2014, roughly 70% of uninsured children were eligible for, but not enrolled in, public health insurance. Georgetown Univ. Health Policy Inst., Ctr. for Children & Families, *Medicaid Expansion: Good for Parents and Children* (Jan. 2014), http://tinyurl.com/y6pyg8eb. This provided the ACA with a huge opportunity to expand children's health insurance coverage. Research shows that the ACA's expansion of coverage for parents provided a "welcome mat" for their children: increases in public health insurance *eligibility* for parents led to increased *coverage* for their children, even when the children were already eligible. Julie L. Hudson & Asako S. Moriya, *Medicaid Expansion for Adults Had Measurable 'Welcome Mat' Effects on Their Children*, 36:9 Health Affairs 1643, 1643 (2017), https://tinyurl.com/yxqp79fv ("*Welcome Mat*"). The expansion of Medicaid to low-income adults earning up to 138% of the FPL created a pathway for enrolling already eligible uninsured children. Additionally, the ACA requires Medicaid-eligible parents to enroll their children as a prerequisite to receiving coverage themselves. 42 C.F.R. § 435.119(c). In total, ***over 700,000*** low-income children obtained coverage through these "welcome mat" effects thanks to the ACA. *Welcome Mat* 1643.

2. Children Can Now Retain Health Coverage Until Age 26

Historically, young adults were almost twice as likely to forego health insurance as children or older adults. Kevin Quinn et al., *On Their Own: Young Adults Living Without Health Insurance*, Commonwealth Fund 1 (May 2000), https://tinyurl.com/yysnah4u. This was due to a variety of reasons, including working low-wage jobs that do not provide insurance, recently coming off of their parents' health insurance and not knowing how to obtain coverage for themselves, and forgoing expensive insurance under the belief that they would remain healthy and not need care for the foreseeable future. *Id.* at 1, 8.

To increase the number of insured young adults, the ACA allows young adults to remain on their parents' health insurance policies until they turn 26. 42 U.S.C. § 300gg–14(a). The expansion of dependent coverage was "one of the earliest and most popular provisions in the [ACA]." Weiwei Chen, *Young Adults' Selection and Use of Dependent Coverage Under the Affordable Care Act*, 6 Frontiers Pub. Health 3 (Jan. 31, 2018), http://tinyurl.com/y3o9m3b9.

Allowing young adults to stay on their parents' health insurance both saves lives and allows young adults to be productive members of society. Kendall Brown, the executive director of a nonprofit in Oklahoma, was diagnosed with Crohn's Disease in elementary school. Robin Marty, *Six Stories of Obamacare Already Making a Difference*, Rolling Stone (Oct. 16, 2013), https://tinyurl.com/y5mjwhe4; Kendall Brown, *Open Letter to Lawmakers: The Human Cost*, OKC.net

(Sept. 30, 2013) ("*Open Letter*"), https://tinyurl.com/k2fh8d3. Kendall's parents' insurance covered her through childhood, but she experienced a lapse in coverage in college, resulting in thousands of dollars in medical bills. *Open Letter*. Thanks to the ACA, Kendall went back on her parents' insurance until her 26th birthday. *Ibid.* This allowed her to pay for necessary intestinal surgery. *Ibid.* As Kendall wrote to members of Congress, "Without . . . the Affordable Care Act, I could not have gotten the surgery. And without the surgery, I would have died." *Ibid.*

Similarly, the ACA allows former foster care youth—an especially vulnerable population—to keep their public health insurance (usually Medicaid) until they turn 26. 42 U.S.C. § 1396a(a)(10)(A)(i)(IX). One study found that one- to two-thirds of foster children "have at least one chronic or acute physical health condition that needs treatment," and up to "three-fourths show behavioral or social competency problems that may warrant mental health services." Emilie Stoltzfus et al., *Child Welfare: Health Care Needs of Children in Foster Care & Related Federal Issues*, Cong. Research Serv. 2 (Nov. 19, 2014), https://tinyurl.com/yxjpe8lq. In addition, over half of adopted foster care children have "special health care needs," defined as "one or more conditions (expected to last 12 months or more) that require[] ongoing need for more medical, mental health, or educational services than is usual for most children of the same age." *Id.* at 7. Even controlling for family and economic situations, foster children are about twice as likely as other children to have a learning disability, about three times as likely to have Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder, about five times

as likely to have anxiety, about six times as likely to have behavioral problems, and about seven times as likely to have depression. Kristin Turney & Christopher Wildeman, *Mental and Physical Health of Children in Foster Care*, Pediatrics 138(5) (Nov. 2016), https://tinyurl.com/wkgbtzw. Young adults who have aged out of foster care are more likely to have a health condition limiting daily activity, more likely to take part in psychological and substance abuse counseling, and less likely to be insured. Dina Emam & Olivia Golden, *The Affordable Care Act and Youth Aging Out of Foster Care: New Opportunities and Strategies for Action*, State Policy Advocacy and Reform Ctr. (April 2014), https://tinyurl.com/yd7yngy3. For the roughly 250,000 American children who leave foster care each year, continued health insurance coverage as a result of the ACA provides much-needed security and stability in what can be an otherwise tumultuous situation. Cong. Research Serv., *Medicaid Coverage for Former Foster Youth Up to Age 26* (Oct. 26, 2018), https://tinyurl.com/y4kzk9wa.

The effects of the dependent care expansion have been dramatic. In 2010, about 30% of young adults aged 19 to 25 went without health insurance. Susan R. Todd & Benjamin D. Sommers, *Overview of the Uninsured in the United States: A Summary of the 2012 Current Population Survey Report*, Dep't of Health & Human Servs. 1 (Sept. 12, 2012), https://tinyurl.com/y6b36oal. Just one year after the ACA, 500,000 previously uninsured young adults obtained coverage, *ibid.*, and by early 2016, ***over 6 million*** young adults gained health insurance as a result of the ACA, Namrata Uberoi et al., *Health Insurance Coverage & the Affordable Care Act, 2010–2016*, Dep't

of Health & Human Servs. 2 (Mar. 3, 2016), https://tinyurl.com/kboqlcd. Young adults constitute over 25% of the nonelderly adults who gained coverage under the ACA between 2010 and 2016. *Ibid.*

B. The ACA Increases The Quality Of Children's Health Insurance And Healthcare

Beyond allowing more children to *access* health insurance, the ACA improved the *quality* of coverage. Childhood can be a particularly vulnerable time, both for the health of the child and the financial well-being of the parents. Better healthcare protects children and their families from potentially catastrophic loss and helps ensure healthy development.

1. Children With Preexisting Conditions Now Obtain Meaningful and Affordable Insurance Coverage

"In the Affordable Care Act, Congress addressed the problem of those who cannot obtain insurance coverage because of preexisting conditions or other health issues" through "'guaranteed issue' and 'community-rating' provisions." *NFIB*, 567 U.S. at 547–48. Preexisting conditions are "health condition[s] that predate[] a person applying for or enrolling in a new health insurance policy." Dep't of Health & Human Servs., *Health Insurance Coverage for Americans with Pre-Existing Conditions: The Impact of the Affordable Care Act* 2 (Jan. 5, 2017) ("*Health Insurance Coverage*"), http://tinyurl.com/ybkaxxmk. Those with preexisting conditions who could not obtain employment that offered coverage were "desperately in need of insurance" but often could not acquire it. *NFIB*, 567

U.S. at 596 (Ginsburg, J., concurring in part, concurring in the judgment, and dissenting in part).

Prior to the ACA, Americans with preexisting conditions were often uninsurable. *NFIB*, 567 U.S. at 596–97. Insurance policies that covered routine care or unexpected conditions often did not cover preexisting conditions. Moreover, insurers were permitted to define for themselves what constituted a preexisting condition; in addition to serious but less-common conditions such as cancer and certain infectious diseases, insurers included commonplace conditions such as high blood pressure, high cholesterol, asthma, and depression. *Health Insurance Coverage* 8. As many as one in two Americans could have a preexisting condition. *See* J.A. 202, 282 (133 million Americans); *see also* Ctr. for Consumer Info. & Ins. Oversight, *At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans: 129 Million People Could Be Denied Affordable Coverage Without Health Reform* ("*At Risk*"), https://tinyurl.com/yba2dzcv (129 million Americans). More than ***80 million*** Americans with employer-based insurance have a preexisting condition. *See At Risk*.

Americans with preexisting conditions lucky enough to find insurance often paid exorbitant rates. From 2006–2009, ***12.6 million*** adults were either denied coverage or charged a higher premium due to a preexisting condition. *NFIB*, 567 U.S. at 597 (Ginsburg, J., concurring in part, concurring in the judgment, and dissenting in part). Prior to the ACA, "[i]ndividuals with these conditions would at least get charged a higher premium." *At Risk*.

The bar to meaningful health insurance for those with preexisting conditions was not limited to adults. Children with the misfortune of having a preexisting condition could make health insurance prohibitively expensive for their parents and have difficulty obtaining health insurance as an adult. It is estimated that ***over 17 million*** children have a preexisting condition. *Health Insurance Coverage* 13. That amounts to roughly 25% of American children who, without the ACA, would be subject to denial of coverage based on preexisting conditions.

As parents of a child with a preexisting condition, Jodi and Mark Lemack faced this very situation. Their son, Joshua, was born with a heart defect requiring three high-risk surgeries immediately after birth, the first of which had a survival rate of just 5%. Sabrina Corlette, *Waiting for 2014: One Family's Story*, Georgetown Univ. Health Policy Inst., Ctr. on Health Ins. Reforms (July 23, 2012), https://tinyurl.com/ycmuxvhg. While Joshua beat the odds and became a thriving child, his parents were left with astronomical medical bills. *Ibid.* Jodi had access to a generous group health insurance policy through her nonprofit job, but the Lemacks enrolled in their current health insurance plan before Joshua was born, so the plan treated Joshua as a "healthy" child. *Ibid.* Jodi could not move her family to the more generous plan because it would charge much higher premiums based on Joshua's preexisting condition. *Ibid.*

The Lemacks were not alone. Many families needing and able to obtain coverage for a preexisting condition for a child were locked into their current jobs, unable to pursue new opportunities or make changes to address personal circumstances for fear of

losing health-protecting or life-saving insurance. "Without the [ACA], such conditions limit the ability to obtain affordable health insurance if they become self-employed, take a job with a company that does not offer coverage, or experience a change in life circumstance, such as divorce, retirement, or moving to a different state." *At Risk*; *see also The Economic Case for Health Reform: Hearing Before the H. Comm. On the Budget*, 111th Cong. 12 (2009) (statement of Christina D. Romer, Chair, Council of Econ. Advisors), https://tinyurl.com/y6avfzp8 ("Expanding coverage and eliminating restrictions on preexisting conditions could end the phenomenon of job lock, where worries about health insurance cause workers to stay in jobs even when there are ones that pay better or are a better match available.").

The ACA changed the landscape by requiring that comprehensive insurance plans be offered at standard rates to all patients, regardless of medical history. 42 U.S.C. § 300gg–6; 42 U.S.C. § 300gg–3(a). Thanks to the ACA, children born with preexisting conditions need no longer fear the day they age out of their parents' insurance policies because they are able to purchase insurance on the same terms as everyone else. And parents of those children have the security of knowing that they can buy insurance to cover the necessary care, as well as the freedom to change jobs without fear of jeopardizing their children's coverage.

Many leading medical organizations supported—and continue to support—the ACA explicitly because of its protections for children with preexisting conditions. The American Cancer Society stated that "[i]nsurance companies can no longer deny coverage to children with pre-existing conditions such as cancer

or diabetes." Am. Cancer Soc'y, *Health Care Law: How It Can Help People with Cancer & Their Families* 6 (July 2013), https://tinyurl.com/y6zkv8dh. The American Academy of Pediatrics argued that "[n]o child should be denied coverage for a pre-existing condition." Judith S. Palfrey, *Health Reform Law & Children with Pre-Existing Conditions*, Am. Acad. of Pediatrics (Mar. 29, 2010), https://tinyurl.com/yytxok25. And in response to legislation that would have gutted the ACA, the American College of Physicians underscored that the ACA "ensures that children, adolescents and adults with preexisting conditions cannot be denied coverage, be charged higher premiums, or be subject to cancellation." Nitin S. Damle, *Letter to Congressional Leaders*, Am. Coll. of Physicians 3 (Mar. 7, 2017), https://tinyurl.com/y3m7t3gy.

Additionally, leading medical organizations reiterated their support of the ACA in light of this case. The American Hospital Association "strongly urge[d]" this Court to "deci[de] in favor for the ACA and its protections for patients with pre-existing conditions, expansion of the Medicaid program, creation of new and innovative models of care and many other critical benefits." Rick Pollack, *Statement on Supreme Court Decision in California v. Texas*, Am. Hosp. Assoc. (Mar. 2, 2020), https://tinyurl.com/y8aljvgk. The American Cancer Society warned that this case "threatens vital patient provisions that ACS CAN fought to include and protect, including those that prohibit pre-existing condition exclusions." Cancer Action Network, Am. Cancer Soc'y, *Affordable Care Act Challenge in Texas* (Jan. 30, 2020), https://tinyurl.com/y8ok5bwp.

The COVID-19 pandemic places the necessity of these protections into sharp relief. Individuals with

chronic lung disease, moderate-to-severe asthma, diabetes, obesity, or who are immunocompromised from cancer treatment are especially susceptible to COVID-19; all could have been denied health insurance for a preexisting condition. Cancer Action Network, Am. Cancer Soc'y, *Affordable Care Act Challenge in Texas* (Jan. 30, 2020), https://tinyurl.com/y8ok5bwp; Ctr. for Disease Control & Prevention, *People Who Are at Higher Risk for Severe Illness* (Apr. 15, 2020), https://tinyurl.com/sxn5fbc. Without insurance, these vulnerable individuals stricken by COVID-19 may have avoided care, compounding the crisis and leading to more deaths.

The ACA's requirement that insurance policies cover preexisting conditions will protect generations of children from the perils of going without healthcare. The issue cuts across geographic, income, and political lines, uniting parents in support of their sick children. For example, two mothers in Louisiana, one a Democrat, the other a Republican, developed a friendship after spending hours in a neonatal intensive care unit caring for their sons. Charlotte Alter & Haley Sweetland Edwards, *United Patients of Am.*, Time (July 13, 2017) ("*United Patients*"), https://tinyurl.com/y2955clr. Angéla Lorio's son John Paul and Jessica Michot's son Gabriel were born premature. *Ibid.* Premature births are not uncommon: one in ten births occur prior to a full gestation period. Ctr. for Disease Control & Prevention, *Preterm Birth* (Mar. 18, 2019), http://tinyurl.com/kp36q3c. Children born premature are not just at risk from the early birth; they also have higher rates of death and disability during their lives. *Ibid.* John Paul and Gabriel had serious medical problems resulting from their early

births, including developmental disabilities, needing a feeding tube to eat, and using a tracheotomy to breathe. *United Patients*. Lorio and Michot launched a group called "Trach Mommas of Louisiana," which traveled to Washington, D.C. to protest the 2017 attempted repeal of the ACA. *Ibid.* With the legislation intact, the ACA allows John Paul and Gabriel to access private health insurance now and through adulthood, despite suffering from preexisting conditions. If the ACA were overturned, John Paul and Gabriel would be part of the up to 17 million children who would lose coverage—"with one in five uninsured, depending on what other coverage options might be available under a replacement plan." Samantha Artiga & Petry Ubri, *Key Issues in Children's Health Coverage*, Henry J. Kaiser Family Found. (Feb. 15, 2017), https://tinyurl.com/sdv3rz6.

2. Children No Longer Face Annual and Lifetime Limits

Beyond leaving children with preexisting conditions vulnerable to denials of coverage or exorbitant rates, federal law before the ACA allowed limits on the total amount of healthcare any one person could have reimbursed. In other words, previously, if a child developed a condition requiring extensive medical care after enrolling in a policy, the insurer would only be responsible for paying a certain amount, both annually and over the child's lifetime. Any additional medical expenses would have fallen completely on the child's parents. Sofija Rak & Janis Coffin, *Affordable Care Act*, J. of Med. Prac. Mgmt. 317, 318 (2013), http://tinyurl.com/y2fckzc2. These limits had applied to both individual market policies and employer-based insurance plans. U.S. Ctrs. for Medicare & Medicaid

Servs., *Ending Lifetime & Yearly Limits* (last accessed May 7, 2019), https://tinyurl.com/y5x845ah. In 2017, 54% of those who have health insurance received coverage through their employers. Henry J. Kaiser Family Found., *Health Insurance Coverage of the Total Population* (2017), https://tinyurl.com/y8q9m8q4.

Certain pediatric conditions, such as cancer, may exhaust both annual and lifetime limits in a matter of months. In 2009, the average cost of a hospital stay for a child with cancer was $40,400 per visit, at $3,900 per day. Rebecca Anhang Price et al., *Pediatric Cancer Hospitalizations*, Agency for Healthcare Research & Quality 2 (May 2012), http://tinyurl.com/y44xqq5g. The average pediatric cancer diagnosis occurs at just eight years old, leaving parents of uninsured children with almost a decade of hospital bills to pay out of pocket. *Id.* at 1–2. Of course, adults with serious illnesses faced limits as well.

The ACA abolished annual and lifetime limits. 42 U.S.C. § 300gg–11; Dep't of Health & Human Servs., *Lifetime & Annual Limits* (Jan. 31, 2017), http://tinyurl.com/yxtk5v4o. As a result, children can now receive much-needed healthcare without fear that they or their parents will fall into bankruptcy as a result of enormous medical bills.

Timmy Morrison's life illustrates the ACA's profound impact on families whose children have a complex pediatric illness. Timmy was born seven weeks premature with a rare genetic disease; he spent his first six months in a hospital. Sarah Kliff, *The Little Lobbyist: A 6-Year-Old, Whose Life Depends on ACA, Heads to Capitol Hill*, Vox (June 21, 2017), http://tinyurl.com/y62opvqv. That inaugural hospital visit

amounted to more than $2 million in medical bills, far eclipsing the previous standard lifetime limit of $1 million. *Ibid.* The visit turned out to be the first of many. Timmy frequents hospitals because of his rare genetic disease, and he has gone under anesthesia more than 45 times in his young life. *Ibid.* Without the ACA's prohibition on annual and lifetime limits, Timmy's parents would be in financial ruin. Timmy personally shared his story with legislators in the days before the vote to repeal the ACA in 2017, and he provided Congress with stories of over 100 other children whose health depended on the ACA. *Ibid.* Congress listened, and in rejecting repeal, it reaffirmed that Timmy and millions of other children deserve affordable, quality healthcare.

3. Better Health Insurance Means Better Healthcare Outcomes

Access to high-quality and comprehensive health insurance improves healthcare outcomes for children in several ways.

First, the ACA requires a minimum package of benefits for each insurance plan sold on the exchanges. 42 U.S.C. § 18022. That benefits package contains all preventive care screenings and services recommended by the American Academy of Pediatrics without cost sharing, including "[m]aternity and newborn care" and "[p]ediatric services, including oral and vision care." *Id.* § 18022(b)(1); Am. Academy of Pediatrics, *Achieving Bright Futures, Implementation of the ACA Pediatrics Preventive Services Provision* (2020), https://tinyurl.com/y8fcjjg7. These services are integral to the growth and development of the estimated ***18.6 million children*** whose insurance now

covers preventive services due to the ACA. Amy Burke & Adelle Simmons, *Increased Coverage of Preventive Services with Zero Cost Sharing Under the Affordable Care Act*, Dep't Health & Human Servs. (June 27, 2014), http://tinyurl.com/yyju5xl5. Indeed, providing health insurance to low-income uninsured children "results in significantly better health status; improved access to medical, preventive, and dental care; greater use of preventive services; a higher quality of well-child care; increased parental satisfaction; reduced out-of-pocket costs and family financial burden; and savings of approximately $2886 per year per child insured." Glenn Flores et al., *The Health and Healthcare Impact of Providing Insurance Coverage to Uninsured Children: A Prospective Observational Study*, BMC Pub. Health 8–10 (2017), https://tinyurl.com/yaqcz34n. Preventive care can drastically reduce overall healthcare expenditures by treating avoidable conditions earlier, before the patient must resort to the emergency room. *Key Facts*.

Second, the ACA injected more funding into Community Health Centers ("CHCs"), which act as primary healthcare providers for underserved and low-income communities. In 2016, over 10,000 CHCs provided care to more than ***25 million Americans***. Sara Rosenbaum et al., *Community Health Centers: Growing Importance in a Changing Health Care System*, Henry J. Kaiser Family Found. (Mar. 9, 2018), https://tinyurl.com/y3gnzn6o. ***Over 8 million children*** receive healthcare at CHCs, accounting for nearly one-third of CHC patients. *Ibid.* CHCs provide care to roughly one-in-ten children nationwide and nearly four-in-ten low-income children. Brian Bruen & Leighton Ku, *Community Health Centers Reduce*

the Costs of Children's Health Care, RCHN Community Health Found. Research Collaborative (June 20, 2017), https://tinyurl.com/yc4z77jt. CHCs serve as medical homes, offering comprehensive services addressing children's physical, mental, developmental, and oral health needs; in addition to high quality clinical care, they provide enabling services to address social and economic needs, such as care management, interpretation, social services, and transportation. *Ibid.*

Third, the ACA prioritized prenatal and early childhood care by establishing Maternal, Infant, and Early Childhood Home Visiting Programs ("MIECHV"), which fund home visits to at-risk pregnant mothers and those with young children. 42 U.S.C. § 711. MIECHV visits include healthcare, social services, and child development professionals providing instruction and care to mothers and parents on a wide range of topics, including preventive health and prenatal practices, child development, and positive parenting. Health Res. & Servs. Admin., Maternal & Child Health, *Home Visiting* (Mar. 2020), https://tinyurl.com/yx8hoo53. In 2019, MIECHV provided care to 154,000 parents and children with nearly ***one million*** home visits. *Ibid.* MIECHV programs have been found to have positive impacts on a number of family outcomes, including improved quality of the home environment, reduced frequency of psychological aggression toward the child, fewer emergency department visits for the child, and fewer child behavior problems. Charles Michalopoulos *et al.*, *Impacts on Family Outcomes of Evidence-Based Early Childhood Home Visiting: Results from the*

Mother and Infant Home Visiting Program Evaluation, U.S. Dep't Health & Hum. Servs. ES-9 (Jan. 2019), https://tinyurl.com/ycrtdfww.

Fourth, the ACA's increased "parental Medicaid enrollment is associated with increases in pediatric primary care use in low-income families." Maya Venkataramani et al., *Spillover Effects of Adult Medicaid Expansions on Children's Use of Preventative Services*, Pediatrics 6 (Nov. 13, 2017), https://tinyurl.com/y9sogp9h. Specifically, parental enrollment in Medicaid is associated with an increased likelihood that children will receive well-child visits ("WCVs") from doctors. *Id.* at 4. "Children who receive WCVs are more likely to complete immunization schedules and are less likely to have avoidable hospitalizations." *Id.* at 2.

These changes have improved outcomes substantially. A recent study showed that the ACA accelerated the decline of infant mortality rates in states that opted for the Medicaid expansion compared to states not opting for the expansion. Chintan B. Bhatt & Consuelo M. Beck-Sagué, *Medicaid Expansion and Infant Mortality in the United States*, 108(4) Am. J. of Pub. Health 565 (Apr. 2018), http://tinyurl.com/y3yswz7o. An additional study found that the states receiving the Medicaid expansion from the ACA saw lower rates of maternal mortality than their sister states. Jaime Rosenberg, *Medicaid Expansion Linked to Lower Maternal Mortality Rates*, Am. J. of Managed Care (Feb. 6, 2019), http://tinyurl.com/y28hdmlu. Still more studies demonstrate the straightforward conclusion: when children have health insurance, they are more likely to experience better health outcomes. David Murphey, *Health Insurance Coverage Improves Child*

Well-Being, Child Trends (May 2017), http://tinyurl.com/y2y9xmwf.

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The ACA increased the quality of health insurance coverage for millions of children and their families, including those with preexisting conditions. With the ACA, children are obtaining better health insurance, receiving better healthcare, and thus achieving better health outcomes.

II. By Eliminating The Tax Penalty, Congress Did Not Intend To Invalidate The Entire ACA

The district court here concluded that Congress would not have enacted the ACA without the Individual Mandate. *Texas*, 340 F. Supp. 3d at 607. The court of appeals remanded for further consideration of severability but indicated that at least some provisions likely were inseverable. But this is wrong: Congress made clear when it eliminated the tax penalty that the Individual Mandate is severable from the rest of the life-saving provisions of the comprehensive law.

This Court has held that invalid statutory provisions are presumptively severable from the otherwise valid, operative provisions. The standard for overcoming this presumption is demanding: Courts must uphold the remainder of the statute absent "evident" congressional intent to allow the entire statute to fall along with the invalid provision. *NFIB*, 567 U.S. at 586.

Here, the Court does not have to guess about what Congress would have wanted now that the ACA has revolutionized the healthcare system. Instead, it can look to what Congress actually did. Congress zeroed

out the tax penalty for failure to comply with the Individual Mandate but left the rest of the ACA in place. In passing the TCJA, Congress answered the question before the Court: yes, the tax payments could now be eliminated, but the Act's other guarantees, including protections for people with preexisting conditions, elimination of lifetime benefit limits, and extending benefit coverage, must remain in place. Indeed, Congress has rejected dozens of efforts to do what Respondents ask this Court to do: abolish the entire ACA and eliminate its enormous positive impact on the healthcare of the nation. That position has no basis in law or fact.

A. Statutory Provisions Are Presumptively Severable Absent Clear Contrary Congressional Intent

Even where a court finds a statutory provision to be unconstitutional, it must "seek to determine what Congress would have intended in light of the Court's constitutional holding" and "refrain from invalidating more of the statute than is necessary." *United States v. Booker*, 543 U.S. 220, 246, 258 (2005) (quotation marks omitted). "'Generally speaking, when confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (quoting *Ayotte*, 546 U.S. at 328–29). The Court's "duty" is "to maintain the act in so far as it is valid," *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quotation marks omitted), because a "ruling of unconstitutionality frustrates the intent of the elected representatives of the people," *Ayotte*, 546 U.S. at 329 (quotation marks omitted); *see*

also id. at 330 ("[A] court cannot use its remedial powers to circumvent the intent of the legislature.") (quotation marks omitted). Thus, the Court presumes that valid statutory provisions are severable "[u]nless it is evident that the Legislature would not have enacted those provisions" without the invalid one. *Free Enter.*, 561 U.S. at 509 (quotation marks omitted; alteration in original).

The touchstone of severability is congressional intent—whether Congress "[would] have preferred what is left of its statute to no statute at all." *Ayotte*, 546 U.S. at 330. Here, as in *NFIB*, the core question is "whether Congress would have wanted the rest of the [ACA] to stand, had it known" that an important part of the law would be struck down. 567 U.S. at 587. "Unless it is 'evident' that the answer is no, [the Court] must leave the rest of the [ACA] intact." *Ibid.* (quoting *Champlin Ref. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932)). As the Fifth Circuit and members of this Court have recognized, "inconclusive" evidence cannot overcome the presumption of severability, *Med. Ctr. Pharm. v. Mukasey*, 536 F.3d 383, 405 (5th Cir. 2008), particularly where the remainder of the statute "may . . . function largely as intended," *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1235 (10th Cir. 2017); *see also PHH Corp. v. CFPB*, 881 F.3d 75, 199 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (severance appropriate where remainder of "statute is capable 'of functioning' without the offending provisions").

B. Congress Has Repeatedly Maintained The ACA's Benefits To Children And Their Families

Months before passing the TCJA in 2017, Congress rejected a repeal of the ACA. *See* Am. Health Care Act, H.R. 1628, 115th Cong. (2017). During extensive debate, as they had many times before, members of Congress highlighted the many harms to the healthcare of millions of American children if various provisions of the ACA were repealed. Some painted vivid pictures of the despair facing parents who could not afford life-saving treatment for their children. As Senator Murphy stated, "when . . . your child has an expensive disease and you lose insurance, you can't pay for it. You can sell your house, you can sell your car, and you can exhaust your savings. For some families, that will cover 6 months' worth of expenses for their sick child. At some point, the patient dies if they don't have access to healthcare." 115 CONG. REC. S4233 (daily ed. July 26, 2017) (statement of Sen. Murphy). Others underscored the importance of access to coverage for those below and just above the federal poverty line. 115 CONG. REC. S4171 (daily ed. July 25, 2017) (statement of Sen. Nelson) ("How about some of the children's programs on Medicaid? If you start cutting that back to the tune of about $800 billion over a decade, you are going to knock out a lot of these people."); 115 CONG. REC. H2411 (daily ed. Mar. 24, 2017) (statement of Rep. Carbajal) ("The Affordable Care Act meant [that a mother] could open her small business and afford insurance coverage for her two children. . . . Repealing legislation that has improved the quality of life . . . for the over 20 million Americans who have gained health insurance under

the Affordable Care Act[] would be callous, cruel, and irresponsible."). Still others emphasized that they "cannot support a bill that takes away care from these families" of children with preexisting conditions who previously found it "impossible . . . to get coverage." 115 CONG. REC. S4242 (daily ed. July 26, 2017) (statement of Sen. Donnelly).

After refusing to repeal the ACA, Congress passed the TCJA. The TCJA's text confirms Congress intended to maintain the ACA. The TCJA is full of provisions "repeal[ing]" various Tax Code provisions.[3] By contrast, the TCJA zeroed-out the shared responsibility payment—taking care not to characterize its action as a "repeal" or mention the ACA by name. *See* Pub. L. No. 115-87, § 11081, 131 Stat. 2092 (2017). And it left untouched the other portions of the ACA, including tax credits to access insurance on exchanges, 26 U.S.C. § 36B, parental coverage of young adults, 42 U.S.C. § 300gg–14, and guaranteed coverage for those with preexisting conditions, *id.* §§ 300gg, 300gg–1, 300gg–3, 300gg–4.

If Congress had wanted to repeal the ACA, "[i]t would not have used such a winding path of connect-the-dots" via the TCJA. *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015). "One determines what Congress would have done by examining what it did." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 560 (2001) (Scalia, J., dissenting); *see also New Mexico*, 854 F.3d

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3 *See, e.g.*, TCJA, Pub. L. No. 115-97, § 11051, 131 Stat. 2089 ("Repeal of Deduction for Alimony Payments."); *id.* § 12001, 131 Stat. 2092 ("Repeal of Tax for Corporations."); *id.* § 13305, 131 Stat. 2126 ("Repeal of Deduction for Income Attributable to Domestic Production Activities.").

at 1228 (statutory "text and history" demonstrate what "Congress intended"). As Senator Toomey said, Congress's amendment to the shared responsibility payment was not "chang[ing] any of the subsidies. They are all available to anyone who wants to participate. We don't change the rules. We don't change eligibility. We don't change anything else." 163 CONG. REC. S7672 (daily ed. Dec. 1, 2017). To hold otherwise would "transform[] Congress's statutory text into something far beyond what Congress plausibly intended." *Sinclair Wyo. Ref. Co. v. EPA*, 887 F.3d 986, 997 (10th Cir. 2017).

The ACA indisputably benefits millions of children, young adults, and their families. Infants born with complex medical issues can receive care without fear of annual or lifetime limits; young adults navigating their first jobs or higher education have the protection of their parents' insurance; other children receive care through Community Health Centers and home visits. Given that Congress did not repeal these provisions or countless others, there is no basis to conclude that it would want the courts to strike them down—particularly given the millions of American children whose lives have been changed (and saved) because of the ACA, and given how deeply the ACA is now woven into the fabric of the nation's healthcare system and economy. This Court has no basis to eliminate those protections when Congress has not, and to do so would exceed the lawful role of the judiciary.

CONCLUSION

Congress has made clear again and again that it intends to improve children's access to healthcare, not destroy it, by maintaining the ACA. The Fifth Circuit's decision should be reversed.

Respectfully submitted,

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