Nos. 19-840 and 19-1019

IN THE

Supreme Court of the United States

CALIFORNIA, *et al.*,

Petitioners,

v.

TEXAS, *et al.*,

Respondents.

TEXAS, *et al.*,

Cross-Petitioners,

v.

CALIFORNIA, *et al.*,

Cross-Respondents.

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

BRIEF OF *AMICI CURIAE* WALTER DELLINGER, DOUGLAS LAYCOCK, AND CHRISTOPHER SCHROEDER IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Walter Dellinger is the Douglas B. Maggs Professor Emeritus of Law at Duke University, and a partner at O'Melveny & Myers LLP.[2] Professor Dellinger has studied and written on the scope of the Article III jurisdiction of federal courts, including issues related to Article III standing, and is committed to the public interest and to the enforcement of proper limits on the scope of judicial power. Professor Dellinger's *amicus* brief was quoted in the majority opinion in the landmark standing case of *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013).

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1. The Plaintiff-States, U.S. House of Representatives, and federal Respondents have offered blanket consent to the filing of *amicus* briefs in these cases. The State Petitioners and the Individual Plaintiffs have consented to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel made a monetary contribution to its preparation or submission.

2. Institutional affiliations are listed for identification purposes only. None of the mentioned universities takes any position on the issues in this case.

Christopher Schroeder is the Charles S. Murphy Professor of Law and Public Policy Studies at Duke University. Professor Schroeder is a scholar of constitutional and environmental law. Before joining the faculty of Duke University, Professor Schroeder served in several positions at the Department of Justice, including as acting Assistant Attorney General in the Office of Legal Counsel, where he was responsible for advising the Attorney General and the President on separation of powers, other constitutional issues, and matters of administrative law.

Based on their study of the applicable precedent and principles, *amici* believe that Plaintiffs Neill Hurley and John Nantz (collectively, the "Individual Plaintiffs") and the Plaintiff-States[3] (the "States," and together with the Individual Plaintiffs, "Plaintiffs") have no standing to challenge the constitutionality of the so-called "'individual mandate" of the Patient Protection and Affordable Care Act (the "ACA"), 26 U.S.C. § 5000A.

SUMMARY OF ARGUMENT

This case presents fundamental questions about the proper role of Article III courts. The statute the Plaintiffs challenge "is not a legal command to buy insurance." *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563 (2012). Rather, it offers individuals a choice, which today has no legal consequence: purchase health insurance and owe no additional tax, or do not purchase health insurance and owe no additional tax (that is, the $0 tax prescribed by

3. The Plaintiff-States are the States of Texas, Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Utah, and West Virginia.

Congress in 2017). *See id.* at 562-63; Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092. Because they cannot demonstrate that § 5000A commands them to act or attaches any consequences to their conduct, the Plaintiffs lack standing to bring this challenge. Accordingly, the judgment of the Court of Appeals should be reversed, and the case should be remanded to the District Court with instructions to dismiss for lack of jurisdiction.

This case underscores the critical gatekeeping role that Article III's standing requirement plays in the American judicial system. "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent 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). The Article III standing requirement "preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that 'the legal questions presented ... 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.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring in part) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)); *see infra* Sec. I.

The Supreme Court's statement in *Sebelius* that § 5000A is not an exercise of Congress's Commerce Clause powers and thus "not a legal command to buy insurance," 567 U.S. at 563, precludes the Plaintiffs from showing that the choice presented by § 5000A as amended causes

them any concrete and particularized harm. *See Lujan*, 504 U.S. at 560-61, 573-74. Accordingly, it is dispositive of this case. Instead of obligating individuals to purchase insurance, § 5000A as originally enacted merely presented individuals with a choice to buy health insurance or pay an additional tax if they chose not to do so. *See id.*

In 2017, Congress amended the ACA to reduce the tax in § 5000A to $0. 131 Stat. at 2092. This amendment removed any consequence that could flow to individuals who decline to purchase health insurance. The Individual Plaintiffs now have a choice of buying insurance and owing no additional tax, or not buying insurance and owing no additional tax. Under § 5000A as amended, absolutely nothing turns on whether the Individual Plaintiffs do or do not buy insurance. Because § 5000A does not obligate the Individual Plaintiffs to purchase health insurance and no longer imposes any concrete harm on individuals who decline to purchase insurance, the Individual Plaintiffs cannot establish an injury-in-fact. *See infra* Sec. II.

The States' claim of standing is even weaker. The Fifth Circuit held that the States have standing because § 5000A would cause more individuals to enroll in health insurance—even though it imposes no penalty—and therefore increase the costs that States incur by filing reports with the Internal Revenue Service (the "IRS") that document compliance with certain statutory requirements and by administering Medicaid and CHIP programs. The Fifth Circuit's assumption that health-insurance enrollment in the States has increased because of § 5000A lacks factual support and rests on a misconception of how the provision operates. Section 5000A does not force anyone to purchase insurance, and

the States' claim of indirect injury caused by § 5000A's regulation of individuals is even more speculative than the basis for standing asserted by the Individual Plaintiffs. *See Clapper*, 568 U.S. at 410 (rejecting "highly speculative" theory of standing); *infra* Sec. III.

ARGUMENT

I. ARTICLE III'S "CASES" OR "CONTROVERSIES" REQUIREMENT IS A FOUNDATIONAL PRINCIPLE OF OUR DEMOCRACY

Recognizing the need for constraints on the powers accorded to each of the three branches of government, the Framers limited the federal courts' jurisdiction to only "Cases" and "Controversies." U.S. Const. art. III, § 2. Through standing doctrine, the federal courts have developed principles for delineating disputes appropriate for adjudication under Article III. *See Lujan*, 504 U.S. at 560.

This framework borrows from the traditions of the English judicial system. *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (Article III limits federal courts to "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process"). In the English legal tradition, the existence—or imminent threat—of concrete harm is a necessary element of every judicial dispute. *See* F.W. Maitland, *The Forms of Action at Common Law* 298-99 (1929); 3 William Blackstone, *Commentaries* *115-166 (1st ed. 1768) (enumerating "several injuries cognizable

by the courts of common law, with … respective remedies applicable to each particular injury"). For instance, in 1625, Justice Dodderidge explained in *Cable v. Rogers* that "*injuria* and *damnum* are the two grounds for the having all actions...: if there be *damnum absque injuria* [harm without an actionable wrong], or *injuria absque damno* [actionable wrong without harm], no action lieth." 3 Bulst. 312, 312, 81 Eng. Rep. 259, 259 (K.B. 1625).[4]

Thus, Article III restricts the Judiciary's power to "redress[ing] or prevent[ing] actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). This requirement of concrete harm

4. Claims of unjust enrichment are based on a defendant's gains rather than a plaintiff's losses, and very occasionally, a plaintiff may have a claim for unjust enrichment derived from an intentional violation of the plaintiff's legal rights even though the plaintiff suffered no tangible or provable harm. *Restatement (Third) of Restitution and Unjust Enrichment* § 1 cmt. *a*, § 3 cmt. *c*. This exception to the usual rule is irrelevant here. The Plaintiffs have not alleged a claim for unjust enrichment, and any such claim would only confer standing to recover for unjust enrichment—not standing to seek an injunction against enforcement of the ACA. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Even if the Plaintiffs had alleged a claim for unjust enrichment, that claim would fail: As explained below, *see infra* Sec. II, § 5000A as amended has no capacity or tendency to change anyone's behavior in any way, so it can neither produce losses to the Plaintiffs nor gains to anyone else; nor would the Government be enriched if the Plaintiffs bought health insurance. The United States does not sell health insurance policies under the ACA, and it spent some $685 billion in 2018 to subsidize the purchase of insurance under the ACA. Congressional Budget Office, *Federal Subsidies for Health Insurance Policies for People Under Age 65: 2018-2028*, at 1, https://bit.ly/35K2H00.

"prevent[s] the judicial process from being used to usurp the powers of the political branches." *Clapper*, 568 U.S. at 408; *see also Valley Forge*, 454 U.S. at 471, 473 (because the exercise of judicial power "can so profoundly affect the lives, liberty, and property of those to whom it extends," it is "legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy"). A rigorous examination of the standing requirements is especially necessary "when reaching the merits of the dispute would force [this Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'" *Clapper*, 568 U.S. at 408 (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)).

The Fifth Circuit held that both the Individual Plaintiffs and the States have standing to challenge § 5000A, Pet. App. 20a-39a, but as explained below, neither the Individual Plaintiffs nor the States come close to satisfying Article III's requirements.

II. THE INDIVIDUAL PLAINTIFFS HAVE NOT SHOWN ANY CONCRETE AND PARTICULARIZED HARM

While the Individual Plaintiffs claim, and the Fifth Circuit held, that they are injured because § 5000A "compel[s]" them "to purchase insurance," Pet. App. 24a, § 5000A does no such thing. Since passage of the Tax Cuts and Jobs Act of 2017 (the "TCJA"), which reduced § 5000A's tax penalty to $0 beginning in 2019, 131 Stat. at 2092, the Individual Plaintiffs have a choice: purchase minimum essential coverage or not. The TCJA eliminates any adverse consequence for declining to purchase health insurance, guaranteeing that the Individual Plaintiffs

will not suffer any concrete harm arising from a choice to forego insurance. Their voluntary choice to do so—absent any threat of consequence for failing to do so—cannot serve as the basis of Article III standing to challenge § 5000A.

A. Section 5000A Does Not Require the Individual Plaintiffs to Purchase Coverage

The Individual Plaintiffs' asserted basis for Article III standing is that § 5000A "force[s] [them] to purchase … health insurance that they neither need nor want." Br. of Pls. in Supp. of Application for Preliminary Injunction 40 & n.5, *Texas v. United States*, No. 4:18-cv-00167-O (N.D. Tex. Apr. 26, 2018) (ECF No. 40) ("Pls.' Br."). This argument is foreclosed by the statement in *Sebelius*—reinforced by the TJCA—that § 5000A "is not a legal command to buy insurance." 567 U.S. at 563.

Sebelius considered, *inter alia*, the constitutionality of § 5000A's requirement that individuals maintain minimum essential insurance coverage on penalty of owing the IRS a "shared-responsibility" payment. *Id.* at 530-31, 539.[5] Chief Justice Roberts, writing for the majority, rejected the Government's argument that the individual minimum-coverage requirement was permissible under the Commerce Clause. *Id.* at 548-49, 552. The Court concluded that § 5000A—if construed as a mandate—would "force[] individuals into commerce precisely because they elected to refrain from commercial activity," which would exceed Congress's power to regulate existing commercial activity.

5. *Sebelius*'s discussion of the constitutionality of the ACA's Medicaid expansion is not pertinent to this case. *See* 567 U.S. at 531.

Id. at 558. Pointing to the shared-responsibility payment, the Court concluded that § 5000A could fairly be read as a lawful exercise of Congress' taxation power that presented a *choice* either to purchase insurance or to pay a tax for failing to do so. *Id.* at 566-67. On this point, the Court was unequivocal: "Neither the [ACA] nor any other law attached negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. … [I]f someone chooses to pay rather than obtain health insurance, they have fully complied with the law." *Id.* at 568. Declining to read the word "shall" in § 5000A as imposing a mandate, the Court held that § 5000A imposes "incentives" to engage in certain actions deemed by Congress to have social utility. *Id.* at 568-69. Accordingly, the Court upheld § 5000A as a tax. *Id.* at 574.

Sebelius thus confirms that § 5000A is not a stand-alone, legally enforceable obligation, but instead presents individuals with a choice: obtain minimum coverage or pay the shared-responsibility payment set forth in the ACA. Once the TCJA set that payment at $0, failure to obtain minimum coverage carried no consequences at all. Thus, the Individual Plaintiffs cannot show any injury-in-fact. Indeed, even the District Court implicitly recognized that without a *mandate* to purchase health insurance, the Individual Plaintiffs cannot allege any concrete harm. *See, e.g.*, Pet. App. 135a (concluding that the Individual Plaintiffs had standing because §5000A "requires them to purchase and maintain certain health-insurance coverage"). There is no such mandate—and with neither a mandate nor a penalty, there can be no cognizable Article III harm. *See Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) ("To have standing, a litigant must seek relief for an injury that affects him in a personal and individual way." (internal quotation marks omitted)).

The Individual Plaintiffs have contended that § 5000A as amended, stripped of its accompanying tax, now operates as an unconstitutional mandate rather than a tax. Pls.' Br. at 41. Not so. Although the TCJA reduced the ACA's shared-responsibility payment to $0, effective January 1, 2019, 131 Stat. at 2092, Congress took no other action with respect to § 5000A. It simply adjusted the "cost-benefit" analysis, thereby reducing the tax for failing to have health insurance to zero and eliminating *any* consequence for choosing not to purchase insurance. *See Sebelius*, 567 U.S. at 566-67.

Nothing in the TCJA suggests that Congress intended to recast §5000A—interpreted in *Sebelius* as permitting a *choice* to obtain health insurance coverage—as a *mandate* to obtain health insurance coverage. The amendment did not repeal the shared-responsibility payment, add the word "mandate," or otherwise suggest that *failing* to purchase health insurance coverage would subject individuals to any fines or other consequence. Nor have the Plaintiffs cited any legislative history to the contrary. Absent a clear indication from Congress that it intended to alter § 5000A's meaning in enacting the TJCA, *Sebelius*'s construction of § 5000A should control in assessing whether the Plaintiffs have standing. *See* Antonin Scalia & Bryan Garner, *Reading Law* 331 (2012); *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017). That point has particular force here: Given *Sebelius*'s holding that the Commerce Clause does not empower Congress to impose a mandate on individuals to purchase insurance, interpreting the 2017 law to *intend* that result, absent any signal from Congress, would make no sense.

B. Because the Tax Imposed By § 5000A Is Now Zero Dollars, the Individual Plaintiffs Cannot Demonstrate an Injury-in-Fact

In any event, because the TCJA reduced the only consequence for failure to purchase insurance coverage to $0, the Individual Plaintiffs' contention that they are harmed by their "obligation to comply with the individual mandate," despite their desire not to purchase health insurance, J.A.60, lacks any basis. Congress has now *ensured* that the Individual Plaintiffs will not suffer any of the forms of concrete harm the Supreme Court has found sufficient to satisfy Article III's injury-in-fact requirements, *e.g.*, pecuniary loss; lost business opportunities; loss of enjoyment of public resources; discriminatory treatment based on race, sex, or some other prohibited characteristic; or viable threat of a government enforcement action.[6] Being provided with a *choice* to obtain coverage and pay nothing, or not to obtain coverage and pay nothing, does not constitute a "concrete and particularized injury." *Lujan*, 504 U.S. at 560-61.

1. An Alleged Desire to Comply Voluntarily with § 5000A Is Not an Injury-in-Fact

The Individual Plaintiffs cannot demonstrate standing based on their perceived "obligation" or desire

6. *Hardin v. Ky. Utils. Co.*, 390 U.S. 1, 5-6 (1968) (pecuniary loss and lost business opportunities); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 180-83 (2000) (loss of enjoyment of public resources); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (fear of government enforcement); *Heckler v. Matthews*, 465 U.S. 728, 739-40 (1984) (discriminatory treatment).

to comply with the individual requirement, when the only consequence for failing to do so is a zero-dollar shared-responsibility payment. *See* Pet. App. 24a (relying on the Individual Plaintiffs' statements that "they 'value compliance with [their] legal obligations' and bought insurance because they 'believe that following the law is the right thing to do'" (alteration in original)).

The Supreme Court instructed in *Poe v. Ullman* that "[t]he party who invokes the power (to annul legislation on grounds of its unconstitutionality) must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement." 367 U.S. 497, 504-05 (1961) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)). Moreover, "[s]uch law must be brought into *actual or threatened operation*." *Id.* at 504 (emphasis added). In other words, to invoke standing a plaintiff must show that the law at issue has been enforced, resulting in an injury-in-fact, or will be enforced and likely cause a redressable injury. *See id.* at 504-05.

The Court applied this principle in *Poe* to conclude that the plaintiffs lacked standing to challenge a Connecticut ban on birth control that had not been enforced for eighty years, where the prosecutor—despite agreeing that the conduct the plaintiffs sought to engage in would violate the statute—had no intention of enforcing the ban. *Id.* at 501-02. "The fact that Connecticut ha[d] not chosen to press the enforcement of this statute deprive[d] these controversies of the immediacy which is an indispensable condition of constitutional adjudication," and the Court declined to "umpire … debates concerning harmless, empty shadows." *Id.* at 508.

The Fifth Circuit attempted to distinguish *Poe* on the ground that in *Poe*, there was a "'skimpy record,' devoid of evidence that the 'individuals [were] truly caught in an inescapable dilemma." Pet. App. 29a (quoting *Poe*, 367 U.S. at 509 (Brennan, J., concurring) (alteration in original)). The Fifth Circuit pointed to the undisputed evidence here that the Individual Plaintiffs "feel compelled by the individual mandate to buy insurance." *Id.* at 29a-30a. But the evidence lacking in *Poe* was proof that the plaintiffs faced a dilemma between complying with the statute and facing prosecution under the statute. *See Poe*, 368 U.S. at 508. In *Poe*, there was no evidence that the statute had ever been enforced or that it ever would be. *Id.* Here, the Individual Plaintiffs' evidence is even weaker. Not only is there no evidence that the individual mandate will ever be enforced—there is no evidence that there is any enforcement mechanism by which the Government ever *could* enforce the mandate. Here, as in *Poe*, there is no evidence that the Individuals Plaintiffs face an inescapable dilemma: they can purchase insurance or not without fear of penalty.[7] *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160 (2014) (requiring at least "a *credible* threat

7. Courts of appeals routinely reject constitutional challenges for lack of standing where there is no legitimate threat of prosecution. *See, e.g.*, *Plunderbund Media, L.L.C. v. DeWine*, 753 F. App'x 362, 367-72 (6th Cir. 2018) (dismissing bloggers' challenge to statute prohibiting harassing telecommunications where the plaintiffs could show no history of enforcement or intention to enforce); *Joint Heirs Fellowship Church v. Akin*, 629 F. App'x 627, 631-32 (5th Cir. 2015) (per curiam) (rejecting church's argument that "the very existence of the statute" prohibiting churches from becoming involved in efforts to recall elected officials was "a credible threat of its enforcement"); *Doe v. Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986) (rejecting challenge to Virginia's fornication and cohabitation statutes where the plaintiffs "face[d] only the most theoretical threat of prosecution").

of prosecution" for standing to challenge a statute (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)) (emphasis added)); *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 625 n.1 (1986) ("*reasonable* threat of prosecution" is required for "a sufficiently ripe controversy" (emphasis added)).

2. The Individual Plaintiffs Cannot Manufacture Standing by Purchasing Health Insurance to "Comply" with § 5000A

Nor can the Individual Plaintiffs manufacture standing simply by purchasing health insurance, as *Clapper* confirms. The plaintiffs in *Clapper* sought to challenge a provision of the Foreign Intelligence Surveillance Act ("FISA") allowing surveillance of foreign individuals. *Id.* at 401. The plaintiffs contended that although they were U.S. citizens, there was a reasonable likelihood that their communications would be acquired pursuant to FISA, and that, in the meantime, they were already suffering economic harm because the *threat* of surveillance was causing them to take costly measures to avoid surveillance. *Id.* at 401-02. The Court found the plaintiffs' concerns were merely speculative; the challenged provision did not *mandate* or *direct* the surveillance—it merely *authorized* surveillance, and the parties and Court could only speculate as to how the Attorney General and Director of National Intelligence would choose to exercise their discretion. *Id.* at 412. And because the risk of harm was not "certainly impending," the plaintiffs' choice to spend money to avoid surveillance was merely self-inflicted harm, which does not supply Article III standing. *Id.* at 416.

That conclusion applies with even more force here. *Sebelius* establishes that § 5000A does not *mandate* that the Individual Plaintiffs purchase insurance, and the TCJA reduces to zero any payment for those who choose not to purchase it. Thus, the Individual Plaintiffs have not shown *any* risk of harm, much less a "certainly impending" risk of harm. Any costs attributable to their decision to purchase health insurance to fulfill their *own* desire to comply with the requirement are entirely self-inflicted, and thus cannot support standing. *See Clapper*, 568 U.S. at 416 ("[Plaintiffs] cannot manufacture standing merely by inflicting harm on themselves ….").

The Fifth Circuit also accused the State Petitioners and the dissenting opinion of conflating the merits of the case with the threshold standing question by relying on the fact that the Individual Plaintiffs have a "voluntary 'choice' to purchase insurance" under the present version of the statute. Pet. App. 30a. Not so. The merits question of whether a mandate that lacks any enforcement mechanism is an unconstitutional exercise of Congress's power is altogether separate from the practical reality that a mandate without any enforcement mechanism amounts to a voluntary choice. Even assuming for purposes of the jurisdictional inquiry that § 5000A is unconstitutional without the tax penalty, the fact remains that the Individual Plaintiffs suffer no harm as a result of the mandate. *See* Pet. App. 84a-85a.

The Fifth Circuit's reliance on *Texas v. EEOC* to suggest otherwise is likewise misplaced. There, while the EEOC itself did not have the power to bring enforcement actions against states, an enforcement mechanism existed whereby the EEOC could refer cases to the Attorney

General, who could bring an enforcement action. 933 F.3d 433, 447 (5th Cir. 2019). Critically, the court noted that "[o]ne Texas agency ha[d] already been required to respond to a charge of discrimination filed with the EEOC." *Id.* at 447 n.26. Thus, a real threat of enforcement existed—"the possibility of investigation by EEOC and referral to the Attorney General for enforcement proceedings if [Texas] fail[ed] to align its laws and policies with [the EEOC's] Guidance." *Id.* at 447. Here, by contrast, it is undisputed that no enforcement mechanism exists to compel the Individual Plaintiffs to purchase insurance or to penalize them for not doing so.

Poe makes clear that even the existence of a statute *criminalizing* conduct that a plaintiff wishes to engage in cannot supply an injury-in-fact for purposes of Article III absent some "realistic fear of prosecution." 367 U.S. at 508. The argument made by the Individual Plaintiffs here is even less compelling than the standing argument in *Poe*. After the TCJA, there is no mandate to purchase insurance, and absolutely no *threat* that the Individual Plaintiffs will be subjected to some consequence for failing to do so. Section 5000A's shared-responsibility payment is now $0, and there cannot be any viable threat of a government enforcement action—the IRS could not bring a suit against a taxpayer for failure to pay $0 even if it wanted to, and of course the Plaintiffs have offered absolutely no evidence that the IRS intends to do such a foolish thing. The dispute presented by the Individual Plaintiffs is thus not even a "harmless, empty shadow[]." *See Poe*, 367 U.S. at 508. It is literally nothing—it is zero.

3. The Individual Plaintiffs' Generalized Disagreement with § 5000A Is Not a Concrete and Particularized Injury

Having failed to establish any harm caused by § 5000A because it imposes no adverse consequence for choosing not to purchase minimum essential health insurance coverage, the Individual Plaintiffs are left with simply their belief that § 5000A is an unconstitutional exercise of Congress's commerce power. *See* Br. of Appellees Neill Hurley and John Nantz 15, *Texas v. United States*, No. 19-10011 (5th Cir. May 1, 2019) (contending that the Individual Plaintiffs have "a concrete stake in ensuring that Congress does not legislate outside its constitutional bounds"). But this kind of generalized disagreement is not an injury-in-fact that can support Article III standing. *See Valley Forge*, 454 U.S. at 476-77.

In *Valley Forge*, the Supreme Court considered an Establishment Clause challenge to the Department of Health, Education, and Welfare's disposal of surplus property to a religious college. *Id.* at 468-69 The plaintiffs argued that they had standing to challenge the property disposal because the conveyance injured their right to a government that does not establish a religion. *Id.* at 485-86. The Supreme Court held that such an injury was not sufficient, explaining: "Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them … other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485.

The same result holds here. After the TCJA removed the tax enforcement mechanism, the Individual Plaintiffs' complaint about § 5000A is, at most, a political disagreement with Congress's refusal to strike the provision from the ACA. The Fifth Circuit agreed with the District Court's characterization of the Individualized Plaintiffs' injury-in-fact as the inability to be "free[] … from what they essentially allege to be arbitrary governance." Pet. App. 23a. This kind of generalized grievance—the desire to be free of purportedly arbitrary governance—untethered to any concrete effect on the Individual Plaintiffs, does not meet the case-and-controversy requirement set forth in Article III. *See Hollingsworth*, 570 U.S. at 706 (mere desire to "vindicate the constitutional validity of a generally applicable … law" does not confer standing); *United States v. Richardson*, 418 U.S. 166, 177 (1974) (an injury that is "undifferentiated and 'common to all members of the public'" is a nonjusticiable generalized grievance (quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (per curiam))).

Because the tax penalty of § 5000A is now $0, the Individual Plaintiffs cannot show any economic injury or any other concrete injury to support their standing to bring this action, and their generalized political disagreement with the ACA is not enough.

III. THE STATES LACK STANDING BECAUSE THEY ARE NOT INJURED BY § 5000A

To invoke the judicial power of Article III, a State must establish that it directly suffered an "injury in fact," that there is a "causal connection between the injury and the conduct complained of," and that the injury is likely

redressable by a favorable decision. *Susan B. Anthony List*, 573 U.S. at 157-58. The States cannot do so here, and their claims must be dismissed as well.

The States cannot claim that § 5000A injures them directly because § 5000A never purported to regulate the States. Congress designed § 5000A only to encourage *private individuals* to purchase health insurance—not to require *the States* to take or refrain from any action. Section 5000A therefore cannot, standing alone, cause the States any injury-in-fact.

Apparently recognizing that § 5000A does not cause the States any direct injury, the Fifth Circuit held that they nonetheless have standing based on the assumption that § 5000A would increase the number of enrollees in state-run health insurance programs, which would in turn raise the costs that States incur to comply with IRS reporting requirements under 26 U.S.C. §§ 6055 and 6056 and to administer Medicaid and CHIP programs. Pet. App. 33a-39a. This argument fails. To establish standing by challenging the "regulation (or lack of regulation) of *someone else*" (here, the theoretical individuals who would not buy health insurance but for § 5000A after the TCJA), the States must demonstrate a sufficient connection between the regulation of that someone else and their claimed injury. *See Lujan*, 504 U.S. at 562. Claiming standing by way of injury to another is "ordinarily substantially more difficult" than establishing standing by way of direct injury to the plaintiff, *id.* (internal quotation marks omitted), because the causal connection between the regulation and the injury is often "too speculative for Article III purposes," *Clapper*, 568 U.S. at 409.

The States' claim of injury by virtue of increased reporting and administrative costs falls into this second category and is too speculative to support standing. As an initial matter, the States have offered *no* evidence that § 5000A actually will increase enrollment in state-run health insurance programs. *See, e.g.*, Pet. App. 86a-87a (King, J., dissenting) ("[T]he state plaintiffs provided no evidence *at all*, never mind conclusive evidence, to support the dubious notion that even a single state employee enrolled in one of state plaintiffs' health insurance programs solely because of the unenforceable coverage requirement."); *id.* at 90a ("[T]he state plaintiffs produce no evidence—let alone conclusive evidence—showing that anyone has enrolled in their Medicaid programs solely because of the unenforceable coverage requirement."). "[U]nadorned suspicion" about the impact of § 5000A is insufficient to establish standing. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976); *see Clapper*, 568 U.S. at 410 (rejecting "highly speculative" theory of standing).

Contrary to the Fifth Circuit's characterization of the provision, § 5000A does not "command[]" individuals to enroll in any health insurance programs. Pet. App. 36a. As explained above, § 5000A puts individuals to a choice: purchase insurance or do not purchase insurance and pay any "tax levied on that choice," *Sebelius*, 567 U.S. at 574, and the tax levied on that choice is now $0. Section 5000A "is not a legal command to buy insurance." *Id.* at 563.

The Fifth Circuit assumed that individuals would enroll in state-run health insurance because of § 5000A, as amended by the TCJA, and thus concluded that additional costs associated with "the reporting requirements in Sections 6055(a) and 6056(a) [will] flow from the individual

mandate." Pet. App. 36a-37a. But there is no indication in the record that the choice presented by § 5000A actually will incentivize enrollment in state-run health insurance or punish individuals who choose not to enroll. Although § 5000A (f)(1)(A)(ii) and (iii) provide that enrollment in Medicaid or CHIP satisfies the Minimum Coverage Provision, § 5000A does not expand eligibility for those programs. Nothing in § 5000A's statement that Medicaid or CHIP enrollment satisfies the now-unenforceable directive to purchase health insurance makes it any more or less likely that individuals will want to enroll in state-backed health insurance because of § 5000A. Moreover, any compulsion that Medicaid- or CHIP-eligible individuals may have felt to enroll in those programs to avoid paying the tax previously levied by § 5000A is gone now that the TCJA reduced the tax to $0. Whether a private individual will enroll in Medicaid or CHIP is thus an "unfettered choice[]" unaffected by § 5000A, which cannot support Article III standing for the States. *See Lujan*, 504 U.S. at 562 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.)).

As with the Individual Plaintiffs' standing arguments, the standing arguments raised by the States here closely resemble those rejected by this Court in *Clapper*. The States' assertion of standing based on § 5000A's regulation of others echoes the *Clapper* plaintiffs' failed standing theory, which was based on speculation "that the Government will target [for surveillance] *other individuals*—namely, [the plaintiffs'] foreign contacts." 568 U.S. at 411. And the States' speculation about how Medicaid- and CHIP-eligible individuals will react to § 5000A's recent transformation into an unfettered choice without tax consequences fails because, as *Clapper*

explained, standing cannot "rest on speculation about the decisions of independent actors." *Id.* at 414.

Nor does *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), point to a different result. In *Department of Commerce*, several States asserted injuries that "turn[ed] on their expectation that reinstating a citizenship question [in the census would] depress the census response rate and lead to an inaccurate population count." *Id.* at 2565. The district court found that evidence at trial "established a sufficient likelihood that the reinstatement of a citizenship question would result in noncitizen households responding to the census at lower rates than other groups." *Id.* This Court concluded that the district court's factual findings following the trial were not "clearly erroneous" and "therefore" held that the States had standing, as reduced responsiveness to the census would cause them to "lose out on federal funds that are distributed on the basis of state population." *Id.*; *see also id.* at 2566 (relying on "[t]he evidence at trial" to conclude that the States' "theory of standing thus [did] not rest on mere speculation about the decisions of third parties; it relie[d] instead on the predictable effect of Government action on the decisions of third parties"). Here, by contrast, the States have offered *zero* evidence "that anyone has enrolled in their Medicaid programs solely because of the unenforceable coverage requirement," Pet. App. 90a (King, J., dissenting), and the District Court, which did not address whether the States have standing in this case, *see* Pet. App. 125a-137a, certainly did not make any factual findings to that effect.[8]

8. *Texas v. United States (DAPA)*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016), (cited at Pet. App. 38a), is distinguishable for the reasons explained in the

Even if the States could establish that § 5000A after the TCJA increases enrollment in state-run health insurance programs, they failed to demonstrate that the provision would result in increased reporting costs under 26 U.S.C. §§ 6055 and 6056. The States do not incur any additional reporting costs under § 6056 when an individual enrolls in health insurance—that provision merely requires States, as qualifying large employers, to report annually to the IRS that they offer health insurance coverage in compliance with the so-called "employer mandate" of 26 U.S.C. § 4980H. Section 6055 requires, among other things, that States file a report with the IRS in connection with providing individuals with "minimum essential coverage." But § 6055 reports can be combined with § 6056 reports. *See* 26 U.S.C. § 6056(d) (permitting combined returns and statements); Internal Revenue Service, *Questions and Answers on Information Reporting by Health Coverage Providers (Section 6055)* ¶ 26, https://bit.ly/3akgdJu (last visited Mar. 26, 2020) (applicable large employers "will combine section 6055 and section 6056" onto a single form). Section 6055 therefore does not impose additional reporting costs on any self-insuring State for minimum-essential-coverage enrollees that it employs full-time, and the States have not produced any evidence demonstrating that § 5000A will increase enrollment in minimum essential insurance coverage by anyone else.

Opening Brief for the State Petitioners (at 25). Moreover, in *DAPA*, the court of appeals predicated its finding that Texas had standing on the "special solicitude" that is sometimes due to sovereign litigants. 908 F.3d at 162 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007)). Here, the Fifth Circuit expressly declined to rely on the "special solicitude" doctrine because it held that "the state plaintiffs … suffered fiscal injuries as employers." *See* Pet. App. 33a.

To be sure, the Fifth Circuit claimed that "[t]he record is replete with evidence that the individual mandate has increased the cost of" States' reporting requirements under §§ 6055 and 6056, as well as costs associated with the States' internal administration of health insurance coverage for their employees. Pet. App. 33a; *see also* States' BIO 17. But many of the sources cited by the Fifth Circuit state only that § 5000A *in its original form* (*i.e.*, with a non-zero tax penalty for non-compliance) increased States' reporting and administrative costs, *see, e.g.*, Pet. App. 36a n.28, when the relevant question here is whether § 5000A *as challenged* (*i.e.*, with a zero-dollar penalty for non-compliance) increased the States' costs. *See* Pet. App. 90a (King, J., dissenting) (State administrator's declaration that "refers specifically to the coverage requirement at the time of the ACA's enactment, when the coverage requirement interacted with the shared-responsibility payment," provided "no insight into how the coverage requirement affect[ed] Medicaid rolls after the shared-responsibility payment's repeal").[9] To the extent the Fifth Circuit relied on sources that projected the States would incur reporting costs in 2020, *see* Pet. App. 35a, those sources fail to explain how those reporting costs

9. For the same reason, the States' assertion that this "is not a pre-enforcement challenge" because "[t]he individual mandate has been in effect for more than five years" is misleading. States' BIO 18. The Plaintiffs do not challenge the original version of § 5000A, with its non-zero penalty for noncompliance. They challenge § 5000A *as amended by the TCJA*, which zeroed out that penalty as of January 1, 2019—after this lawsuit was filed. *See Lujan*, 504 U.S. at 569 n.4 ("[J]urisdiction is to be assessed under the facts existing when the complaint is filed."). And because § 5000A has no enforcement mechanism and never can or will be enforced, any challenge, no matter when it is filed, would be a pre-enforcement challenge.

would be caused by § 5000A, or whether the States would incur such costs regardless of any individual enrollments in health insurance because they had to comply with overlapping § 6056 reporting obligations.

Finally, any attempt by the States to predicate standing on any injury caused by §§ 6055 or 6056 or any other provision of the ACA not at issue in this lawsuit simply by arguing that the provision is inseverable from § 5000A should fail. "[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). The States "must demonstrate standing for each claim [they] seek[] to press." *DaimlerChrysler Corp. v. Ohio*, 547 U.S. 332, 352 (2006).

Standing based on asserted inseverability would undermine the separation of powers concerns that underlie standing doctrine. *Cf. Lewis*, 518 U.S. at 357 ("[Standing doctrine] would hardly serve [its] purpose … if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration."); *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) ("[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.").[10] The 900-page ACA includes a wide variety of provisions sprinkled throughout the U.S. Code. Standing based on inseverability would, for example, presumably permit

10. Even the Fifth Circuit recognized that a plaintiff may not "claim[]injury based on provisions whose enforcement would be enjoined only if they are inseverable." Pet. App. 26a n.29.

the following types of plaintiffs to challenge § 5000A based solely on an allegation that they are burdened by a completely separate, but allegedly inseverable, provision of the ACA:

- A chain restaurant required by the ACA to post nutritional information, *see* 21 U.S.C § 343(q)(5)(H);

- A drug manufacturer required to seek licensure of a product under the ACA's biosimilarity regime, *see* 42 U.S.C. § 262(k);

- A hospital that hired additional staff to cover an influx of patients after the ACA's expansion of Medicaid coverage, *see* 42 U.S.C. § 1396a(a)(10); or

- A member of an American Indian tribe regulated by any provision of the Indian Health Care Improvement Act, which Congress enacted as part of the ACA, *see* 25 U.S.C. § 1601 *et seq.*

Perhaps because of the absurd consequences that would result, no relevant authority supports this novel theory of standing. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987) (cited at States' BIO 19), is silent on standing and therefore inapposite. *See Steel Co.*, 523 U.S. at 91 ("[D]rive-by jurisdictional rulings … have no precedential effect.").[11] Moreover, as Professor Kevin C. Walsh has

11. One commentator has argued for the recognition of "inseverability claims," in which a litigant who is injured by an otherwise valid statutory provision sues to strike down as unconstitutional a different statutory provision, which harms others but not the litigant, and asserts that the first provision also must fall solely because it is inseverable from the second. Brian Charles Lea,

explained, *Alaska Airlines* is "far removed" from the circumstances facing the States here. *See The Ghost that Slayed the Mandate*, 64 Stan. L. Rev. 55, 76 (2012). The unconstitutional provision in that case (a legislative veto provision) was "directly link[ed] … with the specific grant of rulemaking authority under attack." *Id.* (quoting *Alaska Airlines, Inc. v. Donovan*, 594 F. Supp. 92, 96 (D.D.C. 1984)). Here, by contrast, there is no direct link between § 5000A and the provisions of the ACA that the States claim burden them.[12]

Situational Severability, 103 Va. L. Rev. 735, 765-66 (2017). This view of standing would dramatically expand the role of the judiciary beyond its proper function, permitting courts to issue advisory opinions that do no more than "provide clarity to other actors … concerning the scope of their legal obligations and rights." *Id.* at 762; *cf. Murphy v. Nat'l Coll. Athletic Ass'n*, 138 S. Ct. 1461, 1487 (2018) (Thomas, J., concurring) (noting that "the severability doctrine often requires courts to weigh in on statutory provisions that no party has standing to challenge, bringing courts dangerously close to issuing advisory opinions," even in cases where "the plaintiff had standing to challenge the unconstitutional part of the statute"). But even if it were accepted, this commentator's argument for "inseverability claims" would not confer standing on the States in this case because here, the allegedly unconstitutional provision (§ 5000A) harms no one. *See supra* Sec. II.B.

12. The States also cannot claim *parens patriae* standing because, as explained above, *see* Sec. II, § 5000A does not "injur[e] … an identifiable group of individual[s]" and therefore does not impinge any "quasi-sovereign interest." *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

CONCLUSION

The Plaintiffs have failed to meet Article III's standing requirements. The judgment of the Court of Appeals should be reversed, and the case should be remanded to the District Court with instructions to dismiss for lack of jurisdiction.

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Respectfully submitted,

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