No. 19-840

In the Supreme Court of the United States

CALIFORNIA, ET AL., PETITIONERS

v.

TEXAS, ET AL.

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

BRIEF FOR PROFESSORS MICHAEL C. DORF AND MARTIN S. LEDERMAN AS AMICI CURIAE IN SUPPORT OF PETITIONERS ON QUESTION TWO

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INTEREST OF AMICI CURIAE[*]

Amici curiae are legal scholars who teach and write on constitutional law, including the scope of congressional power, and who have written on various issues related to the interpretation of the Affordable Care Act.

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[*] Pursuant to Rule 37.6, amici curiae affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. All parties have provided consent for the filing of this amicus brief.

SUMMARY OF ARGUMENT

According to Respondents and the court of appeals, when the 115th Congress and President Trump enacted the Tax Cuts and Jobs Act (TCJA) in 2017, they did something a majority of this Court concluded, just five years earlier, that the federal government may not do: enact a legal obligation, or "mandate," that individuals maintain health insurance. *See National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 548-61, 575 (2012) (*NFIB*) (opinion of Roberts, C.J.); *see also id.* at 649-61 (joint dissent).

If that conclusion about the effect of the TCJA is wrong—if Congress's discrete reduction of the *amount* of the "shared responsibility payment" in 26 U.S.C. § 5000A to $0 did not establish a statutory obligation to maintain insurance—then the current version of Section 5000A is constitutional, according to this Court's holding in *NFIB* respecting the original version of Section 5000A, *see* 567 U.S. at 574. And if Section 5000A, as amended, is constitutional, that resolves this case, and there is no occasion for the Court to consider whether the remainder of the Patient Protection and Affordable Care Act (ACA) is severable.

This Court often confronts difficult questions of statutory interpretation. Whether the 2017 Congress enacted a mandate to obtain health insurance is not one of them: Of course it didn't.

The TCJA did not in any way alter the text of subsections 5000A(a) and (b), the provisions this Court construed in *NFIB* as affording "applicable individual[s]" a choice between two alternative ways of complying with the law, rather than as an obligation to buy insurance. Indeed, there is no evidence at all in the text of the TCJA

amendment, let alone a "relatively clear indication," *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017), that Congress intended to overturn this Court's construction of Section 5000A.

Furthermore, there is no evidence that even a single member of Congress who voted for the TCJA took issue with *NFIB*'s conclusion that Congress lacks the power to mandate maintenance of health insurance, let alone that any of those legislators intended to impose such a mandate in the teeth of *NFIB*. Instead, the evidence is uncontroverted that all those members of Congress understood that they were alleviating Section 5000A's regulatory burden, rather than turning it into an unforgiving—and unconstitutional—mandate. That is also how President Trump has understood, and publicly characterized, the legislation from the day he signed it until now.

Nor is there any basis for concluding that Congress *inadvertently* enacted an unconstitutional mandate, as the Fifth Circuit appears to have presumed. According to the court of appeals, when Congress reduced the amount of Section 5000A's "shared responsibility payment" to $0, it meant that Congress was no longer exercising its authority "To lay and collect Taxes," Art. I, § 8, cl. 1, *see* J.A. 419-20, and that, absent use of the tax power, "the only logical conclusion under *NFIB* is to read the individual mandate as a command," *id.* at 423.

On this view, if Congress had lowered the "shared responsibility payment" amount to $0.01, rather than to $0, Section 5000A would remain constitutional and this case would be over. The legislature's decision to go just one cent further, however, purportedly spells the constitutional doom of Section 5000A—indeed, according to Respondents, that extra penny topples the entire edifice of the Nation's health-care system.

That result is not only counterintuitive, inconsistent with this Court's authoritative construction of Section 5000A, and contrary to the contemporaneous and uniform understanding of the President and Congress. It also rests upon a fundamentally flawed premise, for even if subsection 5000A(b) is no longer an exercise of Congress's taxing authority, this Court's construction of Section 5000A as lawfully affording individuals two options remains sound.

This Court's constitutional holding in *NFIB* did not depend upon the fact that Congress had exercised its "Power To lay and collect Taxes," Art. I, § 8, cl. 1, as such. What mattered was that Congress had the constitutional power to impose the second option Section 5000A offered to covered individuals (making a payment), unlike the first (buying insurance). The principal case on which this Court relied in *NFIB*, *New York v. United States*, 505 U.S. 144 (1992), confirms that understanding, as does this Court's reading in *King v. Burwell*, 135 S. Ct. 2480 (2015), of a different pair of choices Congress offered to the States in the ACA itself. *New York*, *NFIB*, and *King* all demonstrate that where Congress offers a party two options, one of which it could not impose directly, that binary choice is constitutional as long as the second option is something Congress has the independent authority to prescribe.

Congress has the constitutional power to repeal or reduce a previously imposed tax—as it did in 2017—just as it may reduce, repeal, or eliminate regulatory obligations or other exercises of its Article I authorities. And, contrary to Respondents' contention, even if this reading of Section 5000A were to render it a "nonbinding" provision of law, it would remain constitutional, because Congress does not need to rely on a particular enumerated power to

enact provisions of laws without any binding legal effect, as it regularly does.

Because Congress may offer individuals a choice between buying insurance and doing nothing, and because it's undisputed that's what the 2017 Congress intended to accomplish, this Court must affirm that understanding of Section 5000A. To conclude otherwise would turn the constitutional avoidance canon on its head—to insist, in effect, that the political branches brazenly enacted a law that they and a majority of this Court considered to be beyond the federal Government's power to enact. Nothing about the 2017 amendment requires such an astonishing and counterintuitive conclusion.

ARGUMENT

THE 2017 AMENDMENT TO SECTION 5000A DOES NOT REQUIRE INDIVIDUALS TO MAINTAIN MINIMUM ESSENTIAL HEALTH INSURANCE COVERAGE

All of the parties in this case agree on at least two important things: First, if the amended Section 5000A mandated individuals to maintain minimum essential insurance, it would be unconstitutional and unenforceable under *NFIB*. *See NFIB*, 567 U.S. at 575 (opinion of Roberts, C.J.); *see also id.* at 548-61; *id.* at 649-61 (joint dissent, agreeing with the Chief Justice on this proposition).[1]

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[1] The members of the Court disagreed about whether that conclusion was necessary to the judgment in *NFIB*. *Compare id.* at 574-75 (Opinion of Roberts, C.J.) *with id.* at 623 & n.12 (Ginsburg, J.). There is little doubt, however, that the Chief Justice's opinion with respect to Congress's power to impose a "mandate" to purchase insurance is,

Second, if the amended Section 5000A does *not* impose such a mandate, that's the end of the case.

The 2017 Congress did not enact, and President Trump did not approve, a mandate to maintain insurance. That indisputable fact (in effect, an answer to the second Question Presented) is sufficient to resolve this dispute.

A. *NFIB* Held That Subsections 5000A(a) And 5000A(b) Afford Individuals Two Alternative Options For Compliance.

As enacted by Congress in the ACA in 2010, Pub. L. No. 111-148, § 1501(b), 124 Stat. 244, subsection (a) of Section 5000A provided—and continues to provide—that "[a]n applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month."[2]

Subsection 5000A(b)(1), in turn, titled "Shared Responsibility Payment," provided—and continues to provide—that "[i]f a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer

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for all practical purposes, precedential. More to the point, and as explained *infra* at Part B.2, there is no reason to believe anyone in the political branches doubted this constitutional principle when they considered amending Section 5000A in 2017.

[2] "Minimum essential coverage" is defined in subsection 5000A(f).

a penalty with respect to such failures in the amount determined under subsection (c)."[3]

Before *NFIB*, there were two ways to understand the relationship between, and possible legal effect of, these two conjoined subsections.

According to the dissenting Justices in *NFIB*, subsection (a) imposed a legal obligation to maintain health insurance, and subsection (b) merely prescribed the legal sanction for failing to comply with that legal obligation. *See* 567 U.S. at 661-69 (dissenting opinion).

The Court in *NFIB*, however, rejected this reading. Instead, it construed subsections (a) and (b) to offer "applicable individuals" two distinct, alternative ways of complying with the statute: They "may lawfully forgo health insurance and pay higher taxes, *or* buy health insurance and pay lower taxes." *Id.* at 574 n.11 (majority opinion) (emphasis added); *accord id.* at 574 (imposition of the tax in subsection (b) "nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice").

The Chief Justice favored this second, choice-conferring reading of the interrelationship of subsections 5000A(a) and (b) in part because "'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality,'" *id.* at 563 (opinion of Roberts, C.J.) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). But that was not the only basis for the Court's

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[3] The other two paragraphs of subsection (b) provide that the payment "shall be included with a taxpayer's [tax] return" and specify who makes the payment for dependents and individuals filing joint returns.

holding that Section 5000A offers applicable individuals a binary choice of methods for compliance with the statute. The Court also relied on the fact that the Executive Branch itself, tasked with enforcing the law, had "confirm[ed]" its view "that if someone chooses to pay rather than obtain health insurance, they have fully complied with the law," *id.* at 568 (majority opinion).[4] And the Court explained that such a reading reflected Congress's actual expectations, and avoided the absurd results that would follow if "shall" were read to mean "must":

> [I]t is estimated that four million people each year will choose to pay the IRS rather than buy insurance . . . . We would expect Congress to be troubled by that prospect if such conduct were unlawful. That Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws. It suggests instead that the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance.

Ibid.

The Court also invoked precedent for this choice-conferring reading. As the Court explained, this was not the first time it had "rejected a similar ["shall" necessarily

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[4] *See also* Tr. Of Oral Arg. at 50, *Dep't of Health and Human Servs. v. Florida*, No. 11-398 (Mar. 26, 2012) (Solicitor General's representation), https://perma.cc/WP52-JP2P.

means "must"] argument," *id.*, in a case where Congress lacked the constitutional power to directly impose one prong of a binary choice. In *New York v. United States*, 505 U.S. 144 (1992), the Court took the same approach with respect to a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 stating that "[e]ach State shall be responsible for providing . . . for the disposal of . . . low-level radioactive waste." 42 U.S.C. § 2021c(a)(1)(A).

In *New York*, the Court held that if this provision were read as "a direct command from Congress," 505 U.S. at 169, it would have been an unconstitutional "commandeer[ing]" of state governments "into the service of federal regulatory purposes." *Id.* at 175; *accord id.* at 161. The Court concluded, however, that the "shall" provision should not be considered "alone and in isolation, as a command to the States independent of the remainder of the Act," but, rather, that the Act should be "[c]onstrued as a whole" to afford States a series of *choices*, in which the apparent directive to regulate for the disposal of radioactive waste would be "no more than an option which a State may elect or eschew." *Id.* at 170.

In particular, the *New York* Court construed the Act to offer a State a series of three binary choices: "to choose first between regulating pursuant to federal standards and losing the right to a share of the Secretary of Energy's escrow account; to choose second between regulating pursuant to federal standards and progressively losing access to disposal sites in other States [that federal law had previously guaranteed]; and to choose third between regulating pursuant to federal standards and taking title to the waste generated within the State." *Id.* at 169.

The Court in *New York* then proceeded to assess

whether each of the *alternative* options afforded the States, apart from regulating radioactive waste pursuant to federal standards, was a proper exercise of Congress's constitutional authority. *New York* is best known for the Court's holding that the third "either/or" option was unconstitutional because Congress did not have the power to impose *either* of its two alternatives—it could neither "commandeer" a State to regulate waste *nor* require a State to take title to the waste generated within its borders. *Id.* at 175-76.

Critically, however, the Court held that the "secondary" options in each of the other two binary choices Congress offered the States *were* constitutional. The alternative to compelled regulation in the first binary—withdrawing a State's access to a share of the Secretary of Energy's escrow account—was a constitutional exercise of Congress's spending authority. *Id.* at 171-73. And as to the second set of options, Congress could exercise its power to regulate interstate commerce to deny waste-generating entities in non-regulating States the privilege federal law had previously afforded them of low-cost access to disposal sites in other States. *Id.* at 173-74. The Court therefore held that the first and second sets of choices in the 1985 Act were constitutionally permissible.

In *NFIB*, the Court treated subsection 5000A(a)'s "shall . . . ensure . . . minimum essential coverage" language just as the Court in *New York* had construed the "shall be responsible for providing . . . for the disposal of . . . low-level radioactive waste" provision at issue in that case—*i.e.*, as prescribing one non-exclusive way that "applicable individuals" could comply with the Act. Making the "shared responsibility payment" described in subsection (b), the Court agreed, was yet another, alternative means of compliance: Individuals could "choose to pay *in*

lieu of buying health insurance." 567 U.S. at 568 (emphasis added).

The Court's conclusion that Section 5000A gave individuals a choice, however, did not fully resolve the *constitutional* question in *NFIB*. As in *New York*, the Court in *NFIB* also assessed whether the subsection 5000A(b) option (requiring persons without qualifying insurance to make the shared responsibility payment) was something Congress had the constitutional authority to impose directly, in light of the Court's conclusion that Congress would lack the power to compel the subsection (a) choice—the maintenance of qualifying insurance—standing alone. The Court concluded that imposing the "shared responsibility payment" was a valid exercise of Congress's "Power To lay and collect Taxes," Art. I, § 8, cl. 1, because it had all the indicia of a tax, *see* 567 U.S. at 563-68; because it was not properly viewed as "'punishment for an unlawful act or omission,'" *id.* at 567 (quoting *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U. S. 213, 224 (1996)); and because the payment was not a "direct tax" that Congress would have had to apportion among the several States under Art. I, § 9, cl. 4, *id.* at 570-71.

Because Congress had the constitutional authority to require such a payment by covered individuals who chose not to maintain health insurance, the Court concluded that the "either/or" choice Section 5000A afforded such individuals was constitutional. *Id.* at 574. And three years later, in *King v. Burwell*, this Court reaffirmed that Section 5000A "generally requires individuals to maintain health insurance coverage or make a payment to the IRS." 135 S. Ct. at 2486.

That was the state of the law, and the authoritative

construction of Section 5000A, on the morning of December 22, 2017, just before the President signed the Tax Cuts and Jobs Act.

B. The Political Branches' 2017 Amendment Preserved This Court's Choice-Conferring Construction Of Section 5000A.

Congress's 2017 amendment to Section 5000A did not repudiate or eliminate this Court's choice-conferring construction of the statute.

1. Congress Did Not Alter The Provisions This Court Construed In *NFIB*.

In the TCJA, Congress made a single, discrete amendment to Section 5000A. That amendment *did not alter either subsection (a) or subsection (b)*, and thus did not in the slightest way affect the language of the two provisions this Court construed in *NFIB* as affording "applicable individuals" a choice between two alternative ways of complying with the law. The only thing the 2017 amendment did was to make a simple change to subsection 5000A*(c)*—the provision prescribing the "[a]mount" of the shared responsibility payment option.

Before Congress enacted the TCJA, that payment amount was the greater of (i) $695 for an adult (subject to a cost-of-living adjustment), or (ii) 2.5 percent of household income above a certain threshold. *See NFIB*, 567 U.S. at 539. The TCJA amendment changed "$695" to "$0" and "2.5 percent" to "Zero percent," effective as of 2019. *See* Pub. L. 115-97, Title I, § 11081, 131 Stat. 2092

(2017).[5]

That is *all* the 2017 amendment did to the ACA (save for a technical amendment to another, inapposite provision, *see* Pet. Br. 10 n.9). Congress made this simple, numerical change to subsection 5000A(c) fully aware that in *NFIB* and in *King* this Court had twice construed the preceding two subsections—which Congress left unchanged—to offer covered individuals a choice of two alternatives, only one of which was the maintenance of "minimum essential" health insurance coverage.

Even if one looks only at the language of the 2017 amendment, then, it is clear that all Congress did was to *reduce* (indeed, eliminate) the regulatory burden of Section 5000A, by offering individuals a choice of either maintaining qualifying insurance *or* paying $0, *i.e.*, of doing nothing. That is not a mandate to maintain health insurance—it is the exact opposite.

2. Congressional And Presidential Statements And Understandings Uniformly Confirm The Original Public Meaning Of The 2017 Amendment To Section 5000A.

All indicia of legislative and presidential intent and understandings confirm this choice-preserving reading of the amendment to Section 5000A. Indeed, both the President and the proponents of the amendment consistently and unequivocally touted it as a *repeal* of the "individual mandate" that would make it easier for individuals to opt not to purchase ACA-compliant insurance.

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[5] It also struck the subparagraph calculating the cost-of-living increase, Section 5000A(c)(3)(D), which became inapposite once the required payment was set at $0.

a. The Senate. On November 1, 2017, as Congress was deliberating major tax reform legislation, President Trump tweeted: "Wouldn't it be great to Repeal the very unfair and unpopular Individual Mandate in ObamaCare and use those savings for further Tax Cuts." @realDonaldTrump, Twitter (Nov. 1, 2017, 7:59 AM), https://perma.cc/TE5C-LV5J. The President reportedly got the idea from Senator Tom Cotton,[6] who went to the Senate floor the next day to announce "a creative idea, a novel idea—one that I think is gaining momentum in the Senate and in the House. We can repeal the individual mandate of ObamaCare" (which he characterized as "[y]ou must buy the product of a private company for the mere privilege of being an American citizen"). 163 Cong. Rec. S6975, S6978 (Nov. 2, 2017). Two weeks later, the Finance Committee's proposed amendment to the House bill included Senator Cotton's proposal—which consisted simply of "reduc[ing] to zero" the "amount of the individual shared responsibility payment." Staff of Joint Comm. on Taxation, 115th Cong., *Description of the Chairman's Modification to the Chairman's Mark of the Tax Cuts and Jobs Act* 11 (Nov. 14, 2017), https://perma.cc/MVE2-N9P6 ("Finance Chairman's Mark Description").[7]

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[6] *See* Peter Nicholas, et al., *Over Golf and an Airport Chat, Trump and GOP Hashed Out a Historic Tax Plan*, Wall St. J. (Dec. 20, 2017), https://perma.cc/8VXM-S3PH.

[7] The bill "zeroed out" the shared responsibility payment rather than formally repealing § 5000A altogether only because an internal Senate rule effectively precluded resort to the latter method as part

In the debates preceding the Senate's approval of the bill on December 2, 2017, proponents consistently characterized the amendment as a repeal of the "mandate" that would *alleviate* any pressure on Americans to purchase insurance. Senator Capito, for example, explained that "[b]y eliminating the individual mandate, we are simply stopping penalizing and taxing people who either cannot afford or decide not to buy health insurance plans. . . . If you opt not to purchase, which I hope you would not, your government shouldn't be taxing you . . . ." 163 Cong. Rec. S7367, S7383 (Nov. 29, 2017) (statement of Sen. Capito).[8]

Senators continued to describe their approved amendment that way as the two chambers prepared to vote on the Conference Committee version of the bill, which included the Senate's "zeroing out" amendment. Senator Barrasso, for example, declared that "by repealing the ObamaCare insurance mandate," "Republicans in the Senate" had "take[n] ObamaCare from being a mandatory program to being a voluntary program . . . . When Republicans struck down this mandate, we gave people back the freedom they had to decide for themselves and to make their own choices." 163 Cong. Rec. S7859, S7868

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of this tax legislation. *See* Amici Health Care Policy Scholars Br. Part II-B-2.

[8] *See also, e.g.*, 163 Cong. Rec. S7225, S7229 (Nov. 15, 2017) (statement of Sen. Cotton); *id.* at S7239 (statement of Sen. Lankford); *id.* at S7240 (statement of Sen. Cassidy); 163 Cong. Rec. S7319, S7322 (Nov. 27, 2017) (statement of Sen. Cornyn); 163 Cong. Rec. S7367, S7370-71 (Nov. 29, 2017) (statement of Sen. Hatch); 163 Cong. Rec. S7507, S7542 (Nov. 30, 2017) (statement of Sen. Toomey).

(Dec. 6, 2017).

On the morning after the Senate approved the conference version of the bill—just before the House vote—Majority Leader McConnell confirmed that the Senate had "accomplished something really remarkable . . . . We voted to repeal ObamaCare's individual mandate tax so that low and middle-income families *are not forced to purchase something they either don't want or can't afford*." 163 Cong. Rec. S8153, S8153 (Dec. 20, 2017) (emphasis added).[9]

b. The House. The universal understanding in the House of Representatives likewise was that the amendment would "repeal" the so-called "individual mandate" and guarantee that individuals would be free *not* to purchase qualifying insurance. As the Speaker of the House declared, "[b]y repealing the individual mandate at the heart of ObamaCare, we are giving back the freedom and the flexibility to buy the healthcare that is right for you and your family." 163 Cong. Rec. H10183, H10212 (Dec.

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[9] *Accord* 163 Cong. Rec. S8051, S8051 (Dec. 18, 2017) (statement of Sen. McConnell) ("repealing" the mandate "will give low- and middle-class families even more tax relief, along with the flexibility to make their own healthcare decisions"); *see also, e.g.*, 163 Cong. Rec. S7809, S7811-12 (Dec. 4, 2017) (statement of Sen. Cornyn); 163 Cong. Rec. S8073, S8098 (Dec. 19, 2017) (statement of Sen. Thune); *id.* at S8123 (statement of Sen. Young); *id.* at S8130 (statement of Sen. Sullivan); 163 Cong. Rec. S8153, S8168 (Dec. 20, 2017) (statement of Sen. Gardner); 164 Cong. Rec. S81, S82 (Jan. 9, 2018) (statement of Sen. McConnell).

19, 2017) (statement of Rep. Ryan).[10]

c. The President. President Trump had a similar understanding of the provision, which he proclaimed to the Nation. When he signed the TCJA on December 22, 2017, he declared that "now we're overturning the individual mandate." *Remarks by President Trump at Signing of H.R. 1, Tax Cuts and Jobs Bill Act, and H.R. 1370* (Dec.

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[10] *See also, e.g.*, 163 Cong. Rec. H9257, H9268 (Nov. 15, 2017) (statement of Rep. Harris) ("No American should ever be forced to purchase something that they don't want. That is not freedom. That is not the American way . . . . [I]t is time for Congress to repeal ObamaCare's individual forced mandate."); 163 Cong. Rec. H10147, H10176 (Dec. 18, 2017) (statement of Rep. Gohmert) ("[W]hat the repeal of the individual mandate is going to mean is that people can still buy the insurance if they want to.").

Because this was the uniform description of congressional proponents (and, for that matter, opponents of the amendment, too), it is hardly surprising that the media consistently represented the amendment to the public in the same way. *See, e.g.*, Heather Long, *The Final GOP Tax Bill Is Complete. Here's What Is In It.*, Wash. Post (Dec. 15, 2017), https://perma.cc/5MF4-7V33 ("The individual health insurance mandate goes away in 2019: Beginning in 2019, Americans would no longer be required by law to buy health insurance (or pay a penalty if they don't)."); Robert Pear, *Without the Insurance Mandate, Health Care's Future May Be in Doubt*, N.Y. Times (Dec. 18, 2017), https://perma.cc/L3EV-VM5A ("Remarkably, after the millions of words written by lawyers to attack and defend the mandate in court, the tax bill wipes it out with just two sentences."); Michael C. Bender et al., *Trump Cheers GOP Tax Overhaul, Slams Democrats Who Opposed It*, Wall St. J. (Dec. 20, 2017), https://perma.cc/SK5X-PCU8 ("Starting in 2019, the GOP plan also includes a repeal of the Affordable Care Act's mandate that most people get health insurance or pay a penalty, another GOP priority.").

22, 2017), https://perma.cc/74LE-L492; *see also* @realDonaldTrump, Twitter (Dec. 22, 2017, 2:11 PM), https://perma.cc/74Y9-KUKZ. A few days later, the President boasted in an interview with the *New York Times* that "the individual mandate is the most unpopular thing in Obamacare, and I got rid of it." Michael Schmidt, *Excerpts From Trump's Interview With The Times*, N.Y. Times (Dec. 28, 2017), https://perma.cc/TCC7-B798. And the next month, in his State of the Union address, President Trump declared that "[w]e repealed the core of the disastrous Obamacare. *The individual mandate is now gone*." 164 Cong. Rec. H683, H727 (Jan. 30, 2018) (emphasis added).[11]

That remains the President's understanding to this day. Just last week, in the very course of confirming that the Department of Justice would defend the court of appeals' judgment in this case, the President reiterated that "we got rid of the individual mandate" so that "you don't have [to] buy health insurance at a ridiculous price for not good health insurance." *Remarks by President Trump at Signing of a Proclamation in Honor of National Nurses Day* (May 6, 2020), https://perma.cc/5VRE-ENZJ.

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This evidence evinces an uncontradicted, unambiguous account of how the political branches uniformly understood and described the effect of the 2017 amendment.

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[11] *See also* 164 Cong. Rec. S557, S570 (Jan. 30, 2018) (statement of Sen. Cornyn) (declaring, in anticipation of the State of the Union address, that the President's "[f]irst and foremost" achievement in 2017 was that "he signed comprehensive tax reform into law," emphasizing that "it repealed the Obama-Care individual mandate, *making the Affordable Care Act voluntary and not mandatory*" (emphasis added)).

As far as amici are aware, neither the President nor any member of Congress who voted for the TCJA took issue with this Court's holding in *NFIB* that the federal Government cannot mandate maintenance of health insurance. (Indeed, most of the Senators who voted to approve the amendment, including the Majority Leader, had argued to this Court in *NFIB* that such a mandate would be unconstitutional. *See* Amicus Br. of 43 Senators, *Dep't of Health & Human Servs. v. Florida*, No. 11-398 (Feb. 13, 2012), https://perma.cc/V9UN-YNL6.[12])

More importantly, there is no evidence that any member of Congress, let alone majorities of both Houses and the President, intended to alter this Court's choice-conferring construction of Section 5000A, or to impose a statutory mandate to purchase insurance in flagrant disregard of the constitutional judgment of a majority of the Justices of this Court. There certainly was nothing approaching a "relatively clear indication of [an] intent" to overturn that construction. *TC Heartland*, 137 S. Ct. at 1520.

Amici recite the foregoing extensive and uncontradicted evidence not because legislators' and the President's statements necessarily determine how a statute must be construed, but because such contemporaneous, uniform understandings of the Congress and the President in this case confirm the original public understanding

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[12] *See also* 163 Cong. Rec. S7665, S7682 (Dec. 1, 2017) (statement of Sen. McConnell) ("From its inception, I have opposed the individual mandate because it is simply wrong for the Federal Government to require someone to purchase a particular product, particularly one they do not want and cannot afford.").

of the meaning of the amended law (if any such confirmation were needed)—namely, that it means exactly what the text, when read in light of *NFIB*, says. All of these congressional actors were—and the President remains—obviously correct: The *only* reasonable reading of the 2017 Amendment is that it eliminated any coercive effect of Section 5000A, rather than making that provision unconstitutionally coercive.

C. The Court of Appeals' Construction Of Section 5000A As Imposing An Unconstitutional Mandate Is Indefensible.

Without considering any of the foregoing evidence, the court of appeals held that by virtue of their single, simple numerical substitution of "0" and "zero" in place of the numbers "695" and "2.5" in subsection 5000A(c), Congress and the President established—presumably inadvertently—a mandate to buy insurance. That account of the 2017 amendment is inconsistent with every relevant principle of statutory construction and would turn the constitutional avoidance canon on its head.

1. The Court Of Appeals' Construction Ignores The Text And Structure Of Section 5000A.

The court of appeals' reading ignores the fact that in *NFIB*, this Court had recently construed subsections 5000A(a) and (b) to establish two distinct choices (a reading it then reaffirmed in *King v. Burwell*); that Congress did not in any way amend those two provisions; and that Congress did not offer any sign, let alone a "relatively clear indication of intent," *TC Heartland LLC*, 137 S. Ct. at 1520, to overturn this Court's choice-conferring construction.

The Fifth Circuit's construction also ignores how each

of the branches has construed a parallel penalty-limitation in Section 5000A and how that provision has been operating for several years. Subsection 5000A(e) expressly exempts five categories of "applicable individuals," *see* § 5000A(d)—*i.e.*, persons who would otherwise be covered by subsection (a)—from having to pay the "penalty" (*i.e.*, the shared responsibility payment): (i) individuals who cannot afford coverage; (ii) taxpayers with incomes below the tax-filing threshold; (iii) members of Indian tribes; (iv) individuals experiencing "short coverage gaps" in health insurance; and (v) persons who received a "hardship" exemption from the Secretary of Health and Human Services. *See* 26 U.S.C. § 5000A(e)(1)-(5); *see also NFIB*, 567 U.S. at 539-40. Many persons in those categories have neither maintained the requisite levels of insurance nor made any shared responsibility payments since Section 5000A become operative in 2014.

If, as the court of appeals insists, subsection 5000A(a) must be read as imposing a legal mandate to maintain insurance in the absence of any provision for an alternative payment, then those persons have been violating federal law every month for more than six years. And, as this Court explained in *NFIB*, their seemingly innocent conduct would thus expose them to "all the attendant consequences of being branded a criminal" other than fines and imprisonment, including "deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections; loss of employment opportunities; social stigma; and severe disabilities in other controversies, such as custody or immigration disputes." 567 U.S. at 573.

That cannot be correct. Congress surely did not intend to afford these groups *fewer* lawful options than everyone else has had, and to subject them to the potential consequences of lawbreaking if they failed to do so. *See*

id. at 568 (Congress "did not think it was creating . . . million[s of] outlaws"). To the contrary: Congress obviously exempted such persons from the payment obligation because they couldn't afford to maintain federally prescribed levels of health insurance, or for some other equitable reason why it wouldn't be feasible or necessary for them to maintain such coverage (such as the inefficiency of purchasing insurance during "short coverage gaps," or the fact that many Indian tribes provide health care to their members).

That explains why all three branches, including this Court, have understood subsection 5000A(e)'s elimination of a payment obligation to have effected a *de facto* exemption for those persons from any legal obligation to maintain qualifying coverage. *See King*, 135 S. Ct. at 2486-87 ("Congress . . . provided an exemption *from the coverage requirement* for anyone who has to spend more than eight percent of his income on health insurance." (citing §§ 5000A(e)(1)(A), (e)(1)(B)(ii)) (emphasis added)); HHS Br. on the Anti-Injunction Act 41, *HHS v. Florida*, No. 11-398 (Feb. 6, 2012), https://perma.cc/ZH8L-2R8M ("[T]here is . . . no basis for concluding that the Congress that exempted individuals from the penalty because of their low income nonetheless intended the exempted individuals to be regarded as violators of a freestanding statutory requirement that they lack the resources to satisfy"); *Finance Chairman's Mark Description* 10-11 (listing the groups identified in subsection 5000A(e) as among those provided "[e]xemptions from the requirement to maintain minimum essential coverage"), https://perma.cc/MVE2-N9P6.

The effect of Congress's December 2017 amendment to Section 5000A was simply to put all other "applicable

individuals" in the same boat that the individuals described in subsection 5000A(e) have been in for the better part of a decade: Now *everyone* is effectively exempt from making any shared responsibility payment, and thus everyone now enjoys a lawful choice to do nothing—to make a "payment" of zero.

2. Congress Has The Constitutional Power To Repeal Or Reduce Taxes And To Enact Provisions Of Law That Have No Binding Legal Effect

The court of appeals nevertheless concluded that when Congress reduced the shared responsibility payment to $0, it meant that subsection 5000A(b) was no longer an exercise of Congress's power "To lay and collect Taxes," Art. I, § 8, cl. 1, *see* J.A. 419-20, and that therefore "the only logical conclusion under *NFIB* is to read the individual mandate as a command . . . ." J.A. 423; *see also* Texas Br. in Opp. 24-25.

Even assuming, however, that subsection 5000A(b) is no longer an exercise of Congress's tax-laying authority, *but see* Pet. Br. 32-34, this Court's construction of Section 5000A as affording individuals two options remains not only viable and "logical," but undeniable. And because the second of those options ("pay $0") is itself something Congress has the authority to enact, the binary choice itself raises no constitutional concerns.

To be sure, this Court in *NFIB* considered whether the shared responsibility payment was a tax rather than a "penalty" for violating a legal mandate to maintain minimum essential coverage. As a majority of the Court determined, if Section 5000A(b) were the latter, *i.e.*, a "'punishment for an unlawful act or omission,'" 567 U.S. at 567 (quoting *Reorganized CF&I Fabricators,* 518 U.S.

at 224), then it would not have been an available, alternative means of complying with the statute at all, in which case the only lawful course of conduct for covered individuals in Section 5000A—maintaining ACA-compliant insurance coverage—would have been an unconstitutional mandate.

The Court in no way suggested, however, that a tax was the *only* alternative choice Congress had the constitutional power to offer "applicable individuals" in lieu of maintaining minimum coverage. What made Section 5000A constitutional was not that Congress had exercised its taxing power as such, but rather that the second of the two alternatives Section 5000A offered, unlike the first, was something Congress had the constitutional power to impose upon individuals. That requirement does not turn on the particular constitutional source of Congress's authority to offer the alternative choice.

As explained above, the principal case on which this Court relied in *NFIB*, *see* 567 U.S. at 568-69, confirms that understanding. In *New York v. United States*, the Court upheld two "either/or" choices Congress had afforded States in which the constitutionally permissible alternative in each pair of options involved an exercise of Congress's Article I authorities distinct from its taxing power. *See supra* at 9-10 (discussing 505 U.S. at 169-74). As the Court explained, the two "incentives" it upheld "represent permissible conditional exercises of Congress' authority under the Spending and Commerce Clauses respectively, in forms that have now grown commonplace. Under each, Congress offers the States a legitimate choice rather than issuing an unavoidable command." 505 U.S. at 185.

Likewise, this Court in *King v. Burwell* construed an-

other use of "shall"—this one in the ACA itself—as offering States a choice between one option that Congress could not directly order them to undertake and another that Congress is constitutionally empowered to prescribe. At issue was 42 U.S.C. § 18031(b)(1), which provides that "[e]ach State shall . . . establish an American Health Benefit Exchange." The Court noted that although that provision is "phrased as a requirement," the Act as a whole is best construed to afford a State "flexibility," *King*, 135 S. Ct. at 2489, because the statute also provides that if a State fails to establish an insurance exchange, the Secretary of Health and Human Services would "establish and operate such Exchange," 42 U.S.C. § 18041(c)(1). The Secretary's operation of an insurance exchange obviously is not a tax; nevertheless, Congress's provision for such "a federal fallback," *King*, 135 S. Ct. at 2494, is sufficient—when viewed as an available option that a State may elect—to foreclose the constitutional problem that would arise if Congress had actually required States to establish exchanges.

New York, *King*, and *NFIB* thus demonstrate that where Congress offers persons or States a choice of means of compliance, one of which Congress could not impose upon them directly, what the Constitution requires is simply that the *other* option be something that doesn't exceed Congress's constitutional authority. In one statute, that permissible option might be "pay a $695 tax" (*NFIB*); in another it might be a denial of federal funds (as in the first pair of options in *New York*), or a denial of federal benefits (*e.g.*, reduced-cost access to disposal sites in the second pair of options in *New York*); in yet a third, it could be the creation of "a federal fallback" (*King*).

In the amended Section 5000A, the secondary option Congress has offered to covered individuals is to "pay $0."

The pertinent question, then, is whether the legislature had the constitutional authority to enact that option.

The answer to that question is yes—of course Congress has such authority. Congress may repeal or reduce a tax it previously imposed, just as it may narrow or eliminate regulatory obligations or "undo" other exercises of its Article I powers, such as by shuttering a post office, *see* Art. I, § 8, cl. 7 (empowering Congress "To establish Post Offices and post Roads"). Such statutes are commonplace, even though Article I does not specifically enumerate any "repeal," "deregulation," or "cessation" authorities.

One might fairly view such laws as an exercise of authority inhering in the enumerated powers themselves, or implied from or incidental to those powers. *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406, 411 (1819); *see also id.* at 417 (citing examples of authorities implied or inferred from the power to "establish post-offices and post-roads"); *United States v. Comstock*, 560 U.S. 126, 147 (2010) ("Congress has the implied power to criminalize any conduct that might interfere with the exercise of an enumerated power[.]").

Alternatively, the power to reduce, deregulate or repeal may be "necessary and proper" to carry the enumerated powers themselves into execution, *see* Art. I, § 8, cl. 18, if only because Congress would be severely deterred from exercising those powers in the first instance if it couldn't adjust the law to make it less restrictive if and when future circumstances warrant. *Cf. Comstock*, 560 U.S. at 157 (Alito, J., concurring in the judgment) ("[I]t is . . . necessary and proper for Congress to protect the

public from dangers created by the federal criminal justice and prison systems.").[13]

Either way, the 2017 Amendment is in every relevant particular a repeal of earlier law, and there can be no real dispute about Congress's authority to take that step.

It is true, of course, that the 2017 amendment did not eliminate a provision of the Tax Code—something that Congress would have done but for an internal Senate rule, *see supra* note 7—but instead codified a version of Section 5000A that no longer has any binding legal effect at all; it is, at most, merely "a nudge in [a] preferred direction[]." *Rosado v. Wyman*, 397 U.S. 397, 413 (1970). If anything, however, that makes the amended Section 5000A less constitutionally problematic, not more, than it was before the amendment (or than the provisions this Court considered in *New York*), because it now has no impact at all on the freedom of individuals to act.

The State Respondents miss the mark in suggesting that if Section 5000A is construed as offering individuals a choice between maintaining insurance and doing nothing it would be beyond Congress's power to enact because Congress lacks any "enumerated" power to enact "nonbinding" provisions of law. Texas Br. in Opp. 25-26.

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[13] *See also* 42 U.S.C. § 2000bb-3(a) (providing that the Religious Freedom Restoration Act, which prohibits imposing substantial burdens on religious exercise absent sufficient justification, "applies to all Federal law"); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695 (2014) ("As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work.").

Since the very first Congress,[14] the national legislature has enacted statutes containing provisions that have no binding legal effect, such as "Whereas" clauses; "Sense of the Congress" declarations; "It shall be the policy of the United States" proclamations; congressional "findings"; and exhortations of others to act in certain ways or expressions of congressional expectations or aspirations. *See* Pet. Br. 32 (citing examples); House of Rep. Br. 35-36 (citing others).[15] No one would argue that Congress lacks the power to make such legally inoperative statements in a concurrent resolution of both Houses. The fact that in some such cases the President signs the bill (*i.e.*, a joint resolution) into law, and that it later appears in the Statutes at Large, surely does not mean that Congress thereby crosses some constitutional line. (Indeed, many

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[14] *See, e.g.*, Resolution of Sept. 23, 1789, 1 Stat. 96 ("That it be recommended to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of their gaols, to receive and safe keep therein all prisoners committed under the authority of the United States . . . ."); *Printz v. United States*, 521 U.S. 898, 909 (1997) ("Significantly, the [1789] law issued not a command to the States' executive, but a recommendation to their legislatures.").

[15] *See also, e.g.*, *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 168-69 (2009) (discussing statute containing many such expressions, acknowledgements, apologies, etc., including one that "urges the President [to] acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the Native Hawaiian people").

provisions of the original ACA itself have no operative legal effect,[16] and Respondents rest their case for inseverability almost entirely on an ACA "finding." *See* Texas Br. in Opp. 30-31 (discussing 42 U.S.C. § 18091(2)(I).)

* * *

Because Congress may enact a statute that offers individuals a choice between two options, one of which Congress could properly enact on its own, and because it's clear that is precisely what Congress did in 2017—*i.e.*, afford covered individuals a choice between maintaining minimum coverage and paying $0, rather than "mandating" compliance with the first of those two options—this Court must affirm that understanding of Section 5000A in order to "take care not to undo what [the Legislature] has done." *King*, 135 S. Ct. at 2496. "A fair reading of legislation demands a fair understanding of the legislative plan." *Ibid.*

Indeed, to conclude otherwise would turn the constitutional avoidance canon on its head. Adopting the court of appeals' construction of the amended Section 5000A would not merely raise the sort of "grave and doubtful constitutional questions" this Court has a "duty" to avoid

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[16] The ACA contains, for instance, several "Sense of the Senate" and "Sense of the Congress" provisions expressing certain things that various actors "should," "should not," or "may" do. *E.g.*, Pub. L. No. 111-148, § 1563(b), 124 Stat. 271 (2010); *id.* § 2406, 124 Stat. 306; *id.* § 2952(a)(2), 124 Stat. 344-45; *id.* § 4401(b), 124 Stat. 587; *id.* § 5201(a)(2), 124 Stat. 606 (creating 42 U.S.C. § 292s(d)); *id.* § 5403(a), 124 Stat. 648 (creating 42 U.S.C. § 294a(k)); *id.* § 6801, 124 Stat. 804; *id.* § 7001(b), 124 Stat. 804; *id.* § 7002(f)(2), 124 Stat. 818.

where possible. *Jones v. United States*, 529 U.S. 848, 857 (2000) (internal citation omitted); *see also NFIB*, 567 U.S. at 562 (Opinion of Roberts, C.J.). It would be to accuse the political branches of brazenly enacting a law that a majority of Justices of this Court, and a majority of those who voted for the amendment, believed to be beyond the power of the federal Government to enact.

It is exceedingly unusual, to say the least, for the federal political branches to enact laws in flagrant disregard of this Court's constitutional holdings or judgments. On the rare occasions where they've done so, it has typically been to express profound constitutional disagreement with the Court—such as when the 37th Congress and President Lincoln enacted a law declaring that "there shall be neither slavery nor involuntary servitude in any of the Territories of the United States," Act of June 19, 1862, ch. 111, 12 Stat. 432, as a direct rebuke to this Court's pronouncement in *Dred Scott v. Sandford*, 60 (19 How.) U.S. 393, 432-52 (1857), that Congress lacked authority to do just that.[17]

This is not one of those rare cases.

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[17] *See also United States v. Eichman*, 496 U.S. 310 (1990) (declaring unconstitutional a flag-burning prosecution under the Flag Protection Act of 1989, which Congress enacted in part to "invite[] [the Court] to reconsider," *id.* at 315, its holding in *Texas v. Johnson*, 491 U.S. 397 (1989), that "flag burning as a mode of expression" enjoys "the full protection of the First Amendment").

CONCLUSION

For the foregoing reasons, the Court should reverse the court of appeals' judgment.

Respectfully submitted.

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