Nos. 19-840, 19-1019

In The
Supreme Court of the United States

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

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Petitioners,
v.
CALIFORNIA, ET AL.,
Respondents.

On Writs of Certiorari to the
United States Court of Appeals for the Fifth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF RESPONDENTS IN NO. 19-840 AND IN SUPPORT OF PETITIONERS IN NO. 19-1019

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INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys regularly appear before this Court, federal courts of appeals and other courts as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amici, *e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), addressing a variety of constitutional law issues. The ACLJ is dedicated to the founding principles of a limited federal government and the corollary that individual liberty is secured best when the boundaries established in the Constitution are respected.

The ACLJ was active in litigation concerning the Patient Protection and Affordable Care Act of 2010 ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("ACA"), in particular, with regard to the "individual mandate" provision, 26 U.S.C. § 5000A, which required millions of Americans to purchase and maintain Federal Government-approved health insurance. The ACLJ filed amici curiae briefs in support of the following challenges to the ACA: *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *King v. Burwell*, 135 S. Ct. 2480 (2015); *Virginia v. Sebelius*, 702 F. Supp. 2d

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*Counsel of record for the parties have consented to the filing of this brief. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from Amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

598 (E.D. Va. 2010), and 656 F.3d 253 (4th Cir. 2011); and *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011).

The ACLJ and more than 450,000 of its members file this brief urging affirmance of the Fifth Circuit's decision that the individual mandate is unconstitutional, and reversal of the court's judgment on severability.

SUMMARY OF THE ARGUMENT

The Fifth Circuit correctly held that the individual mandate has been rendered unconstitutional by the Tax Cuts and Jobs Act of 2017. The individual mandate is now untethered from any of Congress's enumerated powers. It no longer functions as a tax because it no longer triggers a tax payment generating revenue for the government. It is a bare command to purchase health insurance and is unconstitutional under Congress's taxing power as well as the Commerce and Necessary and Proper Clauses.

The ACA's text governs the severability issue and it establishes unequivocally that the individual mandate cannot be severed from at least the community rating and guaranteed issue provisions. The 2017 Congress neither repealed the individual mandate, nor rescinded the 2010 Congress's Findings that the individual mandate was essential to the proper functioning of the guaranteed issue and community rating provisions. Because the ACA's text

is clear, it prevails over any inferences that might be drawn from Congress's removal of the tax penalty.

ARGUMENT

I. The Individual Mandate No Longer Functions as a Tax and Cannot Be Sustained as a Constitutional Exercise of Congress's Power to Tax.

In *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012) ("*NFIB*"), five Justices held that the ACA's individual mandate exceeded Congress's power under the Commerce and Necessary and Proper Clauses. *Id.* at 546-61 (Roberts, C.J.); *id.* at 657 (joint dissent of Scalia, Kennedy, Thomas, and Alito, JJ.). The only possible remaining Constitutional authority for the individual mandate was Congress's power to tax. Chief Justice Roberts, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, held that it was "fairly possible," *id.* at 563, to interpret the individual mandate as a tax because the penalty imposed for noncompliance with the individual mandate "looks like a tax in many respects." *Id.* at 566.

The first feature of the penalty ("shared responsibility payment"), 26 U.S.C. § 5000A(b), was that taxpayers paid the penalty to the Treasury when they filed their tax returns. *NFIB*, 567 U.S. at 563. The second key feature was that it was calculated in accordance with "familiar [tax] factors [such] as taxable income, number of dependents, and joint filing status." *Id.* (citing 26 U.S.C. §§ 5000A(b)(3), (c)(2),

(c)(4)). And finally, the Court stated that the penalty "yields the essential feature of any tax: It produces at least some revenue for the Government. Indeed, the payment is expected to raise about $4 billion per year by 2017." *Id.* at 564.

Thus even though the penalty's primary purpose was to induce Americans to purchase health insurance, and not to raise revenue, five Justices held that it could still be upheld as a tax because it functioned as a tax. *Id.* at 567. Chief Justice Roberts cited the example of cigarette taxes which serve the dual purpose of encouraging people to quit smoking as well as raising revenue. *Id.* Because "Congress had the power to impose the exaction in § 5000A under the taxing power, and . . . § 5000A need not be read to do more than impose a tax, [t]hat is sufficient to sustain it." *Id.* at 570.

For five years, the individual mandate generated revenue. For example, in 2015, the Commissioner of the IRS reported that approximately 7.5 million taxpayers paid a total of $1.5 billion in individual shared responsibility payments. Letter from John A. Koskinen, IRS Commissioner, to Members of Congress (July 17, 2015) (on file with the IRS). In December 2017, however, Congress passed the Tax Cuts and Jobs Act of 2017 ("TCJA"), which stripped the individual mandate of its revenue-generating feature. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11081(b), 131 Stat. 2054, 2092 (2017). Specifically, section 11081, which is entitled "elimination of shared responsibility payment for individuals failing to maintain minimum essential coverage," removed the penalty for noncompliance

with the individual mandate, effective December 31, 2018. The statute provides:

Section 5000A(c) is amended -

(1) in paragraph (2)(B)(iii), by striking "2.5 percent" and inserting "Zero percent", and

(2) in paragraph (3) -

(A) by striking "$ 695" in subparagraph (A) and inserting "$ 0", and

(B) by striking subparagraph (D).

All three features that supported the *NFIB* Court's "saving construction," of the individual mandate as a tax, *NFIB*, 567 U.S. at 575, are now effectively nonexistent. For the past two years, Americans were no longer required to make the shared responsibility payment with their income tax returns and were therefore not responsible for calculating their payment in accordance with such "familiar factors as taxable income, number of dependents, and joint filing status." *Id.* at 563. Because no payments have been made, no revenue will be generated.

In passing the TCJA provision which reduced to zero the shared responsibility payment, Congress eliminated the *NFIB* majority opinion's rationale for upholding §5000A as a tax. Section 5000A is now a bare "command" to Americans to purchase health insurance. *See id*. at 562 ("[T]he most straightforward reading of the mandate . . . commands individuals to purchase insurance").

Section 5000A(a) provides that "an applicable individual *shall* for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month."

26 U.S.C. § 5000A (emphasis added). The use of the word "shall" connotes a mandatory requirement. *E.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007). And because the mandatory requirement no longer triggers a tax payment generating revenue for the government, the individual mandate is unmoored from any of Congress's enumerated powers. It is unconstitutional under the Commerce and Necessary and Proper Clauses, *NFIB,* 576 U.S. at 561, and it is now unconstitutional under Congress's taxing power.

II. The Individual Mandate Cannot Be Severed From the Guaranteed Issue and Community Rating Provisions.

On the severability issue, the most textually defensible conclusion is that the individual mandate cannot be severed from the guaranteed issue [1] and community rating [2] provisions. "The inquiry into whether a statute is severable is essentially an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999). "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently."

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[1] The "guaranteed-issue" provisions bar insurance companies from denying coverage because of an individual's medical condition or history. *See* 42 U.S.C. §§ 300gg-1, -3, -4(a).

[2] The "community-rating" provisions bar insurance companies from charging higher premiums because of an individual's risk profile, including medical condition or history. *See* 42 U.S.C. §§ 300gg(a)(1), 4(b).

Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987). A court must ask "whether [after removing the invalid provision] the [remaining] statute will function in a manner consistent with the intent of Congress." *Id*. at 685 (original emphasis omitted). If severing an unconstitutional provision would result in an inoperable or counterproductive regulatory scheme, the Court must conclude that the offending provision is not severable. *Id. at* 684; *accord Free Enter. Fund. v. Pub. Co. Accounting Oversight Bd*., 561 U.S. 477, 508 (2010).

The clearest expression of Congress's intent on the severability question is reflected in the ACA's text. *See Holder v. Hall*, 512 U.S. 874, 933 (1994) (stating that statutory text is "authoritative source" of Congress's intent). The 2010 Congress included Findings, codified in 42 U.S.C. §§ 18091(2)(H)-(J), which unequivocally set forth the essential role of the individual mandate in the ACA's complex statutory scheme.

The 2017 Congress did not amend or rescind those Findings, nor did it express a contrary view about the inextricable link between the individual mandate and other ACA provisions. The 2017 Congress merely zeroed out the tax penalty. 26 U.S.C. § 5000A(c). Because Congress's intent with respect to severability was clearly expressed in statutory text adopted in 2010, and Congress's intent in 2017 may only be guessed, the ACA's text should guide the Court's severability analysis. "Given the clarity of the text, we

need not consider such extra-textual evidence." *Trump v. Hawaii*, 138 S. Ct. 2392, 2412 (2018).

Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). The 2010 Congress could not have been clearer that the individual mandate was a fundamental detail in the ACA's statutory scheme. The individual mandate is "essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." 42 U.S.C. § 18091(2)(I); *see also* 42 U.S.C. § 18091(2)(J) ("The [individual mandate] requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.").

The severability issue was vigorously litigated in several cases challenging the constitutionality of the individual mandate. From the beginning, the government consistently conceded that the guaranteed-issue and community-rating provisions in particular were not severable from the individual mandate. For example, in *Mead v. Holder*, the Government asserted that the individual mandate is essential to the workings of the ACA's reforms to the health insurance and health care markets. Memo. in Support of Defs' Motion to Dismiss, *Mead v. Holder*, No. 1:10-CV-950-GK (D.D.C.), Doc. 15-1 at 22 (filed on Aug. 20, 2010) (available on PACER) (emphasis added).

Specifically, the government argued that 1) Congress found that the individual mandate "not only

is adapted to, but is 'essential' to, achieving key reforms of the interstate health care and health insurance markets," *id.* at 24 (emphasis added); 2) "Congress determined, also with substantial reason, that [the individual mandate] provision was essential to its comprehensive scheme of reform. Congress acted well within its authority to integrate the provision into the interrelated revenue and spending provisions of the Act." *Id.* at 31. *See also* Memo. in Support of Defs' Motion for Summary Judgment, *Virginia v. Sebelius*, No. 3:10-CV-188-HEH (E.D. Va.), Doc. 91 at 26 (filed on Sept. 3, 2010) (available on PACER) (quoting 42 U.S.C. § 18091(2)(H)).

Based on these statements, at least two lower federal courts held that the individual mandate could not be severed from other ACA provisions. *See, e.g., Florida v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1299-1305 (N.D. Fla. 2011) (holding entire ACA invalid); *Goudy-Bachman v. United States Dep't of Health & Human Servs.*, 811 F. Supp. 2d 1086, 1110 (M.D. Pa. 2011) (explaining that the government conceded that the guaranteed issue and preexisting conditions provisions are "'absolutely intertwined'" with the individual mandate and "must be severed should the individual mandate provision be severed").

The government made similar statements before this Court,[3] and in two separate decisions, this Court acknowledged that the individual mandate, guaranteed issue and community rating provisions

[3] *See, e.g.*, Reply Br. for Fed. Gov't on Severability at 10, *Nat'l Fed'n of Indep. Bus v. Sebelius*, 567 U.S. 519 (2012) (conceding that the Findings indicate Congress's intent on severability).

functioned as interdependent provisions. *See King v. Burwell*, 135 S. Ct. 2480, 2487 (2015) (noting "[t]hese three reforms are closely intertwined" and that "Congress found that the guaranteed issue and community rating requirements would not work without the coverage requirement"). *NFIB*, 567 U.S. at 548 (opinion of Roberts, C.J.) (stating that the individual mandate solved the problem created by the community rating and guaranteed issue provisions preventing "cost-shifting by those who would otherwise go without [health insurance]. In addition, the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept."); *see also id.* at 597 (Ginsburg, J., concurring in part, and dissenting in part) (stating that "imposition of community-rated premiums and guaranteed issue on a market of competing private health insurers will inexorably drive that market into extinction, unless these two features are coupled with . . . a mandate on individual[s] to be insured") (citations omitted).

The joint dissent in *NFIB* would have held the entire ACA invalid because the individual mandate was an essential feature of the ACA's design of "shared responsibility," and its absence [along with the absence of the Medicare expansion] "would pose a threat to the Nation that Congress did not intend." *Id.* at 698 (joint dissent).

The 2017 Congress must be presumed to have been aware of "relevant judicial precedent when it enacted"

the TCJA. *See Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020). Congress must be presumed further aware that both this Court and lower courts accepted Congress's statements about the inextricable link between the individual mandate, the community rating provisions and the guaranteed issue provisions. With that knowledge, the 2017 Congress could not rationally have believed that by zeroing out the tax penalty, it was silently altering the ACA's fundamental statutory scheme as understood by this Court.

The 2017 Congress said nothing about the core importance of the individual mandate. It repealed neither the individual mandate, nor the ACA Findings which explained the centrality of the individual mandate. In short, Congress did not hide the elephant of a dramatic structural change to the ACA in the mouse hole of the TCJA. *See Whitman,* 531 U.S. at 468. The only statutory text that directly bears on the question of severability is the ACA Findings codified in 42 U.S.C. § 18091(2) (H) – (J). Those findings reflect Congress's intent that the individual mandate is essential to proper functioning of the guaranteed issue and community rating provisions, and is not severable from them. *See Alaska Airlines*, 480 U.S. at 684.

CONCLUSION

Amicus respectfully requests that this Court affirm in part and reverse in part the judgment of the Fifth Circuit.

Respectfully submitted,

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July 2, 2020