Nos. 19-840 and 19-1019

In The Supreme Court of the United States

STATE OF CALIFORNIA, ET AL.,

Petitioners,

v.

STATE OF TEXAS, ET AL.,

Respondents.

STATE OF TEXAS, ET AL.,

Petitioners,

v.

STATE OF CALIFORNIA, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF FEDERAL RESPONDENTS IN 19-840 AND PETITIONERS IN 19-1019

MATTHEW C. FORYS
Counsel of Record
MICHAEL J. O'NEILL
LANDMARK LEGAL FOUNDATION
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176
703-554-6100
703-554-6119 (Facsimile)
matt@landmarklegal.org

RICHARD P. HUTCHISON
LANDMARK LEGAL FOUNDATION
3100 Broadway
Suite 1210
Kansas City, MO 64111
816-931-5559

Attorneys for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution and individual rights. Specializing in Constitutional history and litigation, Landmark presents herein a unique perspective concerning the legal issues of the lower courts' decisions striking down the individual mandate and its penalty provision.

Unique among those briefing in the Court's earlier consideration of the Patient Protection and Affordable Care Act, Landmark argued that the individual mandate's penalty provision failed to satisfy every test for a tax permitted by the Constitution under the Apportionment Clause as well as the taxing power of Article I, Section 8, and the 16th Amendment. The Court concluded otherwise in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). However, the law as amended continues to menace principles of individual liberty, state sovereignty and federalism. Indeed, the limits on the federal government's power to compel

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[1] The parties have provided blanket consent for the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

citizens to engage in commerce is the fundamental question before this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress's effort to regulate healthcare through the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), violated the Commerce Clause. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (opinion of Roberts, C.J.) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). It attempted to compel people to enter commerce by issuing an "individual mandate" to obtain health insurance coverage and requiring payment of a penalty or "shared responsibility payment" from those who did not in 26 U.S.C. § 5000A. *NFIB*, 567 U.S. at 557-58. The Court found that forcing people to engage in commerce was too far beyond even the most expansive readings of the Commerce Clause, such as those found in *Wickard v. Fillburn*, 317 U.S. 111 (1942). Nor could the provision be justified under the Necessary and Proper Clause. *NFIB*, 567 U.S. at 561 (Roberts, C.J.); *id.* at 654-55 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

Although by the plain meaning of its terms a regulatory penalty, the Court used a saving construction to read the penalty as a proper exercise of Congress's taxing Power, art. I, § 8, cl. 1. The Court created a functional test to distinguish a tax from a penalty. Yet this

test is just as troublesome as the functional test used in *Wickard*. By permitting regulatory penalties to be viewed as taxes, Congress's power was expanded beyond the confines of the Commerce Clause. With little analysis, the Court also wrongly dismissed the argument that the shared responsibility payment, if it were a tax, was a direct tax requiring apportionment under art. I, § 9, cl. 4. The individual mandate and shared responsibility payment thus sat on a shaky foundation.

Congress amended the ACA through the Tax Cuts and Jobs Act ("TCJA"), Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017), by setting the "shared responsibility payment" amount to the "lesser" of "zero percent" of an individual's household income or "$0." See 26 U.S.C. § 5000A(c). With the shared responsibility payment at zero, even the dubious justification for the provision under the taxing power is removed. The individual mandate to purchase health insurance can no longer be read as anything but an expression of its plain meaning: a statutory command to purchase health insurance that violates the Commerce Clause.

ARGUMENT

I. The Individual Mandate is not a Proper Exercise of the Taxing Power.

The ACA's individual mandate requires Americans to obtain health insurance coverage. 26 U.S.C. § 5000A(a). It commands 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." *Id*. (emphasis added). The individual mandate works in conjunction with a penalty or "shared responsibility payment." 26 U.S.C. § 5000A(b). This penalty was amended by Congress in the Tax Cuts and Jobs Act ("TCJA"), Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017), to the "lesser" of "zero percent" of an individual's household income or "$0." 26 U.S.C. § 5000A(c).

Prior to the amendment's effective removal of the tax penalty, the individual mandate's constitutionality was addressed by a divided Court in a fractured opinion in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (*NFIB*). With the support of four dissenting justices, the Chief Justice determined in Part III A. that the individual mandate was not a valid exercise of congressional power under the Commerce Clause or the Necessary and Proper Clause. *Id*. at 547-51. The power to regulate interstate commerce does not include the power to compel commerce, they reasoned. *Id*. at 555.

In Parts II and III C., Chief Justice Roberts wrote the opinion of the Court to address the nature of the shared responsibility payment: either regulatory penalty or tax. The Court attempted to square the circle, holding: 1) Congress did not intend the payment to be a tax for purposes of the Anti-Injunction Act since Congress described it as a penalty and not a tax; and 2) The payment, when analyzed under a functional test,

could be upheld under the taxing power for constitutional purposes as a tax, not a penalty.

Writing only for himself in III B., the Chief Justice stated, "The most straightforward reading of the mandate is that it commands individuals to purchase insurance. After all, it states that individuals 'shall' maintain health insurance." 26 U.S.C. §5000A(a). *NFIB*, 567 U.S. at 562. He raised the canon of constitutional avoidance – the requirement when choosing between two possible interpretations to use the valid interpretation over the unconstitutional one. Thus, a saving construction was applied to the individual mandate. Rather than read the individual mandate as a command to buy insurance, which was impermissible under the Commerce Clause, he suggested an alternative reading was "reasonable": it was a tax on those without insurance. In other words, *the condition of not owning health insurance* triggers the tax. In this way, "it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income." *NFIB*, 567 U.S. at 563. The tax examples he raised, however, were inapposite. They were taxes on activity, not inactivity.

In part III C., the Court began its analysis of the individual mandate under the taxing power. It noted that "it looks like a tax in many respects" and detailed how it is paid by taxpayers; calculated by familiar factors like taxable income, number of dependents, and filing status; located in the Internal Revenue Code; and enforced by the IRS. *Id*. at 563. "This process yields the essential feature of any tax: It produces at least some

revenue for the Government." *Id*. at 564. The Court proceeded to use a "functional approach" to determine its true nature. Relying heavily on *Child Labor Tax Case*, 259 U.S. 20 (1922) (*Drexel Furniture)*, the Court noted that the payment is not so prohibitively high that there is no choice but to buy health insurance; the payment has no scienter requirement; and the IRS collects the payment through the normal means of taxation. *NFIB*, 567 U.S. at 565-66. Thus, these factors "support the conclusion that what is called a 'penalty' here may be viewed as a tax." *Id*. at 566.

This saving construction of the individual mandate as a tax is no longer viable after the TCNJ's amendment of the ACA. The reason is simple. The shared responsibility payment now requires no payment. It produces no revenue for the Government. By the Chief Justice's formulation, it does not have "the essential feature of any tax." What was once a "possible" interpretation of the individual mandate cannot be sustained. Instead, the proper interpretation of the individual mandate is to use its "most straightforward reading." It commands individuals to purchase insurance, in violation of the Commerce Clause.

II. *NFIB* Wrongly Applied the Saving Construction to the Individual Mandate.

Despite TCNJ's removal of any continued justification for treating the individual mandate as a tax, the House and the intervenor States nevertheless want to prop up the saving construction. The intervenor States

argue that the individual mandate can "still be upheld as a lawful exercise of Congress's taxing powers, albeit one whose practical application is currently suspended." Intervenor States Br. 32. Despite the amendment of the tax to zero, they argue that it retains some of the factors used in *NFIB* to construe it as a tax, such as the elements in the statutory formula for calculating the payment. *Id*. at 33. Furthermore, they argue it is similar to taxes that yield little or no revenue. *Id.* at 32-34. The House similarly contends that the individual mandate "retains the architecture of the tax upheld in *NFIB*," so that it should be upheld under the Necessary and Proper Clause. House Br. 37; see Intervenor States Br. 33. These arguments to retain the saving construction suggest *not taxing people* is somehow an exercise of the taxing power and should be given little weight.

Nonetheless, these attempts to maintain the savings construction force renewed scrutiny of the extreme lengths taken in *NFIB* to interpret the mandate as a tax. The canon of constitutional avoidance was used to spare the individual mandate from its Commerce Clause issues. But the canon is one of many and is not absolute. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 59-62 (2012). Furthermore, it "is qualified by the proposition that 'avoidance of a difficulty will not be pressed to the point of disingenuous evasion.'" *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (citing *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)). The simple fact is that Congress passed a regulatory penalty, not a tax, that exceeded its powers under the Commerce Clause.

The word "penalty" was used eighteen times within § 5000A. Two subheadings used the word penalty: Payment of penalty, Amount of penalty. 26 U.S.C. § 5000A(b)(3); 26 U.S.C. § 5000A(c). The plain meaning of the text was ignored. As the four dissenting Justices wrote, "there is simply no way, 'without doing violence to the fair meaning of the words used,' . . . to escape what Congress enacted: a mandate that individuals maintain minimum essential coverage, enforced by a penalty." *NFIB*, 567 U.S. at 662 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (internal citations omitted).

NFIB's analysis moved between form and function. It found that the payment was not a tax for purposes of the Anti-Injunction Act since Congress described it as a penalty and not a tax, but later found that it was a tax and not a penalty for constitutional purposes using a functional test. But *Drexel Furniture*, 259 U.S. 20 (1922), the template for the test, was an extreme example of Congress attempting to regulate business activity through taxation that bordered on criminal punishment. In *Drexel Furniture*, if the business owner employed certain categories of child labor, he had "to pay to the Government one-tenth of his entire net income in the business for a full year." *Id*. at 36. This amount was not to be proportioned by any extent or frequency of the regulation, and would still be due "whether he employs five hundred children for a year, or employs only one for a day." *Id*. Furthermore, there was a scienter element. If the business owner did not know the child was underage, he would not be required to pay. *Id*. at 37.

Writing for the Court, Chief Justice Taft considered the difficulty of defining the difference between a tax and penalty against the restrictions of the Commerce Clause. "Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous." *Id*. at 38. The incidental motive does not remove their character as taxes, however, he wrote. "But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us." *Id.* In *Drexel Furniture*, a severely confiscatory penalty, one bordering on criminal punishment, was masquerading as a tax. Thus, *NFIB* used the facts of an extreme example to draw the line between tax and penalty and devise its functional test. It is little wonder that the individual mandate did not meet *Drexel Furniture's* example of a penalty.

The future effects of the *NFIB's* functional test may be similar to *Wickard v. Fillburn*, 317 U.S. 111 (1942). The Court expanded the reach of congressional power in *Wickard* through economic analysis of regulation. An individual wheat farmer's consumption of his own wheat could be regulated under the Commerce Clause. Wholly intrastate, non-commercial activity when viewed in the aggregate has a substantial effect on interstate commerce, the Court reasoned. 317 U.S. at 127-29. As Judge Robert Bork noted, this was

"[s]ound economics without doubt, but it meant that the most trivial and local activities could be regulated." Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 56 (1990).

The "functional approach" used in *NFIB* to describe the shared responsibility payment as a tax may produce similar results. It may allow Congress to bypass the restrictions of the Commerce Clause on government regulation. Indeed, "the decision highlights the potential for the tax law to swallow all government policy." Linda Sugin, *The Great and Mighty Tax Law: How the Roberts Court has Reduced Constitutional Scrutiny of Taxes and Tax Expenditures*, 78 Brooklyn L. Rev. 777, 779 (Spring 2013). Professor Sugin notes that the problem inherent to finding the boundary between tax and penalty is that they are "functional economic equivalents." *Id*. at 786. Ultimately, she argues that boundary "depends on whether there is a legal duty underlying the exaction. Penalties are imposed for failure to comply with legal obligations, but taxes are imposed even on fully law-abiding citizens." *Id.* Using the broccoli example in *NFIB's* discussion of the Commerce Clause, it is easy to envision how a future Congress could obligate people to buy broccoli by creating a tax on those who don't buy broccoli. *NFIB*, 567 U.S. at 557-58.

NFIB also blurred the lines between types of taxes. The Chief Justice proposed that the condition of not owning health insurance triggers the tax. In this way, "it makes going without insurance just another thing the Government taxes, like buying gasoline or

earning income." *NFIB*, 567 U.S. at 563. These examples of taxes are unlike an exaction imposed on someone *for not buying insurance*. Purchasing goods or services and realizing gains from income are the common subjects of excise and income taxes, but refraining from purchasing goods and earning no money are not. Excise taxes require some sort of action or activity on the part of the individual to be assessed. According to Professor Steven J. Willis and Mr. Nakku Chung, "[an excise tax] involves something an obligor chose to do: purchase a product or service, use a product or service, transfer property, or conduct commercial activity." Steven J. Willis and Nakku Chung, *Constitutional Decapitation and Healthcare*, 2010 TNT 133-6, July 13, 2010.

The individual mandate is not an income tax as well. The 16th Amendment authorizes taxation upon income without apportionment. "The Congress has the power to lay and collect taxes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. Amend. XVI. Admittedly, this vests Congress with broad authority to determine what constitutes "income." However, this power is not absolute. In order to be qualified as "income," an individual or entity must realize a gain. There is no realization event and there is no derived income when a taxpayer declines to purchase health insurance. The individual taxpayer has not taken any affirmative action to realize any gain. The individual's economic situation may improve as a result of electing not to purchase health

insurance, but there is no realization event and hence no quantifiable income.

Moreover, the penalty provision's floor and ceiling components in § 5000A(c) further establish it is not an income tax. Certain individuals who elect not to purchase health insurance will either pay the flat dollar amount or their income will be such that they pay the amount capped by the cost of bronze level coverage. *Id*. In many instances, the tax will not be indexed to income but will be a predetermined flat rate. Professor Erik M. Jensen noted: "Uninsured persons with incomes of $500,000, $1 million, $10 million, $100 million, and $1 billion will have to pay exactly the same penalty – the cost of bronze level coverage. If that is a 'tax on incomes,' I will eat my insurance card." Erik M. Jensen, *The Individual Mandate and the Taxing Power*, Case Research Paper Series in Legal Studies, Working Paper 2010-33, September 2010.

Neither excise nor income tax, the shared responsibility payment of the individual mandate is best understood as a direct tax, not an indirect tax such as an excise tax. Indeed, Federalist No. 36 described indirect taxes as "duties and excises on articles of consumption." Direct taxes, in contrast to indirect taxes, must be apportioned according to population. U.S. const. art. I, § 9, cl. 4. (There is now no need to apportion a tax set to zero, of course.) In *NFIB*, the Court contended that a "tax on going without health insurance" does not fit in any recognized category of direct tax." *Id*. at 571. Furthermore, the Court continued, it is not a tax on land or personal property or a capitation because

capitations "are taxes paid by every person, 'without regard to property, profession, or any other circumstance.'" *Id*. (citing *Hylton v. United States*, 3 U.S. 171, 175 (1796) (opinion of Chase, J.)). The Court continued that: "The whole point of the shared responsibility payment is that it is triggered by specific circumstances – earning a certain amount of income but not obtaining health insurance." *NFIB*, 567 U.S. at 571.

This does not comport with Professor Robert G. Natelson's review of founding era tax law and documents that inform the original understanding of direct taxes. "Poll taxes, also called head taxes or capitations, existed in all of the New England states and in most other states as well. They were levied both on free persons and slaves." Robert G. Natelson, *What the Constitution Means by "Duties, Imposts, and Excises" – and "Taxes" (Direct or Otherwise)*, 66 Case W. Res. L. Rev. 297, 316 (2015). However, "[l]aws imposing capitations did not necessarily require the same payment from everyone. Rates often were adjusted according to the taxpayer's circumstances," similar to how Britain's present-day "council taxes" are graduated. *Id.* He continued that "American legislatures could, and often did, reduce or eliminate the poll tax due from the poor. American legislatures also granted complete or partial exemptions to persons who lived in particular places, who had reached (or not reached) a stated age, who were married, or who pursued particular occupations." *Id*. at 316-18.

In short, *NFIB's* saving construction of the individual mandate was improper. It ignored the plain

meaning of the text of the ACA to describe it as a tax and failed to recognize the constitutional ramifications of treating it as a tax, such as requiring apportionment among the States.

CONCLUSION

For these reasons, Landmark Legal Foundation respectfully urges this Court to affirm the judgment of the court of appeals insofar as it held that the individual mandate is unconstitutional. This case should then be remanded for consideration of the scope of appropriate relief redressing plaintiffs' injuries.

Respectfully submitted,

MATTHEW C. FORYS
Counsel of Record
MICHAEL J. O'NEILL
LANDMARK LEGAL FOUNDATION
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176
703-554-6100
703-554-6119 (Facsimile)
matt@landmarklegal.org

RICHARD P. HUTCHISON
LANDMARK LEGAL FOUNDATION
3100 Broadway
Suite 1210
Kansas City, MO 64111
816-931-5559

Attorneys for Amicus Curiae