No. 19-____

IN THE

Supreme Court of the United States

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

v.

STATE OF TEXAS, ET AL.,
Respondents,

and

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519 (2012), this Court upheld 26 U.S.C. 5000A, a provision of the Affordable Care Act, as a valid exercise of Congress's taxing power because the provision offered individuals a lawful choice between purchasing insurance and paying a tax, known as a "shared responsibility payment." In December 2017, Congress eliminated the Act's monetary incentive to purchase insurance by reducing the shared responsibility payment to zero, such that Section 5000A now offers individuals a choice between purchasing insurance and paying a tax of $0. In this case, the court of appeals held that Section 5000A, as amended, exceeds Congress's constitutional authority and that the Act's thousands of other provisions may be invalid as a result.

The questions presented are:

1. Whether the individual and state plaintiffs (respondents here) possess Article III standing to challenge the constitutionality of Section 5000A.

2. Whether Section 5000A, as amended, exceeds Congress's constitutional authority.

3. Whether, if Section 5000A is invalid, the provision is severable from the remainder of the Act.

PARTIES TO THE PROCEEDING

Petitioner the United States House of Representatives was an intervenor-appellant in the court of appeals.

Respondents State of California, State of Connecticut, State of Delaware, District of Columbia, State of Hawaii, State of Illinois, Commonwealth of Kentucky, *ex rel.* Andy Beshear, Governor, Commonwealth of Massachusetts, State of Minnesota (by and through its Department of Commerce), State of New Jersey, State of New York, State of North Carolina, State of Oregon, State of Rhode Island, State of Vermont, Commonwealth of Virginia, and State of Washington were intervenor-defendants in the district court and intervenor-appellants in the court of appeals. Respondents State of Colorado, State of Iowa, State of Michigan, and State of Nevada were intervenor-appellants in the court of appeals.

Respondents United States of America, United States Department of Health and Human Services, Alex Azar, II, Secretary of the U.S. Department of Health and Human Services, United States Department of Internal Revenue, and Charles P. Rettig, in his official capacity as Commissioner of Internal Revenue were defendants in the district court and appellants in the court of appeals.

Respondents State of Texas, State of Alabama, State of Arizona, State of Arkansas, State of Florida, State of Georgia, State of Indiana, State of Kansas, State of Louisiana, State of Mississippi, by and through Governor Phil Bryant, State of Missouri, State of Nebraska, State of North Dakota, State of South Carolina, State of South Dakota, State of Tennessee, State of Utah, State of West Virginia, Neill

Hurley, and John Nantz were plaintiffs in the district court and appellees in the court of appeals.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

Texas, et al. v. *United States, et al.*, No. 19-10011, U.S. Court of Appeals for the Fifth Circuit. Judgment entered Dec. 18, 2019.

Texas, et al. v. *United States, et al.*, No. 4:18-cv-167-O, U.S. District Court for the Northern District of Texas. Judgment entered December 30, 2018.

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Petitioner the U.S. House of Representatives (House) respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The slip opinion of the court of appeals, Pet. App. 1a-111a, is available at 2019 WL 6888446. The memorandum opinion and order of the district court granting respondents' claim for declaratory relief, Pet. App. 115a-185a, is reported at 340 F. Supp. 3d 579. The memorandum opinion and order of the district court staying its ruling and entering partial final judgment, Pet. App. 186a-232a, is reported at 352 F. Supp. 3d 665.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2019. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions are reproduced in the appendix to this petition. Pet. App. 237a-265a.

INTRODUCTION

In the decade since it was enacted, the Affordable Care Act (ACA or Act) has become a fixture of the American health-care system. The Act reformed the individual health insurance market to bar discrimination against persons with preexisting conditions and to provide affordable subsidized insurance to millions of people who could not previously obtain it. The Act also expanded Medicaid to cover millions more Americans. It reshaped the Medicare program in important ways

to control costs and provide additional benefits to senior citizens. And it reformed the nation's health-care system in myriad additional ways.

Although the ACA has continued to be the subject of policy debate, this Court has definitively held that the Act's health insurance reforms are constitutional, *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519 (2012) (*NFIB*), and that the federal government is implementing those reforms in a lawful manner, *King* v. *Burwell*, 135 S. Ct. 2480 (2015). In both of those landmark decisions, this Court stressed that the authority to determine the nation's health-care policy lies with the democratically accountable branches of government, not the courts. Years of effort and billions of dollars have been invested by private and government actors alike to reshape our health-care system in reliance on those decisions.

The present case represents yet another effort by litigants who disagree with the policy judgments embodied in the ACA to use the courts, rather than the democratic process, to undo the work of the people's elected representatives. In 2017, Congress voted down legislation that would have repealed the ACA. Instead, Congress amended a single provision of the law—Section 5000A—to reduce to zero the tax payment previously imposed on persons who failed to maintain health insurance coverage. Seizing upon that single change, a group of States and two private individuals sued, alleging that the amended Section 5000A was no longer constitutional, that the provision was inseverable from the rest of the Act, and that, consequently, the entire ACA had to be treated as though it had been deleted from the U.S. Code. The plaintiffs claimed, in other words, that in the 2017 amendment

Congress had done the very thing it voted not to do when it refused to repeal the ACA earlier that year.

In a remarkable decision that the dissent below correctly described as "textbook judicial overreach," Pet. App. 111a, a divided panel of the Fifth Circuit upheld the plaintiffs' constitutional claims. Disregarding bedrock Article III standing limitations that exist for the very purpose of preventing federal courts from using abstract legal disputes to intervene in substantive policy debates that are properly resolved by the democratically accountable branches, the court of appeals held that the plaintiff States had standing to challenge Section 5000A even though it does not even arguably apply to them. The court likewise held that the individual plaintiffs had standing even though their alleged injury arose from their voluntary choice to purchase insurance, and they would not (indeed could not) have suffered any injury had they chosen not to do so. The court then held that the 2017 amendment to Section 5000A erased any obligation to adhere to *NFIB*'s definitive construction of the provision as a lawful choice between maintaining insurance or paying a tax, and the court treated the amended provision as an unconstitutional command to purchase insurance.

Having issued a ruling that threatens profound destabilization of the health-care system—at the behest of plaintiffs who suffered no injury—the court of appeals then took the remarkable step of refusing to decide whether Section 5000A was severable from the remainder of the ACA. It did so even though severability is a pure question of law that was fully briefed and argued below, and that has a straightforward answer. If Section 5000A is no longer operative, the 2017 Congress could not have been clearer that it intended the

remainder of the ACA to continue to operate in the manner it had been operating before the amendment.

By abdicating the responsibility to address severability and instead remanding the case for interminable (and unnecessary) provision-by-provision trench warfare in the district court, the Fifth Circuit has created an intolerable situation. Paralyzing uncertainty now hangs over the ACA. Millions of Americans who rely on it for health coverage will not be able to make important life decisions about what jobs to take or where to live secure in the knowledge that those choices will not deprive them and their families of affordable health insurance. Insurance companies will not know whether they should continue to invest in providing insurance on ACA exchanges, and at a minimum will have to raise insurance rates to account for the risks of market upheaval if the ACA is struck down. States must live with, and plan for, the possibility that they will lose billions of dollars in Medicaid subsidies and that the individual insurance markets in their states will be thrown into chaos if the ACA is entirely invalidated. The debilitating effects of this massive uncertainty will persist for years if the Court does not grant review now.

It is thus imperative that this Court grant certiorari promptly to resolve the vitally important questions presented in this petition.

STATEMENT

1. a. Congress enacted the ACA in 2010. Pub. L. No. 111-148, 124 Stat. 119 (2010). At the time, over 45 million Americans had no health insurance. Among many other changes, the ACA barred insurers from denying coverage to individuals with preexisting conditions or from charging higher premiums because of

a medical condition, 42 U.S.C. 300gg *et seq*.; created "exchanges" where individuals who do not obtain coverage through an employer can shop online for insurance, 42 U.S.C. 18031(b)(1); provided generous subsidies to defray the cost of that insurance, 26 U.S.C. 36B; altered the rules governing employer-provided coverage, *e.g.*, 26 U.S.C. 4980H(a); and expanded Medicaid to cover millions of additional Americans, 42 U.S.C. 1396a(a)(10)(A)(i)(VIII).

One of the ACA's original provisions, 26 U.S.C. 5000A, amended the Internal Revenue Code to create an incentive for individuals to purchase insurance in order to increase the likelihood that the newly reformed individual insurance market would develop in an economically sustainable manner. Subsection (a)—sometimes known as the "individual mandate"—stated that certain individuals "shall * * * ensure" that they and their dependents are "covered under minimum essential coverage." Subsection (b) provided that if those individuals do not obtain such coverage they must make a "[s]hared responsibility payment" as part of their tax return. Subsection (c) set the amount of that payment.[1]

b. In *NFIB*, this Court upheld the constitutionality of Section 5000A. Applying constitutional avoidance principles, the Court construed Section 5000A to establish a choice between two lawful alternatives. The Court explained that "[n]either the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS"—and that payment therefore "merely imposes a

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[1] The Act exempted some categories of people from Subsection (a) and others from Subsection (b). 26 U.S.C. 5000A(d)-(e).

tax citizens may lawfully choose to pay in lieu of buying health insurance." 567 U.S. at 568; see *id.* at 567-568 (the ACA did not "declare that failing to" purchase insurance "is unlawful"). Based on that construction, the Court concluded that Congress possessed authority under the Taxing Clause to enact the provision. *Id.* at 563-575.

2. Subsequently, the ACA's reforms continued to be the subject of a policy debate in Congress and in electoral contests for national office. In the 112th, 113th, and 114th Congresses, the House passed bills that would have repealed the law, defunded it, or blocked its implementation. None of those bills was enacted. In the 115th Congress, both the House and the Senate considered legislation to repeal the Act—but, again, that legislation failed when it was voted down by the Senate. Pet. App. 8a.

Congress instead made a single narrow adjustment to the Act. In December 2017, Congress eliminated the Act's monetary incentive to purchase insurance by reducing the shared responsibility payment in Section 5000A(c) to zero. Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017) (Pet. App. 263a). But Congress deliberately left intact the rest of Section 5000A and the rest of the ACA. Numerous legislators made clear that their support for the 2017 amendment was contingent on their understanding that all other provisions of the Act—particularly its protections for people with preexisting conditions—would remain in force.[2]

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[2] See, *e.g.*, 163 Cong. Rec. S7672 (daily ed. Dec. 1, 2017) (statement of Sen. Patrick J. Toomey); 163 Cong. Rec. S7666 (daily ed. Dec. 1, 2017) (statement of Sen. Timothy E. Scott); 163 Cong. Rec. S7383 (daily ed. Nov. 29, 2017) (statement of Sen. Shelley Moore Capito); *Continuation of the Open Executive Session to Consider*

Before voting on that amendment, Congress received a report from the Congressional Budget Office (CBO) forecasting that markets for individual insurance policies "would continue to be stable in almost all areas of the country throughout the coming decade" if the shared responsibility payment were eliminated. CBO, *Repealing the Individual Health Insurance Mandate: An Updated Estimate* 1 (Nov. 2017) (CBO Report). That prediction has proven correct.[3] And evidence shows that the ACA has—both before and after the 2017 amendment—provided millions of Americans with insurance coverage that was previously unavailable to them, improved many Americans' health, and saved many lives.[4]

3. a. Three months after Congress enacted the 2017 amendment, respondents—a group of States (state respondents) and two individuals (individual respondents)—filed this suit in the Northern District of Texas. Pet. App. 128a-129a. They challenged the amended Section 5000A, claiming that it exceeds Congress's constitutional powers. They also asserted that Section 5000A is inseverable from the remainder of the

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an Original Bill Entitled the "Tax Cuts and Jobs Act" Before the Senate Comm. on Fin., 115th Cong. 286 (Nov. 15, 2017) (statement of Sen. Orrin G. Hatch, Chairman).

[3] See, *e.g.*, Bob Bryan & Zachary Tracer, *The Newest Obamacare Enrollment Numbers Prove the Health Law Is 'Far From Dead,'* Business Insider (Dec. 20, 2018), https://www.businessinsider.com/obamacare-open-enrollment-sign-ups-down-4-after-gop-trump-changes-2018-12.

[4] See, *e.g.*, Amy Goldstein, *With the Affordable Care Act's Future In Doubt, Evidence Grows That It Has Saved Lives*, Washington Post (Sept. 30, 2019), https://www.washingtonpost.com/health/i-would-be-dead-or-i-would-be-financially-ruined/2019/09/29/e697149c-c80e-11e9-be05-f76ac4ec618c_story.html.

ACA such that the entire statute must be invalidated. Pet. App. 129a.

The Department of Justice (DOJ) declined to defend the statute. But DOJ disagreed with respondents' requested relief, arguing to the district court that only the ACA provisions that directly regulate the individual insurance market are inseverable from Section 5000A. Pet. App. 129a. Sixteen States and the District of Columbia (state intervenors) intervened to defend the ACA *in toto*. Pet. App. 129a.

b. The district court (O'Connor, J.) ruled that the individual respondents had standing to challenge Section 5000A and that Section 5000A is unconstitutional. Pet. App. 133a-157a. Those rulings both depended heavily on treating *NFIB*'s interpretation of Section 5000A as no longer valid in the wake of the 2017 amendment. The court stated that the individual respondents have standing because Section 5000A "*requires* them to purchase and maintain certain health insurance coverage." Pet. App. 135a (emphasis added). The court also concluded that Section 5000A exceeds Congress's power because the provision "command[s]" purchase of insurance but no longer imposes any tax for failing to do so. Pet. App. 157a.

The district court then struck down the ACA in its entirety. Looking solely to statements regarding the importance of Section 5000A to the original 2010 enactment of the ACA, the court reached the sweeping conclusion that the entire Act must fall. Pet. App. 158a-184a.

Following a motion for clarification, the district court stayed its ruling and entered a partial final declaratory judgment.[5] Pet. App. 232a-234a.

4. a. The state intervenors appealed. The House moved to intervene as an appellant, and the Fifth Circuit granted that motion, deeming the House a party to the case. Pet. App. 112a-114a.

DOJ changed its position on appeal in significant ways. In its brief, DOJ contended that the district court was correct to rule that Section 5000A could not be severed from any other provision of the ACA, and that the entire Act should therefore be declared unconstitutional. DOJ also argued that total invalidation of the ACA should not "extend[] beyond the plaintiff states"—that is, that operation of the ACA in "the intervenor states" should remain unaltered. U.S. Letter Br. 10 (5th Cir. July 3, 2019); U.S. Br. 26 (5th Cir. May 1, 2019).

b. A divided panel of the Fifth Circuit agreed with the bulk of the district court's analysis.

i. The court of appeals first ruled that all of the respondents had standing to challenge Section 5000A. Pet. App. 19a-38a. The court stated that the individual respondents suffered injury traceable to Section 5000A on the theory that they were "obligated to" purchase health insurance under that provision, notwithstanding that the individual respondents would suffer no consequence if they did not do so. Pet. App. 24a.

[5] The district court entered final judgment on Count I of respondents' complaint (the count that formed the basis for respondents' preliminary-injunction motion). See Pet. App. 233a; Docket No. 40. The other counts of the complaint are similar and seek similar relief. See Docket No. 27 (amended complaint).

And the court concluded that the state respondents suffered injury on the theory that Section 5000A increased the number of state employees enrolled in minimum essential coverage and thereby increased the "cost of printing and processing" tax forms, even though the record contained no evidence of any such increase in enrollments or related costs. Pet. App. 33a.

Turning to the constitutionality of Section 5000A, the Fifth Circuit decided that *NFIB*'s "construction" of Section 5000A "is no longer available" because the "zeroing out of the shared responsibility payment" transformed the provision into a "command." Pet. App. 47a-48a. Based on that premise, the court ruled that Section 5000A was unconstitutional unless it was an exercise of one of Congress's enumerated powers; that Section 5000A was not an exercise of the power to tax because the provision does not generate revenue; and that Section 5000A could not be justified under the Commerce Clause because it "*compels*" individuals "into commerce." Pet. App. 49a.

After declaring Section 5000A unconstitutional, the court of appeals declined to address whether that provision was severable from the rest of the ACA—even though severability is a pure question of law that was fully briefed and argued and was ruled on by the district court. The Fifth Circuit expressed doubt as to whether a court should ever conclude that any portion of any statute is severable from a single unconstitutional provision. Pet. App. 55a-56a. The court also recounted aspersions cast on the ACA as a whole, noting uncritically that "[s]ome opponents of the ACA assert" that a "video" exists proving that "the entire law was enacted as part of a fraud on the American people." Pet. App. 5a n.3 (citation and internal quotation marks omitted).

Rather than decide for itself whether Section 5000A was severable from the rest of the ACA, the court of appeals returned the case to the district court for a more thorough severability analysis—although the majority failed to offer any guidance as to which legal principles to apply. See Pet. App. 68a (district court should use a "finer-toothed comb," although that court could determine "just how fine-toothed that comb should be"); Pet. App. 54a, 58a, 65a-66a (district court should put in more "legwork" and engage in a "meticulous," "careful, granular approach" that involves a "careful parsing of the statutory scheme"). After that analysis is done, the Fifth Circuit stated, "[i]t may still be that none of the ACA is severable from the individual mandate, * * * that all of the ACA is severable from the individual mandate," or that "some of the ACA is severable from the individual mandate, and some is not." Pet. App. 68a-69a.

ii. Judge King dissented. See Pet. App. 111a (characterizing decision as "perpetuat[ing]" the district court's "textbook judicial overreach").

Judge King concluded that none of the respondents had standing to challenge Section 5000A and that the provision is in any event constitutional. As Judge King explained, after the 2017 amendment, Section 5000A "does nothing more than require individuals to pay zero dollars to the IRS if they do not purchase health insurance, which is to say it does nothing at all." Pet. App. 74a. In her view, that "insight * * * should be the end of this case. Nobody has standing to challenge a law that does nothing. When Congress does nothing, no matter the form that nothing takes, it does not exceed its enumerated powers." Pet. App. 74a.

Judge King also expressed strong disagreement with the court's approach to severability. Pet. App. 96a-97a. She reasoned that "severability is a question of law that we review de novo" and that the court of appeals is "just as competent as the district court" to undertake that legal analysis. Pet. App. 96a-97a. And she found "the answer here" to be "quite simple": because in 2017 "Congress removed the coverage requirement's only enforcement mechanism but left the rest of the Affordable Care Act in place," Congress gave the "plain[est]" possible "indication" that it "considered the coverage requirement entirely dispensable and, hence, severable." Pet. App. 72a, 96a.

Judge King concluded that the decision to remand—leaving "no end * * * in sight"—will "prolong the uncertainty this litigation has caused to the future of this indubitably significant statute" and "the concomitant uncertainty over the future of the healthcare sector." Pet. App. 97a, 111a; see Pet. App. 111a (ACA significant to "the welfare of the economy and the American populace at large").

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS EXCEPTIONALLY IMPORTANT QUESTIONS ON WHICH THIS COURT'S REVIEW IS WARRANTED IMMEDIATELY.

A. This Court's review of the Fifth Circuit's decision is manifestly warranted. The court invalidated Section 5000A—an Act of Congress—and indicated that some or all of the ACA's myriad provisions may fall as a result. The ACA is "one of the most consequential laws ever enacted by Congress." *Sissel* v. *U.S. Dep't of Health & Human Servs.*, 799 F.3d 1035, 1049

(D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc); see *United States* v. *Gainey*, 380 U.S. 63, 65 (1965) (recognizing need to review "the exercise of the grave power of annulling an Act of Congress").

Acknowledging the need for certainty as to the lawfulness of the ACA's central insurance and health-care reforms, this Court has twice before acted expeditiously to adjudicate challenges to the Act's key provisions—first on constitutional grounds in *NFIB*, and then on statutory grounds in *King*. Both times this Court upheld the statute's provisions, recognizing that "[i]n a democracy, the power to make the law rests with those chosen by the people," and that this Court "must respect the role of the Legislature, and take care not to undo what it has done." *King*, 135 S. Ct. at 2496; see *NFIB*, 567 U.S. at 588 ("[T]he Court does not express any opinion on the wisdom of the [ACA]. Under the Constitution, that judgment is reserved to the people.").

In the intervening years, the ACA has only become more deeply embedded in the nation's economy and more important to its citizens. The health-care sector comprises nearly one-fifth of the economy, and has adapted itself in myriad ways to the ACA's reforms. Millions of individuals have purchased health coverage for the first time; the markets established by the exchanges are stable and effective; States have expanded their Medicaid programs to accommodate the massive increase in enrollment; Medicare reimbursement systems have been substantially reformed; and States, insurers, and other market actors have invested billions of dollars in reliance on the statute's continued operation. See, *e.g.*, State Defs.' Mot. To Expedite 2-5 (5th Cir. Feb. 1, 2019).

B. There is a pressing need for review now, notwithstanding the Fifth Circuit's remand to the district court. By invalidating Section 5000A and indicating that the ACA's insurance market reforms, or perhaps the entirety of the law, may well fall as a result, the decision below poses a severe, immediate, and ongoing threat to the orderly operation of health-care markets throughout the country, casts considerable doubt over whether millions of individuals will continue to be able to afford vitally important care, and leaves a critical sector of the nation's economy in unacceptable limbo. Unless this Court acts, debilitating uncertainty surrounding the ACA's legal status will persist for several years.

The Fifth Circuit created this intolerable situation by abdicating its responsibility to decide the severability issue that was properly before it. Whatever one concludes about the Fifth Circuit's rulings on standing and the constitutionality of Section 5000A (and they are wrong), that court's refusal to decide severability was indefensible. The task that the court prescribed—to "pars[e] through the over 900 hundred pages of the post-2017 ACA," Pet. App. 65a, and determine each provision's severability using a "finer-toothed" comb, Pet. App. 68a—would be unnecessary if Section 5000A is severable from the remainder of the ACA. That antecedent question was a central focus of the litigation before the Fifth Circuit. It is a pure question of law that can be answered on the basis of the statutory text and structure, the information Congress had before it when it amended Section 5000A in 2017, and Congress's intent in enacting the amendment. See *Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) (severability involves examining whether "the legislature [would] have preferred what

is left of its statute to no statute at all").[6] And the answer is obvious, given what Congress actually legislated: Congress intended that the remainder of the ACA continue to function after the 2017 amendment without any change other than elimination of the tax payment (see pp. 19-20, 29-34, *infra*). There is no principled basis for the Fifth Circuit's refusal to answer that straightforward legal question. And the court made no effort to offer one.[7]

Unless this Court steps in now, the Fifth Circuit's refusal to deal forthrightly with the severability question will produce years of protracted, unnecessary litigation in the lower courts. There is no reasonable prospect that the "finer-toothed" analysis the Fifth Circuit directed, and the second round of appeals that will follow, can be completed until well into 2021, meaning that it will be 2022 at the earliest before the case returns to the Court. And after that litigation, this

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[6] Accordingly, this Court often addresses severability in the first instance, even when lower courts have not done so—including in the cases the Fifth Circuit invoked here. See, *e.g.*, *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1482 (2018); *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 508 (2010); *United States* v. *Booker*, 543 U.S. 220, 245 (2005).

[7] The Fifth Circuit also stated that a remand was warranted with respect to the United States' newly raised argument that relief should be limited to ACA provisions that injure the individual respondents. Pet. App. 70a-71a. That also poses no obstacle to this Court's review. As the dissent noted, the argument is "moot" if the Court concludes that the remainder of the ACA is severable. Pet. App. 97a n.12. And the question is a purely legal one with an obvious answer: the individual respondents have challenged only Section 5000A, and DOJ does not explain why they are injured by "an unenforceable mandate." U.S. Br. 28-29 (5th Cir. May 1, 2019).

Court will still face the same questions of law presented in this petition: whether respondents have standing to challenge Section 5000A, whether the provision is constitutional, and, if not, whether this Court's severability principles dictate that the provision be severed from the remainder of the ACA.

Even more to the point, the lengthy delay that will result from the Fifth Circuit's approach will inflict enduring concrete harms on the health insurance market, individuals, States, and insurers and other businesses. Millions of Americans will once again have to live with the insecurity of not knowing that they have access to affordable health care, and will be forced to make important life decisions without knowing whether those decisions will jeopardize their continued access to such care. That uncertainty will persist through next year's open enrollment period and, in all likelihood, the ones after in 2021 and 2022. Businesses will be unable to accurately plan for the future without knowing how they will approach health insurance for their employees and the amount to budget. Insurers will face continuing uncertainty about how the individual insurance market will operate (and whether subsidies will remain available). That uncertainty will increase the cost of insurance policies sold on the exchanges and may discourage insurers from offering such policies at all. States will not know whether they will continue to receive the billions of dollars in Medicaid and other funding that the ACA provides—uncertainty that could wreak havoc on state budgeting processes. States will also be forced to investigate steps necessary to stabilize their insurance markets in the event of a full or partial invalidation of the ACA. And other businesses, such as pharmaceutical companies that rely on the ACA's new regulatory

regime for biosimilars, House C.A. Reply 27, will have to decide whether to defer massive investments until they know whether the Act will remain in place.

Granting review now is the only way to avoid the damage that will result from the Fifth Circuit's unorthodox and unjustified refusal to decide whether Section 5000A (if it is unconstitutional) is severable from the remainder of the ACA. Pet. App. 97a (King, J., dissenting) ("When it comes to analyzing the statute's text and historical context, we are just as competent as the district court. There is thus no reason to prolong the uncertainty this litigation has caused.").

II. THE DECISION BELOW IS WRONG AND CONFLICTS WITH THIS COURT'S PRECEDENTS.

Each of the questions presented is worthy of this Court's review. The subject matter at issue could hardly be more important. And at every turn the court of appeals failed to heed this Court's admonition in *King*, a case addressing the very same statute, that Article III courts "must respect the role of the Legislature, and take care not to undo what it has done." 135 S. Ct. at 2496. By finding standing in disregard of this Court's precedents, the Fifth Circuit allowed the judicial process to be used to usurp the powers of the political branches to decide what the nation's health-care policy should be. See *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). By refusing to respect this Court's definitive construction of Section 5000A as providing a choice between lawful alternatives, the court of appeals went out of its way to construe that provision in a manner designed to invalidate it rather than to save it from constitutional infirmity. And by

refusing even to decide whether Section 5000A (if unconstitutional) is severable from the remainder of the ACA, the court of appeals again thwarted the obvious intent of the people's representatives, who decided in 2017 that they would not repeal the ACA and that elimination of the shared responsibility payment was the only change they would make to the operation of the ACA. The court of appeals cannot be allowed to have the last word on those questions of exceptional importance.

A. The 2017 amendment did not alter *NFIB*'s authoritative construction of Section 5000A.

Much of the Fifth Circuit's analysis of respondents' standing, and the entirety of its analysis of Section 5000A's constitutionality, rests on an implausible construction of Section 5000A that bears no resemblance to what Congress actually did or how the statute actually operates. In the Fifth Circuit's view, when Congress amended Section 5000A to reduce the shared responsibility payment to zero, it transformed the provision from what this Court definitively construed it to be in *NFIB*—a lawful choice between maintaining insurance or making a shared responsibility payment—into a command to purchase insurance. That construction defies both common sense and the fundamental principle that once this Court has authoritatively construed a statute and adjudicated its constitutionality, Congress is presumed to act in accordance with this Court's construction.

1. In *NFIB*, this Court held that Section 5000A gave individuals a lawful choice between two options: purchasing insurance or making a "shared responsibility payment" to the federal government. 567 U.S. at

574 & n.11. The Court relied on the fact that Section 5000A is structured to provide those alternatives; that Section 5000A imposes no legal consequences for failing to buy insurance apart from the shared responsibility payment; and that Congress anticipated that "four million people each year" would decline to buy insurance. *Id.* at 568. As this Court explained, Congress clearly "did not think it was creating four million outlaws." *Ibid.*

Once this Court adopted that authoritative construction, the construction became "part of the statutory scheme." *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). The question before the court of appeals therefore was whether Congress, in enacting the 2017 amendment in light of this Court's construction of Section 5000A, intended to transform that provision from a choice into a command. See *TC Heartland LLC* v. *Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017). The answer is clearly no.

As a matter of text and structure, the 2017 amendment did not convert Section 5000A from a choice into a command. As originally enacted, Section 5000A(a) provided that "[a]n applicable individual shall" maintain insurance, and Section 5000A(b) provided that those who do not do so may make a "shared responsibility payment" in the amount set forth in Section 5000A(c). 26 U.S.C. 5000A(b). After the 2017 amendment, Subsection 5000A(a) still provides that "[a]n applicable individual shall" maintain insurance, and Subsection 5000A(b) still provides for the "shared responsibility payment." The 2017 Congress did not amend those provisions. The only change is that the *amount* of that payment, prescribed in Section 5000A(c), is now $0.

In other words, Congress left the choice-creating text and structure of Section 5000A intact, and made it easier to forgo insurance by reducing the tax payment to zero. Had Congress intended to transform Section 5000A into a command, it would have altered the text that created the choice. See *Lightfoot* v. *Cendant Mortg. Corp.*, 137 S. Ct. 553, 563 (2017) (statutory text that Supreme Court has already construed must be construed to "ha[ve] that same meaning"). Myriad contemporaneous statements by Members of Congress confirm that they understood the amended Section 5000A to allow individuals to "cho[o]se not to enroll in health coverage once the penalty for doing so is no longer in effect." *E.g.*, *Continuation of the Open Executive Session to Consider an Original Bill Entitled the "Tax Cuts and Jobs Act" Before the Senate Comm. on Fin.*, 115th Cong. 106 (Nov. 15, 2017) (statement of Sen. Orrin G. Hatch, Chairman) ("*Continuation*").

2. Ignoring the overwhelming evidence of Congress's carefully limited intent, the Fifth Circuit held that "now that the shared responsibility payment has been zeroed out, the *only* logical conclusion under *NFIB* is to read the individual mandate as a command." Pet. App. 47a (emphasis added). The Fifth Circuit reasoned that *NFIB* construed Section 5000A as a choice only as a matter of constitutional avoidance. Pet. App. 41a-42a, 47a-48a (citing *NFIB*, 567 U.S. at 563-564). Because the payment amount is now $0, the Fifth Circuit asserted, the predicate for *NFIB*'s construction—that Section 5000A could be viewed as an exercise of Congress's taxing power—is now absent. But that is not the "only logical conclusion" that can be drawn from Congress's action. To the contrary, what matters is that the 2017 Congress acted knowing that this Court had already definitively construed Section

5000A as offering a lawful choice between alternatives, sought to remove the particular incentive to purchase insurance that Section 5000A may have created, and did so by reducing the payment while preserving all operative provisions of the statutory text.

To construe the current statute as a command, the Fifth Circuit had to violate a cardinal rule of statutory construction: it assumed that Congress and the President *defied NFIB* by transforming Section 5000A into a command unconnected to any tax, which is precisely what *NFIB* held Congress could not do under its commerce power. When Congress amends a statute after the Court has construed the statute pursuant to constitutional avoidance, Congress is presumed to have "considered the constitutional issue and determined the amended statute to be a lawful one." *Boumediene* v. *Bush*, 553 U.S. 723, 738 (2008). Given the respect due co-equal branches of government, it is remarkable that the Fifth Circuit would assign Section 5000A a meaning that renders it unconstitutional rather than presuming that Congress intended to preserve this Court's constitutional interpretation of the provision.

B. Respondents lack standing.

The Fifth Circuit's analysis of respondents' standing conflicts with this Court's precedent. Adherence to the requirements laid out in that precedent is essential to maintaining "the proper—and properly limited—role of the courts in a democratic society," *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975), and "prevent[ing] the judicial process from being used to usurp the powers of the political branches," *Clapper*, 568 U.S. at 408; see John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230-1231 (1993). Given the gravity of the constitutional challenge raised in

this case—and the massive disruption that would result from a ruling in respondents' favor—the need to respect the limits that Article III imposes on the exercise of the judicial power could not be more important. Yet the court of appeals did not give the standing inquiry the consideration that this Court's precedents require. Review of the standing question is therefore manifestly warranted.

1. To establish standing, a plaintiff must have "suffered" or be "imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 125 (2014). Those requirements—as to which the plaintiff carries the burden of proof—are "especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by" Congress "was unconstitutional." *Raines* v. *Byrd*, 521 U.S. 811, 819-820 (1997).

This Court's precedents establish clear principles to guide that rigorous inquiry. First, a self-inflicted injury does not give rise to standing because such an injury is not "fairly traceable" to Congress's complained-of action. *Clapper*, 568 U.S. at 418. To allow a plaintiff to assert standing under those circumstances would allow "an enterprising plaintiff" to "manufacture standing," thereby "improperly water[ing] down the fundamental requirements of Article III." *Id.* at 416; see Pet. App. 78a-79a (King, J., dissenting) (collecting cases).

Second, standing exists to bring a pre-enforcement challenge to a statute only if there is a "credible threat of prosecution thereunder." *Babbitt* v. *United Farm*

Workers Nat'l Union, 442 U.S. 289, 298 (1979); see, *e.g.*, *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 159 (2014). Alleged compulsion arising from "the mere existence" of a statute, rather than from any "real threat" that the government will take action under the statute, constitutes "insufficient grounds to support a federal court's adjudication of [the statute's] constitutionality." *Poe* v. *Ullman*, 367 U.S. 497, 507 (1961) (plurality op.).

Third, a plaintiff must have standing for each specific claim asserted. Accordingly, a plaintiff challenging one provision of a statute does not satisfy standing requirements by asserting injury that flows from different provisions of that statute. See, *e.g.*, *Davis* v. *FEC*, 554 U.S. 724, 733-734 (2008); *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006).

2. The decision below is irreconcilable with those principles.

a. The Fifth Circuit accepted the individual respondents' assertion that they are injured because they have purchased health insurance that meets the Act's minimum-coverage standard. That assertion does not establish standing.

i. As an initial matter, that purported injury is entirely self-inflicted. As *NFIB* held, and the 2017 amendment reinforced, Section 5000A imposes no legal requirement to obtain insurance. The individual respondents' purchase of insurance is thus the result not of the ACA but of their own voluntary choices. Such choices cannot satisfy standing requirements. See, *e.g.*, *Clapper*, 568 U.S. at 416; see also, *e.g.*, *Zimmerman* v. *City of Austin, Texas*, 881 F.3d 378, 389 (5th Cir. 2018); *Crawford* v. *United States Dep't of*

Treasury, 868 F.3d 438, 456-457 (6th Cir. 2017); *Grocery Mfrs. Ass'n* v. *EPA*, 693 F.3d 169, 177 (D.C. Cir. 2012).

The court below misinterpreted the ACA in ruling otherwise. See pp. 18-21, *supra*. And the court also erred in suggesting that it was acceptable for purposes of the standing inquiry to assume that mistaken reading of the ACA, on the ground that the individual respondents pressed that reading as a basis for relief on the merits. See Pet. App. 30a (characterizing statutory interpretation as "merits" question not to be "conflate[d]" with "threshold inquiry of standing"). Where the "merits and jurisdiction * * * come intertwined," the court must "answer the jurisdictional question"—even if the court "must inevitably decide some, or all, of the merits issues" in doing so. *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017).

ii. In any event, even if the ACA can be read to require the purchase of insurance, the individual respondents have no standing to complain of any such requirement, because "they can disregard it without consequence." Pet. App. 84a (King, J., dissenting). The only thing that follows from failing to maintain insurance is the tax payment set forth in Section 5000A(b), see *NFIB*, 567 U.S. at 574 & n.11, and the tax amount is now zero. Accordingly, there is no threat, much less a credible one, that the individual respondents will be subject to government enforcement of Section 5000A. Pet. App. 82a (King, J., dissenting) (no "*possibility* of enforcement" exists). The individual respondents therefore lack standing. See, *e.g.*, *Susan B. Anthony List*, 573 U.S. at 159; see also, *e.g.*, *Winsness* v. *Yocom*, 433 F.3d 727, 732 (10th Cir. 2006); *Doe* v. *Pryor*, 344 F.3d 1282, 1287-1288 (11th

Cir. 2003); *McKay* v. *Federspiel*, 823 F.3d 862, 868 (6th Cir. 2016).

The court of appeals seemed to believe that the individual respondents' assertion that they subjectively felt compelled to spend money to purchase insurance was enough to make this case something other than a pre-enforcement challenge. See Pet. App. 28a. That is mistaken. The fact that a plaintiff complies with a statutory provision that he wishes to attack does not mean that the government can or will enforce the provision against him—and "[t]he great power of the judiciary should not be invoked to disrupt the work of the democratic branches" if a plaintiff will suffer no injury from failing to obey Congress's dictate. Pet. App. 84a (King, J., dissenting). The contrary approach taken by the court below cannot be reconciled with this Court's decisions explaining that the "mere existence" of a statute does not represent the necessary enforcement threat. *Poe*, 367 U.S. at 507 (plurality op.).

b. The state respondents' case for standing is no more plausible than that of the individual respondents. The States are not even arguably subject to Section 5000A. The court of appeals nevertheless concluded that Section 5000A injures the state respondents because they must submit forms verifying which of their employees retain minimum essential coverage. Pet. App. 32a-38a. That conclusion is wrong for several reasons.

First, nothing in Section 5000A requires the state respondents to submit the forms in question. This Court's cases make clear that the state respondents cannot bootstrap any injury that flows from the separate reporting requirements—set forth in 26 U.S.C.

6055(a) and 6056(a)—into standing to challenge Section 5000A itself. See *Davis*, 554 U.S. at 733-734; *DaimlerChrysler*, 547 U.S. at 352.

Second, the Fifth Circuit's theory that the state respondents sent out more forms because Section 5000A caused more state employees to get "insurance through a state employer," Pet. App. 36a; see Pet. App. 33a-35a, is unsupported by evidence in the summary-judgment record. No affidavit established the implausible proposition that state employees within the respondent States purchased employer-provided health insurance *because of* amended Section 5000A and would stop if the provision were declared unconstitutional. See Pet. App. 85a (King, J., dissenting) ("[T]here is no evidence in the record, much less conclusive evidence, to support the state plaintiffs' alleged injuries."). Rather, the court of appeals impermissibly "presume[d]" the missing causal link. *Lujan* v. *Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990). That presumption stands in stark contrast to the analysis in *Department of Commerce* v. *New York*, 139 S. Ct. 2551 (2019), on which the court below relied. The conclusions drawn in that case about "predictable" behavior were based on an extensive record and detailed factual findings, *id.* at 2566; see 351 F. Supp. 3d 502, 592, 596-599 (S.D.N.Y. 2019), that do not exist here—and the predictable behavior in that case was a violation of law based on strong incentives, not irrational compliance based on no incentive at all.

In short, the standing analysis in the decision below represents "textbook judicial overreach," in precisely the circumstance in which it is most important to ensure that the judicial power is being appropriately invoked by respecting the limits on that power. Pet.

App. 111a (King, J., dissenting). Review of the standing issue is therefore manifestly warranted.

C. Section 5000A remains constitutional.

1. The Fifth Circuit's decision to invalidate Section 5000A as a result of the 2017 amendment raises a question of exceptional importance warranting this Court's review. The court of appeals has not merely invalidated an Act of Congress but has done so in a manner that conflicts with the constitutional-avoidance principles set forth in *NFIB* and that depends on an implausible construction of Section 5000A. Pet. App. 44a-50a. For the reasons stated above, Section 5000A is correctly construed to permit individuals to choose between the lawful options of buying insurance and paying a tax of zero dollars. See pp. 18-21, *supra*. But even if that were not the *best* construction, it is unquestionably a "reasonable" one. *NFIB*, 567 U.S. at 562-563. The Fifth Circuit therefore had a duty to construe Section 5000A as a choice if doing so would preserve its constitutionality. *Ibid*.

The Fifth Circuit did not suggest that Section 5000A would be unconstitutional if it were construed to provide a choice between buying insurance and paying nothing. And no party has ever argued in this case that Section 5000A would be unconstitutional if construed as a choice rather than a command. That is no doubt because Section 5000A(a), so construed, self-evidently imposes no binding legal obligation and thus cannot exceed Congress's powers. Yet despite the availability of a statutory construction that no party argued would be unconstitutional, the Fifth Circuit insisted that Section 5000A(a) must now be interpreted as a command and invalidated it exclusively for that reason.

2. Construed as a choice, Section 5000A is constitutional. Congress's original enactment of Section 5000A was a valid exercise of its taxing power. *NFIB*, 567 U.S. at 575. After the 2017 amendment, the ACA continues to offer individuals the same choice. Congress has simply decided that the tax shall now be nothing. Because Congress had the authority to take that step, Section 5000A(a) remains constitutional for the same reason it was upheld in *NFIB*. And because Section 5000A simply establishes a condition—not having insurance—that triggers a tax of zero dollars, Section 5000A imposes no obligation whatsoever, and certainly no obligation that Congress lacks the Article I power to impose. *Ibid.*; see *New York*, 505 U.S. at 169-174.

Indeed, because Section 5000A as amended does not alter anyone's legal rights and duties, its validity no longer depends on an enumerated power. Congress possesses authority to express its views in a non-binding manner. Congress may, for instance, use a concurrent resolution to "express[] fact, principles, opinions, and purposes of the two Houses." *Constitution, Jefferson's Manual, and Rules of the House of Representatives* § 396, 115th Cong., H.R. Doc. No. 115-177, at 208 (2019). Because a concurrent resolution does not alter legal rights and duties, Congress need not exercise its constitutional legislative power in order to pass such a resolution. *Bowsher* v. *Synar*, 478 U.S. 714, 756 (1986) (Stevens, J., concurring); accord *INS* v. *Chadha*, 462 U.S. 919, 952 (1983). Those principles apply equally to statutes. Congress routinely enacts statutes that are no more binding than a concurrent resolution, in that they urge particular behavior but permit people to choose whether to comply—even when such statutes

cannot be premised on an enumerated power.[8] See, *e.g.*, 36 U.S.C. 135; 15 U.S.C. 7807. Section 5000A, as amended, is constitutional for the same reason.

D. Section 5000A is severable from the rest of the Act.

1. Having held that Section 5000A(a) is unconstitutional, the Fifth Circuit refused to decide whether that provision is severable from the rest of the ACA. That refusal was both unorthodox and unjustifiable. Severability is a pure question of law that requires the court to examine congressional intent. *NFIB*, 567 U.S. at 586. Although the Fifth Circuit asserted that the district court was better placed to examine severability because the analysis would necessarily involve "parsing through the over 900 pages of the post-2017 ACA," Pet. App. 65a, that rationale for remanding is utterly unpersuasive. As noted above, see pp. 14-15, *supra*, a provision-by-provision severability analysis would become necessary only if the court first rejected both respondents' argument that *none* of the ACA's remaining provisions are severable, and the argument by the intervenor States and the House that *all* remaining provisions are severable. Either answer would have resolved the litigation without any need for the further

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[8] Even if Section 5000A requires an enumerated power, the provision can be upheld as necessary and proper to Congress's taxing power. The Necessary and Proper Clause grants Congress "broad power to enact laws that are convenient, or useful or conducive to" exercise of legislative authorities. *United States* v. *Comstock*, 560 U.S. 126, 133-134 (2010) (internal quotation marks omitted). It is "convenient[] or useful" for Congress to maintain the statutory structure upheld in *NFIB*, so that Congress may easily reinstate a payment in the future. *Ibid*. And setting the tax at zero is "proper," as it neither expands "the sphere of federal regulation," *NFIB*, 567 U.S. at 560 (opinion of Roberts, C.J.), nor compels any action.

analysis the court required. And the parties had fully briefed whether all or none of the ACA's provisions should be severed. The Fifth Circuit thus had before it everything it needed to decide those antecedent questions.

2. In attempting to justify its refusal to decide severability, the Fifth Circuit strove to cast the severability question as a difficult one. It is not. The court of appeals erroneously gave short shrift to this Court's precedents establishing the standard for determining severability and disregarded—once again—what the 2017 Congress actually did in amending Section 5000A.

a. The Fifth Circuit spent much of its decision questioning the legitimacy of any severability analysis, stating that deciding whether to sever an unconstitutional provision "places courts between a rock and a hard place," Pet. App. 52a, "requires 'a nebulous inquiry into hypothetical congressional intent,'" Pet. App. 55a (quoting *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring)), and amounts to no more than "legislative guesswork," Pet. App. 61a. And the court minimized the well-established presumption of severability, deeming it merely the creation of "commentators" and asserting that "severability doctrine defies reliance on presumptions." Pet. App. 53a-54a.

This Court's precedents, however, are crystal clear: when a statutory provision is unconstitutional, the remainder of the statute is *presumptively* severable unless its continued enforcement would produce "a scheme sharply different from what Congress contemplated." *Murphy*, 138 S. Ct. at 1482; see *NFIB*, 567 U.S. at 692. In other words, in answering a severabil-

ity question, a court must determine whether it is "*evident* that the Legislature would not have enacted" the remaining valid "provisions * * * independently." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987) (emphasis added; citation omitted). The court must also "limit the solution to the problem." *Free Enter. Fund*, 561 U.S. at 508 (citation omitted); *United States* v. *Booker*, 543 U.S. 220, 258-259 (2005). The Fifth Circuit simply refused to apply these established severability principles.

b. The Fifth Circuit's reluctance to undertake what it described as a "hypothetical," "counterfactual" inquiry into congressional intent betrays its unwillingness to follow this Court's precedents and decide severability on the basis of what the 2017 Congress *actually did*. Throughout its discussion of severability, the court of appeals gave short shrift to what should have been the most important element of the severability analysis: the fact that the 2017 Congress rendered Section 5000A *unenforceable* while leaving the rest of the statute intact. Had the court acknowledged that basic reality, the answer to the severability question would have been obvious: *all* of the rest of the ACA is severable from Section 5000A.

There is no need to "hypothe[size]," as the Fifth Circuit put it, about what Congress would have wanted here. Severing Section 5000A would result in a framework *materially identical* to the one the 2017 Congress actually enacted. Congress reduced the shared responsibility payment to zero but otherwise left the ACA intact, thereby surgically removing the government's sole method of enforcing Section 5000A. At the same time, Congress left the remainder of the law unchanged, to function together with that now-unenforceable provision.

The text of the ACA, as amended in 2017, therefore allows only one reasonable conclusion: Congress expected and intended the remainder of the Act to function independently of any effective command to purchase insurance. Put another way, Section 5000A is already unenforceable because Congress rendered it so by eliminating the *only* statutorily prescribed method of enforcement. That the provision is *also* unenforceable because the Fifth Circuit has declared it unconstitutional would hardly change Congress's expectation that the rest of the statute would continue to function.

The history of the 2017 amendment confirms what the statutory text establishes. Chairman Hatch insisted that "[t]he bill does nothing to alter Title 1 of Obamacare, which includes all of the insurance mandates and requirements related to preexisting conditions and essential health benefits." *Continuation*, 115th Cong. 286 (Nov. 15, 2017). And Senator Scott insisted that reducing the tax to zero "take[s] nothing at all away from anyone who needs a subsidy, anyone who wants to continue their coverage." 163 Cong. Rec. S7666 (daily ed. Dec. 1, 2017). The CBO, for its part, explained that reducing the tax to zero would have "very similar" effects to repealing both Section 5000A(a)'s statement that individuals shall purchase insurance and Section 5000A(b)'s shared responsibility payment. CBO Report 1. Thus, Members of Congress unquestionably understood that, in practical terms, Congress was eliminating any mandate by removing any incentive to purchase insurance. See pp. 19-20, *supra*.

The correct outcome of the severability analysis should have been particularly obvious given that all of the arguments against severability were predicated on the role that the pre-2017 *enforceable* provision played in the original statutory scheme. Respondents failed

to offer *any* explanation for why the same Congress that rendered Section 5000A unenforceable and left the rest of the statute untouched would have wanted the entire ACA to fall if Section 5000A were invalidated.

Thus, respondents relied heavily on congressional findings that reflected the 2010 Congress's view that the *enforceable* provision was important for creating effective insurance markets. See 42 U.S.C. 18091(2)(I). But those findings were "superseded" by both legal and factual developments—namely, Congress's action to eliminate any incentive to purchase insurance—and they therefore have no continuing probative force as to the 2017 Congress's intent. *Gonzales* v. *Carhart*, 550 U.S. 124, 130 (2007). Respondents' purported empirical evidence showing the importance of a mandate to certain individual-market and insurance reforms, along with statements from this Court's decisions in *NFIB* and *King* making the same point, are equally irrelevant. That evidence and those opinions concern the originally enacted provision, which imposed a financial cost on those who failed to comply with it. By 2017, however, the individual markets were up and running effectively. And the CBO correctly predicted that those markets "would continue to be stable in almost all areas of the country throughout the coming decade" without imposition of any such cost. CBO Report 1. The individual marketplace—which continues to include the Act's other reforms and protections—is plainly functioning well even without any mandate.

In sum, as Judge King observed, "a severability analysis will rarely be easier" than that presented here. Pet. App. 96a. The Fifth Circuit's refusal to undertake the analysis is indefensible. By remanding on the severability question, the court ignored the basic

text and purpose of legislation before it and disregarded this Court's precedent. The Fifth Circuit's abdication of its responsibility to decide the issues before it unnecessarily prolongs this litigation and inflicts years of continued uncertainty on the nation's health-care markets and millions of individuals. This Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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