No. _______

In the Supreme Court of the United States

THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON, ANDY BESHEAR, THE GOVERNOR OF KENTUCKY, AND THE DISTRICT OF COLUMBIA,

Petitioners,

v.

THE STATE OF TEXAS, *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

As part of the Patient Protection and Affordable Care Act (ACA), Congress adopted 26 U.S.C. § 5000A. Section 5000A provided that "applicable individual[s] shall" ensure that they are "covered under minimum essential coverage," 26 U.S.C. § 5000A(a); required any "taxpayer" who did not obtain such coverage to make a "[s]hared responsibility payment," *id.* § 5000A(b); and set the amount of that payment, *id.* § 5000A(c). In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 574 (2012), this Court held that Congress lacked the power to impose a stand-alone command to purchase health insurance but upheld Section 5000A as a whole as an exercise of Congress's taxing power, concluding that it affords individuals a "lawful choice" between buying health insurance or paying a tax in the amount specified in Section 5000A(c). In 2017, Congress set that amount at zero but retained the remaining provisions of the ACA. The questions presented are:

1. Whether the individual and state plaintiffs in this case have established Article III standing to challenge the minimum coverage provision in Section 5000A(a).

2. Whether reducing the amount specified in Section 5000A(c) to zero rendered the minimum coverage provision unconstitutional.

3. If so, whether the minimum coverage provision is severable from the rest of the ACA.

PARTIES TO THE PROCEEDING

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

The United States House of Representatives intervened as a defendant in the court of appeals and will be concurrently filing its own petition for a writ of certiorari.

Respondents the United States of America, the United States Department of Health and Human Services, Alex Azar II, Secretary of the U.S. Department of Health and Human Services, the United States Internal Revenue Service, and Charles P. Retting, the Commissioner of the Internal Revenue Service, are defendants in the district court and filed a notice of appeal. They remained appellants in the court of appeals, but ultimately filed their appellate brief on the appellees' schedule and defended the district court's judgment.

Respondents the States of Texas, Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Louisiana, Mississippi by and through Governor Phil Bryant, Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Utah, and West Virginia, and individuals Neill Hurley and John Nantz, are plaintiffs in the district court and appellees in the court of appeals.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit:

Texas, et al. v. United States, et al., No. 19-10011 (Dec. 18, 2019) (affirming in part and vacating in part the district court's grant of partial final judgment)

U.S. District Court for the Northern District of Texas:

Texas, et al. v. United States, et al., No. 4:18-cv-167-O (Dec. 30, 2018) (granting partial final judgment on Count I of plaintiffs' amended complaint)

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PETITION FOR A WRIT OF CERTIORARI

The States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Massachusetts, Michigan, Minnesota (by and through its Department of Commerce), Nevada, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington, Andy Beshear, the Governor of Kentucky, and the District of Columbia, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-113a) will be reported at ___ F.3d ____ (5th Cir. 2019), and is also available at 2019 WL 6888446. The relevant orders of the district court are reported at 340 F. Supp. 3d 579 (App. 163a-231a) and 352 F. Supp. 3d 665 (App. 117a-162a).

JURISDICTION

The court of appeals had jurisdiction over petitioners' appeal of the district court's partial final judgment under 28 U.S.C. § 1291. The judgment of the court of appeals was entered on December 18, 2019. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this petition. App. 232a-244a.

INTRODUCTION

The Patient Protection and Affordable Care Act (ACA) affects the health and well-being of every American and has transformed our Nation's healthcare system. One of its hundreds of provisions is 26 U.S.C. § 5000A. As originally enacted, that provision required most Americans either to maintain a minimum level of healthcare coverage or to pay a specified amount to the Internal Revenue Service. This Court upheld that provision as an exercise of Congress's taxing power, affording individuals a "lawful choice" between buying insurance or paying the tax. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574 (2012) (*NFIB*). In 2017, Congress amended Section 5000A to set at zero the amount of the tax imposed on those who choose not to maintain healthcare coverage—thus rendering the minimum coverage provision effectively unenforceable. At the same time, Congress left every other provision of the ACA in place.

The lower courts in this case held that the plaintiffs have standing to challenge the now-unenforceable minimum coverage provision and struck down that provision as an unconstitutional command to purchase health insurance. The district court also would have invalidated the entire ACA, on the theory that the minimum coverage provision is "so interwoven" with the rest of the Act that it could not be severed from any other provision. App. 224a. A panel of the court of appeals recognized that the district court's severability analysis was at least "incomplete." *Id.* at 65a. But instead of resolving that legal issue itself, the panel majority remanded for the district court to "pars[e] through the over 900 pages of the post-2017 ACA" with a "finer-toothed comb" to determine whether "particular segments" of the Act might be

"inextricably linked" to the minimum coverage provision. *Id.* at 65a, 68a.

The court of appeals' decision warrants immediate review. This Court normally grants certiorari when a lower court has invalidated a federal statutory provision on constitutional grounds, and that customary approach is especially appropriate here. The actions of the lower courts have cast doubt on hundreds of other statutory provisions that together regulate a substantial portion of the Nation's economy. States, health insurers, and millions of Americans rely on those provisions when making important—indeed, life-changing—decisions. The remand proceedings contemplated by the panel majority would only prolong and exacerbate the uncertainty already caused by this litigation.

The decision below is both ripe for review and incorrect on every point. As the dissent explains, after the 2017 amendment to the ACA, 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." App. 75a (King, J., dissenting). The individual plaintiffs lack "standing to challenge a law that does nothing," *id.*, and the state plaintiffs have failed to substantiate their alleged fiscal injuries, *id.* at 86a. In any event, there is no constitutional problem. As amended, Section 5000A is merely a precatory provision that (at most) encourages Americans to buy health insurance but does not compel anyone to do anything. *Id.* at 91a-93a, 97a-98a. Finally, any question of severability in this case requires no extended analysis. Severability turns on the intent of Congress, and here "Congress removed the coverage requirement's only enforcement mechanism but left the rest of the Affordable Care Act

in place." *Id.* at 73a. It "is difficult to imagine a plainer indication that Congress considered the coverage requirement entirely dispensable and, hence, severable." *Id.* There is no need for any "searching inquiry" (*id.* at 68a (majority opinion)) into hundreds of distinct provisions, and no reason for this Court to defer review given the enormous practical significance of this case.

STATEMENT

A. Legal Background

1. Congress enacted the ACA in 2010 to expand healthcare coverage, lower the cost of healthcare, and improve health and quality of life. *See NFIB*, 567 U.S. at 538. "The Act's 10 titles stretch over 900 pages and contain hundreds of provisions." *Id.* at 538-539. Collectively, those provisions affect every level of government and almost every aspect of an industry that accounts for nearly one-fifth of the Nation's economy. D.Ct. Dkt. 91-2 at 164.[1]

Among its many reforms, the ACA expanded access to healthcare coverage by making a series of reforms in the individual health insurance market. *See generally King v. Burwell*, 135 S. Ct. 2480, 2485-2487 (2015); D.Ct. Dkt. 91-1 at 16-19. It made health insurance more affordable by providing billions of dollars of subsidies in the form of refundable tax credits to low- and middle-income Americans. *King*, 135 S. Ct. at 2487, 2489 (citing 26 U.S.C. § 36B and 42 U.S.C. §§ 18081, 18082). It created government-run health insurance marketplaces (known as "Exchanges") that allow consumers "to compare and purchase insurance

[1] Citations to "D.Ct. Dkt." are to the docket in N.D. Tex. Case No. 4:18-cv-167-O.

plans." *Id*. at 2485, 2487. And it adopted the provision at issue in this case, 26 U.S.C. § 5000A, which "generally require[d] individuals to maintain health insurance coverage or make a payment to the IRS." *Id.* at 2486.

The ACA also increased the number of people eligible for healthcare coverage through Medicaid. *See generally NFIB*, 567 U.S. at 541-542.[2] As a result, thirty-six States and the District of Columbia have expanded their Medicaid programs, with the federal government covering most of the cost of that expansion. *See* 42 U.S.C. § 1396d(y)(1).[3] Nearly 12 million individuals received healthcare coverage in 2016 through the ACA's Medicaid expansion. D.Ct. Dkt. 15-2 at 10-11.

Other provisions of the ACA protect consumers and their families. *See, e.g.*, D.Ct. Dkt. 91-1 at 96-97. The Act bars insurance companies from denying individuals coverage because of their health status (the "guaranteed issue" requirement), 42 U.S.C. §§ 300gg, 300gg-1; refusing to cover pre-existing health conditions, *id.* § 300gg-3; or charging higher premiums to

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[2] The ACA originally required each State to expand its Medicaid program or risk losing all of its federal Medicaid funds. *See NFIB*, 567 U.S. at 542. This Court struck down that requirement under the Spending Clause, *see id*. at 575-585 (plurality opinion); *id*. at 671-689 (joint dissent), but it held that States that wanted to expand their Medicaid programs could do so and receive the federal funding made available by the ACA, *see id*. at 585-586 (plurality opinion); *id*. at 645-646 (opinion of Ginsburg, J.).

[3] *See generally Status of State Medicaid Expansion Decisions: Interactive Map*, Kaiser Family Found. (Nov. 15, 2019), https://tinyurl.com/y9gseqv5 (Medicaid Map). Twenty-six of the States that have expanded Medicaid are parties to this litigation, including eighteen of the state petitioners and eight of the state respondents. *Id.*

less healthy individuals (the "community-rating" requirement), *id.* § 300gg-4. *See also NFIB*, 567 U.S. at 650-651. Because of those protections, more than 100 million Americans with pre-existing conditions—including cancer, diabetes, asthma, high blood pressure, and pregnancy—cannot be denied coverage or charged higher premiums because of their health status. *See* D.Ct. Dkt. 91-1 at 14, 93. The ACA further requires insurers to allow young adults to stay on their parents' health insurance plans until age 26, 42 U.S.C. § 300gg-14; prohibits insurers from imposing lifetime or annual limits on the value of benefits provided to any individual, *id.* § 300gg-11; and mandates that insurance plans cover ten essential health benefits, including prescription drugs, maternity and newborn care, and emergency services, *id.* § 18022.

The ACA reformed the Nation's healthcare system in other important respects as well. For example, the Act changes the way Medicare payments are made, encouraging healthcare providers to deliver higher quality and less expensive care. D.Ct. Dkt. 91-1 at 23-25, 29-30. It authorizes the FDA to approve "biosimilar[s]," drugs that are similar to but less expensive than ones that have already been approved. *Id.* at 23-24. The Act also creates the Prevention and Public Health Fund, which has supported state and local responses to emerging public health risks such as flu outbreaks and the opioid epidemic. *Id.* at 27, 30; *see also* 42 U.S.C. §§ 280h-5, 280k, 280k-1, 280k-2, 280k-3, 294e-1, 299b-33, 299b-34, 300u-13, 300u-14, 1396a. And the ACA invests billions of dollars in local community health programs. D.Ct. Dkt. 91-1 at 27-29.

Nearly a decade after its enactment, the ACA has achieved many of its goals. D.Ct. Dkt. 91-1 at 99-101.

Among other accomplishments, the Nation's uninsured rate dropped by 43 percent shortly after the Act's major reforms took effect. *Id.* at 9; *see also id.* at 19-20, 99; D.Ct. Dkt. 15-2 at 10-11. In 2017, 10.3 million people received coverage through the Exchanges, with over 8 million receiving tax credits to help them pay their premiums. D.Ct. Dkt. 15-1 at 97-98; D.Ct. Dkt. 91-1 at 17. An estimated 125,000 fewer patients died from conditions acquired in hospitals in 2015 than in 2010, due in part to an ACA-funded program. D.Ct. Dkt. 91-1 at 11. And the costs of "uncompensated care" (*i.e.*, providing healthcare services to individuals who are unable to pay) fell by a quarter nationally between 2013 and 2015—and by nearly half in States that had expanded Medicaid. *Id.* at 12-13, 101.

2. The ACA has been the subject of frequent legal challenges. *See, e.g.*, *NFIB*, 567 U.S. 519; *King*, 135 S. Ct. 2480. In *NFIB*, this Court addressed the constitutionality of 26 U.S.C. § 5000A. As originally enacted, that section provided that all "applicable individual[s] shall" ensure that they are "covered under minimum essential coverage." 26 U.S.C. § 5000A(a); *see also id.* § 5000A(f) (defining "minimum essential coverage"). Any "taxpayer" who did not obtain such coverage was required to make a "[s]hared responsibility payment," *id.* § 5000A(b), in the amount specified in Section 5000A(c).

With differing majorities, this Court upheld the constitutionality of Section 5000A. Writing for himself, Chief Justice Roberts first concluded that Section 5000A would exceed Congress's Commerce Clause powers if it were construed to impose an enforceable, stand-alone requirement that individuals purchase health insurance. *NFIB*, 567 U.S. at 547-558 (Roberts,

C.J.). The Chief Justice reasoned that the Commerce Clause gave Congress the power to "regulate Commerce," not to require individuals to "become active in commerce by purchasing a product." *Id.* at 550, 552 (Roberts, C.J.) (emphasis omitted). Four dissenting Justices reached the same conclusion. *See id.* at 657 (joint dissent). The same five Justices also held that an enforceable command to purchase minimum coverage could not be sustained under the Necessary and Proper Clause. *See id.* at 560 (Roberts, C.J.); *id.* at 653-655 (joint dissent).

In a separate part of his opinion, announcing the judgment of a different majority of the Court, the Chief Justice reasoned that Section 5000A could be upheld as a valid exercise of Congress's power to "lay and collect Taxes." *NFIB*, 567 U.S. at 561, 574.[4] He explained that it was "fairly possible" to read Section 5000A as imposing "a tax hike on certain taxpayers who do not have health insurance." *Id.* at 563 (Roberts, C.J.). Section 5000A as a whole was not a command to purchase insurance, but instead offered individuals a "lawful choice" between forgoing health insurance and paying higher taxes, or buying health insurance and paying lower taxes. *Id.* at 573-574 & n.11.

3. The ACA has also engendered passionate political debate. Between 2010 and 2016, Congress considered several bills to defund, delay, or otherwise amend

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[4] Four Justices joined Part III-C of the Chief Justice's opinion, which upheld Section 5000A under Congress's taxing powers. *See NFIB* 567 U.S. at 589 (opinion of Ginsburg, J.). Those Justices did not formally join Parts III-B and III-D of that opinion, which discussed the interpretation of Section 5000A. *Id.*

the ACA, including legislation that would have repealed the entire Act. *See* App. 8a. Except for a few modest changes that attracted bipartisan support, those efforts failed. *Id.*[5]

In 2017, congressional opponents of the ACA renewed their efforts to repeal many of the Act's most important reforms. Several votes were taken; each one failed.[6] Congress did, however, make one change to the law in December 2017. As part of the Tax Cuts and Jobs Act (TCJA), Congress reduced to zero the amount of the tax imposed by Section 5000A(c), effective January 1, 2019. *See* Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017). The TCJA did not make any other changes to the ACA. Indeed, several congressional proponents of the bill emphasized that it would not affect other aspects of the ACA. *See, e.g.*, 163 Cong. Rec. S7672 (daily ed. Dec. 1, 2017) (statement of Sen. Toomey that TCJA does not "change any of the subsidies" or "anything except one thing"); 163 Cong. Rec. S7666 (daily ed. Dec. 1, 2017) (statement of Sen. Scott that TCJA "take[s] nothing at all away from

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[5] *See generally* Redhead & Kinzer, Cong. Research Serv., *Legislative Actions in the 112th, 113th, and 114th Congresses to Repeal, Defund, or Delay the Affordable Care Act* at 1 (Feb. 7, 2017).

[6] *See, e.g.*, American Health Care Act of 2017, H.R. 1628, 115th Cong. (2017); Better Care Reconciliation Act of 2017, S. Amendment 270, 115th Cong. (2017); Obamacare Repeal Reconciliation Act of 2017, S. Amendment 271, 115th Cong. (2017); Health Care Freedom Act of 2017, S. Amendment 667, 115th Cong. (2017); *see generally* Roubein, *TIMELINE: The GOP's Failed Effort to Repeal Obamacare*, The Hill, Sept. 26, 2017, https://tinyurl.com/s2x2g6o.

anyone who needs a subsidy, anyone who wants to continue their coverage").[7]

B. Proceedings Below

1. Two months after Congress enacted the TCJA, two private individuals and a group of States filed this suit against the federal government. App. 10a. The plaintiffs argued that because Congress reduced the amount of the alternative tax provided for in Section 5000A(c) to zero, Section 5000A(a) was now unconstitutional on the ground that it could no longer be construed as part of a tax. *Id.* at 10a-11a. They further argued that the rest of the ACA was now invalid as well, because the minimum coverage provision was "essential to and inseverable from" the remainder of the Act. *Id.* at 10a. They sought declaratory relief and preliminary and permanent injunctions forbidding the federal defendants from enforcing any provision of the ACA or its associated regulations. *See id.* at 11a.

The federal defendants agreed with the plaintiffs that the minimum coverage provision now exceeded Congress's constitutional authority. App. 11a. At the start of the litigation, the federal defendants argued that the provision could not be severed from the ACA's guaranteed-issue and community-rating requirements, but that those three provisions could be severed from the remainder of the Act. *Id.* Sixteen States and the District of Columbia (the state petitioners here) intervened to defend the ACA. *Id.*

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[7] Since 2017, Congress has made additional limited changes to the ACA, including by recently repealing the Act's medical device and "Cadillac" taxes, *see* Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, §§ 501, 503, 133 Stat. ___, (2019), but it has continued to leave most of the Act's provisions in place.

The district court denied the plaintiffs' motion for a preliminary injunction but granted partial summary judgment and declaratory relief in their favor. App. 11a-12a; 163a-231a. The court first held that the individual plaintiffs had standing to bring their challenge because Section 5000A(a) "requires them to purchase and maintain certain health-insurance coverage." *Id.* at 182a.[8] As to the merits, the court held that Section 5000A as a whole could no longer be construed as an exercise of Congress's taxing power, principally because it would no longer "produce[] at least some revenue for the Government." *Id.* at 192a. The court instead construed Section 5000A(a) as a "standalone command" to purchase health insurance, which exceeded Congress's power under the Commerce Clause. *Id.* at 203a.

On the question of severability, the district court focused primarily on the intent of the 2010 Congress and certain legislative findings enacted by that Congress. It reasoned that "the text of the ACA is unequivocal" that the minimum coverage provision is "inseverable—because it is essential—from the entire ACA—because it must work together with the other provisions." App. 213a (citing 42 U.S.C § 18091) (emphasis omitted). The district court also believed that *NFIB* and *King* "ma[d]e clear" that its severability conclusion was correct. *Id.* at 220a; *see id.* at 214a-220a.

In a separate order, the district court entered a partial final judgment under Federal Rule of Civil Procedure 54(b), but stayed the effect of that judgment. App. 116a, 114a-162a. The state intervenor-

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[8] The district court did not address whether the state plaintiffs had established standing. *See* App. 181a-185a.

defendants and the federal defendants both filed notices of appeal. *Id.* at 14a & n.14.

2. a. Shortly after the appeal was docketed, the United States House of Representatives successfully moved to intervene to defend the ACA. App. 12a.[9] On the day that opening briefs were due, the federal defendants "changed their litigation position," *id.*, informing the court of appeals that they had "determined that the district court's judgment should be affirmed" in its entirety. C.A. Dkt. No. 514887530 at 1 (Mar. 25, 2019). In other words, the federal defendants agreed that the entire ACA should be invalidated and were no longer "urging that any portion of the district court's judgment be reversed." *Id.*

b. On December 18, 2019, a divided panel of the Fifth Circuit affirmed in part and vacated in part. App. 1a-113a. The panel majority first held that the individual plaintiffs have standing to challenge the minimum coverage provision because they "feel compelled by the individual mandate to buy insurance" and bought insurance "solely for that reason." *Id.* at 29a-30a. It also held that the state plaintiffs are injured by the minimum coverage provision, reasoning that Section 5000A(a) causes some state employees to seek health insurance from the States, which in turn must spend money "to issue forms verifying which employees are covered" in accordance with other provisions of the ACA. *Id.* at 33a (citing 26 U.S.C. §§ 6055, 6056); *see also id.* at 32a-39a.

On the merits, the majority agreed with the district court that *NFIB*'s savings construction of Section

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[9] Around the same time, the States of Colorado, Iowa, Michigan, and Nevada also successfully moved to intervene to defend the ACA. App. 12a n.12.

5000A was "no longer available," now that Congress had set the alternative tax provided for in Section 5000A(c) at zero. App. 44a. It held that "[t]he proper application of *NFIB* to the new version of the statute" required Section 5000A(a) to be read as a "command to purchase insurance." *Id.* at 45a. Interpreted that way, the majority concluded that the amended statute "finds no constitutional footing in either the Interstate Commerce Clause or the Necessary and Proper Clause." *Id.*

As to severability, the majority vacated the district court's judgment. App. 52a-72a. The majority concluded that the district court's analysis was "incomplete" because it gave "relatively little attention to the intent of the 2017 Congress," and failed to "do the necessary legwork of parsing through the over 900 pages of the post-2017 ACA" and "explaining how particular segments are inextricably linked to the individual mandate." *Id.* at 65a. It "direct[ed] the district court to employ a finer-toothed comb on remand and conduct a more searching inquiry into which provisions of the ACA Congress intended to be inseverable from the individual mandate." *Id.* at 68a. The majority stated that "[i]t may still be that none of the ACA is severable from the individual mandate," and "[i]t may be that all of the ACA is severable" or "that some of the ACA is severable . . . and some is not." *Id.* at 69a. It also directed the district court to consider the federal defendants' new arguments about the proper scope of relief. *Id.* at 70a-72a.[10]

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[10] In their Fifth Circuit brief, the federal defendants "changed their litigation position to argue that the relief in this case should be tailored to enjoin enforcement of the ACA in only the plaintiff states," and should "only reach ACA provisions that injure the plaintiffs." App. 70a-71a.

c. Judge King dissented. App. 73a-113a. She would have resolved the appeal at the outset on the ground that the plaintiffs lacked standing to sue. App. 76a-91a. She observed that Congress's 2017 amendment simply "change[d] the amount of the shared-responsibility payment to zero dollars," meaning that Section 5000A now "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." *Id.* at 75a. Thus, even assuming that Section 5000A(a) "acts as a legal command," the individual plaintiffs are "free to disregard [it] without legal consequence." *Id.* at 80a. Any injury they might have incurred by purchasing health insurance was "entirely self-inflicted." *Id.* at 79a. Judge King also concluded that the state plaintiffs did not have standing because they failed to establish "that even a single state employee enrolled in one of the state plaintiffs' health insurance programs solely because of the unenforceable coverage requirement." *Id.* at 86a-87a.

On the merits, Judge King concluded that Section 5000A is "constitutional, albeit unenforceable." App. 74a; *id.* at 91a-98a. Because Congress "zeroed out" the shared-responsibility payment, the minimum coverage provision "affords individuals the same choice individuals have had since the dawn of private health insurance": either purchase insurance or "pay zero dollars." *Id.* at 91a. The majority's focus on whether "Congress's taxing power or the Necessary and Proper Clause authorizes" Section 5000A was a "red herring" because Congress does not "exceed[] its enumerated powers when it passes a law that does nothing." *Id.* at 91a-92a.

Judge King agreed with the majority that there were "serious flaws" in the district court's severability

analysis, App. 73a, but failed to see the "logic behind remanding this case for a do-over," *id.* at 98a. She noted that severability is a "question of law that we review de novo," and which the court of appeals is "just as competent as the district court" to address. *Id.* at 98a-99a. Moreover, in this case the severability analysis is "easy." *Id.* at 73a. "Congress removed the coverage requirement's only enforcement mechanism but left the rest of the Affordable Care Act in place." *Id.* That action "plain[ly] indicat[es] that Congress considered the coverage requirement entirely dispensable and, hence, severable." *Id.*

REASONS FOR GRANTING THE PETITION

I. THE QUESTIONS PRESENTED WARRANT IMMEDIATE REVIEW

"[W]hen a lower court has invalidated a federal statute," the "usual" approach of this Court is to "grant[] certiorari." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2298 (2019); *see, e.g.*, *United States v. Kebodeaux*, 570 U.S. 387, 391 (2013); *United States v. Morrison*, 529 U.S. 598, 605 (2000). As the United States recently told this Court, that "practice is consistent with the Court's recognition that judging the constitutionality of a federal statute is 'the gravest and most delicate duty that th[e] Court is called upon to perform.'" Pet. 16, *Barr v. Am. Ass'n of Political Consultants et al.*, No. 19-631 (filed Nov. 14, 2019); *see also* Pet. 24, *United States v. Sineneng-Smith*, No. 19-67 (filed July 12, 2019).

That usual approach is particularly appropriate in this case. The courts below not only "invalidated a federal" statutory provision "on constitutional grounds," *Morrison*, 529 U.S. at 605, they did so in a way that creates uncertainty about the status of the

entire Affordable Care Act. The district court asserted that the minimum coverage provision "'is essential to' and inseverable from 'the other provisions of' the ACA," App. 231a—meaning *every one* of the "hundreds of provisions" spread across the ACA's "10 titles [and] over 900 pages," *NFIB*, 567 U.S. at 538-539. And while all three judges on the panel below recognized serious flaws in that analysis, *see* App. 65a-70a, 73a, in remanding for further examination the panel majority commented that "[i]t may still be that none of the ACA is severable from the individual mandate, even after this inquiry is concluded," *id.* at 69a.

The uncertainty created by this litigation is especially problematic because individuals, businesses, and state and local governments make important decisions in reliance on the ACA. Each year, for example, millions of Americans make life-changing decisions—like starting a family or changing jobs—in reliance on the ACA's patient protections and the greater access to affordable healthcare coverage it provides.[11] Millions more decide whether to purchase health insurance on the state or federal Exchanges created by the Act.[12] Health insurance companies must decide whether to participate in the Exchanges and, if so, how to set their premiums and in which cities and counties to offer coverage.[13] And States

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[11] *See* Amicus Br. of Small Bus. Majority Found., C.A. Dkt. No. 514895946 (Apr. 1, 2019); Amicus Br. of Nat'l Women's Law Center, *et al.*, C.A. Dkt. No. 514897602 (Apr. 1, 2019).

[12] *See* D.Ct. Dkt. 15-1 at 97-98; D.Ct. Dkt. 91-1 at 17.

[13] *See* D.Ct. Dkt. 91-1 at 101-106; Amicus Br. of America's Health Ins. Plans, C.A. Dkt. No. 514896554 at 14 (Apr. 1, 2019) ("health insurance providers . . . require significant lead time to develop

must decide whether to expand their Medicaid programs (or continue existing expansions), whether to operate their own Exchanges, and how to budget for health-related spending in future years.[14] Prolonged uncertainty about whether or to what extent important provisions of the ACA might be invalidated makes these choices more difficult, threatening adverse consequences for American families, healthcare markets, and the broader economy.[15]

While the possibility of further proceedings in the lower courts sometimes weighs against certiorari, *see, e.g.*, *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam), here it supports immediate review. This is not a case where the court of appeals remanded for further factfinding, *see id.*, or for some other reason necessitating additional proceedings in the district court. The only reason this case is not final is because the panel majority declined to resolve the severability issue and instead "remand[ed] for a do-over." App. 73a (King, J., dissenting). But severability is a legal question, subject to de novo review, that is already poised for resolution by an appellate tribunal. Remand accomplishes little beyond "prolong[ing] this litigation and the concomitant uncertainty over the future of the healthcare sector." *Id.* at 74a.

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strategies and offerings").

[14] *See* D.Ct. Dkt. 91-1 at 31-66; Amicus Br. of Counties and Cities, C.A. Dkt. No. 514897439 at 20-22 (describing healthcare funding as a complex multi-year process between federal, state, and local governments); Medicaid Map, https://tinyurl.com/y9gseqv5 (detailing States' consideration of whether to expand Medicaid).

[15] *See, e.g.*, C.A. Dkt. No. 514820298 at 15-37 (Feb. 1, 2019) (declarations of health policy experts and government health officials in support of the state petitioners' motion to expedite appeal).

Indeed, the panel majority's decision directing the district court to conduct a "searching inquiry" into the entire ACA on remand only worsens the existing confusion about the ACA's future. App. 68a. At the majority's behest, the district court will "employ a finer-toothed comb" and the "many [other] tools at its disposal," *id.* at 69a, to "pars[e] through the over 900 pages of the post-2017 ACA, explaining [whether] particular segments are inextricably linked to the individual mandate," *id.* at 65a. That process would compound doubts in the healthcare markets about the future of important provisions of the ACA.

As addressed at greater length in the next section, such a process is also quite unnecessary here. There is no need to consider issues of severability at all because no plaintiff has established standing and, in any event, an unenforceable minimum coverage provision does not offend the Constitution. *See* App. 76a-98a (King, J., dissenting); *infra* pp. 19-23. At a minimum, however, there is no need for any court to conduct the granular severability analysis envisioned by the panel majority. Under the circumstances here there can be no doubt that Congress wanted to keep the rest of the ACA in place even without an enforceable minimum coverage provision, because that is precisely the effect of the amendment that Congress itself enacted. *See* App. 98a-112a (King, J., dissenting); *infra* pp. 23-26.[16]

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[16] The "federal defendants' new arguments as to the proper scope of relief in this case," App. 70a, are not a reason for this Court to defer review. Those belated and novel arguments would only be relevant if this Court ruled against petitioners on each of the questions presented here. *See id.* at 99a n.12 (King, J., dissenting) (remedial issues are "largely moot" if the "coverage requirement is completely severable from the rest of the ACA"). In that

To be sure, plaintiffs (and now the federal government) may dispute those conclusions; but there is every reason for this Court to resolve that dispute with dispatch. As the federal government argued to the court of appeals below, the "[p]rompt resolution of this case will help reduce uncertainty in the healthcare sector." C.A. Dkt. 514906506 at 3 (Apr. 8, 2019). The lower courts have struck down a federal statutory provision on constitutional grounds and cast doubt on the validity of the entire ACA, arguably the most consequential package of legislative reforms of this century. That uncertainty threatens adverse consequences for patients, providers, and insurers nationwide. *See supra* pp. 16-17. Further proceedings in the lower courts will not allay that uncertainty. Under these circumstances, this Court should grant immediate review and resolve the case this Term.

II. THE DECISION BELOW IS WRONG

Review is also warranted because the decision below is incorrect as to standing, the merits, and severability.

1. The panel majority's standing analysis disregards the central holding in *NFIB*. This Court held that Section 5000A as a whole must be read as offering a "lawful choice" between maintaining healthcare coverage and paying a tax in an amount specified by Congress. 567 U.S. at 573-574 & n.11. The only change Congress made to that statute in 2017 was to set the amount of the tax at zero. *See* Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017). As amended, Section 5000A "still gives individuals the choice to purchase insurance or make a shared-responsibility

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event, the Court could address the proper scope of relief itself or remand for further proceedings on that issue as appropriate.

payment—but the amount of that payment is zero dollars." App. 93a (King, J., dissenting). Now that Congress has reduced the tax to zero, the individual plaintiffs do not need to do anything to comply with the law. A statutory provision that offers individuals a choice between purchasing insurance and doing nothing does not impose any legally cognizable harm. *See id.* at 79a-85a.

The majority below reasoned that the individual plaintiffs have standing because they "feel compelled by the individual mandate to buy insurance" and have done so "solely for that reason." App. 29a-30a. But that analysis "overlooks what will happen if the individual plaintiffs fail to purchase insurance: absolutely nothing." *Id.* at 79a (King, J., dissenting). Any "injury they incur by freely choosing to obtain insurance" is "entirely self-inflicted." *Id.* at 79a, 81a. Article III does not allow plaintiffs to invoke the jurisdiction of the federal courts on that basis. *See id.* at 85a.

As to the state plaintiffs, the majority held that they have established standing based on "fiscal injury as employers." App. 32a. A fiscal injury caused by a federal statute or policy can of course be a basis for state standing. *See, e.g.*, *California v. Azar*, 911 F.3d 558, 570-573 (9th Cir. 2018); *Texas v. United States*, 787 F.3d 733, 752-753 (5th Cir. 2015). But the burden of establishing such an injury rests on the plaintiff States, and allegations of financial injury do not suffice if they are "purely speculative" and unsupported by "concrete evidence that [the State's] costs ha[ve] increased or will increase." *Crane v. Johnson*, 783 F.3d 244, 252 (5th Cir. 2015); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013). Here, the state plaintiffs did not produce concrete evidence supporting either their primary theory of injury—that

the existence of an unenforceable minimum coverage provision would "forc[e] individuals into the States' Medicaid and CHIP programs," C.A. Dkt. 514939271 at 20 (May 1, 2019)—or the panel majority's separate theory that the provision would increase state costs for "printing and processing [certain] forms," App. 33a. Indeed, as Judge King explained, "there is *no* evidence in the record" supporting these alleged injuries. *Id.* at 86a (King, J., dissenting) (emphasis added); *see id.* at 86a-91a.

2. The majority's analysis of the merits also ignores the basic lesson of *NFIB*. Federal courts "have a duty to construe a statute to save it, if fairly possible." *NFIB*, 567 U.S. at 574 (Roberts, C.J.). "This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). In *NFIB*, the Court invoked that canon when it construed Section 5000A as a whole as offering a lawful choice between purchasing health insurance and paying a tax, *see* 567 U.S. at 574 & n.11, even though Section 5000A(a) by itself might "more naturally" be read "as a command to buy insurance," *id.* at 574 (Roberts, C.J.).

Following the 2017 amendment, it remains fairly possible—and thus necessary—to construe Section 5000A in a manner that presents no constitutional problem. As noted, the only change Congress made was to reduce the amount of the tax in Section 5000A(c) to zero. Read in light of that amendment and the construction adopted in *NFIB*, Section 5000A continues to offer individuals a choice between having health insurance and not having health insurance—without paying any tax if they make the latter choice. The minimum coverage provision is now simply precatory;

it may encourage Americans to buy health insurance, but it imposes no legal obligation to do so. Viewed that way, Section 5000A is no more constitutionally problematic than many other provisions adopted by Congress, including "sense of Congress" resolutions and legislative findings, that may exhort or encourage but do not impose any enforceable requirement or prohibition.[17] There is no basis for concluding that "Congress exceeds its enumerated powers when it passes a law that does nothing." App. 91a-92a (King, J., dissenting); *see id.* at 98a (the minimum coverage provision now "functions as an expression of national policy or words of encouragement, at most").

In addition, Section 5000A may still be fairly interpreted as a lawful exercise of Congress's taxing powers, albeit one whose practical operation is currently suspended. Section 5000A retains several of the features that the Court pointed to in construing it as a tax. *NFIB*, 567 U.S. at 566. It is still set out in the Internal Revenue Code; it includes references to taxable income, number of dependents, and joint filing status, 26 U.S.C. § 5000A(b)(3), (c)(2), (c)(4); and it provides a structure through which future taxpayers could be directed to pay a tax as a consequence of choosing not to maintain minimum health coverage, *id.* § 5000A(b). While the "provision no longer produces revenue" at the moment because the tax is currently set at zero,

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[17] *See, e.g.*, 4 U.S.C. § 8 ("No disrespect should be shown to the flag of the United States of America; the flag should not be dipped to any person or thing."); 22 U.S.C. § 7674 (sense of Congress provision encouraging businesses to provide assistance to sub-Saharan Africa); 42 U.S.C. § 1751 (declaring it the policy of Congress to "encourage the domestic consumption of nutritious agricultural commodities").

App. 45a, there is nothing unconstitutional about leaving Section 5000A(a) on the books so that Congress can more easily increase the amount of the tax again later if it decides to do so.

The panel majority cast aside these interpretations, instead reading Section 5000A(a) in isolation as an unconstitutional "command to purchase insurance." App. 45a. But that is hardly the only construction that is "fairly possible." *NFIB*, 567 U.S. at 574 (Roberts, C.J.). Indeed, "it boggles the mind to suggest that Congress intended to turn a nonmandatory provision into a mandatory provision by doing away with the only means of incentivizing compliance with that provision." App. 96a-97a (King, J., dissenting).

3. Finally, the lower courts' approach to severability is incorrect. The "touchstone" of any inquiry into severability "is legislative intent." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006). When a court holds one part of a statute unconstitutional, it generally "sever[s] its problematic portions while leaving the remainder intact," *id.* at 329, unless it is "evident that Congress would not have enacted those provisions which are within its power, independently of those which are not," *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1482 (2018) (internal quotation marks and alterations omitted).

Applying those principles here is "quite simple." App. 98a (King, J., dissenting). If Section 5000A(a) is now viewed as an unconstitutional command to purchase health insurance, then it is one that Congress plainly intended to make unenforceable. By reducing the amount of the alternative tax to zero, Congress eliminated the only consequence for choosing not to maintain healthcare coverage. At the same time, it left every other provision of the ACA in place. So there

is no need to speculate about whether Congress "[w]ould . . . have preferred" to preserve the rest of the ACA if it had known that the minimum coverage provision could not be enforced. *Ayotte*, 546 U.S. at 330. We know from what Congress actually did that it "believed the ACA could stand in its entirety without the unenforceable coverage requirement." App. 98a (King, J., dissenting); *see Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 560 (Scalia, J., dissenting) ("One determines what Congress would have done by examining what it did.").

The surrounding circumstances only confirm that intent. Just months before Congress reduced the alternative tax to zero in the TCJA, it considered and rejected several bills that would have repealed major provisions of the ACA. *Supra* p. 9 & nn.5-6. Prominent congressional supporters of the TCJA also reassured the American public that the amendment to Section 5000A would not "tak[e] anyone's health insurance away," or do anything to "alter Title I of [the ACA], which includes all of the insurance mandates and requirements related to preexisting conditions and essential health benefits." *E.g.*, *Continuation of the Open Executive Session to Consider an Original Bill Entitled the Tax Cuts and Jobs Act Before the S. Comm. on Fin.*, 115th Cong. 106, 286 (2017) (statement of Chairman Orrin Hatch). The history of the 2017 amendment supports the conclusion that Congress would not have wanted a "statute on which millions of people rely for their healthcare and livelihoods to disappear overnight with the wave of a judicial wand." App. 106a (King, J., dissenting).

The panel majority identified multiple flaws in the district court's severability analysis. App. 65a-70a. In particular, it acknowledged that the district court all

but ignored "the intent of the 2017 Congress" that zeroed out Section 5000A's alternative tax. *Id.* at 65a. But rather than resolving the straightforward severability question that was before it, the majority remanded for a "more searching inquiry" by the district court. *Id.* at 68a. As noted above, any such remand is entirely unnecessary. *See supra* pp. 18-19. Severability is a "question of law that [appellate courts] review de novo." App. 98a (King, J., dissenting). The inquiry focuses exclusively on the "statute's text and historical context," which in this case the court of appeals was "just as competent" to analyze as the district court. *Id.* at 99a.

The remand proceeding directed by the panel majority is exactly the sort of remedial exercise that this Court has warned against. Courts may not use their remedial powers to conduct the "quintessentially legislative work" of "rewriting" statutes. *Ayotte*, 546 U.S. at 329 (brackets omitted). In telling the district court to "pars[e] through the over 900 pages of the post-2017 ACA" and conduct a "granular" analysis with "a finer-toothed comb," App. 59a, 65a, 68a, the majority appears to invite the district court to "take a blue pencil" to the ACA, *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring). That exercise involves an "editorial freedom" that "belongs to the Legislature, not the Judiciary." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010). And it is especially unwarranted here, where the intent of Congress as to the proper remedy could not be more plain.

The panel majority's flawed approach to severability, coupled with its mistaken analysis of standing and the merits, casts doubt on the fate of a landmark statute on which millions of Americans depend. The

questions presented by this petition are purely legal, of enormous practical importance, and fully ripe for review by this Court. Under the circumstances here, directing the district court to conduct a burdensome, time-consuming, and wholly unnecessary re-evaluation of severability would serve no useful purpose, while exacerbating uncertainty about the ACA's future and "ensur[ing] that no end for this litigation is in sight." App. 113a (King, J., dissenting). This Court should grant immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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