

Nos. 19-840, 19-1019

**In The
Supreme Court of the United States**

CALIFORNIA, ET AL.,
Petitioners,

v.

TEXAS, ET AL.,
Respondents.

TEXAS, ET AL.,
Petitioners,

v.

CALIFORNIA, ET AL.,
Respondents.

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

**BRIEF OF SMALL BUSINESS MAJORITY
FOUNDATION AS *AMICUS CURIAE*
SUPPORTING PETITIONERS IN NO. 19-840
AND THE U.S. HOUSE OF REPRESENTATIVES**

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INTEREST OF *AMICUS CURIAE*¹

The Small Business Majority Foundation, Inc. is a national, nonpartisan organization founded and run by small business owners across the United States. The organization researches policy issues related to job creation and maximizing business opportunities and competitiveness for small businesses across the United States. It also educates small business owners about their health care options through events and online resources. In addition, the organization represents the interests of small businesses before Congress and state legislatures, the Executive Branch, and the courts. In recent years, it has focused on policies that address rising health care costs, which can limit workforce mobility and disproportionately burden small businesses. *See, e.g.*, Br. for Small Bus. Majority Foundation, Inc., et al., *Dep't of Health and Human Servs., et al. v. Florida*, 567 U.S. 519 (2012); Br. for Small Bus. Majority Foundation, Inc., *King v. Burwell*, 135 S. Ct. 2480 (2015).

The Foundation's considered view is that the reforms established by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA" or "the Act"), have provided substantial benefits for small businesses, their employees, and the self-employed, by offering a means of acquiring affordable health insurance. The Foundation agrees with Petitioners that the Fifth

¹ Counsel of record for all parties consented to the filing of this brief. S. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

Circuit erred in holding that Congress rendered the minimum coverage provision unconstitutional when it zeroed out the tax required from individuals who choose not to buy health insurance. *See Pet'rs' Br. 25-35.*

The Foundation writes separately to highlight how several programs established by the Act work independently of the minimum coverage provision to provide crucial access to health insurance for the Nation's small business owners and their employees. It is inconceivable that Congress—which itself chose to eliminate any enforcement mechanism for the minimum coverage provision while leaving the rest of the Act intact—intended a court to jettison the entire Act after holding the minimum coverage provision unenforceable. Such wholesale dismantling of the Act, moreover, would do great harm to the Nation's entrepreneurs and small business workers by unwinding years of steady progress toward affordable health coverage. The resulting harm would only be magnified now, when many small businesses are already at grave risk of closing forever and millions of self-employed workers risk their health as essential workers that the Nation depends upon for deliveries of food and other items every day.

INTRODUCTION AND SUMMARY OF ARGUMENT

For the Nation's small businesses—and entrepreneurs seeking to start them—few questions loom larger than health insurance. Before the Affordable Care Act, the answers were often negative: health insurance was too costly or unobtainable at any

price, and out of reach for many self-employed people and small business owners. Many entrepreneurs went uninsured. Others clung to jobs with affordable health coverage rather than move to otherwise attractive jobs with small firms or pursue their dreams of starting a business—a phenomenon known as “job lock.”

The Act changed that, through a myriad of different means, some wholly unconnected to the individual market where the minimum coverage provision applied. And when Congress eliminated the alternative tax for those who choose not to maintain minimum coverage, it left every other aspect of these different programs intact. With good reason. These distinct reforms are “fully operative,” *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1482 (2018), in the absence of the tax. The proof is in the pudding. These independent programs have continued to thrive in the years since the tax was set to zero. The result: individuals throughout the Nation freed to make life choices about employment and entrepreneurship without forgoing affordable health care, dramatically increased access to coverage for the self-employed, and easier pathways for small businesses to provide comprehensive health care coverage to employees and their families.

There is no indication Congress intended to abruptly end all of these programs if the minimum coverage provision were held unenforceable. To the contrary, Congress itself rendered the minimum coverage provision unenforceable while leaving the rest of the Act’s reforms in operation. *See Tax Cut and Jobs Act*, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017). Congress’s own actions show how it

“preferred what is left of its statute to no statute at all,” *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006), because that is effectively what it enacted.

Never has “what is left” of ACA been more important than now. Most of the workers shopping for groceries on behalf of the homebound or delivering take-out meals to health care workers on the pandemic’s front lines are self-employed. Chances are high that these essential workers have health coverage through one of several distinct ACA reforms, like Medicaid expansion, premium tax credits, or provisions requiring coverage of young adults on their parents’ policies. Small businesses, too—facing devastating business closures and struggling to survive long enough to re-start operations in a fragile economy with substantial health risks—depend upon yet other ACA reforms to provide crucial health coverage to their employees. Congress did not intend to hinge these millions of Americans’ health coverage on the fate of a single provision that it deemed unnecessary to enforce.

ARGUMENT

Congress Intended To Preserve The Rest Of ACA's Reforms, Which Are Crucial To Small Businesses, Even In The Absence Of The Minimum Coverage Provision.

A. Before the Act, Small Business Workers Were Largely Unable to Obtain Affordable Health Care Coverage.

Before many of ACA's reforms took effect in 2014, small business employees and the self-employed comprised a disproportionate share of the working uninsured. In 2011 roughly two-thirds of the nation's uninsured workers were self-employed or working at a company with fewer than 100 employees. Paul Fronstin, Emp. Benefit Research Inst., *Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2012 Current Population Survey* 15 (2012), <https://tinyurl.com/t5l2qah>. Small businesses were "less likely to offer their employees health coverage, citing the cost of coverage as a key reason." U.S. Gov't Accountability Off., GAO-12-166R, *Health Care Coverage: Job Lock and the Potential Impact of the Patient Protection and Affordable Care Act* 3 (2011) ("GAO Report"). And when small businesses did offer insurance, it was more expensive for their workers. Small business employees typically paid "nearly 30 percent" of "the average share of ... policy premiums," as compared to employees of larger firms who pay "about 7 percent." Cong. Budget Office, Econ. &

Budget Issue Brief, *Effects of Changes to the Health Insurance System on Labor Markets* 1 (2009).

Because coverage options were both limited and undesirable for small businesses before ACA's reforms, many individuals stayed in jobs with large companies that provided affordable health insurance, rather than start their own ventures or take jobs with small businesses—a phenomenon economists refer to as “job lock.” GAO Report at 3. Job lock harms not only those “frozen in a job [they] hate because leaving it means losing key health benefits.” Ellyn E. Spragins, *How to Beat Job Lock*, *Newsweek*, at 98 (Dec. 14, 1998). It also creates inefficiencies that ripple through the entire economy. Worker mobility, which is stymied by job lock, “promotes efficiencies in the labor market and provides benefits to the overall economy.” GAO Report at 3. Due to the greater difficulty small businesses faced in obtaining affordable health coverage pre-ACA, small businesses in particular bore much of the brunt of these harms, both on a personal level—reflected in the high uninsured rate among the self-employed—and in their diminished ability to attract employees.

B. Several Distinct ACA Programs Substantially Improved Small Businesses' Access to Affordable Health Care.

Several ACA reforms made things better for small businesses, both by enabling access to affordable health insurance irrespective of employment and by providing small businesses the opportunity to obtain comprehensive health care coverage for their employees at lower costs and with greater price

stability than ever before. These reforms, operating through distinct pathways and in different insurance markets,² have freed people to make decisions about employment and entrepreneurship with confidence that their access to health care is secure; provided them economic security by protecting them from the possibility of catastrophic medical bills; and enabled them to lead healthier lives.

1. ACA individual market reforms spurred a dramatic increase in health insurance coverage for small business employees and self-employed workers, delivering peace of mind and economic freedom to millions of Americans. These reforms—like the formation of ACA’s exchanges and the associated premium tax credits, the expansion of Medicaid in some States, and the ban on pre-existing condition exclusions—have meaningfully increased individual choice, job mobility, and flexibility since ACA was enacted. And these separate programs have continued to enable crucial access to affordable health coverage for small businesses well after Congress eliminated the alternative tax for those who choose not to purchase minimum coverage.

a. In particular, the individual exchanges have allowed millions more self-employed workers and

² Many ACA provisions of importance to the self-employed apply only in the individual market. Others apply to the group market, which involves employer-sponsored health insurance. See Kaiser Family Foundation, *Health Reform Glossary*, <https://tinyurl.com/yafh7ykq> (entry for “Group Health Insurance”). The small group market is generally for employers with 2-50 employees, although the precise numbers can differ by State. See *id.* (entry for “Small Group Market”).

small business employees to obtain health coverage than before the ACA's passage. A study of 2016 data indicates that more than half of all ACA marketplace enrollees are small business owners, self-employed people, or small business employees. Small Business Majority Foundation, *Small Businesses See Significant Gains from the Affordable Care Act* 3, 10 (Oct. 16, 2018), <https://tinyurl.com/yc3hmmd7> (finding 52.6% of enrollees work for or own a small business). Extrapolated to 2020, more than 6 million small business owners or employees obtained coverage this year through the exchanges. See Kaiser Family Foundation, *Marketplace Enrollment, 2014-2020*, <https://tinyurl.com/y2p7mcxh> (reporting 11.4 million marketplace enrollees in 2020).

The millions of self-employed entrepreneurs and small business workers choosing to enroll through the exchanges continue to do so because the exchanges and premium tax credits provide the security they need to pursue their business ideas and dream jobs—not because of the minimum coverage provision, which has been unenforceable since 2019 due to a zeroed out alternative tax. Enrollment figures—materially the same before and after the alternative tax was eliminated—bear this out. See *id.* (reporting 11.7 million total exchange enrollees in 2018 and 11.4 million in 2019). So does the experience of entrepreneurs, who report that the exchanges and premium subsidies freed them to start new businesses and protected them from ruinous health care costs. See, e.g., Small Business Majority Foundation, *Colorado Photographer Steps from Behind the Camera to Defend ACA* (Feb. 14, 2017),

<https://tinyurl.com/y8p54chp> (describing how Howard Paul started his own photography business because the ability to purchase an exchange health plan “remove[d] a sense of fear associated with entrepreneurship”; three years later, that health plan enabled him to obtain lifesaving medication); Harris Meyer, *Self-Employed Fear ACA Repeal Means 'Job Lock'*, *Modern Healthcare* (Dec. 28, 2016), <https://tinyurl.com/ybct4fpw> (describing how the ability to purchase a subsidized health plan on an exchange enable Joshua Lapp to start a three-person urban planning firm).

b. The Act’s Medicaid expansion has also made coverage available to millions more small business employees, in those States that have chosen to participate. See Sarah Lueck, *Health Coverage Gains for Small-Business Workers at Risk*, *Ctr. on Budget & Pol’y Priorities* (2017), <https://tinyurl.com/yda6qek7> (estimating that 1.7 million small business employees gained coverage through the expansion of Medicaid). As with the exchanges, the expanded availability of Medicaid has fostered entrepreneurship. Autumn Theodore, for example, was able to leave a “corporate job that offered health benefits” to start a photography business due to the ability to access coverage under Ohio’s expansion of Medicaid. See Autumn Theodore, Letter to the Editor, *AHCA Would Not Be Good for Small Business*, *Columbus Dispatch* (June 29, 2017), <https://tinyurl.com/y9okao9w>. As more States have chosen to expand Medicaid in recent years, thousands more self-employed entrepreneurs and small business workers have secured crucial health coverage. See Erik Rettig, *Small Business Majority Foundation*,

Virginia Assembly's Vote to Expand Medicaid Will Benefit Small Businesses, Economy (May 30, 2018), <https://tinyurl.com/y7ucusj2>.

c. For other entrepreneurs, the Act's provisions regarding pre-existing conditions have proved crucial. Pre-existing health conditions are a common problem; a government study estimated that they affect between one-fifth and half of non-elderly Americans. Ctr. for Consumer Information & Ins. Oversight, *At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans*, <https://tinyurl.com/yc9yqm3n>. And small business owners frequently report that absent ACA, they would not have been able to obtain affordable health coverage—or any coverage at all—due to their medical history. For example, Karin McKie, a small business owner in Chicago, reported that she has “endured several serious health issues, which now qualify as pre-existing conditions,” and that without the Act, she “would have had huge financial strain, been forced to abandon [her] business to find employer-sponsored coverage and, in a worst-case scenario, declared bankruptcy.” Karin McKie, Letter to the Editor, *Obamacare a Lifesaver for the Self-Employed*, *Chicago Sun-Times* (July 23, 2017), <https://tinyurl.com/ycokrm8f>. The pre-existing condition exclusion remains as critical for entrepreneurs now as it did before the alternative tax was eliminated. See Small Business Majority Foundation, *Small Business Owners with Pre-Existing Conditions Rely on ACA* (Jan. 21, 2020), <https://tinyurl.com/y8mmj4un> (reporting the experience of a small business owner concerned about needing to close her business if ACA's pre-existing

condition exclusion were eliminated, because she would be denied coverage). Like the other distinct individual market reforms that have enabled affordable health coverage for millions of small business workers, the pre-existing condition exclusion has successfully continued to operate in the absence of any alternative tax for those who choose not to buy minimum coverage. See Rachel Fehr & Cynthia Cox, Kaiser Family Foundation, *Individual Insurance Market Performance in Late 2019* (Jan. 6, 2020), <https://tinyurl.com/ybcbxpqb> (“[T]he risk pool is not significantly sicker than it was while the individual mandate was still in effect.”).

2. The Act’s small group reforms, too, have helped small businesses provide affordable health benefits to employees, fostering growth and economic opportunity. These changes operate in a distinct market from the individual market reforms (to which the minimum coverage provision relates),³ yet they have also significantly benefitted small businesses and their employees. In particular, the Act has stabilized health care costs for small businesses that provide group coverage.

Before the Act was implemented, small businesses paid substantially more for health coverage than larger companies, usually for less comprehensive plans. Sean Lowry & Jane G. Gravelle, Cong. Research Serv., R43181, *The Affordable Care Act and Small Business: Economic Issues* 4 (2015), <https://tinyurl.com/y8x49grw>. And small business

³ The individual market and small group risk pools are generally distinct. See 45 C.F.R. § 156.80.

owners operating in tight labor markets often had no choice but to bear these costs. Because health care benefits are important to employees, ensuring employee access to health care is a significant factor in determining a small business's ability to attract top talent. See Health & Disability Advocates, *Small Businesses and the Affordable Care Act* 3 (2014), <https://tinyurl.com/ycq9l8os> (noting 71.8% of small business respondents reported that “providing health insurance benefits helps them recruit new employees”).

The Act's small group reforms, including the small group exchanges (known as “SHOP,” for “Small Business Health Options Program”), have significantly improved health care costs for small businesses (and their employees). Many small businesses offering health insurance coverage have seen their premium increases stabilize under the ACA, with premium increases dropping to their lowest level in years. Between 2008 and 2010, the average yearly premium increase in the small group market was 10.4%. U.S. Dep't of Health & Human Servs., *Fiscal Year 2017 Budget in Brief* 115 (2016), <https://tinyurl.com/yca5cx5k>. But after ACA, that rate has dropped by half or more. See *id.* (reporting average yearly premium increase in small group market of 5.2% between 2011 and 2015); Michael J. McCue & Mark A. Hall, *How the Small-Business Health Insurance Market Is Faring* (Apr. 22, 2010), <https://tinyurl.com/ybyg25vu> (reporting an average yearly 5% premium increase from 2013 to 2018, similar to the increases in the large group market).

Beyond this stabilization in the small group market, another ACA program designed for newer, smaller businesses provides a tax credit to small businesses with fewer than 25 employees. This credit, up to 50% of the employer’s share of qualifying health insurance premiums, is available for up to two consecutive years. *See* 26 U.S.C. § 45R. As one business owner reported, in addition to the “peace of mind” from “minimal” annual premium increases, he has received about \$2,200 per year for offering group health coverage to his employees, which “goes a long way toward reducing . . . costs.” Ron Nelson, Opinion, *One View: Obamacare Helped Me to Provide Insurance for Employees, Family*, Reno Gazette J. (Jan. 23, 2017), <https://tinyurl.com/ybhkgu2w>. Programs like this, alongside other ACA reforms, not only increase the freedom for individuals to start or join small businesses, but also increase the opportunity for those individuals and businesses to thrive.

C. Congress Did Not Intend to Unwind these Dramatic Improvements in Health Coverage for Small Business Workers—and It Is Now More Crucial than Ever to Protect Them.

The Small Business Majority Foundation agrees with Petitioners that because the minimum coverage provision remains constitutional, there is no need to reach the question of severability. *See* Pet’rs’ Br. 25-35. But if the Court reaches the question, it should not cast aside years of hard-fought progress on the implausible theory that Congress would have preferred no ACA at all to an ACA operating without an enforceable minimum coverage provision. The

“touchstone” of the severability analysis is “legislative intent.” *Ayotte*, 546 U.S. at 330. And here, as Petitioners argue, Pet’rs’ Br. 40-41, the relevant legislative intent is that of the 2017 Congress. The 2010 Congress enacted a fully constitutional law. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). If any constitutional problem exists—which it does not, Pet’rs’ Br. 25-35—it is the result of an enactment by the 2017 Congress. And that Congress itself blessed the idea of ACA operating without an enforceable minimum coverage provision when it eliminated the sole enforcement mechanism for that provision. *See* Pub. L. No. 115-97, § 11081, 131 Stat. at 2092. That is proof that Congress “believed the ACA could stand in its entirety without the unenforceable coverage requirement.” Pet. App. 98a (King, J., dissenting). There is thus no reason to believe that Congress would want to reverse major progress and abandon critical health care programs even if the Court ruled that the minimum coverage provision was rendered unconstitutional by the elimination of the alternative tax.

The progress has been substantial. Collectively, the reforms outlined above substantially reduced the uninsured rate for the tens of millions of people who own or work for small businesses. Within two years of most ACA reforms taking effect, more than a third of previously-uninsured small business workers had found health coverage. Kaiser Family Foundation, *The Uninsured: A Primer* 8–9 (Nov. 2016), <https://tinyurl.com/yb36ywbx> (reporting that 20% of the tens of millions of people working at a small business were uninsured in 2015, down from 31% in

2012). The situation has only improved since then; the uninsured rate for larger small businesses was 13% as of 2018, meaning more than half of previously-uninsured small business workers are now insured. *See* McCue & Hall, *supra* (reporting reduction in uninsured rate for businesses with 20-49 employees from 30% in 2013 to 13% in 2018).

Whichever ACA program has enabled them to obtain coverage, the Act has thus freed workers to make employment choices without the burden of forgoing affordable health coverage, by removing barriers like pre-existing condition exclusions or lack of affordable health coverage options. The newly-obtainable health coverage has been, quite literally, a lifesaver for many small business owners and employees. *See, e.g.*, Small Business Majority Foundation, *Colorado Photographer, supra* (small business owner reporting that without ACA coverage, “there is no way he would be able to pay for his medication” for advanced prostate cancer). It has also benefitted the Nation as a whole, because the resulting new business creation plays a powerful role in the U.S. economy. Microbusinesses alone—businesses with fewer than five workers, including the owner—generate nearly \$5 trillion in economic activity each year. *See* Assoc. for Enter. Opportunity, *Bigger Than You Think: The Economic Impact of Microbusinesses 7* (2019), <https://tinyurl.com/rbqvfkc>.

The elimination of the alternative tax for those who choose not to purchase minimum coverage has not impaired the operation of these other reforms, nor created “a scheme sharply different from what Congress contemplated.” *Murphy*, 138 S. Ct. at 1482.

Rather, the rest of the Act has continued to operate successfully since 2019 without an enforceable minimum coverage provision, which is precisely the scheme that Congress contemplated.

The Act's continued operation is especially critical now, when it has never been more important to protect both the health and finances of the Nation's small business owners and employees. Workers delivering groceries, packages, and meals to the millions of Americans sheltering in place are self-employed. See Lindsay Cates, U.S. Chamber of Commerce, *How Gig Economy Companies are Stepping Up to Help Americans Amid the COVID-19 Pandemic* (Apr. 9, 2020), <https://tinyurl.com/y9ltbvbg>. Without the exchanges or Medicaid, they would have no feasible way to obtain health coverage even as they risk infection daily to deliver essential supplies. Small businesses like restaurants and retail stores are doing their part, too, despite crippling business closures—more than half of small employers who have reduced their workforce due to the pandemic are still offering health care coverage to laid off employees. Small Business Majority Foundation, *Small Business Owners Report Devastating Impacts of COVID-19* (Apr. 14, 2020), <https://tinyurl.com/y9c7p4lz>.

Providing this critical support to the Nation's workers would not be possible without the ACA reforms that have created affordable health care options for small businesses. But it is not easy. Nearly a quarter of small business owners have canceled or lost access to their health insurance coverage as a result of the crisis. *Id.* There is no reason to inflict more damage on already fragile small businesses and

their employees, contrary to congressional intent, by invalidating one of the most significant legislative reforms in the past decade on account of a failure in a single provision that Congress itself deemed unnecessary.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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