Nos. 19-840 & 19-1019

IN THE

Supreme Court of the United States

CALIFORNIA, ET AL.,

Petitioners / Cross-Respondents,

v.

TEXAS, ET AL.,

Respondents / Cross-Petitioners.

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

BRIEF OF HEALTH CARE POLICY SCHOLARS AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 574 (2012), this Court held that the Affordable Care Act's minimum-coverage provision, 26 U.S.C. § 5000A, gives people a "lawful choice" between obtaining health insurance and paying a tax. In 2017, after rejecting proposals to repeal major provisions of the Affordable Care Act, Congress instead amended Section 5000A by reducing the amount of the tax to $0. The questions presented are:

1. Whether respondents have standing to challenge the amended Section 5000A.

2. Whether reducing Section 5000A's tax to $0 transformed that provision into an unconstitutional legal requirement to obtain health insurance.

3. Whether, if the amended Section 5000A is invalid, it is severable from the rest of the Affordable Care Act.

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INTEREST OF AMICI CURIAE

Amici curiae are 32 scholars who study health care policy. All followed, and some participated in, the development of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (ACA or Act). In the decade since the ACA's enactment, all have followed the debates over proposals to repeal or amend the Act.

This case is about a 2017 amendment to the ACA's minimum-coverage provision, 26 U.S.C. § 5000A. Respondents' standing and merits arguments rest on assertions about the amendment's legal effect, and their severability arguments rest on assertions about the congressional intent behind it. Amici write to provide this Court with a full account of the process that led to the 2017 amendment—and to show that the legislative and public record refutes the essential premises of respondents' arguments.[1]

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[1] No counsel for a party authored this brief in whole or in part. No person other than amici and their counsel made a monetary contribution to this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (*NFIB*), this Court held that the ACA's minimum-coverage provision, 26 U.S.C. § 5000A, gives people a choice between obtaining health insurance and paying a tax. In 2017, Congress considered and rejected proposals to repeal key provisions of the ACA. Instead, Congress adopted an amendment reducing Section 5000A's tax to $0 while leaving the rest of the ACA untouched.

Seizing on that narrow amendment, respondents ask this Court to do exactly what Congress would not: wipe the ACA off the books. To reach that startling result, respondents would have the Court embrace two equally startling premises. First, respondents insist that the Republican-controlled 2017 Congress defied *NFIB* by transforming Section 5000A into a mandate to buy insurance. Second, respondents maintain that even though Congress made that purported mandate completely unenforceable, Congress also deemed it so essential to the ACA that the entire Act must fall if the amended Section 5000A is invalid.

Petitioners have shown that those assertions have no basis in the statutory text. Amici submit this brief to demonstrate that context confirms what the text makes clear: Respondents' two central assertions about what the 2017 Congress did and intended flatly contradict Congress's own understanding, which is documented in an extensive legislative and public record.

First, the 2017 Congress did not impose a mandate to buy insurance. Congress was well aware that *NFIB* had construed Section 5000A to give

people a choice between obtaining insurance and paying a tax. Members of Congress uniformly recognized that zeroing out the tax rendered Section 5000A inoperative. No one even hinted that it might transform Section 5000A into the requirement *NFIB* forbade. To the contrary, the amendment's backers—including Majority Leader McConnell and then-Speaker Ryan—emphasized that it would do the opposite, giving Americans *more* "freedom to make our own healthcare choices." 163 Cong. Rec. H10,212 (Dec. 19, 2017) (Rep. Ryan).

Second, even if the amended Section 5000A were unconstitutional, it would be severable from the rest of the ACA unless it were "evident" that the 2017 Congress "would have preferred no [ACA] at all" to an ACA without Section 5000A. *Exec. Benefits Agency v. Arkison*, 573 U.S. 25, 37 (2014). The 2017 Congress actually considered those two options, and it made its preference unmistakable. Congress emphatically rejected anything like "no ACA at all," voting down every repeal proposal it considered. Instead, Congress itself effectively excised Section 5000A from the ACA by making it unenforceable.

Respondents reach a different conclusion about severability only by focusing on the wrong Congress's view about the wrong version of Section 5000A. They invoke the 2010 Congress's findings and this Court's decisions in *NFIB* and *King v. Burwell*, 135 S. Ct. 2480 (2015). But those findings and decisions addressed the role of an *enforceable* Section 5000A in the ACA as originally enacted. The 2017 Congress manifestly made a different decision about the need for Section 5000A's incentive to buy insurance, based in part on different policy priorities. The 2017 Congress

also made an informed judgment that the ACA's markets would continue to function without an operative Section 5000A—as in fact they have.

In short, respondents ask this Court to upend the Nation's health care system by imposing a regime that Congress deliberately rejected—and to do so by presuming twice over that the 2017 Congress did exactly the opposite of what it believed (and told the public) it was doing. The Court should decline that invitation and leave the question of further changes to the ACA where it belongs: with the voters and their elected representatives.

ARGUMENT

I. The 2017 Congress amended Section 5000A after rejecting efforts to repeal the ACA.

During the spring and summer of 2017, Congress considered and rejected a series of proposals to repeal key provisions of the ACA. That fall, after abandoning the repeal effort, Congress zeroed out Section 5000A in a tax bill otherwise unrelated to health care, the Tax Cuts and Jobs Act (TCJA), Pub. L. No. 115-97, 131 Stat. 2054 (2017). The amendment's supporters stressed its narrow scope, emphasizing that it would not affect the rest of the ACA.

A. The 2017 Congress rejected proposals to repeal key provisions of the ACA.

Between 2010 and 2016, Republicans in Congress introduced dozens of bills to repeal the ACA in whole or in part. Cong. Research Serv., *Legislative Actions in the 112th, 113th, and 114th Congresses to Repeal, Defund, or Delay the ACA* 1, 14-22 (Feb. 7, 2017), https://perma.cc/MF8P-CHTM. Those bills were largely symbolic, because President Obama was sure

to veto any repeal—as he in fact did after one passed the Republican-controlled Congress in 2015. H.R. 3762, 114th Cong. (vetoed Jan. 8, 2016).

Things changed when President Trump took office in January 2017. Republicans still controlled Congress, and they made ACA repeal one of their first priorities. But passing an actual repeal bill proved much harder than passing a symbolic one. Republicans quickly recognized that they would "own" the consequences of any repeal "lock, stock, and barrel," and would "be judged on that" by voters. Robert Pear & Thomas Kaplan, *In Private, Republican Lawmakers Agonize Over Health Law Repeal*, N.Y. Times (Jan. 27, 2017), https://perma.cc/MN6R-8ALR. They struggled to agree on a replacement that would keep President Trump's promises to preserve the ACA's expansions in coverage and its popular reforms, including the guaranteed-issue and community-rating requirements protecting people with preexisting conditions. *Id.*; *see King*, 135 S. Ct. at 2485-86. And the politics of repeal only grew more challenging as public support for the ACA reached new heights. Margot Sanger-Katz & Haeyoun Park, *Obamacare More Popular Than Ever, Now That It May Be Repealed*, N.Y. Times (Feb. 1, 2017), https://perma.cc/B4A4-G2PA.

Over the months that followed, the public watched as Congress held an extended debate about the future of the Nation's health care system. We describe the twists and turns of that legislative process below, but three points warrant emphasis at the outset. First, even the broadest repeal bills would have left much of the ACA unchanged, and were thus far more modest than what respondents seek here.

Second, all of the repeal bills would have amended Section 5000A in exactly the way the TCJA ultimately did: by reducing the tax to $0. Zeroing out the tax was, in other words, the accepted mechanism for rendering Section 5000A inoperative—not some novel backdoor means of imposing a mandate. Finally, the Senate rejected each of the repeal proposals because key Republican Senators were unwilling to dismantle the ACA.

1. The effort to repeal the ACA stumbled out of the gate when a "revolt" among rank-and-file Republicans forced Speaker Ryan to withdraw the House's repeal bill without a vote. Robert Pear et al., *Push to Repeal Health Law Fails*, N.Y. Times (Mar. 24, 2017), https://perma.cc/8CL8-QPZC. That defeat initially appeared to doom the repeal effort. *Id.* But in May 2017, after more maneuvering, the House passed a repeal bill, the American Health Care Act (AHCA), H.R. 1628, 115th Cong. (2017).

The AHCA would have made no changes to six of the ACA's ten titles and would have left in place some signature ACA reforms, including the guaranteed-issue requirement. The AHCA would, however, have repealed or changed other key ACA provisions. It would have rolled back the Act's Medicaid expansion. AHCA § 112. It would have reworked the tax credits subsidizing insurance and eliminated the accompanying cost-sharing subsidies. *Id.* §§ 131, 202. And it would have modified or allowed states to modify other insurance reforms, including the community-rating requirement. *Id.* § 135; *see id.* §§ 134, 136.

The AHCA also would have repealed most of the ACA's taxes and tax increases. AHCA §§ 204-13. In particular, it would have reduced the amount of the

tax in Section 5000A, which the AHCA called the "individual mandate," to $0. *Id.* § 204. It would have done the same to 26 U.S.C. § 4980H, the so-called "employer mandate" imposing a tax on employers that do not provide health coverage. AHCA § 205.

2. Senate Republicans "immediately rejected" the House bill, "signaling that they would start work on a new version of the bill virtually from scratch." Thomas Kaplan & Robert Pear, *House Passes Measure to Repeal and Replace the ACA*, N.Y. Times (May 4, 2017), https://perma.cc/L4X3-ATH4.

The Senate was operating under a budget reconciliation resolution for health care. S. Con. Res. 3, 115th Cong. §§ 3001-02 (2017). Reconciliation allows the Senate to pass qualifying budget legislation by a simple majority, without the "normal 60-vote filibuster requirement." *King*, 135 S. Ct. at 2492; *see* 2 U.S.C. § 641(e). In June and July, three reconciliation options emerged, each framed as a substitute amendment to the House bill: "repeal and replace," "repeal and delay," and "skinny repeal."

Repeal and replace. The Senate's repeal and replace proposal was the Better Care Reconciliation Act (BCRA), S. Amendment 270 to H.R. 1628, 115th Cong., 163 Cong. Rec. S4200-18 (July 25, 2017). It was originally released in June and went through several iterations as Republican leaders strove to find a proposal that could garner 50 votes. BCRA broadly resembled the House bill: It would have left much of the ACA untouched while rolling back the Medicaid expansion, BCRA § 125; changing the tax credits and eliminating the accompanying cost-sharing subsidies, *id.* §§ 102, 211; and modifying or allowing states to modify various insurance reforms, *id.* §§ 204-09. Like

the House bill, BCRA also would have zeroed out Sections 5000A and 4980H, *id.* §§ 104-05, and repealed other ACA taxes, *id.* §§ 108-17.[2]

Repeal and delay. As BCRA struggled to secure majority support, some Senators proposed a different strategy: repeal the ACA's coverage-expanding provisions, but with a delayed effective date that would (in theory) force a future Congress to come up with a replacement. That proposal was formally called the Obamacare Repeal Reconciliation Act, S. Amendment 271 to H.R. 1628, 115th Cong., 163 Cong. Rec. S4218-20 (July 25, 2017). It would have repealed the ACA's Medicaid expansion, premium tax credits, and cost-sharing subsidies as of the end of 2019. *Id.* §§ 102, 107, 205. It would have zeroed out Sections 5000A and 4980H, *id.* §§ 104-05, and repealed other ACA taxes and tax increases, *id.* §§ 109-20. It would have left the ACA's insurance reforms unchanged, to be addressed in the future replacement bill.

Skinny repeal. In late July, Senate leadership released an even more minimal option that was not intended to become law—only to be a "placeholder" allowing continued negotiations during a conference with the House. Amy Goldstein, *"Skinny Repeal" Could Be the Senate's Health-Care Bill of Last Resort*, Wash. Post (July 25, 2017), https://perma.cc/8CER-FLNX. This proposal was formally called the Health Care Freedom Act, S. Amendment 667 to H.R. 1628, 115th Cong., 163 Cong. Rec. S4579-80 (July 27, 2017). It would have zeroed out Sections 5000A and

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[2] We cite BCRA as ultimately offered on the Senate floor. Earlier versions are available at https://perma.cc/N3MX-8PZY.

4980H, *id.* §§ 101-02; broadened states' ability to waive some ACA requirements, *id.* § 203; and modified a handful of other ACA provisions. It would have left the ACA's Medicaid expansion, tax credits, and cost-sharing subsidies unchanged.

3. The Senate process came to a head over three days of floor debate in late July.

On the first day, the Senate rejected repeal and replace by a lopsided 43-57 vote, with Republican Senators Collins, Corker, Cotton, Graham, Heller, Lee, Moran, Murkowski, and Paul joining all 48 Democrats in voting no. 163 Cong. Rec. S4183 (July 25, 2017); *see* Thomas Kaplan & Robert Pear, *Senate Votes Down Broad Obamacare Repeal*, N.Y. Times (July 25, 2017), https://perma.cc/2923-S359.

The next day, the Senate rejected repeal and delay by a vote of 45-55, with Republican Senators Alexander, Capito, Collins, Heller, McCain, Murkowski, and Portman joining the Democrats in voting no. 163 Cong. Rec. S4252 (July 26, 2017); *see* Thomas Kaplan, *Senate Soundly Rejects Repeal-Only Health Plan*, N.Y. Times (July 26, 2017), https://perma.cc/6SAE-ZBK9.

On the third day, the Senate ended the repeal effort with a late-night vote to reject the skinny-repeal placeholder. 163 Cong. Rec. S4415 (July 27, 2017). Senators Collins, McCain, and Murkowski joined the Democrats in voting no. *Id.* Senator McCain—who had recently returned to the Senate after being diagnosed with cancer—signaled his decisive vote with a dramatic thumbs-down on the floor. Robert Pear & Thomas Kaplan, *Senate Rejects Slimmed-Down Obamacare Repeal as McCain Votes*

No, N.Y. Times (July 27, 2017), https://perma.cc/92HC-DHUK.

Senator McCain later explained that "[s]kinny repeal fell short" because it "fell short" of Republicans' "promise to repeal [and] replace Obamacare [with] meaningful reform." Kelly Swanson, *McCain Explains His Dramatic Vote Against the GOP's Last-Ditch Obamacare Repeal Idea*, Vox (July 28, 2017), https://perma.cc/9LPC-K5HQ. Senator Collins similarly explained that she had opposed the repeal bills because they would have caused millions of Americans to lose their health coverage and triggered "the loss of important consumer protections." 163 Cong. Rec. S4407 (July 27, 2017). And Senator Murkowski likewise stated that she could not vote to "repeal the ACA without reform that allows people the choice they want, the affordability they need and the quality of care they deserve." Lisa Murkowski, *Statement on Senate Healthcare Process* (July 18, 2017), https://perma.cc/M6NH-NF3L.

4. The repeal effort had one final chapter in September. A new proposal, known as Graham-Cassidy after its lead sponsors, would have (among other things) eliminated the ACA's Medicaid expansion, tax credits, and cost-sharing subsidies and replaced them with block grants to states. Graham-Cassidy §§ 102, 106-07, 117, 125, 205. Like the other repeal bills, it also would have zeroed out Sections 5000A and 4980H. *Id.* §§ 104-05.[3]

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[3] The Graham-Cassidy proposal is available at https://perma.cc/55F3-PBH8.

The Senate abandoned Graham-Cassidy without a vote after it sparked widespread public criticism and several key Senators—including Collins, McCain, and Murkowski—signaled their opposition. Thomas Kaplan & Robert Pear, *Senate Republicans Say They Will Not Vote on Health Bill*, N.Y. Times (Sept. 26, 2017), https://perma.cc/7CUM-N82M. Instead, Leader McConnell indicated that "Republicans would move on to their next big legislative goal: overhauling the tax code." *Id.*

B. The 2017 Congress adopted a narrow amendment rendering Section 5000A inoperative.

The TCJA was the most sweeping revision of the Internal Revenue Code since 1986. Like the failed repeal efforts, it proceeded via budget reconciliation. H. Con. Res. 71, § 3002, 115th Cong. (2017). The House passed its version of the bill on November 16, 2017. H.R. 1, 115th Cong. (2017). The amendment zeroing out Section 5000A's tax was added in the Senate, and the relevant legislative history is thus found primarily in debates in the Senate Finance Committee and on the Senate floor. During those debates, supporters repeatedly emphasized that the amendment would not disturb the rest of the ACA.

1. Senator Cotton was the first to raise Section 5000A in the tax-reform process, taking to the floor to offer "a creative idea": Republicans could "repeal the individual mandate" and use the resulting savings to "deliver more tax relief." 163 Cong. Rec. S6978 (Nov. 2, 2017). Senator Cotton distinguished his proposal from the failed repeal bills, emphasizing that it would not "cut a single dime out of ObamaCare," and would make "not a single regulation change." *Id.*

As the Senate Finance Committee prepared to take up the tax bill, President Trump declared his support for "including the repeal of the individual mandate." Alan Rappeport & Thomas Kaplan, *Trump Again Wades into Tax Debate, Suggesting Repeal of Obamacare Mandate*, N.Y. Times (Nov. 13, 2017), https://perma.cc/A9ZZ-FZ93. The next day, Senator Hatch, the Finance Committee Chairman, released a proposal that included an amendment zeroing out Section 5000A. *Description of the Chairman's Modification to the Chairman's Mark of the TCJA* 10-11 (Nov. 14, 2017), https://perma.cc/MVE2-N9P6.

Democrats on the Committee objected that the amendment would reduce the number of Americans with health coverage and undermine the ACA. *See, e.g.*, Sen. Fin. Comm., *Open Executive Session to Consider the TCJA* 23-27, 32-35 (Nov. 15, 2017) (*Nov. 15 Markup*), https://perma.cc/X3NY-DWKE. Senator Hatch responded that "[n]othing—nothing—in the [proposal] impacts Obamacare policies like coverage for preexisting conditions," *id.* at 106, or "the availability of premium subsidy credits," Sen. Fin. Comm., *Open Executive Session to Consider the TCJA* 7 (Nov. 16, 2017) (*Nov. 16 Markup*), https://perma.cc/Z5T7-BCZH.

The Finance Committee approved Senator Hatch's proposed amendment to the House bill, including the zeroing out of Section 5000A, on a party-line vote. *Nov. 16 Markup* 446-49.

2. The TCJA's Republican supporters repeated Senator Hatch's assurances on the Senate floor. Senator Cotton, for example, reiterated that the amendment to Section 5000A "doesn't cut a single dime out of Medicaid," "doesn't cut a single dime out of insurance subsidies," and "doesn't change a single

regulation of Obamacare." 163 Cong. Rec. S7229 (Nov. 15, 2017). Senator Hatch again declared that "nothing—nothing—in the bill removes or limits anyone's access to health insurance." *Id.* S7371 (Nov. 29, 2017). Many of his colleagues did the same. *See, e.g.*, *id.* S8078 (Dec. 19, 2017) (Sen. Barrasso) ("It doesn't take away anyone's insurance."); *id.* S7666 (Dec. 1, 2017) (Sen. Scott) (the amendment takes "nothing at all away from anyone who needs a subsidy"); *id.* S7542 (Nov 30, 2017) (Sen. Toomey) ("Not a single person is disqualified. Not a single person loses the benefit."); *id.* S7383 (Nov. 29, 2017) (Sen. Capito) ("No one is being forced off of Medicaid or a private health insurance plan."); *id.* S7322 (Nov. 27, 2017) (Sen. Cornyn) ("[N]o one is being kicked off of their health insurance coverage.").

3. The TCJA passed the Senate on a 51-49 vote. 163 Cong. Rec. S7712 (Dec. 1, 2017). Senators Collins and Murkowski provided the decisive votes in favor, and both emphatically distinguished the TCJA's narrow amendment to Section 5000A from the broad repeal efforts they had helped reject. Senator Murkowski stressed that although the TCJA "repeal[ed] the individual mandate," "nothing else about the structure of the Affordable Care Act would be changed," and "those who qualify for subsidies will still be able to retain them." Lisa Murkowski, *Historic Tax Reform Bill Heads to President's Desk* (Dec. 20, 2017), https://perma.cc/7Y3C-D523. Senator Collins likewise explained that there was a "big difference" between the TCJA amendment and the "bills considered last summer and fall that would have taken away insurance coverage" and "made sweeping cuts in the Medicaid program." 163 Cong. Rec. S8060 (Dec. 18, 2017).

4. After a conference, both the House and Senate passed a version of the TCJA with the amendment zeroing out Section 5000A. 163 Cong. Rec. H10,312 (Dec. 20, 2017) (House); *id.* S8141-42 (Dec. 19, 2017) (Senate). In both chambers, only Republicans voted for the bill. *Id.* President Trump then signed the TCJA into law, declaring: "[N]ow we're overturning the individual mandate." *Remarks by President Trump at Signing of H.R. 1* (Dec. 22, 2017), https://perma.cc/74LE-L492. A few weeks later, the President used his State of the Union address to reiterate that "the individual mandate is now gone." 164 Cong. Rec. H727 (Jan. 30, 2018).

II. The legislative and public record confirms that the 2017 Congress did not impose a legal requirement to obtain insurance.

Like President Trump, petitioners interpret the 2017 amendment as rendering Section 5000A inoperative: It now gives people a "lawful choice," *NFIB*, 567 U.S. at 574, between obtaining insurance and paying a tax of $0—which is to say, doing nothing. Respondents, in contrast, stake their case on the proposition that the Republican Congress passed, and President Trump signed, a legal mandate to buy insurance—a requirement that *NFIB* had declared unconstitutional and that Republicans in Congress had denounced for years. The legislative and public record confirms the obvious: Congress and the President did no such thing. The record also refutes respondents' assertion that the 2017 Congress must be deemed to have imposed a mandate because it left an inoperative Section 5000A on the books.

A. The 2017 Congress did not intend to impose a mandate.

The idea of a legal requirement to obtain health insurance has been a feature of health policy debates for decades. *See* Ezra Klein, *Unpopular Mandate*, New Yorker (June 18, 2012), https://perma.cc/7HRG-Y545. Initially, it was not a partisan issue. *Id.* But since the debates over the ACA, most Republicans in Congress have stridently opposed such a requirement on both constitutional and policy grounds. *Id.* In *NFIB*, for example, Leader McConnell and 42 of his Senate colleagues submitted a brief arguing that "requiring [individuals] to purchase health insurance . . . greatly exceeds the authority given to the federal government in the Commerce Clause." Amicus Br. of Members of the Senate at 8, *NFIB*, *supra* (No. 11-398), https://perma.cc/V9UN-YNL6.

Thirty-two of those same Senators voted for the TCJA. 163 Cong. Rec. S8141-42 (Dec. 19, 2017); *id.* S7712 (Dec. 1, 2017). In so doing, they did not abandon their previous understanding of the Commerce Clause by imposing a mandate. Instead, they emphasized that eliminating Section 5000A's tax would do just the opposite, giving people an unconstrained "choice as to whether to buy insurance or not to buy insurance." *Nov. 16 Markup* 23 (Sen. Crapo). That was the inescapable message from Republican leaders in both Houses of Congress:

- Majority Leader McConnell: The amendment would mean that people "are not forced to purchase something they either don't want or can't afford." *Id.* S8153 (Dec. 20, 2017); *see id.* S8051 (Dec. 18, 2017) ("flexibility to make their own healthcare decisions").

- Majority Whip Cornyn: The amendment would let people "voluntarily decide not to buy ObamaCare coverage." *Id.* S7322 (Nov. 27, 2017).
- Conference Chairman Thune: "Americans will no longer be required to buy health insurance." *Id.* S8098 (Dec. 19, 2017).
- Finance Committee Chairman Hatch: The amendment would "give [people] additional freedom" to "make their own choices." *Nov. 16 Markup* 7; *see* 163 Cong. Rec. S7371 (Nov. 29, 2017) ("This bill provides choice.").
- Speaker Ryan: The amendment would provide "the freedom and the flexibility to buy the healthcare that is right for you." *Id.* H10,212 (Dec. 19, 2017).

Other supporters consistently echoed that view. To take just a few examples:

- Senator Barrasso: The amendment changes the ACA from "a mandatory program" into "a voluntary program." *Id.* S8078 (Dec. 19, 2017).
- Senator Toomey: The amendment would "eliminate [the tax's] coercion, which forces people to buy" insurance. *Id.* S7672 (Dec. 1, 2017).
- Senator Scott: "Simply eliminating the individual mandate provides [people] an option." *Nov. 15 Markup* 160.
- Representative Harris: "No American should ever be forced to purchase something that

they don't want." 163 Cong. Rec. H9268 (Nov. 15, 2017).

Respondents, in contrast, have not cited any contemporaneous evidence suggesting that even a single Senator or Representative shared their understanding of the 2017 amendment. Nor have they explained *why* congressional Republicans would have defied *NFIB* and abandoned their long-held opposition to an insurance mandate—much less why they would have done so for the sake of a mandate they were simultaneously rendering unenforceable.

B. The 2017 Congress's decision to leave Section 5000A on the books does not reflect any intent to impose a mandate.

Despite the overwhelming and uncontroverted evidence of what the 2017 Congress thought it was doing, respondents insist that it must be deemed to have imposed a mandate because it left Section 5000A on the books. Respondents emphasize that Section 5000A(a) still says that covered individuals "shall" maintain health coverage. Respondents assert that because Section 5000A no longer raises revenue, it is no longer a tax. And respondents insist that the only other possibility is that it has become an unconstitutional mandate.

As petitioners have explained, that argument ignores the familiar principle that Congress is presumed to legislate against the backdrop of this Court's decisions. Here, that is not just a presumption: The record makes clear that Congress was well aware that *NFIB* had interpreted Section 5000A to do nothing more than impose a tax. Relying on that interpretation, Congress decided to render Section 5000A inoperative by zeroing out the tax.

And Congress chose that approach over a formal repeal because of a Senate procedural rule—not any desire to impose a mandate.

1. In *NFIB*, this Court held that Section 5000A provides a "lawful choice" between buying insurance and paying a tax. 567 U.S. at 574 & n.11. Under that interpretation, Section 5000A(a)'s statement that individuals "shall" maintain coverage imposes no legal duty—it simply serves as the predicate for the tax in subsections (b) and (c). The record shows that the 2017 Congress knew about—and relied on—this Court's authoritative interpretation.

In raising the possibility of zeroing out Section 5000A in the tax bill, Senator Cotton emphasized that "the Supreme Court upheld its constitutionality by saying that it was a tax." 163 Cong. Rec. S6978 (Nov. 2, 2017). Senator Hatch made the same point: "I think we can all agree that the individual mandate is a tax. After all, the Supreme Court would have nullified the mandate had they not reached that very conclusion." *Nov. 15 Markup* 6; *see, e.g.*, 163 Cong. Rec. S7500 (Nov. 29, 2017) (Sen. Portman) ("The Supreme Court has called it a tax."); *id.* S7322 (Nov. 27, 2017) (Sen. Cornyn) ("[T]he U.S. Supreme Court called it a tax."); *id.* S7239 (Nov. 15, 2017) (Sen. Lankford) ("[T]he individual mandate is a tax. That is what the Supreme Court labeled it as, and that is what individuals understand it to be.").

Relying on that understanding, the amendment's supporters consistently stated that zeroing out the tax "repeal[ed] the individual mandate." 163 Cong. Rec. H10,212 (Dec. 19, 2017) (Rep. Ryan); *see, e.g.*, *id.* S8168 (Dec. 20, 2017) (Sen. Gardner) ("ended the ObamaCare individual mandate"); *id.* S8130 (Dec. 19,

2017) (Sen. Sullivan) ("get rid of . . . the individual mandate"); *id.* S8123 (Sen. Young) (same); *id.* S8115 (Sen. Toomey) ("effectively repeal[ed] the individual mandate"); *id.* S8060 (Dec. 18, 2017) (Sen. Collins) ("repeal of the individual mandate"); *id.* H10,176 (Rep. Gohmert) ("repeal of the individual mandate"); *id.* S7916 (Dec. 7, 2017) (Sen. Perdue) ("The individual mandate . . . is eliminated."); *id.* S7500 (Nov. 29, 2017) (Sen. Portman) ("repealing the individual mandate"); *id.* S7383 (Sen. Capito) ("elimination of the individual mandate"); *id.* S7371 (Sen. Hatch) ("individual mandate repeal"); *id.* S7322 (Nov. 27, 2017) (Sen. Cornyn) ("repeal of Obama-Care's individual mandate"); *id.* S7240 (Nov. 15, 2017) (Sen. Cassidy) ("repealing the mandate"); *id.* S7229 (Sen. Cotton) ("repeal[ed] the individual mandate"); *id.* H9268 (Rep. Harris) ("repeal Obama-Care's individual forced mandate").

Democrats opposed the amendment, but likewise recognized that it was a "repeal of the individual mandate." 163 Cong. Rec. S8053 (Dec. 18, 2017) (Sen. Schumer); *see, e.g.*, *id.* S8132 (Dec. 19, 2017) (Sen. Carper); *id.* S8080 (Sen. Blumenthal); *id.* H10235 (Rep. McNerney); *id.* S7399 (Nov. 29, 2017) (Sen. Shaheen); *id.* S7384 (Sen. Cardin); *id.* S7363 (Nov. 28, 2017) (Sen. Casey).[4]

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[4] The only relevant committee document, the Senate Finance Committee's reconciliation recommendations, reflects the same understanding. The report's "[p]resent law" section describes Section 5000A as giving individuals a choice between obtaining health coverage "or be[ing] subject to a tax." S. Prt. No. 20, 115th Cong., 1st Sess. 104 (2017). The only change

2. Congress could have accomplished much the same result by formally repealing Section 5000A. But given this Court's decision in *NFIB*, zeroing out the tax was a perfectly logical way to achieve the 2017 Congress's goal of depriving Section 5000A of practical effect. And the record makes clear that Congress chose that approach over a formal repeal simply to comply with the Senate's Byrd Rule.

The Byrd Rule is a feature of the "complicated budgetary procedure" known as reconciliation. *King*, 135 S. Ct. at 2492. It prevents Congress from using the filibuster-free reconciliation process to pass provisions that lack a sufficient connection to the budget. Cong. Research Serv., *The Budget Reconciliation Process: The Senate's "Byrd Rule"* 1 (Nov. 22, 2016), https://perma.cc/76RC-E5XG. Among other things, the Byrd Rule specifies that every provision of a reconciliation bill must "produce changes in outlays or revenues" that are "not merely incidental to the non-budgetary components of the provision." 2 U.S.C. § 644(b)(1)(A) and (D).

The text of the TCJA amendment zeroing out Section 5000A was taken verbatim from the repeal bills that failed earlier in 2017. Those bills, in turn, borrowed that text from the 2015 repeal bill vetoed by President Obama. *See* H.R. 3762, 114th Cong., § 204 (enrolled bill). The 2015 bill was also a reconciliation measure, and its approach to Section 5000A resulted from the Byrd Rule.

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attributed to the amendment is that it "reduces the amount of [that tax] to zero." *Id.* at 105.

The House's version of the 2015 bill would have enacted a provision specifying that Section 5000A would cease to apply as of December 31, 2014—a change that also required various conforming amendments. H.R. 3762, 114th Cong., § 201 (Oct. 23, 2015). When the bill went to the Senate, the Parliamentarian determined that this proposal and a parallel provision terminating the tax in Section 4980H "d[id] not qualify under the Byrd rule" because "the policy impact of these repeals outweighs their fiscal impact" and because they included "technical and conforming language" that had no budgetary effect. 161 Cong. Rec. S8251 (Dec. 2, 2015) (Sen. Enzi). The Byrd Rule thus prevented the 2015 Senate from formally repealing Sections 5000A and 4980H.[5]

Senate Republicans were nonetheless able to achieve essentially the same result by invoking a parliamentary precedent from the ACA's 2010 enactment. The ACA itself was not adopted through reconciliation, but it was immediately amended by a reconciliation bill. That bill made changes necessary to secure the House's agreement to the Senate version of the ACA, which had passed before Scott Brown's election deprived Senate Democrats of their 60-vote majority. *See* John E. McDonough, *Inside National Health Reform* 94-98 (2011). All provisions of the 2010 reconciliation bill had to be deemed Byrd-Rule compliant by the Parliamentarian. *Id.* at 97.

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[5] It is not uncommon for the Parliamentarian to determine that tax changes violate the Byrd Rule because their budgetary effects are incidental to their policy effects. *See* Ellen P. Aprill & Daniel Hemel, *The Tax Legislative Process: A Byrd's Eye View*, 81 Law & Contemp. Probs. 99, 121-24 (2018) (listing examples).

And two of those approved provisions were changes to the amounts of the taxes in Sections 5000A and 4980H. Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, §§ 1002(a), 1003(b), 124 Stat. 1032-33.

Based on that precedent, the Parliamentarian apparently concluded in 2015 that the reconciliation procedure could again be used to change the amounts of the Section 5000A and 4980H taxes—even to reduce them to $0. *See* 161 Cong. Rec. S8251 (Dec. 2, 2015) (Sen. Enzi). And zeroing out the taxes also eliminated the need for conforming amendments, solving the House bill's other Byrd-Rule problem. *Id.*

Like the failed 2017 repeal bills, the TCJA simply adhered to the approach to Section 5000A that the Parliamentarian had blessed two years earlier. That context makes clear that it was the Byrd Rule—not any desire to impose a mandate by backhanded implication—that led the 2017 Congress to zero out Section 5000A's tax rather than achieving a similar result by formally repealing it.[6]

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[6] Although formal repeal would have yielded precisely the same result for Americans previously subject to Section 5000A, the fact that the Byrd Rule required Congress to leave an inoperative Section 5000A on the books does have an important procedural consequence in the Senate: It means that a future Senate could use reconciliation to increase Section 5000A's tax to a non-zero level without the 60 votes that would have been required to re-enact Section 5000A had it been repealed.

III. The legislative and public record confirms that even if Section 5000A were invalid, it would be severable from the rest of the ACA.

The legislative and public record also confirms that even if the amended Section 5000A were invalid, it would be severable from the rest of the ACA—including the Act's guaranteed-issue and community-rating requirements.

A. The 2017 Congress made clear that it preferred an ACA without Section 5000A to no ACA at all.

1. When this Court holds a statutory provision unconstitutional, it seeks to "'limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 508 (2010) (citation omitted). Under that familiar approach, this Court "must sustain [the ACA's] remaining provisions 'unless it is evident that the Legislature would not have enacted those provisions independently of that which is invalid.'" *Id.* at 509 (brackets, citation, and ellipsis omitted). The question, then, is whether it is "evident" that the 2017 Congress "would have preferred no [ACA] at all" to an ACA without Section 5000A. *Exec. Benefits Agency v. Arkison*, 573 U.S. 25, 37 (2014).

2. Usually, that inquiry is counterfactual. Here, though, the 2017 Congress actually confronted essentially those two options, and it could not have been clearer about which it preferred.

The 2017 Congress manifestly did *not* want to wipe the ACA off the books. During the months Congress considered various proposals to "repeal" the ACA, no one even suggested repealing the entire Act.

That is no wonder: The ACA's ten titles include hundreds of provisions, many of which have little or nothing to do with health coverage, are entirely uncontroversial, or both—and many of which have engendered profound reliance over the past decade.

Of course, many congressional Republicans did support proposals to repeal key provisions of the ACA. But the Senate rejected all of them. Part I.A, *supra*. And it did so because key Republican Senators, including Senators Collins and Murkowski, steadfastly refused to support any bill that did not preserve the ACA's expansions in coverage and popular consumer protections. *Id.*

In contrast, the 2017 Congress was perfectly willing to accept an ACA without Section 5000A. In fact, Congress itself created an ACA functionally identical to the statute that would exist if Section 5000A were invalidated and severed. When this Court holds a statutory provision invalid, it is not "purge[d] from the statute books"—it simply becomes unenforceable. *Winsness v. Yocom*, 433 F.3d 727, 728 (10th Cir. 2006) (McConnell, J.). Here, the 2017 Congress has already achieved the same result by eliminating any enforcement mechanism for Section 5000A's purported mandate.

3. Before changing its position in the court of appeals, DOJ argued that Section 5000A is inseverable only from the ACA's guaranteed-issue and community-rating provisions. DOJ C.A. Br. 15. That narrower severability argument fails for much the same reason: It is equally clear that the 2017 Congress would have preferred an ACA without Section 5000A to an ACA stripped of those popular protections for people with preexisting conditions.

Even the failed repeal bills—which would have zeroed out Section 5000A—would have left the guaranteed-issue and community-rating requirements in place. Part I.A, *supra*. And supporters of the TCJA amendment went out of their way to emphasize that "[n]othing—nothing—in the [amendment] impacts ObamaCare policies like coverage for preexisting conditions." *Nov. 15 Markup* 106 (Sen. Hatch); *see, e.g.*, 163 Cong. Rec. S7666 (Dec. 1, 2017) (Sen. Scott) (the amendment "does not have a single letter in there about pre-existing conditions"). The 2017 Congress made a considered decision to retain those requirements without an enforceable Section 5000A.

4. Respondents have offered no evidence that anyone in the 2017 Congress believed that an unenforceable Section 5000A was essential to the ACA. And when that theory surfaced in this lawsuit, Republican Senators emphatically disclaimed respondents' account of their intentions. Senator Collins called it "absurd," explaining that "[i]f Congress had wanted to strike down the rest of the Affordable Care Act, it would have done so." Tierney Sneed, *DOJ: Congress Nuked Obamacare with 2017 Tax Bill; Senate GOP: Uh, No We Didn't*, Talking Points Memo (May 3, 2019), https://perma.cc/XA5W-2FD8.

Senator Alexander was equally dismissive: "I don't know one single Senator who thought" that "when we voted to get rid of the individual mandate we voted to get rid of Obamacare." Ben Kamisar, *Lamar Alexander: DOJ Argument to Repeal Obamacare "Flimsy,"* NBC News (May 10, 2020), https://perma.cc/34UM-CCKQ. The same understanding was "repeatedly backed up" in a reporter's interviews with "more than a dozen GOP senators"—including

avowed ACA opponents. Paul McLeod, *Republicans Say They Didn't Intend for Obamacare to Get Tossed Out by the Courts*, BuzzFeed (Dec. 19, 2018), https://perma.cc/3XXQ-PAMT.

Senators also specifically rejected DOJ's prior suggestion that a defect in Section 5000A would bring down guaranteed-issue and community-rating. Senator Collins emphasized that "Congress affirmatively eliminated the penalty while leaving these critical consumer protections in place." Letter to Attorney General Sessions 2 (June 27, 2017), https://perma.cc/GA7N-PWFF. Senator Murkowski explained that "the only thing" that everyone agreed on in 2017 was that Congress should not "disturb the provisions that provide for those that have pre-existing conditions." Erica Martinson, *Murkowski "Disturbed" by Justice Department Attack on Coverage of Pre-Existing Conditions*, Anchorage Daily News (June 25, 2018), https://perma.cc/MY3H-D2ZD.

B. The 2017 Congress made different policy and empirical judgments than the Congress that enacted Section 5000A.

Rather than grappling with what the 2017 Congress did and intended, respondents have rested their severability arguments primarily on legislative findings from 2010. But respondents go badly astray in trying to discern the 2017 Congress's intent about severability by looking to findings made by a different Congress, for a different purpose, and about a dramatically different version of Section 5000A. Respondents likewise err in invoking this Court's past discussions of the role of an *enforceable* Section 5000A in the original ACA. Both arguments ignore the 2017 Congress's decision to depart from the

ACA's original design by rendering Section 5000A unenforceable.

1. Respondents have emphasized that the original ACA included findings stating that Section 5000A was "essential to creating effective health insurance markets" under the Act's guaranteed-issue and community-rating rules. 42 U.S.C. § 18091(2)(I) and (J). Respondents assert that those findings are an "inseverability clause." Texas BIO I, 7. And they insist that because the 2017 Congress did not repeal the findings, they continue to control the severability analysis. Respondents are wrong on both counts.

First, "Section 18091 is not an inseverability clause." J.A. 483 (King, J., dissenting). Congress knows how to draft such a clause: by expressly directing "that if a specific portion of an Act is held invalid, the whole Act or some portion of the Act shall be invalid." Senate Office of Legislative Counsel, *Legislative Drafting Manual* § 131 (1997) (*Senate Drafting Manual*); *see* House Office of Legislative Counsel, *Manual on Drafting Style* § 328 (1995); *see generally* Israel H. Friedman, *Inseverability Clauses in Statutes*, 64 U. Chi. L. Rev. 903 (1997).

The statements on which respondents rely are something else entirely: legislative "findings" made to support Congress's authority to enact Section 5000A under the Commerce Clause. 42 U.S.C. § 18091. Such findings are simply "assertions of fact" by the Congress that adopts them; they have no legal effect. *Senate Drafting Manual* § 124. Nor were they a reliable guide to the 2010 Congress's intent on severability, which is "separate, and very different, from the constitutional analysis." *Florida v. HHS*,

648 F.3d 1235, 1326 (11th Cir. 2011), *rev'd in part on other grounds*, *NFIB*, 567 U.S. 519 (2012).

Second, whatever significance the findings might have had before 2017, they are irrelevant now. They refer to "the individual responsibility requirement provided for *in this section*"—that is, Section 1501 of the original ACA, which contained Section 5000A. ACA § 1501(a)(1), 124 Stat. 242 (emphasis added). By their terms, those findings do not apply to the very different version of Section 5000A adopted seven years later. And the fact that the 2010 Congress deemed an enforceable incentive to buy insurance essential to "creating" markets under then-new rules says nothing about whether the 2017 Congress deemed an unenforceable Section 5000A essential to sustaining markets that had been operating for years.

Nor can anything be read into the 2017 Congress's failure to repeal the 2010 findings. Precisely because such findings are merely factual assertions by the Congress that adopted them, there is no reason for a future Congress to repeal them if it disagrees or circumstances change—especially where, as here, the findings are explicitly tied to a superseded version of the statute. And the 2017 Congress *could not* have repealed the 2010 findings in the TCJA, because such a repeal would have lacked the budget effect demanded by the Byrd Rule. *See* 2 U.S.C. § 644(b)(1)(A) and (D).

2. Respondents likewise err in invoking *NFIB* and *King*. Those decisions described the connection between the original version of Section 5000A, the ACA's tax credits, and the guaranteed-issue and community-rating rules. *See, e.g.*, *King*, 135 S. Ct. at 2486-87. But like the 2010 findings, those decisions

discussed the original, enforceable version of Section 5000A, which gave people a tangible "incentive" to obtain health coverage by requiring them to "make a payment to the IRS" if they did not. *Id.* at 2486. The 2017 Congress plainly made a different judgment than the 2010 Congress about the need for such an incentive, and that revised judgment is the one that controls now.

3. The legislative record shows that the 2017 Congress made a different judgment because it had different policy priorities and access to information unavailable in 2010.

As to policy, the 2017 amendment's supporters criticized Section 5000A as a "terribly regressive tax" paid primarily by "low- and middle- income taxpayers." *Nov. 15 Markup* 7 (Sen. Hatch); *see, e.g.*, *id.* at 89 (Sen. Crapo) ("one of the most regressive taxes"); 163 Cong. Rec. S7500 (Nov. 29, 2017) (Sen. Portman) ("an onerous tax"). Supporters also criticized Section 5000A on principle, arguing that it is "wrong for the Federal Government to require someone to purchase a particular product." 163 Cong. Rec. S7655 (Dec. 1, 2017) (Sen. McConnell); *see, e.g.*, *id.* (Sen. Collins) (similar).

As to additional information, the 2017 Congress had the benefit of several years of experience with markets operating under the ACA's guaranteed-issue and community-rating rules—and with the Act's generous tax credits, which themselves provide a powerful incentive to buy insurance. *See Maine Cmty. Health Options v. United States*, No. 18-1023, 2020 WL 1978706, at *3 (Apr. 27, 2020) (*MCHO*).

When Congress enacted the ACA in 2010, it recognized that the Act's new markets posed "business risks" for insurers, "including a lack of

'reliable data'" on the cost of operating under the ACA's new rules. *MCHO*, 2020 WL 1978706, at *3 (citation omitted). To place the ACA's fledgling markets on the strongest possible footing, the 2010 Congress paired the tax credits with Section 5000A, which stabilized the markets by encouraging healthy people to buy insurance. *King*, 135 S. Ct. at 2486-87.

By 2017, it was clear that the ACA's markets would function even without Section 5000A. As Congress was considering the TCJA, the Congressional Budget Office (CBO) predicted that although repealing Section 5000A would increase premiums and reduce coverage somewhat, "insurance markets would continue to be stable in almost all areas of the country." CBO, *Repealing the Individual Health Insurance Mandate: An Updated Estimate* 1 (Nov. 2017) (*CBO Report*). Senator Hatch expressly relied on that assessment in defending the 2017 amendment. *Nov. 15 Markup* 105-06. And supporters of the amendment also argued that it would have even less of an impact than the CBO believed. *See, e.g.*, *id.* at 182 (Sen. Cassidy); 163 Cong. Rec. S7371 (Nov. 29, 2017) (Sen. Hatch).[7]

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[7] Respondents have emphasized that a few lines of the CBO report appeared to distinguish between zeroing out Section 5000A's tax and repealing it altogether. The CBO stated that "[i]f the individual mandate penalty was eliminated but the mandate itself was not repealed, the results would be very similar" to complete repeal because "only a small number of people who enroll in insurance because of the mandate under current law would continue to do so solely because of a willingness to comply with the law." *CBO Report* 1. That statement does not support respondents' position. Unlike respondents, the CBO did not suggest that zeroing out Section

4. The 2017 Congress's empirical judgment about the ACA's markets has proved correct. Section 5000A's tax ended on December 31, 2018. TCJA § 11081(b), 131 Stat. 2092. If that change were going to destabilize the markets, the impact would have been evident starting in January 2019. It was not.

Enrollment on the ACA's exchanges in the first quarter of 2019 "show[ed] little change from the first quarter of 2018." Rachel Fehr et al., *Changes in Enrollment in the Individual Health Insurance Market Through Early 2019* (Aug. 21, 2019), https://perma.cc/ZYG9-PCGK. Total individual-market enrollment fell, but less than it had fallen between 2016 and 2018. *Id.* And early data from 2020 show continued stability: The number of people who selected plans through the exchanges remained essentially unchanged. HHS, *Health Insurance Exchanges 2020 Open Enrollment Report* 2-3 (Apr. 1, 2020), https://perma.cc/97NR-PZED (*Enrollment Report*).

Prices have been stable too. Average premiums for the "silver" plans used to determine tax credits fell by 0.4 percent in 2019 and 3.5 percent in 2020.

5000A would *impose* a legal mandate to buy insurance; instead, it appeared to assume that such a mandate was a feature of "current law"—an assumption flatly contrary to *NFIB*. Congress was well aware of this Court's decision and did not share the CBO's apparent confusion. *See* Part II.B, *supra*. Nor is there any indication that any Member of Congress relied on the CBO's statement that "a small number of people" would obtain coverage to comply with an unenforceable mandate. Instead, when Senators discussed the CBO's analysis of the 2017 amendment, they referred to its estimates of the effect of a total repeal of Section 5000A. *See, e.g.*, *Nov. 15 Markup* 105-06.

John Holahan et al., *Marketplace Premiums and Insurer Participation: 2017-2020*, at 7 (Jan. 2020), https://perma.cc/Z4RL-V2WG (*Premiums & Participation*); *see Enrollment Report* 1 (reporting a three percent decrease in 2020 exchange premiums).

Insurers expanded their participation in the ACA's exchanges in 2019 and 2020, confirming that "many insurers now believe these markets are stable, functional, and potentially profitable." *Premiums & Participation* 2. Insurers have also experienced solid financial performance as measured by medical loss ratios (the share of premiums paid out as claims) and gross margins per member. Rachel Fehr & Cynthia Cox, *Individual Insurance Market Performance in Late 2019* (Jan. 6, 2020), https://perma.cc/FS48-4EKM. Claims costs grew only modestly in 2019, while the average number of days of hospitalization declined slightly, indicating that zeroing out Section 5000A did not, as feared, lead to a less-healthy risk pool. Rachel Fehr et al., *Insurer Participation on ACA Marketplaces, 2014-2020* (Nov. 21, 2019), https://perma.cc/LPN8-LFRW.

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After a closely watched debate about the future of the Nation's health care system, the 2017 Congress made a considered decision to render Section 5000A inoperative while leaving the rest of the ACA intact. The law is now functioning in exactly the manner the 2017 Congress anticipated and intended. This Court should decline respondents' invitation to replace the regime Congress deliberately chose with one it emphatically rejected.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

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