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 Appeal for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

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QUESTIONS PRESENTED

1. Whether at least one respondent has standing to challenge the constitutionality of Congress's ongoing command to buy health insurance.
2. Whether Congress may command Americans to obtain health insurance in the absence of any revenue producing penalty for failing to do so.
3. Whether, considering the 2017 Congress's decision to eliminate any penalty yet leave intact both the mandate and the inseverability clause, any provisions of the ACA remain operative.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Amicus Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle at issue in this case that Congress has been delegated only limited, enumerated powers. The Center for Constitutional Jurisprudence has participated as amicus curiae before this Court in several related cases addressing the constitutionality of the Affordable Care Act, namely, *NFIB v. Sebelius*, 567 U.S. 519 (2012); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); and *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, No. 19-431 (pending).

SUMMARY OF ARGUMENT

In 2010, Congress passed the Affordable Care Act, which included an individual mandate commanding all Americans to obtain health insurance or pay a fine for noncompliance with the mandate. The constitutionality of the Act in general and the mandate in particular was tenuous at best, and a majority of this Court agreed that the mandate was not a valid exercise of Congress's power under the Commerce Clause, even as augmented by the Necessary and Proper Clause. A different majority determined that the mandate could be treated as a tax, however, and held that

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[1] Pursuant to Rule 37.2, this brief is filed with the consent of all parties. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

as a tax it was constitutionally permissible, despite the fact that such a determination raised constitutional problems of its own.

Even that slim and constitutionally problematic reed was eliminated in 2017, when Congress passed the Tax Cut and Jobs Act. The TCJA amended the Affordable Care Act by removing the fine for noncompliance with the individual mandate but keeping the mandate itself. Absent the fine, this Court's prior determination that the mandate could be treated as a tax is no longer sustainable, and the mandate itself is therefore unconstitutional.

The continuing legal obligation to comply with the mandate, even absent a penalty for failure, imposes financial obligations on both the individual and State plaintiffs that are more than sufficient to confer standing.

Finally, because Congress itself described the mandate as "essential" to the overall statutory scheme, the remainder of the Act must likewise be deemed unenforceable.

ARGUMENT

I. The Individual Mandate Is an Unconstitutional Exercise of Federal Power

The federal government is "one of enumerated powers;" it thus "can exercise only the powers granted to it." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). In *NFIB v. Sebelius*, a majority of this Court found that the Affordable Care Act was an unconstitutional exercise of power under the Commerce Clause, even as augmented by the Necessary and

Proper Clause. *NFIB*, 567 U.S. at 520 (opinion of Roberts, C.J.); *id.* at 657 (joint dissent of Scalia, Kennedy, Thomas, and Alito, JJ.). A different majority of the Court nevertheless upheld the ACA as a valid exercise of the federal government's taxing power, despite the fact that the Congress which adopted the Act and the President who signed it disavowed claims that it was a tax, both before and after the Court's decision. *NFIB*, 567 U.S. at 570; *id.* at 589 (Ginsburg, J., joined by Breyer, Sotomayor, and Kagan, JJ., concurring in Part III.C); *see also, e.g.*, Byron Tau, "Obama Campaign: It's a penalty, not a tax," Politico.com (June 29, 2012);[2] Byron Tau, "Flashback: Obama 'absolutely' rejected mandate as a tax," Politico.com (June 28, 2012).[3] This majority reached this conclusion only because it found that the penalty imposed for failure to comply with the individual mandate had the "essential feature of any tax: it produce[d] at least some revenue for the Government." *Id.* at 564.

The decision has been widely criticized as having manufactured a taxing power foundation for the Affordable Care Act, which raised constitutional problems of its own, including that the bill did not originate in the House as required by Article I, Section 7, or that it would be a direct tax that was not apportioned according to population as required by Article I, Section 9. *See, e.g.,* Mark Klock, *The Taxing Power of the Federal Government and the General Welfare: What Are the Limits in the Wake of NFIB v. Sebelius?*,

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[2] Available at https://www.politico.com/blogs/politico44/2012/06/obama-campaign-its-a-penalty-not-a-tax-127721.

[3] Available at https://www.politico.com/blogs/politico44/2012/06/flashback-obama-absolutely-rejected-mandate-as-a-tax-127545.

76 U. Pitt. L. Rev. 325, 355-56 (2015) ("the Chief Justice... argued that Congress has the power to impose a not-apportioned tax for doing nothing. I believe this portion of the opinion is unpersuasive, incomplete, and without support from the Constitution"); Timothy Sandefur, *So It's A Tax, Now What?: Some of the Problems Remaining After NFIB v. Sebelius*, 17 Tex. Rev. L. & Pol. 203, 237 (2013) ("NFIB... resulted in an illogical opinion that withdraws the Court from its proper constitutional role, and does so solely as a function of political considerations"); Gregory Magarian, *Chief Justice Roberts's Individual Mandate: The Lawless Medicine of NFIB v. Sebelius*, 108 NW. U.L. Rev. Colloquy 15, 35 (2013) ("The Chief Justice's opinion exemplifies lawless judicial decisionmaking, in both the descriptive sense of failing to state or justify legal conclusions and the normative sense of violating bedrock legal precepts"); *see also NFIB*, 567 U.S. at 669 ("rewriting [the mandate] as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population. Art. I, § 9, cl. 4. Perhaps it is not (we have no need to address the point); but the meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters.").

But even that thin reed is no longer available. With the passage of the Tax Cut and Jobs Act in 2017, Congress repealed the penalty, stripping the mandate of its revenue-producing feature. Without the revenue production, however, the individual mandate no

longer has the "essential feature of any tax." Yet without that "tax" hook, the Commerce Clause holding of the other majority in *NFIB* is controlling: the individual mandate cannot be sustained as an exercise of the power to regulate commerce among the States, even as augmented by the Necessary and Proper Clause.

Petitioners nevertheless argue that the individual mandate can still be viewed as an exercise of Congress's taxing power, "albeit one whose practical operation is currently suspended." Petition for Writ of Certiorari, *California et al. v. Texas at al.*, at 32 (Dkt. No. 19-840). Petitioners go so far as to argue that "there is nothing unconstitutional about leaving [the individual mandate] on the books so that Congress can more easily increase the amount of the tax again later if it decides to do so." *Id.* at 32-33. But the constitutionality of a law is not assessed by what it might become at some point; it is assessed by how the law is written currently.

Further, the taxing power is not so broad as to encompass every statute even marginally relating to a tax. This is contrary to the majority opinion in *NFIB*, which found that the "essential feature of any tax" is revenue production. *NFIB*, 567 U.S. at 564 (citing *United States v. Kahriger*, 345 U.S. 22, 28, n. 4 (1953)). In *Kahriger*, the decision upon which the *NFIB* majority relied, the Court found that "regardless of its regulatory effect," a wagering tax "produce[d] revenue" and therefore was a valid exercise of the taxing power. *Kahriger*, 345 U.S. at 28. The same cannot be said for the mandate after the 2017 amendment; instead, the mandate is now a regulation that produces *no* revenue. *See* 42 U.S.C. § 18091(2) (describing the mandate

as "an essential part of this larger *regulation* of economic activity" and "essential to creating effective health insurance markets") (emphasis added). The individual mandate is clearly a regulation, not a tax.

The individual mandate thus cannot be an exercise of the taxing power. And the Commerce and Necessary and Proper Clauses have already been held to be constitutionally insufficient to support the individual mandate. Therefore, the mandate is not a law that Congress had the constitutional power to enact.

II. The Respondents Have Article III Standing to Assert Their Claims.

To establish Article III standing a "plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is ... concrete and particularized." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal marks omitted). A state's legal interest has been interpreted so broadly as to include "all the earth and air within its domain." *Massachusetts v. E.P.A.*, 549 U.S. 497, 519 (2007). Thus, as Petitioners themselves concede, a "fiscal injury caused by a federal statute or policy can of course be a basis for state standing." Pet. for Cert. at 30 (Dkt. No. 19-840).

Respondents include two classes of plaintiffs that each possess sufficient interests to confer standing. There are individual plaintiffs who will suffer financial harm if the individual mandate commands them to obtain insurance. And there are State plaintiffs who will suffer the additional financial injury due to individuals enrolling in state Medicaid and CHIP plans to comply with the individual mandate. While the grounds for standing are separate, each turns on

whether the individual mandate is a command to obtain insurance. Even so, "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 n. 4 (2006).

Petitioners challenge whether Respondents suffered an injury that could give rise to Article III standing. They argue that there were no fiscal injuries because the amended individual mandate "encourages Americans to buy health insurance but does not compel anyone to do anything." Pet. for Cert. at 13 (Dkt. No. 19-840). Quite frankly, Petitioners' argument treats a clear command of the law as merely hortatory merely because it is not accompanied by a penalty, but that is not the way *law* is supposed to work.

While the removal of the penalty for noncompliance dramatically changes the constitutional foundation on which this Court previously upheld the mandate, it does not change the fact that the individual mandate cannot be read any other way than as a command to obtain insurance, and that is true whether or not a penalty is affixed for non-compliance. Congress could have removed the individual mandate, or turned it into a mere recommendation, but it did not. Reading the individual mandate differently simply because Congress eliminated the fine for noncompliance is inconsistent with the actual language of the statute. The statute reads:

> Requirement to maintain minimum essential coverage.--An applicable individual *shall* for each month beginning after 2013 ensure that the individual, and any dependent of the indi-

> vidual who is an applicable individual, is covered under minimum essential coverage for such month.

26 U.S.C. § 5000A(a) (emphasis added).

The individual mandate's command was, moreover, never dependent on the fine for noncompliance. If it was, the period would have begun in 2014, the first year that the fine for noncompliance was imposed. *See* 26 U.S.C. § 5000A(c) (phasing in the fine for noncompliance in 2014). But the mandate began in 2013, a year before the fine for noncompliance began. This demonstrates that the individual mandate was a command to obtain insurance from the outset, quite apart from the existence of a penalty for noncompliance.

Further, the individual mandate never imposed a penalty on certain classes of people. *See* 26 U.S.C. § 5000A(e)(1)-(5). In a report issued before the passage of the ACA, the Congressional Budget Office stated that "[m]any individuals" who are subject to the mandate, but are not subject to the penalty, will obtain coverage in order to comply with the mandate "because they believe in abiding by the nation's laws." Congressional Budget Office, Key Issues In Analyzing Major Health Insurance Proposals (Dec. 2008), https://tinyurl.com/CBO2008Report. This report implies that persons who were not subject to the fine for noncompliance would nevertheless need to obtain health insurance to comply with the individual mandate. This report also demonstrates fiscal injury suffered by persons merely because they were subject to the individual mandate and not merely because they could be fined for noncompliance.

The individual mandate was always a command to purchase insurance, independent of the fine for noncompliance. This command causes financial injury to anyone who, in order to comply with the law, purchases insurance he would not otherwise have purchased. It also causes financial injury to States, which bear some of the financial burden from a greater number of persons enrolling in government-run and government-funded insurance programs like Medicaid and CHIP. Because the individual mandate causes financial injury, the respondents clearly had Article III standing to challenge its constitutionality.

III. The Mandate Is Inseverable from the Rest of the Affordable Care Act

In *NFIB*, the four Justices who would have held the individual mandate to be unconstitutional proceeded to address whether, if the mandate were unconstitutional, it was severable from the remainder of the Act. They determined it was not, stating that "all other provisions of the [Affordable Care Act] must fall as well." *NFIB*, 567 U.S. at 691 (joint dissent). No other Justice in *NFIB* indicated otherwise.[4]

The determination in the *NFIB* joint dissent is in accord with this Court's severability doctrine. When evaluating severability, the Court looks to "whether

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[4] The *NFIB* majority that upheld the constitutionality of the mandate did not need to, and therefore did not, address severability in the context of the mandate. Chief Justice Roberts did address severability with respect to the Medicaid Expansion provision, which seven members of the Court held to be unconstitutional, but found that the Medicaid Expansion provision was severable based on a provision in the Medicaid Act not relevant to the individual mandate. *See NFIB*, 567 U.S. at 586 (quoting 42 U.S.C. § 1303).

the statute will function in a manner consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). "The inquiry is eased when Congress has explicitly provided for severance by including a severability clause in the statute." *Id.* at 686.

Instead of a *severability* clause applicable to the individual mandate, the Affordable Care Act has what amounts to an *inseverability* clause. The clause states that "[the individual mandate] is an *essential* part of this larger regulation of economic activity" and "*essential* to creating effective health insurance markets." 42 U.S.C. § 18091(2)(I), (J) (emphasis added). The dissent in the court below argued that this is not an inseverability clause because it does not follow the form set forth in the Senate Legislative Drafting Manual. *See Texas v. United States*, 945 F.3d 355, 420 (5th Cir. 2019). The guidance that one house of Congress set out for itself in that manual is not binding even on that house, of course, much less on the whole Congress or on this Court. But this case does not involve a "form" inseverability clause. Rather, the statute contains findings that describe the mandate, and no other provision of the Act, as "essential." Thus, those findings by Congress that the mandate is "essential" to the overall statutory scheme should be treated as an inseverability clause when, as should be the case here, the mandate is deemed invalid.

Even if the Court declines to read 42 U.S.C. § 18091(2) as an inseverability clause, the Court should still find the rest of the ACA inseverable from the mandate. In a recent opinion analyzing severability, the Court found a statute prohibiting the licensing

and authorization of sports betting operations unconstitutional. *See Murphy v. NCAA*, 138 S. Ct. 1461 (2018). The Court found that if the prohibition on *licensing and authorization* of sports betting operations was struck down while a prohibition on the *operation* of sports betting operations in the same statutory scheme was left standing, "the result would be a scheme sharply different from what Congress contemplated." *Id.* at 1483. The Court also found that the provisions were "meant to work together." *Id.* at 1482. Thus, the Court reasoned that the provisions were inseverable and struck down the entire statutory scheme. *Id.* at 1484.

Like the statutory scheme in *Murphy*, the Affordable Care Act has many provisions that were "meant to work together." *See NFIB*, 567 U.S. at 696 (joint dissent) (*quoting, e.g.*, 42 U.S.C. § 18091(2)(C)) ("In at least six places, the Act describes the Individual Mandate as working 'together with the other provisions of [the Affordable Care Act]'"). Congress included many regulations in the Affordable Care Act that addressed the fiscal consequences of the mandate. *See* 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (expanding Medicaid); *see also* 26 U.S.C. § 36B & 42 U.S.C. § 18071 (implementing federal subsidies); 26 U.S.C. § 4980H (requiring employer with at least 50 employees to provide health insurance or pay a financial exaction); 42 §§ 300gg-300gg-4 (community rating provisions); 42 § 300gg-14(a) (allowing dependent children up to age 26 to stay on their parents plans). For instance, the community rating provision establishes community premium rates and prevents insurers from offering different premiums based on characteristics like medical history or gender. 42 §§ 300gg-300gg–4. All these provisions (at least in theory) worked together with the

mandate to create affordable health insurance so that persons who in the past would have had to pay very large premiums could afford to comply with the mandate. The intent was that all of these provisions were created specifically to allow the mandate to function. *See NFIB*, 567 U.S. at 694-96 (joint dissent) ("Congress did not intend to establish the goal of near-universal coverage without regard to fiscal consequences").

Even if 42 U.S.C. § 18091(2) is not an inseverability clause, therefore, it is at the very least strong evidence that the ACA without the mandate would be a "scheme sharply different from what Congress originally contemplated." *See Murphy*, 138 S. Ct. at 1483. This, combined with the Affordable Care Act's many provisions addressing the fiscal impact of the mandate, proves that Congress's intent when passing the Affordable Care Act revolved around its most essential provision: the mandate. Thus the Affordable Care Act must be struck down in entirety

CONCLUSION

The Court should affirm in part the Fifth Circuit's judgment and hold that the individual mandate as currently constituted is unconstitutional, and then affirm the district court's holding that the remainder of the statute is not severable from the mandate.

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