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 47 MEMBERS OF THE UNITED STATES SENATE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amici are 47 Members of the United States Senate, including Members who were in the Senate when Congress passed the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), and when Congress passed the Tax Cuts and Job Act of 2017 ("TCJA"), Pub. L. No. 115-97, 131 Stat. 20254 (2017), which amended Section 5000A of the Internal Revenue Code.[2] As originally enacted, Section 5000A required most Americans either to maintain a minimum level of health care coverage or pay a specified amount to the Internal Revenue Service. The TCJA amended Section 5000A to set the shared responsibility payment for those who choose not to maintain health care coverage at zero, while leaving every other provision of the ACA in place.

As Senators, amici have a substantial interest in the proper application and interpretation of federal laws. Amici are well positioned to address Congress's intent—as demonstrated in the text and history of the TCJA—to render Section 5000A unenforceable while leaving the rest of the ACA intact. By eliminating the tax consequence for individuals who choose not to purchase insurance, Congress did not in any way transform Section 5000A into an impermissible command to purchase insurance. But even if this Court were to hold that Section 5000A is unconstitutional because the shared responsibility payment was reset to zero, the proper remedy would be to sever that provision—not to strike down the entire ACA, through which Congress established the backbone of the Nation's

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to this brief's preparation and submission. All parties have consented to this filing.

[2] A complete list of Members of the United State Senate participating as amici appears as an Appendix to this brief.

health care system. Because the severability question focuses on Congress's intent, amici are uniquely positioned to explain why Section 5000A is fully severable: severing the provision is consistent with the targeted action Congress took in 2017; the purpose, context, and history of the amendment; and the importance of the ACA to the Nation's health and economy.

SUMMARY OF ARGUMENT

The Fifth Circuit erred in holding 26 U.S.C. § 5000A ("Section 5000A" or "the mandate") unconstitutional. By amending Section 5000A in 2017 to reduce the tax to zero, Congress did not transform that provision into an impermissible command to purchase health insurance. But if the Court were to conclude that Section 5000A is now unconstitutional, the proper remedy is to sever that provision from the ACA.

Severability analysis asks whether Congress would have "preferred what is left of its statute" once an unconstitutional provision is excised "to no statute at all." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006). That question is easily answered here: Congress's measured step of making Section 5000A inoperative while keeping the rest of the ACA intact demonstrates that Congress would prefer retaining the ACA without Section 5000A to having no ACA at all.

Congress's intent is manifest both in its action—a targeted amendment—and in the ways that a sweeping invalidation of the ACA would undermine the very benefits that Congress aimed to achieve. First, unlike in the usual case raising a severability question, where a *court* has struck down part of a statute, here *Congress itself* adjusted the relevant part of the ACA to make it inoperative and left the remainder alone. Accordingly, there is no need to conduct a counterfactual inquiry about whether Congress would have intended the rest of the ACA to remain in place if

Section 5000A were deemed unconstitutional. Congress's own action demonstrates that it believed Section 5000A was dispensable—and so entirely severable.

Second, in amending Section 5000A, Congress did not intend the disastrous consequences that would follow from wholesale invalidation of the ACA. A decision that Section 5000A cannot be severed would eliminate insurance coverage, pre-existing condition protections, and health care for millions; create chaos and increase costs in the health care market; and harm those who face the greatest barriers to care. Where Congress amended a single section of the ACA with a scalpel, the Court need not, and should not, destroy the ACA with a sledgehammer.

ARGUMENT

As a threshold matter, Section 5000A is constitutional. The undersigned Senators concur fully with the United States House of Representatives and the petitioners in No. 19-840 that Congress's decision to zero out the shared responsibility payment—and thereby make Section 5000A unenforceable—did not convert Section 5000A into an impermissible command to purchase health insurance. In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (*NFIB*), this Court declined to read Section 5000A "to declare that failing to [purchase insurance] is unlawful" because "[n]either the [ACA] nor any other law attaches negative legal consequences to not buying health insurance" beyond triggering the shared responsibility payment. *Id.* at 568. Section 5000A's relevant text remains unchanged since this Court definitively interpreted it to provide individuals with a choice to purchase insurance. And zeroing out the shared responsibility payment did not "attach[] negative legal consequences to not buying health insurance," *id.*, but rather *eliminated* all negative consequences for exercising that choice. This Court should accordingly uphold Section 5000A. But if the Court

concludes the provision is now unconstitutional, amici focus on why Section 5000A is severable—an issue that turns entirely on congressional intent.

I. SECTION 5000A IS SEVERABLE FROM THE REST OF THE ACA.

In analyzing severability, the "touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature." *Ayotte*, 546 U.S. at 330 (internal quotation marks omitted); *see NFIB*, 567 U.S. at 586. Here, Congress's intent could not be clearer: by taking targeted action to render Section 5000A unenforceable while leaving all other provisions of the ACA intact, Congress demonstrated its view that Section 5000A is not necessary to the ACA's continued functioning. The ACA is not only capable of operating without Section 5000A but *has* been operating that way since Congress made the provision unenforceable. And context, history, and precedent confirm that the only appropriate remedy would be to sever Section 5000A while leaving the rest of the ACA in place.

In urging wholesale invalidation of the ACA, respondents erroneously focus on the intent of the 2010 Congress that enacted an enforceable Section 5000A and misread a provision intended to set forth Congress's view of the provision's effect on interstate commerce. Ultimately, respondents' theory of congressional intent would require the Court to ignore what Congress actually did: render Section 5000A without practical effect, thereby demonstrating that Congress would prefer the ACA without Section 5000A to no ACA at all.

A. A Straightforward Application Of Severability Principles Demonstrates Section 5000A Is Severable.

1. To respect the separation of powers and principles of judicial restraint, this Court has long recognized that severability analysis hinges on congressional intent. *See, e.g.*, *United States v. Booker*, 543 U.S. 220, 246 (2005) (emphasizing that the Court "seek[s] to determine what Congress would have intended in light of the Court's constitutional holding" (citation omitted)). Because "'[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people,'" the Court "tr[ies] not to nullify more of a legislature's work than is necessary." *Ayotte*, 546 U.S. at 329 (citation omitted). Instead, the Court applies a "presumption . . . in favor of severability," *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion), and "limit[s] the solution to the problem" by severing "problematic portions [of a statute] while leaving the remainder intact." *Ayotte*, 546 U.S. at 328-29.

Accordingly, "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (citation omitted). And "[w]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *Id.* (citation omitted).

2. Under a straightforward application of these severability principles, Section 5000A is severable from the rest of the ACA.

In enacting the TCJA and zeroing out the shared responsibility payment, Congress clearly intended the ACA to function independently of Section 5000A. This Court

need not simply guess at whether Congress would have preferred to leave the rest of the ACA intact without Section 5000A—that was the TCJA's purpose and practical effect. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 560 (2001) (Scalia, J., dissenting) ("One determines what Congress would have done by examining what it did."). No counterfactual analysis or "nebulous inquiry into hypothetical congressional intent" is necessary to resolve the severability question here. *Booker*, 543 U.S. at 320, n.7 (Thomas, J., dissenting in part). Instead, by making Section 5000A unenforceable while preserving the rest of the ACA, Congress demonstrated its intent for the ACA to function without Section 5000A.

Nor is there any question that the ACA remains "fully operative" without Section 5000A. *Alaska Airlines*, 480 U.S. at 684. Indeed, the ACA *has* effectively been operating without that provision since the TCJA zeroed out the shared responsibility payment, effective January 1, 2019. In 2019, 2.8 million new consumers signed up for insurance through the exchange markets alone.[3] Today, 36 states and the District of Columbia are using the ACA's provisions to provide coverage under the Medicaid expansion.[4] During the ongoing COVID-19 pandemic, millions of Americans have relied on the ACA for coverage, health care access, and diagnoses. Indeed, eleven states that run their own health care exchanges under the ACA recently expanded

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[3] Ctrs. for Medicare & Medicaid Servs. ("CMS"), *Health Insurance Exchanges 2020 Open Enrollment Report* at 4 (April 1, 2020), https://www.cms.gov/files/document/4120-health-insurance-exchanges-2020-open-enrollment-report-final.pdf.

[4] Medicaid & CHIP Payment Access Commission, *Medicaid expansion to the new adult group* (last visited May 4, 2020), https://www.macpac.gov/subtopic/medicaid-expansion/.

enrollment periods so that more individuals can obtain insurance, if they so choose.[5]

These real-world effects of how the ACA is operating align with studies Congress considered when it zeroed out the shared responsibility payment in 2017. Shortly before Congress passed the TCJA, the Congressional Budget Office (CBO) reported that if Section 5000A were repealed—and no other changes were made to the ACA—premiums would increase and coverage would decline but ultimately the individual "insurance markets would continue to be stable in almost all areas of the country throughout the coming decade."[6] The CBO further advised that if Congress eliminated the shared responsibility payment but did not repeal Section 5000A, "the results would be very similar." *Id.* Congress accordingly enacted the TCJA with the benefit of data and analysis about how the ACA was actually functioning and whether Section 5000A was a necessary part of the whole. Today, the ACA is *already* "functioning independently" of Section 5000A—to protect the health of the American people. *Alaska Airlines*, 480 U.S. at 684.

3. Legislative context and history further demonstrate Section 5000A is severable from the rest of the ACA. *See Alaska Airlines*, 480 U.S. at 691-96 (considering legislative history in determining congressional intent regarding severability); *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377-81 (2004) (examining the statute's "context,"

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[5] *See* Margot Sanger-Katz and Reed Abelson, *Eleven States Now Letting Uninsured Sign Up for Obamacare*, NY Times (March 23, 2020), https://www.nytimes.com/2020/03/23/upshot/coronavirus-obamacare-marketplaces-reopen.html.

[6] CBO, *Repealing the Individual Health Insurance Mandate: An Updated Estimate* 1 (Nov. 2017), https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53300-individualmandate.pdf.

"purposes" and "[t]he history that led to the enactment" to "ascertain Congress' intent").

Severability analysis asks whether Congress would have "preferred what is left of its statute to no statute at all," *Ayotte*, 546 U.S. at 330—and here Congress repeatedly *rejected* the approach of repealing the entire ACA and leaving no statute in its place. *Cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006) ("Congress' rejection of the very language that would have achieved the result . . . urge[d] here weighs heavily against [that] interpretation."); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 220 (1983) (deeming it "improper . . . to give a reading to the Act that Congress considered and rejected"). Throughout 2017, Congress considered several bills that would have invalidated the ACA in significant part, but ultimately rejected them all.[7] Instead, Congress took the far more targeted action of effectively excising Section 5000A from the ACA by rendering the provision unenforceable. This record definitively demonstrates that Congress preferred an ACA without Section 5000A to no ACA at all.

The amendment's history confirms that Members anticipated the TCJA would produce the same practical result as severing Section 5000A, with no further effect on the rest of the ACA. *See Alaska Airlines*, 480 U.S. at 694-96 (recognizing statements of Members inform the inquiry into

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[7] *See* American Health Care Act of 2017, H.R. 1628, 115th Cong. (2017) ("repeal-and-replace" bill); Better Care Reconciliation Act of 2017, S. Amendment 270, 115th Cong. (2017) ("repeal-and-replace" bill); Obamacare Repeal Reconciliation Act of 2017, S. Amendment 271, 115th Cong. (2017) ("repeal-and-delay" bill to repeal Section 5000A, premium subsidies, and Medicaid expansion with a delayed effective date but retain market reforms); Health Care Freedom Act of 2017, S. Amendment 667, 115th Cong. (2017) ("skinny repeal" bill to repeal Section 5000A but retain Medicaid expansion).

congressional intent when conducting a severability analysis). Senator Hatch, Chairman of the Senate Finance Committee and the sponsor of the amendment zeroing out the shared responsibility payment, explained the TJCA would neither impair the ACA nor command anyone to purchase insurance:

> I expect we will hear that, by repealing the individual mandate tax, the bill will be taking people's health insurance away . . . . That claim will be made despite confirmation from congressional scorekeepers that nothing—nothing—in the bill removes or limits anyone's access to health insurance. . . . This bill provides choice. It doesn't take anything away from those individuals.

163 Cong. Rec. S7370-71 (Nov. 29, 2017); *see* Joint Committee on Taxation, *Description of the Chairman's Modification to the Chairman's Mark of the "Tax Cuts and Jobs Act"* 10-11 (Nov. 14, 2017).[8]

During the Senate's consideration of the TCJA, Senator Cotton reinforced that the TCJA would repeal the tax but that "[i]t doesn't cut a single dime out of Medicaid, it doesn't cut a single dime out of insurance subsidies for people on the exchanges, and it doesn't change a single regulation" of the ACA. 163 Cong. Rec. S7229 (Nov. 15, 2017).

Senators Capito and Barrasso also emphasized that the TCJA made Section 5000A unenforceable but had no other effect on the rest of the ACA. 163 Cong. Rec. S7383 (Nov. 29, 2017) (Sen. Capito) ("No one is being forced off of Medicaid or a private health insurance plan by the elimination of the individual mandate. . . . [W]e are simply

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[8] Along with Senator Hatch, Senators Cornyn, Scott, and Toomey were also members of the Senate Finance Committee that proposed zeroing out the shared responsibility payment in the TCJA.

stopping penalizing and taxing people who either cannot afford or decide not to buy health insurance plans."); 163 Cong. Rec. S8078 (Dec. 19, 2017) (Sen. Barrasso) (the amendment "turn[s] it into a voluntary program" but "doesn't take away anyone's insurance").

During deliberations, Senator Toomey further emphasized the TCJA's narrow reach:

> [A]s we all know, what we have done is—we are zeroing out the penalty, the tax imposed on people who cannot afford or do not wish to purchase an ObamaCare plan. That is all we are doing here. Not a single person is disqualified. Not a single person loses the benefit. There is no reduction in reimbursements to any healthcare providers. . . .
>
> What we are simply saying is this: If you find that these ObamaCare plans are not suitable for you and your family or you can't afford them, we are no longer going to hit you with a tax penalty for the fact that you can't afford this plan that is not well suited for you. That is all.

163 Cong. Rec. S7542 (Nov. 30, 2017); *see also* 163 Cong. Rec. S7672 (Dec. 1, 2017) (Sen. Toomey) ("[If] you opt out, you will no longer be punished with this tax. That is the only thing we do in this bill.").

Senator Scott confirmed "the individual mandate and its effects in our bill take nothing at all away from anyone who needs a subsidy, anyone who wants to continue their coverage," and emphasized "it does not have a single letter in there about preexisting conditions or any actual health feature." 163 Cong. Rec. S7666 (Dec. 1, 2017). Representative Gohmert likewise expressed that "we haven't repealed ObamaCare, but in this bill, we repealed the ObamaCare mandate, the individual mandate." 163 Cong. Rec. H9419 (Nov. 16, 2017).

As these statements illustrate, Members considered zeroing out the tax penalty to be the functional equivalent of repealing Section 5000A itself—the exact effect that severing Section 5000A would produce. *See, e.g.*, 163 Cong. Rec. S7229 (Nov. 15, 2017) (Sen. Cotton) ("[L]et's think about what the mandate repeal does."); 163 Cong. Rec. S7322 (Nov. 27, 2017) (Sen. Cornyn) ("[I]n the latest version of our tax reform bill is the repeal of ObamaCare's individual mandate."); 163 Cong. Rec. S7542 (Nov. 30, 2017) (Sen. Toomey) ("I want to point out . . . the individual mandate repeal. That is what we call it."); 163 Cong. Rec. S7383 (Nov. 29, 2017) (Sen. Capito) ("No one is being forced off of Medicaid or a private health insurance plan by the elimination of the individual mandate."); 163 Cong. Rec. H9419 (Nov. 16, 2017) (Rep. Gohmert) ("[I]n this bill, we repealed the ObamaCare mandate"). Excising Section 5000A is accordingly consistent with Congress's intent to functionally repeal that provision while doing "nothing—nothing" to the rest of the ACA. 163 Cong. Rec. S7370-71 (Nov. 29, 2017) (Sen. Hatch).

Postenactment statements of Members reinforce that Congress intended to render Section 5000A a nullity without making broader changes to the ACA. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 165 & n.10 (2003) (considering postenactment statements in interpreting Congress's intent, though recognizing they are "entitled to less weight"); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 166 & n.19 (1982) (relying on postenactment history to "confirm[] . . . Congress' intent"). For example, immediately after the Senate passed the TCJA, Senator Murkowski explained that "[b]y repealing the individual mandate, nothing else about the structure of the Affordable

Care Act would be changed."[9] Senator Collins likewise emphasized:

> It is implausible that Congress intended protections for those with pre-existing conditions to stand or fall together with the individual mandate, when Congress affirmatively eliminated the penalty while leaving these critical consumer protections in place. If Congress had intended to eliminate these consumer protections along with the individual mandate, it could have done so. It chose not to.[10]

In addition, Senator Alexander, Chairman of the Health, Education, Labor, and Pensions Committee, responded to the Fifth Circuit's decision in this case by stating, "I am not aware of a single senator who said they were voting to repeal Obamacare when they voted to eliminate the individual mandate penalty."[11] These statements reinforce that Congress intended to do precisely what it did: render Section 5000A inoperative, while preserving the remainder of the ACA.

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[9] Press Release, "Historic Tax Reform Bill Heads to President's Desk" (Dec. 20, 2017), https://www.murkowski.senate.gov/press/release/historic-tax-reform-bill-heads-to-presidents-desk.

[10] Letter to Attorney General Sessions (June 27, 2018), https://www.collins.senate.gov/sites/default/files/6.27.18%20Sen.%20Collins%27%20Letter%20to%20AG%20Sessions.pdf; *see also* Letter to Attorney General Barr (April 1, 2019), https://www.collins. senate.gov/sites/default/files/2019-04-01%20SMC%20letter%20to%20Barr%20re%20ACA.pdf (indicating Senator Collins's continued belief that Section 5000A is "severable").

[11] Press Release, "Alexander Statement on Texas v. Azar Court Case Decision" (Dec. 18, 2019), https://www.alexander.senate.gov/public/index.cfm/2019/12/alexander-statement-on-texas-v-azar-court-case-decision.

4. Severing Section 5000A while permitting the rest of the ACA to operate fits comfortably within this Court's severability precedents.

In *Booker*, for example, the Court held severance was appropriate even where it "alter[ed] the system that Congress designed" because the surviving statute still functioned and advanced "Congress' basic goal." 543 U.S. at 246, 253, 258-59 (severing provisions that made the Sentencing Guidelines mandatory, while preserving the Guidelines themselves). Here, the case for severance is even stronger than in *Booker* because severing Section 5000A would hardly alter the system that has been in effect since Congress eliminated the shared responsibility payment while leaving the rest of the ACA in place. Excising Section 5000A and retaining the ACA certainly advances Congress's basic goal.

Similarly, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court severed unconstitutional officer-removal provisions in the Sarbanes-Oxley Act, but kept the remainder of the law intact with a different accountability structure. 561 U.S. 477, 492, 508-10 (2010). Again, the case for severance is stronger here. Rather than change any functional aspect of the ACA, severance would merely set aside a provision that Congress already made unenforceable.

In contrast, in *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018), the Court declined to sever an unconstitutional provision in a federal act that barred states from authorizing sports gambling. The Court emphasized that severing that provision would produce the perverse result of making states unable to operate safe, low-stakes sports lotteries, while leaving private individuals free to run high-stakes, potentially dangerous sports gambling operations in casinos. That would have been "a scheme sharply different from what Congress contemplated" and

"would have seemed exactly backwards" from what Congress intended. *Id.* at 1482-83. The Court declined to uphold the remaining provisions because the federal act would "cease[] to implement any coherent federal policy" without the unconstitutional provision and would have the "weird result" of rendering federal and state law at odds in every case, regardless of whether an individual state chose to legalize or outlaw gambling. *Id.* at 1483-84.

No such "weird result" would follow from severing Section 5000A, which Congress already rendered unenforceable. Instead, this Court's precedents demonstrate that Section 5000A should be severed because all other provisions of the ACA "will remain fully operative as a law, . . . and will still function in a way consistent with Congress' basic objectives in enacting the statute." *NFIB*, 567 U.S. at 587-88 (citations omitted).

B. Respondents' Arguments Against Severability Are Unavailing.

In arguing that the entire ACA should be invalidated if the unenforceable Section 5000A is also unconstitutional, respondents focus on the intent of the 2010 Congress that enacted the ACA, rather than the 2017 Congress that amended Section 5000A. Respondents emphasize that the 2010 Congress described the enforceable Section 5000A as "essential to creating effective health insurance markets" in findings regarding the ACA's effect on interstate commerce, 42 U.S.C. § 18091(2)(I), and that the TCJA did not repeal that finding. Respondents' proposed severability analysis is flawed twice over: severability turns on Congress's intent in 2017 when it took the relevant action in amending Section 5000A, and Congress's prior findings describing that provision as "essential" to creating markets was by that time obsolete because the markets had already been created.

1. This Court has recognized that when Congress amends part of an existing law, "it is the intent of the

Congress that amended [the section] . . . that [is] controlling." *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 33-34 (1982); *cf. Boumediene v. Bush*, 553 U.S. 723, 738 (2008) ("If Congress amends, its intent must be respected."). Accordingly, to determine how Congress intended Section 5000A to function within the broader context of the ACA, the Court must look to Congress's intent in 2017 when it amended that provision.

That rule makes good sense. As the Fifth Circuit recognized, "the 2017 Congress had the benefit of hindsight over the 2010 Congress" and "was able to observe the ACA's actual implementation." J.A. 441. The 2010 Congress, in contrast, needed to make predictions about how the ACA would operate, including the potential importance of, and interplay among, its various provisions. At that point, before ACA markets existed, Congress believed Section 5000A as enforced by the shared responsibility payment was warranted because the ACA's provision requiring insurers to cover individuals with pre-existing conditions without charging higher premiums or excluding benefits could incentivize individuals to "wait to purchase health insurance until they needed care." 42 U.S.C. § 18091(2)(I). But in 2017, when Congress amended Section 5000A to make it unenforceable, the Legislature had the benefit of data and analysis establishing that, given the availability of premium tax credits, ACA markets were stable and would continue to function without Section 5000A. *See supra* p. 7 & note 6 (summarizing CBO report).

Given that inherent information asymmetry, it is no surprise that this Court has consistently focused on the intent of the Congress that had the relevant information and took the relevant action. *See, e.g.*, *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 69-70, 74-78 (1984) (analyzing a 1972 amendment to the 1964 Civil Rights Act in light of information known to the 1972 Congress); *Regan*, 468 U.S. at 653-54 (considering, for purposes of severability,

Congress's intent to codify a "then-existing practice" when it amended a statute); *cf. Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("[T]he implications of a statute may be altered by the implications of a later statute."). The question whether Section 5000A as amended is severable is accordingly not answered by considering what Congress *predicted* in 2010 with respect to a then-enforceable provision—but rather by what Congress *knew* about the ACA's functioning in 2017 when it made that provision unenforceable.

2. Respondents' reliance on the 2010 Congress's description of Section 5000A as "essential" cannot bear the weight they place on it.

Respondents mischaracterize that interstate commerce finding as an "inseverability clause." *See* Texas Br. in Opp. 7. When Congress intends to draft an inseverability clause, it knows how to do so—and Section 18091(2)(H) looks nothing like one. The Senate drafting manual, for example, provides a straightforward example of an inseverability clause:

> [If] any part of those sections is held to be invalid, all provisions of and amendments made by this Act shall be invalid.

Office of Legislative Counsel, U.S. Senate, Legislative Drafting Manual § 131(b)(2) (1997). It makes sense for Congress to include such a clause if it intends to make a statutory provision inseverable in light of this Court's recognition that a statute's other provisions must be upheld unless it is "evident" that Congress would prefer no statute at all. *See* Office of Legislative Counsel, U.S. House of Representatives, House Legislative Counsel's Manual on Drafting Style § 328 (1995) (citing the Court's presumption in favor of severability); Senate Legislative Drafting Manual, § 131(a) (same). The ACA and the TCJA plainly lack any such statement of inseverability.

Rather, the obvious function of the legislative finding describing Section 5000A as "essential" was to explain Congress's view of the provision's effect on interstate commerce. Indeed, the provision is titled "Effects on the national economy and interstate commerce," 42 U.S.C. § 18091(2), and Congress included the findings to explain how Section 5000A was "commercial and economic in nature, and substantially affects interstate commerce," *id.* § 18091(1). The specific language Congress used in describing Section 5000A as "essential," moreover, tracks the legal requirements for the exercise of Congress's power under the Commerce Clause. *See United States v. Lopez*, 514 U.S. 549, 561 (1995) (holding a provision exceeded Congress's lawmaking authority under the Commerce Clause because it was "not an *essential* part of a larger regulation of economic activity") (emphasis added).

Nor did the 2017 Congress have cause to amend this language when it modified Section 5000A to make the provision inoperative. By that time, this Court had already determined in *NFIB* that Section 5000A was not authorized by Congress's Commerce Clause power, so the question whether the provision was "essential to creating effective health insurance markets" lacked its prior legal significance. It also lacked ongoing factual relevance, given that the insurance markets *had* been created by 2017. In any event, if the "essential" goal of Section 5000A was to help ensure "improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions," 42 U.S.C. § 18091(2)(I), the way to realize that goal is to uphold, not invalidate, those ACA provisions. *See NFIB*, 567 U.S. at 646 (Ginsburg, J., concurring) ("[The Court's] endeavor must be to conserve, not destroy, the legislature's dominant objective.").

Ultimately, whatever the 2010 Congress believed, the 2017 Congress did not view Section 5000A as "essential."

If it had, the 2017 Congress would never have rendered that provision inoperative while leaving intact every other provision of the ACA. Congress's action demonstrates its intent for the rest of the ACA to function without Section 5000A—and that settles the severability question.

II. CONGRESS DID NOT INTEND THE DISASTROUS CONSEQUENCES THAT WOULD FLOW FROM REPEAL OF THE ACA.

Congress passed and amended the ACA "after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot." *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980). To undo Congress's work by invalidating the Act would invite catastrophic harm to the Nation's economy and its health.

Those consequences would contradict Congress's intent in multiple ways:

First, where Congress sought to increase insurance coverage and quality of care, millions would become uninsured or lose coverage protections.

Second, where Congress sought to stabilize the insurance market, instability would reign while costs soared.

Third, where Congress aimed to protect individuals who faced challenges accessing care, including older Americans, women, families facing economic hardship, and those with pre-existing conditions, repeal would fall most harshly upon these groups.

After extensive study and careful consideration, Congress made the important policy choices underlying the ACA and reaffirmed those judgments by keeping the ACA intact when amending Section 5000A. This Court's remedial powers provide no warrant to disrupt Congress's choices through wholesale invalidation of the law. *See*

NFIB, 567 U.S. at 586 ("[A] court cannot use its remedial powers to circumvent the intent of the legislature." (citation omitted)).

A. Invalidating the ACA Would Leave Millions Uninsured and Millions More with Lower Quality Coverage.

Since its enactment, the ACA has transformed the Nation's health care system. The ACA expanded Medicaid coverage, restructured the markets for private health insurance, and reformed Medicare. Through the Act, over 20 million people gained health insurance coverage.[12] Many millions more now enjoy higher quality coverage. *See, e.g.*, 42 U.S.C. § 300gg-3 (prohibiting insurers from refusing to cover pre-existing conditions); *id*. § 300gg-11 (prohibiting insurers from imposing lifetime or annual limits on the value of benefits provided); *id.* § 18022 (mandating that small group and individual plans cover ten essential health benefits).

These gains in coverage, quality, and enhanced access demonstrably improved the health of the Nation.[13] For

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[12] *See, e.g.*, Robin A. Cohen et al., *Health Insurance Coverage: Early Release of Estimates From the National Health Interview Survey, January – March 2017*, Nat'l Ctr. for Health Statistics 1 (Aug. 2017), https://www.cdc.gov/nchs/data/nhis/earlyrelease/insur201708.pdf.

[13] *E.g.* Sherry Glied et al., *Issue Brief: Effect of the Affordable Care Act on Health Care Access*, Commonwealth Fund 1, 4 (May 2017), https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_issue_brief_2017_may_glied_effect_of_aca_on_hlt_care_access_ib.pdf ("Gaining insurance coverage through the expansions decreased the probability of not receiving medical care by between 20.9 percent and 25 percent"); Am. Hosp. Ass'n, *The Importance of Health Coverage* at 2 (Oct. 2019), https://www.aha.org/system/files/media/file/2019/10/report-importance-of-health-

example, the National Bureau of Economic Research determined that over a five-year period, the ACA's expansion of Medicaid saved over 19,000 lives. *See* Sarah Miller et al., *Medicaid and Mortality: New Evidence from Linked Survey and Administrative Data*, NBER Working Papers 26081, Nat'l Bureau of Econ. Research (August 17, 2019). Other studies have linked Medicaid expansion to lower rates of cardiovascular mortality, infant mortality, depression, and greater smoking cessation.[14]

Striking down the ACA would eliminate these gains. Indeed, the CBO estimated that a near-complete repeal of the ACA would, within ten years, cause 32 million people to lose coverage.[15] Many of those uninsured individuals would likely forgo preventive care and delay treatments, shortening lives and "requiring more costly and extensive intervention." *NFIB*, 567 U.S. at 594 (Ginsburg, J., concurring). When Congress amended Section 5000A, it

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coverage_1.pdf (collecting studies showing individuals in Medicaid expansion states are more likely to obtain access to various treatments).

[14] *See* Am. Hosp. Ass'n, *supra* note 13, at 2-3 (collecting studies); Larissa Antonisse et al., *The Effects of Medicaid Expansion Under the ACA: Updated Findings from a Literature Review*, Kaiser Family Found. at 7-8 (Mar. 28, 2018), http://files.kff.org/attachment/Issue-Brief-The-Effects-of-Medicaid-Expansion-Under-the-ACA-Updated-Findings-from-a-Literature-Review (same).

[15] CBO, *How Repealing Portions of the Affordable Care Act Would Affect Health Insurance Coverage and Premiums* 1 (Jan. 2017) ("CBO Report on Repeal"), https://www.cbo.gov/publication/52371; *see also* Matthew Buettgens et al., *The Cost of ACA Repeal*, Urban Inst. 1, 3 (June 2016), http://www.urban.org/sites/default/files/publication/81296/2000806-The-Cost-of-the-ACA-Repeal.pdf (24 million uninsured over a five-year period); Allen Dobson et al., *Estimating the Impact of Repealing the Affordable Care Act on Hospitals*, Am. Hosp. Ass'n at 3 (Dec. 6, 2016), https://www.aha.org/system/files/2018-02/impact-repeal-aca-report_0.pdf ("22 million people by 2026" would be uninsured).

made the deliberate decision to retain the ACA's key reforms—yet declining to sever Section 5000A would result in a total number of uninsured individuals *higher* than before the ACA was passed.[16] A decision invalidating the ACA thus would not effectuate Congress's intent, but rather would produce a result directly at odds with Congress's principal policy objective.

B. Invalidating the ACA Would Inject Chaos into the Health Care Market and Impose Substantial Costs.

For a decade, the ACA has functioned as the backbone of the Nation's health care system. The Act's hundreds of provisions address virtually every aspect of that system, spanning 10 titles, stretching over 900 pages, and cutting across numerous statutes, including the Social Security Act, the Public Health Service Act, ERISA, the Indian Health Care Improvement Act, the Federal Food, Drug, and Cosmetic Act, and the Internal Revenue Code. To dismantle the Nation's health care system at any time would be perilous. To do so during a global pandemic, when millions have lost work and the ACA provides an alternative to employer-based health insurance, would trigger even greater chaos.

A congressional repeal itself would have been "a difficult task—and one subject to considerable uncertainty" because of difficulties in "predict[ing] how repealing a law as complex as the ACA would be interpreted and implemented by executive branch agencies without some specific statutory guidance." CBO, *Budgetary and Economic Effects of Repealing the Affordable Care Act* at 5 (June 19, 2015) ("CBO Budgetary Report"), https://www.cbo.gov/publication/50252. A court order invalidating the ACA would provide no such administrative or statutory guidance

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[16] Buettgens, *supra* note 15, at 3.

and would be instantly more disruptive to the health care system.

Insurers would be forced to abandon ACA-based business models they developed and relied on for a decade, and would need to scramble to generate new models without a statutory regime to guide them. States, too, would be destabilized. Without Medicaid expansion funding, states would likely have to eliminate Medicaid coverage for millions, drastically alter their budgets, and calculate new Medicaid rates to reflect the removal of expansion enrollees from managed care risk pools. Most states have enacted laws that implement, supplement, or otherwise rely on the ACA.[17] Those laws, too, would become immediately imperiled.

Similar disruption and uncertainty would reign in private industries such as the biosimilar market. The ACA included the Biologics Price Competition and Innovation Act ("BPCIA"), which created a new regulatory pathway for "biosimilars"— biologic drugs that are highly similar to an already approved biologic. 42 U.S.C. § 262. If the ACA were to fall, the BPCIA would fall with it, subjecting developers to heightened regulatory requirements, increased costs, and renewed uncertainty regarding which biosimilars can remain on the market. *See* Kelly Davio, *With the Future of the ACA in Question, Are US Biosimilars at Risks*, Center for Biosimilars (Dec. 19, 2018), https://www.centerforbiosimilars.com/news/with-the-future-of-the-aca-in-question-are-us-biosimilars-at-risk.

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[17] *See* National Conference of State Legislatures, *2011-2014 Health Insurance Reform Enacted State Laws Related to the Affordable Care Act* (last visited April 27, 2020), http://www.ncsl.org/research/health/health-insurance-reform-state-laws-2013.aspx#2014_laws.

Invalidating the ACA would also roil Medicare, which provides health coverage for over 60 million older Americans and individuals with disabilities.[18] Among other things, the ACA created a new payment structure for Medicare Advantage plans, 42 U.S.C. §§ 1395w-23, 1395w-24, and established the Center for Medicare and Medicaid Innovation ("CMMI") "to test innovative payment and service delivery models to reduce program expenditures . . . while preserving or enhancing the quality of care," 42 U.S.C. § 1315a. The CMMI has launched over 40 new payment and health care delivery models, served more than 26 million patients, and engaged over 950,000 health care providers. CMS, *CMS Innovation Center: Report to Congress* at 4, 109-21 (2018), https://innovation.cms.gov/files/reports/rtc-2018.pdf. Invalidating the ACA would wipe out statutory payment provisions and cast doubt on the continued viability of the Medicare payment and delivery models rooted in the ACA.

Amidst this tumult, the economic costs of striking down the ACA would be grim when the Nation's economy is already reeling from the COVID-19 pandemic. While the ACA improved Medicare's efficiency and boosted its revenues, invalidation would reverse these gains.[19] The

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[18] *See* Medicare Trustee 2020 Annual Report at 6 (April 22, 2020), https://www.cms.gov/files/document/2020-medicare-trustees-report.pdf; *see also* Medicare Trustee 2018 Annual Report at 3 (June 5, 2018), https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/ReportsTrustFunds/Downloads/TR2018.pdf (ACA contains "roughly 165 provisions affecting the Medicare program").

[19] *E.g.* Paul N. Van de Water, *Medicare Is Not "Bankrupt:" Health Reform Has Improved Program's Financing*, Center on Budget and Policy Priorities (May 1, 2019), https://www.cbpp.org/research/health/medicare-is-not-bankrupt; Juliette Cubanski et al., *The Facts on Medicare Spending and Financing*, Kaiser Family Found. (Aug. 20, 2019),

CBO has projected that a full repeal—the functional equivalent of invalidation—would require increased federal spending of over $800 billion on Medicare alone.[20]

Additionally, without the ACA, hospitals' net income would decrease by an estimated $165 billion over a nine-year period. Allen Dobson, *supra* note 15, at 1.[21] The ACA's Medicaid expansion has particularly helped rural hospitals, which are often a community's largest employer. Removing that support would fuel closures of rural hospitals, eliminate high-skilled jobs, and devastate local economies. Richard C. Lindrooth et al., *Understanding the Relationship Between Medicaid Expansions and Hospital Closures*, Health Affairs 37(1):111-20 at 118 (Jan. 2018).[22]

These economic repercussions would spread beyond the health care sector. Analysts have predicted that ending the ACA's tax credits and Medicaid expansion would cost the Nation three million jobs, including two million in fields

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https://www.kff.org/medicare/issue-brief/the-facts-on-medicare-spending-and-financing/.

[20] *See* CBO Budgetary Report, *supra*, at 10.

[21] *See also* Linda J. Blumberg et al., *State-by-State Estimates of the Coverage and Funding Consequences of Full Repeal of the ACA*, Urban Inst. 2 (Mar. 26, 2019), https://www.urban.org/sites/default/files/publication/100000/repeal_of_the_aca_by_state_2.pdf (estimating demand for uncompensated care would increase 82% if the ACA were fully repealed).

[22] The coronavirus pandemic has intensified the existential threat to rural hospitals. Lois Beckett, *Coronavirus threatens survival of US rural hospitals on frontlines of crisis*, Guardian (April 6, 2020 10:27 AM), https://www.theguardian.com/world/2020/apr/06/us-rural-hospitals-coronavirus-crisis-face-shutdowns. In March 2020 alone, three rural hospitals closed, leaving patients stranded as the virus spread. *Id.*

other than health care.[23] Over a four-year period, states would lose $1.5 trillion in gross state domestic product and $2.6 trillion in business output, while tax revenues declined.[24] In sum, invalidating the ACA would inject chaos into a stable market at tremendous costs to the Nation's medical and fiscal health and in direct contravention of Congress's objective in enacting and amending the law.

C. Invalidating the ACA Would Disproportionately Harm Americans Who Already Face Barriers to Care.

Invalidating the ACA would profoundly harm those who already face barriers to care, including older Americans, those facing economic hardship, women, and individuals with pre-existing conditions. Such a result would be particularly devastating amidst a health crisis whose most deadly effects have been concentrated among many of these groups.[25]

The ACA's Medicaid-expansion initiatives "created the opportunity for states to expand Medicaid to cover nearly all low-income Americans under age 65." Medicaid.gov, *Eligibility* (last visited May 5, 2020),

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[23] Leighton Ku et al., *Issue Brief: Repealing Federal Health Reform: Economic and Employment Consequences for States*, Commonwealth Fund at 4 (Jan. 2017), https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_issue_brief_2017_jan_ku_aca_repeal_job_loss_1924_ku_repealing_federal_hlt_reform_ib.pdf

[24] *Id.*

[25] *See, e.g.*, Center for Public Integrity, *These Charts Show Who's Most Vulnerable to the Coronavirus* (April 1, 2020), https://publicintegrity.org/health/coronavirus-and-inequality/pre-existing-inequality-could-make-coronavirus-hit-some-harder/ (tracking COVID-19's disproportionate effects on individuals with "low incomes," those "with underlying illnesses," "the elderly," and the "underinsured").

https://www.medicaid.gov/medicaid/eligibility/index.html. In 2019 alone, over nine million Americans enjoyed reduced premiums thanks to ACA-related tax credits, and between 2013 and 2019 another 13 million Americans became newly eligible for, and enrolled in, Medicaid.[26] Ending Medicaid expansion and the ACA's tax credits would divert health care resources from those who have the least ability to secure other means of coverage. *See* Buettgens, *supra* note 15, at 7 (reporting that reduced Medicaid spending would most profoundly affect families living close to the federal poverty level); *see also* CBO, *Cost Estimate of H.R. 1628: Obamacare Repeal Reconciliation Act of 2017* at 8, 10 (July 19, 2017) ("CBO Report on H.R. 1628"), https://www.cbo.gov/publication/52939 (estimating repeal of the ACA in 2017 would result in 4 million fewer people with Medicaid coverage in 2018, and 19 million fewer people with Medicaid coverage in 2026).

Striking down the ACA would also undo protections for Americans with pre-existing conditions who are clearly in need of health care. Before the ACA, insurers in most states used medical underwriting to deny coverage, charge higher premiums, and limit benefits based on pre-existing conditions. *See* Michelle M. Doty et al., *Failure to Protect: Why the Individual Insurance Market is not a Viable Option for Most US Families*, Commonwealth Fund at 2 (July 2009). The ACA bars insurance companies from denying individuals coverage because of their health status, refusing to cover pre-existing conditions, charging higher premiums

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[26] *See* CMS, *Early 2019 Effectuated Enrollment Snapshot* (April 12, 2019), https://www.cms.gov/newsroom/fact-sheets/early-2019-effectuated-enrollment-snapshot; Medicaid & CHIP Payment Access Commission, *Medicaid Enrollment Changes Following the ACA* (last visited April 27, 2020), https://www.macpac.gov/subtopic/medicaid-enrollment-changes-following-the-aca/.

to less healthy individuals, or cancelling the policies of people who become ill. 42 U.S.C. §§ 300gg-1-4; *id.* 300gg-12. Without the ACA, these protections would disappear and over 130 million Americans would risk losing coverage and benefits, or face higher premiums.[27]

Women, too, would be at risk of losing protections related to coverage and access to care. Before the ACA, "one-third of women who tried to buy a health plan on their own were either turned down, charged a higher premium because of their health, or had specific health problems excluded from their plans."[28] In 2010, 19 million women aged 19 to 64 lacked health insurance—but by 2016, this number fell to 11 million.[29] While the majority of individual market plans did not cover any maternity services prior to the ACA, the ACA ensured that maternity and newborn care are covered as an essential health benefit.[30] Striking down the ACA would remove these protections for American women.

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[27] *See* U.S. Dep't of Health & Human Srvs., Office of the Assistant Secretary for Planning and Evaluation, *Issue Brief: Health Insurance Coverage for Americans with Pre-Existing Conditions: The Impact of the Affordable Care Act* 1 (Jan. 5, 2017), https://aspe.hhs.gov/system/files/pdf/255396/Pre-ExistingConditions.pdf.

[28] Munira Z. Gunja et al., *How the Affordable Care Act Has Helped Women Gain Insurance and Improved Their Ability to Get Health Care*, Commonwealth Fund (August 10, 2017), https://www.commonwealthfund.org/publications/issue-briefs/2017/aug/how-affordable-care-act-has-helped-women-gain-insurance-and

[29] Gunja, *supra* note 28.

[30] U.S. Dep't of Health & Human Srvs., Office of the Assistant Secretary for Planning and Evaluation, *Issue Brief: Essential Health Benefits: Individual Market Coverage* (Dec. 16, 2011), https://aspe.hhs.gov/basic-report/essential-health-benefits-individual-market-coverage.

Invalidating the ACA would also impose disproportionate harms on older Americans by decreasing their access to coverage and care. For adults under 65, who are not yet of Medicare age, the ACA increased affordability in the individual market by limiting how much more insurers can charge older adults. 42 U.S.C. § 300gg(a)(1)(A)(iii). Without this protection, many older adults would again face insurmountable barriers to affordable health care.[31]

Medicare beneficiaries including Americans age 65 and over and those with disabilities would also suffer from the elimination of two key coverage provisions. The ACA reduced and eventually closed Medicare's prescription drug coverage gap, known as the "donut hole."[32] Additionally, the ACA eliminated copays and deductibles for many preventive services, such as mammograms, pap smears, bone mass measurement for those with osteoporosis, depression screening, diabetes screening, HIV screening, obesity screening and counseling, and annual wellness visits. As a result, 11 million Medicare beneficiaries saved over $26.8 billion on prescription drugs; 40 million beneficiaries received at least one no-cost preventive service in 2016 alone; and 10 million beneficiaries had an annual wellness visit that same year with no copay or deductible.[33]

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[31] Claire Noel-Miller & Jane Sung, *In Health Reform, Stakes are High for Older Americans with Preexisting Health Conditions*, AARP Pub. Policy Inst. at 4-5 (March 2017), https://www.aarp.org/content/dam/aarp/ppi/2017-01/ACA-Protects-Millions-of-Older-Adults-with-Preexisting-Health-Conditions-PPI-AARP.pdf.

[32] Prior to the ACA's enactment, Medicare beneficiaries had to pay 100 percent of prescription drug costs after an initial coverage limit until those costs reached a "catastrophic" level. The ACA gradually reduced—and by 2019 completely closed—this coverage gap.

[33] CMS, *Nearly 12 million people with Medicare have saved over $26 billion on prescription drugs since 2010* (Jan. 13, 2017), https://www.cms.gov/

Without the ACA and these attendant benefits, older Americans and individuals with disabilities would face costlier treatments and worse outcomes.

On all these fronts—medical care for low- and middle-income Americans, protections for women and those with pre-existing conditions, and benefits for Medicare beneficiaries—invalidating the ACA would reverse years of gains that Congress provided for the American people. Congress did not intend that result and this Court should not order it.

D. Invalidating the ACA Would Nullify Congress's Informed Policy Decision.

As this Court recognized in rejecting a prior challenge to the ACA, the Court has "neither the expertise nor the prerogative" to supplant Congress's policy decisions. *NFIB*, 567 U.S. at 538. This Court's longstanding approach respects the separation of powers and recognizes that Congress and the courts possess different institutional competencies.

That restraint is well warranted here, where in amending the ACA the 2017 Congress considered extensive data about the Act's benefits and the costs of a broader repeal. Each time, the CBO reported that repeal would result in millions more uninsured Americans.[34] Congress also knew that zeroing out the shared responsibility payment would have a far more modest impact. The CBO had studied the effects of such a targeted repeal and found

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newsroom/press-releases/nearly-12-million-people-medicare-have-saved-over-26-billion-prescription-drugs-2010.

[34] CBO Report on Repeal, *supra* note 15, at 2 (32 million more uninsured by 2026); CBO Report on H.R. 1628, *supra*, at 1 (32 million more uninsured by 2026); CBO, *Cost Estimate of H.R. 1628: American Health Care Act of* 2017 at 4 (May 24, 2017), https://www.cbo.gov/publication/52752 (23 million uninsured by 2026).

the increase in uninsured Americans would be substantially smaller. *See* CBO, *supra* note 6, at 1, 3. The CBO also analyzed the likely effect on insurance markets of nullifying Section 5000A, either through outright appeal or elimination of the shared responsibility payment, and determined this targeted adjustment would leave insurance markets "stable." *Id*. at 1.

Amici vigorously opposed the TCJA's amendment to Section 5000A because they opposed even those more modest losses in coverage. Amici argued at the time, and continue to believe, that the pre-amendment version of Section 5000A was better policy. But although that view did not prevail and Congress zeroed out the shared responsibility payment, Congress chose to retain the rest of the ACA intact. That policy choice was Congress's to make. *Diamond*, 447 U.S. at 317 ("That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives."); *see also NFIB*, 567 U.S. at 538 ("Members of this Court are vested with the authority to interpret the law . . . [not] make policy judgments.").

Accordingly, even if the Court were to conclude that Section 5000A is unconstitutional (which it should not), the Court should follow its precedents and sever that provision. To do otherwise would thwart Congress's intent, violate the separation of powers, and needlessly upend a stable health care system upon which tens of millions of Americans rely.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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May 13, 2020

APPENDIX
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Senator Patty Murray
Senator Ron Wyden
Senator Dianne Feinstein
Senator Tammy Baldwin
Senator Michael F. Bennet
Senator Richard Blumenthal
Senator Cory A. Booker
Senator Sherrod Brown
Senator Maria Cantwell
Senator Benjamin L. Cardin
Senator Thomas R. Carper
Senator Robert P. Casey
Senator Christopher A. Coons
Senator Catherine Cortez Masto
Senator Tammy Duckworth
Senator Richard J. Durbin
Senator Kirsten Gillibrand
Senator Kamala D. Harris
Senator Maggie Hassan
Senator Martin Heinrich
Senator Mazie Hirono
Senator Doug Jones

Senator Tim Kaine
Senator Angus S. King, Jr
Senator Amy Klobuchar
Senator Patrick Leahy
Senator Joe Manchin III
Senator Edward J. Markey
Senator Robert Menendez
Senator Jeffrey A. Merkley
Senator Christopher S. Murphy
Senator Gary C. Peters
Senator Jack Reed
Senator Jacky Rosen
Senator Bernard Sanders
Senator Brian Schatz
Senator Jeanne Shaheen
Senator Kyrsten Sinema
Senator Tina Smith
Senator Debbie Stabenow
Senator Jon Tester
Senator Tom Udall
Senator Chris Van Hollen
Senator Mark R. Warner
Senator Elizabeth Warren
Senator Sheldon Whitehouse