Nos. 19-840, 19-1019

IN THE

Supreme Court of the United States

CALIFORNIA, *ET AL.*,

Petitioners,

v.

TEXAS, *ET AL.*,

Respondents.

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Petitioners,

v.

CALIFORNIA, *ET AL.*,

Respondents.

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

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PETITIONERS IN NO. 19-840 AND NON-EXECUTIVE-BRANCH RESPONDENTS IN NO. 19-1019

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
NANDAN M. JOSHI
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a consumer advocacy organization that appears on behalf of its members and supporters before Congress, administrative agencies, and the courts. Maximizing access to quality healthcare has long been one of Public Citizen's central concerns, and the issue posed by this case starkly implicates that concern. If, as the parties challenging the Patient Protection and Affordable Care Act (ACA) argue, the ACA must be invalidated in its entirety because Congress chose to eliminate the tax on individuals who do not obtain health insurance coverage, millions of Americans, including members of Public Citizen, may lose access to affordable and comprehensive health insurance coverage.

The impact of this case may turn significantly on the question of severability. That issue, too, is one that Public Citizen has frequently addressed in the courts, including in its recent brief to this Court in *Barr v. American Ass'n of Political Consultants*, No. 19-631 (brief filed Mar. 2, 2020). Public Citizen submits this brief to assist the Court in its consideration of severability, in the event that the decision of this case requires the Court to address that issue.

SUMMARY OF ARGUMENT

When it enacted the ACA, Congress included a provision referred to as the "individual mandate," which required individuals to obtain health insurance coverage or pay a tax penalty. 26 U.S.C. § 5000A. In

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief. Counsel for all parties have consented in writing to its filing.

National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012), this Court sustained section 5000A as a constitutional exercise of Congress's taxation powers because the only legal consequence of the individual mandate was the obligation to pay a tax if an individual chose not to obtain health coverage. Subsequently, Congress enacted the Tax Cuts and Jobs Act of 2017 (TCJA), Pub. L. No. 115-97, 131 Stat. 2054, which altered section 5000A by zeroing out the penalty amount for tax years beginning with 2019. The TCJA added no other legal consequence for failing to obtain coverage, and it otherwise left the ACA intact. By eliminating section 5000A's legal consequences, the TCJA effectively decoupled the rest of the ACA's provisions from an individual coverage mandate.

The parties challenging the ACA argue that because the mandate now has no legal consequences whatsoever for tax years after 2018, it is no longer a constitutional exercise of the taxing power. If the issue here were simply whether a provision with no prospective legal consequences is constitutional, this case would present a question of little more than metaphysical importance. But the challengers here seek to use their argument that section 5000A has become unconstitutional as a basis for overturning the ACA in its entirety on the theory that all of the 900-page law is inseverable from section 5000A. Public Citizen agrees with California and the United States House of Representatives that the argument that section 5000A has become unconstitutional is incorrect. But even if the constitutional challenge had merit, invalidating the ACA in its entirety would be perverse. On what basis could this Court overturn Congress's

decision to leave the ACA intact while rendering its individual mandate inoperative?

The answer, under this Court's precedents, is that there is no such basis. Severability, under this Court's precedents, turns on congressional intent. If otherwise valid provisions of a law can still operate as Congress intended in the absence of a provision that the Court determines to be invalid, the Court *must* sustain those provisions unless it is *evident* that Congress would have preferred *no law at all* to a law without the invalid provision.

Here, Congress itself has, through legislation, clearly expressed its preference that the ACA remain standing regardless of the fate of section 5000A. After all, it was Congress that chose to strip section 5000A of any legally enforceable consequence for tax years after 2019. A decision by this Court that Congress's choice rendered section 5000A unconstitutional would not affect the operation of the individual mandate, because Congress has already made it effectively inoperative. By doing so, Congress expressed, through legislation, its judgment that a mandate with legal consequences is not indispensable to the remainder of the ACA. Thus, without section 5000A, the rest of the ACA can continue to function in precisely the manner Congress intended when, in 2017, it provided by law that the law would henceforth operate without an enforceable individual mandate. This Court has no authority to override Congress's choice.

ARGUMENT

I. Congress indisputably chose to eliminate the individual mandate's legal consequences while leaving the rest of the ACA intact.

In *Sebelius*, this Court held that the ACA's "individual mandate," 26 U.S.C. § 5000A, does not impose a binding legal requirement on individuals to obtain health insurance. The ACA, the Court held, "need not be read to declare that failing to [purchase health insurance] is unlawful." 567 U.S. at 567–68. The Court pointed out that "[n]either the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS." *Id*. at 568. Thus, the Court accepted the position of the United States that a person who chose not to obtain health insurance and instead made the payment called for by section 5000A would "have fully complied with the law." *Id*. The law "le[ft] an individual with a lawful choice to do or not do a certain act"—that is, purchase health insurance. *Id*. at 574.

The 2017 amendment to the ACA did not transform section 5000A into a declaration that failure to purchase health insurance is unlawful. The language of section 5000A(a), which sets forth the "[r]equirement to maintain minimum essential coverage," remains unaltered from that construed by the Court in *Sebelius*. So, too, does the language imposing on a taxpayer who has not purchased health insurance "a penalty with respect to such failure[] in the amount determined under subsection (c)," to be "included with a taxpayer's return" for the relevant tax year. 26 U.S.C. § 5000A(b)(1)–(2). Moreover, the 2017 legislation left the amount of the tax imposed on taxpayers who failed

to purchase health insurance unaltered for all tax years from 2014 through 2017, as well as for the following tax year, 2018. The only alteration made to section 5000A was to reduce "the amount determined under subsection (c)" to zero, effective January 1, 2019.

Thus, after the 2017 legislation, as before, "[n]either the [ACA] nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS," *Sebelius*, 567 U.S. at 568. And although that consequence became dormant indefinitely for tax years from 2019 onward, when the amount of the required payment was set at zero, individuals still have "a lawful choice to do or not do a certain act," *id.* at 574, if they are willing to pay any applicable tax penalty. What has changed is only that, currently, there is no tax imposed for choosing not to obtain health insurance.

II. Congress's choice definitively answers the question whether the individual mandate can be severed from the remainder of the ACA.

The courts below held that section 5000A is no longer a constitutional exercise of Congress's taxing power because it no longer produces "at least some revenue for the Government," and thus lacks the "essential feature of any tax." Pet. App. 44a–45a (quoting *Sebelius*, 567 U.S. at 564). But even assuming that a law that was a valid exercise of the taxing power when enacted (and must have remained so for at least the tax year following its amendment as well) became unconstitutional when it no longer generated revenue, that transformation would have no effect on any other provision of the ACA. Congress left the remainder of the ACA intact even while acting to render the

individual mandate dormant as a tax and leaving it unenforceable by any other means. That action clearly evinces Congress's intent that the rest of the ACA remain fully effective without an enforceable individual mandate. Under long-established principles governing severability of unconstitutional provisions from otherwise constitutional statutes, Congress's action to make a statutory provision entirely unenforceable forecloses any suggestion that the provision is so essential to the statutory scheme enacted by Congress that it is inseverable from the rest of the statute.

A. This Court's precedents require it to honor congressional intent in determining whether to sever invalid statutory provisions.

This Court has long recognized that unconstitutional provisions of a federal statute *must* be severed unless severance would be inconsistent with congressional intent or leave the remainder of the statute inoperative. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010); *United States v. Booker*, 543 U.S. 220, 258 (2005); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). The Court has grounded this principle in institutional limitations on the Court's role that obligate it, "'when confronting a constitutional flaw in a statute, [to] try to limit the solution to the problem,' [by] severing any 'problematic portions while leaving the remainder intact.'" *Free Enter. Fund*, 561 U.S. at 508 (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–329 (2006)). Accordingly, "whenever 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." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (emphasis added; citation omitted); *accord Alaska Airlines*, 480 U.S. at 684.

Under this Court's precedents, whether an unconstitutional provision can be severed involves a two-part inquiry. First, if they are to remain intact, any otherwise valid provisions must be "fully operative as a law" with the defective provision excised. *Free Enter. Fund*, 561 U.S. at 509 (citations omitted). Second, all such operative provisions must be sustained "[u]nless it is evident that the Legislature would not have enacted those provisions … independently of that which is [invalid]." *Id.*; *accord*, *e.g.*, *Murphy*, 138 S. Ct. at 1482; *Alaska Airlines*, 480 U.S. at 684; *Buckley v. Valeo*, 424 U.S. 1, 108 (1976). Where these conditions for severability are met, "partial … invalidation is the required course." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985).

The inquiry into whether a statute is fully operative as a law without the offending provision requires consideration, first, of whether the unconstitutional portion of the law is a discrete "textual provision[] that can be severed" without rewriting the statute. *Reno v. ACLU*, 521 U.S. 844, 882 (1997). In addition, the otherwise valid provisions must not be "incapable of functioning independently" from the unconstitutional one. *Alaska Airlines*, 480 U.S. at 684. Further, the statute must be able to "function in a *manner* consistent with the intent of Congress." *Id.* at 685.

This final aspect of the "operative as law" inquiry overlaps substantially with the second part of the severability test: whether severance is consistent with congressional intent. In considering that issue, the

Court's role is not to try to reconstruct the legislative compromises that would have determined the statute's content if initially enacted without the invalid provision, but rather "to implement what the legislature would have willed had it been apprised of the constitutional infirmity" in what it did enact. *Levin v. Commerce Energy Inc.*, 560 U.S. 413, 427 (2010). Thus, "[a]fter finding an application or portion of a statute unconstitutional, [the Court] must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" *Ayotte*, 546 U.S. at 330. Put another way, "[t]he question … is whether Congress would have wanted the rest of the Act to stand, had it known" the invalid provision would fall. *Sebelius*, 567 U.S. at 587 (opinion of Roberts, C.J.). Only if it is "evident" that Congress would have preferred no statute at all to one with the unconstitutional feature excised may the Court decline to sever the statute. *Free Enter. Fund*, 561 U.S. at 509.

Approached in this manner, severability doctrine reflects judicial restraint and reinforces the separation of the legislative and judicial powers under the Constitution. Severance of discrete, invalid statutory provisions shows respect for Congress's role in enacting legislation by ensuring that its "overall intent" is not "frustrated," *New York v. United States*, 505 U.S. 144, 186 (1992), while at the same time avoiding the exercise of "editorial freedom" that properly "belongs to the Legislature, not the Judiciary," *Free Enter. Fund*, 561 U.S. at 510.

B. Congress's unambiguously expressed intent requires severance if the Court deems the individual mandate unconstitutional.

Determining severability often requires the Court to "as[k] a counterfactual question" about what Congress's preferences would have been had it known that a portion of its statutory scheme would be jettisoned. *Murphy*, 138 S. Ct. at 1485 (Thomas, J., concurring). But the severability question is not always counterfactual. Sometimes, for example, Congress enacts severability provisions that address the consequences of the possible unconstitutionality of parts of a statute with enough specificity that the Court "need go no further." *Sebelius*, 567 U.S. at 586 (opinion of Roberts, C.J.); *see also id.* at 645 (opinion of Ginsburg, J.). When Congress provides an unambiguous legislative answer to a severability question, giving effect to Congress's intentions does not require engaging in hypotheticals.

Here, Congress has expressed itself unambiguously and in a way that answers the severability inquiry without requiring the Court to ask or answer counterfactual questions: Congress effectively severed the individual mandate from the ACA by eliminating the provision's legal consequences for tax years beginning in 2019 while leaving the remainder of the statute fully intact. In so doing, Congress has, through duly enacted legislation, unmistakably provided that neither an individual mandate that functions as a tax nor one that is enforceable in some other manner is necessary to the functioning of the ACA. That Congress itself dispensed with a legally consequential individual mandate unambiguously forecloses the contention that the individual mandate is indispensable.

Congress's enactment of the 2017 tax law directly answers both parts of the severability inquiry. First, it makes clear that severance of section 5000A would leave the remainder of the statute operative "in a *manner* consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685. The passage of the TCJA necessarily contemplated that, for tax years after 2018, the remaining provisions of the ACA (including the guaranteed-issue and community-rating requirements) would operate without an individual mandate backed by the financial incentive of a tax or any other means of enforcement. If this Court were to determine that section 5000A is unconstitutional and hence unenforceable as to tax years after 2018 because, as amended by the TCJA, it exceeds Congress's taxing powers, the Court's judgment would have no effect on the operation of section 5000A, which *already* has no legal consequences for those tax years. At the same time, the remaining provisions of the ACA would continue to operate in the same manner as Congress intended for those years. The TCJA necessarily reflected a legislative intent that those provisions operate in a manner that does not require or presuppose an operative individual mandate.

Likewise, the 2017 legislation definitively answers the second inquiry posed by this Court's severability doctrine: whether it is "evident" that Congress would have preferred no statute at all to one without section 5000A. *Free Enter. Fund*, 561 U.S. at 509. Here, Congress exercised its legislative powers to express and, indeed, *embody* its preference for a statute *without* an operative individual mandate—because it enacted precisely such a statute. It cannot possibly be "evident" that Congress would have preferred an outcome that is exactly the opposite of the statutory scheme it

enacted. Congress's action compels the conclusion that the ACA, in its entirety, is severable from section 5000A if that provision has become unconstitutional.

C. None of the arguments against severance justifies disregard of Congress's choice to decouple the rest of the ACA from the individual mandate by making the mandate legally inconsequential.

The challengers' arguments against severance do nothing to overcome Congress's unambiguous preference that the ACA stand regardless of the fate of the individual mandate. *First*, Texas's insistence that the statute contains an "inseverability clause," Conditional Cross-Pet. 12, is patently wrong. The provision Texas cites, 42 U.S.C. § 18091(2), says nothing at all about severability or inseverability. Indeed, section 18091(2) contains no functional legal commands. Rather, it sets forth findings by which Congress sought—unsuccessfully, in the view of a majority of this Court—to satisfy the predicate for treating section 5000A as a valid exercise of Congress's commerce power. *See Sebelius*, 567 U.S. at 547–61 (opinion of Roberts, C.J.); *id.* at 650–54 (Scalia, J., dissenting). As is typical of such provisions, "[t]here is no need to consider [the provision] here as more than a declaration of the legislative findings deemed to support and justify the action taken as a constitutional exertion of the legislative power." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). Thus, even the *Sebelius* dissenters who would have held section 5000A unconstitutional and struck down the entire ACA as inseverable from it never characterized section 18091(2) as an inseverability clause that dictated the outcome of their severability analysis.

Moreover, even if section 18091(2) could have been plausibly viewed in that way before 2017, Congress's enactment of the TCJA, which eliminated the mandate's legal consequences beginning in 2019, negates any possibility that the findings can be read as a congressional determination that an operative mandate is so indispensable to the remainder of the ACA that Congress would prefer no ACA at all to one without a mandate. On such a reading, the findings would amount to a statement that Congress would prefer a legislative scheme *other than the one it enacted in 2017*. Findings cannot be read to turn a statute on its head.

Second, Texas asserts that the ACA's community-rating and guaranteed-issue provisions, together with the rest of the ACA's "major provisions," are inseverable from section 5000A because they presuppose or "effectuate the near-universal healthcare coverage that the mandate requires." Conditional Cross-Pet. 15. Even before 2017, that argument would have been unpersuasive. There can be no legitimate dispute that the ACA was designed to encourage broader health insurance coverage, or that the law will function better if more people obtain insurance. *See Sebelius*, 567 U.S. at 567–58. The individual mandate, however, was never the ACA's sole means of increasing the number of individuals covered. Subsidies for purchase of insurance, for example, play a key role in sustaining the guaranteed-issue and community-rating requirements. *See King v. Burwell*, 135 S. Ct. 2480 (2015). Moreover, Congress always understood that millions of people would exercise the option of forgoing insurance even when doing so entailed a tax obligation, and it regarded "such extensive failure to comply with the mandate as tolerable." *Sebelius*, 567 U.S. at 568.

Congress's enactment of the TCJA, which predictably would make not buying insurance "a reasonable financial decision," *id.* at 566, for greater numbers of individuals, likewise reflected a choice to regard that consequence as "tolerable," *id.* at 568, from the standpoint of the broader purposes of the remainder of the ACA that Congress left unchanged. Whether Congress made a wise choice in that regard may be debatable, but that question is not before this Court. Rather, the Court must decide whether a Congress that has already pulled the teeth of the mandate would want the entire Act to fail if the now toothless mandate were held to be unconstitutional as well.

In *Sebelius* itself, the Court held that a much more consequential constitutional holding invalidating incentives for Medicaid expansion did not require that the entire Act be struck down. In the words of the lead opinion, "we do not believe Congress would have wanted the whole Act to fall, simply because some may choose not to participate. The other reforms Congress enacted, after all, will remain 'fully operative as a law,' and will still function in a way 'consistent with Congress' basic objectives in enacting the statute.'" *Id.* at 587–88 (opinion of Roberts, C.J.) (citations omitted). That reasoning is even more compelling here, given that any increased nonparticipation in the insurance market will be attributable to Congress's choice to eliminate an incentive to buy insurance, not to this Court's academic decision whether that choice renders an effectively dormant section 5000A unconstitutional.

Third, Texas contends that what it calls the ACA's "minor" or "ancillary" provisions are inseverable because it sees "no reason to believe" that Congress would have enacted them if they were not part of the

greater package of reforms included in the ACA. Conditional Cross-Pet. 16–17. That argument, however, both misunderstands the nature of the severability inquiry and reverses the burden of persuasion with respect to congressional intent. Severability analysis is not a license to engage in speculation about the likelihood that political compromises would have resulted in enactment of particular statutory provisions if they had not been coupled with the challenged part of a law. Rather, the Court's task is to determine whether it is "evident" that Congress would not have wanted the otherwise fully operative provisions that it in fact enacted to survive if the challenged provision were stuck down. *Free Enter. Fund*, 561 U.S. at 509. Texas's opinion that it is "unlikely" that the provisions it characterizes as "minor" and "ancillary" would have been enacted separately from the rest of the ACA falls far short of establishing that it is *evident* that Congress, having enacted them, would rather see them struck down than preserved if section 5000A is declared unconstitutional. Indeed, given that Congress left those provisions in place when it eliminated the tax for not obtaining insurance, what is evident is that Congress would not want their continued existence to depend on the existence of an enforceable individual mandate.

Finally, any suggestion that determination of the severability issues posed by this case requires remand for review of the entirety of the approximately 900-page ACA with a "finer-toothed comb," Pet. App. 68a, is unwarranted. The possibility that some provision buried within the statute may in fact be inoperative without an enforceable individual mandate does not justify such review, when the challengers have failed to identify any such specific provision and explain how they are harmed by it. The challengers have chosen

instead to make broad-brush attacks on the totality of the ACA and sweepingly defined "tranches" of its provisions. Conditional Cross-Pet. 13. As demonstrated above, all those attacks ultimately founder on the same fundamental point: Congress in 2017 chose to remove the legal consequences of the individual mandate beginning in 2019 while maintaining the rest of the statute. This Court must respect that choice.

CONCLUSION

The Court should reverse the judgment of the Fifth Circuit.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
NANDAN M. JOSHI
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org
Attorneys for Amicus Curiae

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