Nos. 19-840, 19-1019

In The
Supreme Court of the United States

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

STATE OF TEXAS, ET AL.

STATE OF TEXAS, ET AL., CROSS-PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR JONATHAN H. ADLER, NICHOLAS BAGLEY, ABBE R. GLUCK, AND ILYA SOMIN AS AMICI CURIAE SUPPORTING PETITIONERS

JOSHUA L. HEDRICK
HEDRICK KRING, PLLC
1700 Pacific Ave., Ste. 4650
Dallas, TX 75201

JOSEPH R. PALMORE
Counsel of Record
SAMUEL B. GOLDSTEIN
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave. NW
Washington, DC 20006
(202) 887-6940
JPalmore@mofo.com

JAMES R. SIGEL
MORRISON & FOERSTER LLP
425 Market St.
San Francisco, CA 94105

Counsel for Amici Curiae

MAY 13, 2020

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WWW.COCKLELEGALBRIEFS.COM

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CARES Act, Pub. L. No. 116-136, 134 Stat. 281
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Families First Coronavirus Response Act,
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Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) 24

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) 1

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U.S. Const. art. I, § 7 13

OTHER AUTHORITIES

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Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) 3, 14, 28

C. Stephen Redhead & Janet Kinzer, Cong. Research Serv., R43289, *Legislative Actions in the 112th, 113th, and 114th Congresses to Repeal, Defund, or Delay the Affordable Care Act* (2017), https: //fas.org/sgp/crs/misc/R43289.pdf 13

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Congressional Budget Office, *Options for Reducing the Deficit: 2017 to 2026* (Dec. 2016), https://www.cbo.gov/system/files?file=2018-09/52142-budgetoptions2.pdf 20

Congressional Budget Office, *Repealing the Individual Health Insurance Mandate: An Updated Estimate* (Nov. 2017), https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53300-individualmandate.pdf 11, 12, 20

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INTERESTS OF AMICI CURIAE[1]

Amici are experts in constitutional law, legislation, statutory interpretation, and administrative law. They disagree on many legal and policy questions concerning the Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), including many questions about how to interpret it and whether the plaintiff States have standing in the present case. Yet they agree on this: even assuming the insurance mandate is unconstitutional, it is severable from the other provisions of the ACA. Any contrary conclusion would be inconsistent with settled law and Congress's clearly expressed intent. Amici respectfully submit this amicus brief to explain this point.

Jonathan H. Adler is the Johan Verheij Memorial Professor of Law at Case Western Reserve University School of Law and the director of its Coleman P. Burke Center for Environmental Law. He joined an amicus brief arguing against the constitutionality of the individual mandate in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)

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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 its preparation or submission. All parties have consented to the filing of this brief.

(“*NFIB*”).[2] He is also the co-author of *A Conspiracy Against Obamacare: The Volokh Conspiracy and the Health Care Case* (2013), a book about the Supreme Court’s decision in *NFIB* and the events leading up to it. The work of Professor Adler (with Michael Cannon) provided the basis for the plaintiffs’ argument in *King v. Burwell*, 135 S. Ct. 2480 (2015), that the federal government lacked authority under the ACA to issue premium subsidies for insurance coverage purchased through federally established exchanges.[3]

Nicholas Bagley is a professor of law at the University of Michigan Law School. He is the author of a leading health law casebook[4] and has written extensively on the legality of the Affordable Care Act’s implementation across both the Obama and Trump administrations.[5] He also filed an amicus brief on behalf

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[2] *See* Brief of the Washington Legal Foundation and Constitutional Law Scholars as Amici Curiae in Support of Respondents, *U.S. Dep’t of Health & Hum. Servs. v. Florida*, 567 U.S. 519 (2012) (No. 11-398), https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-398_respondents_amcu_washingtonlegalfoundation.authcheckdam.pdf.

[3] *See* Brief of Jonathan Adler & Michael F. Cannon as Amici Curiae in Support of Petitioners at 1, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114) (collecting scholarship), https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/14-114_amicus_pet_Adler.authcheckdam.pdf.

[4] *Health Care Law and Ethics* (9th ed. 2018).

[5] *See, e.g.*, Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 PENN. L. REV. 1715 (2016); Nicholas Bagley, *Federalism and the End of Obamacare*, 127 YALE L.J. F. 1 (2017), http://www.yalelawjournal.org/forum/federalism-and-the-end-of-obamacare; Nicholas Bagley, *Executive Power and the ACA*, *in* The Trillion Dollar Revolution: How the Affordable

of federalism scholars in *King v. Burwell* arguing that the federal government does have authority under the ACA to issue premium subsidies for insurance coverage purchased through federally established exchanges.[6]

Abbe R. Gluck is a professor of law at the Yale Law School and the director of its Solomon Center for Health Law and Policy. She filed an amicus brief on behalf of health law professors in support of the constitutionality of the individual mandate in *NFIB*.[7] She was on the same amicus brief as Professor Bagley in *King v. Burwell*. She wrote the *Harvard Law Review* Supreme Court issue comment on *King v. Burwell*,[8] and she has written many other articles about the ACA.[9] She is also the co-author of a leading casebook

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Care Act Transformed Politics, Law, and Health Care in America (Ezekiel J. Emanuel & Abbe R. Gluck eds., 2020).

[6] *See* Brief for Professors Thomas W. Merrill, Gillian E. Metzger, Abbe R. Gluck, and Nicholas Bagley as Amici Curiae Supporting Respondents, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114), https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/14-114_amicus_resp_merrill.authcheckdam.pdf.

[7] *See* Brief of 104 Health Law Professors as Amici Curiae in Support of Petitioners, *U.S. Dep't of Health & Hum. Servs. v. Florida*, 567 U.S. 519 (2012) (No. 11-398), https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-398_petitioneramcu104healthlawprofs.authcheckdam.pdf.

[8] Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62 (2015).

[9] *E.g.*, Abbe R. Gluck & Thomas Scott-Railton, *Affordable Care Act Retrenchment*, 108 GEO. L.J. 495 (2020); Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689 (2018).

on legislation and administrative law[10] and a co-editor and featured author of a book about the ACA's history.[11]

Ilya Somin is Professor of Law at George Mason University. His research focuses on constitutional law, and he has written extensively about federalism. He is the author of *Democracy and Political Ignorance: Why Smaller Government is Smarter* (rev. 2d ed. 2016), *The Grasping Hand:* Kelo v. City of New London *and the Limits of Eminent Domain* (2015), and co-author of *A Conspiracy Against Obamacare: The Volokh Conspiracy and the Health Care Case* (2013), a book about the Supreme Court's decision in *NFIB* and the events leading up to it. He authored an amicus brief in *NFIB* urging the Court to strike down the individual health insurance mandate.[12]

As noted above, Amici have taken opposing positions in significant and hotly contested cases involving the ACA. But they agree on the severability question presented here. As experts on statutory interpretation,

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[10] William N. Eskridge Jr., Abbe R. Gluck & Victoria F. Nourse, *Statutes, Regulation, and Interpretation: Legislation and Administration in the Republic of Statutes* (2014).

[11] *The Trillion Dollar Revolution: How the Affordable Care Act Transformed Politics, Law, and Health Care in America* (Ezekiel J. Emanuel & Abbe R. Gluck eds., 2020).

[12] *See* Brief of the Washington Legal Foundation and Constitutional Law Scholars as Amici Curiae in Support of Respondents, *Florida v. U.S. Dep't of Health & Hum. Servs.*, 567 U.S. 519 (2012) (No. 11-400), https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-398_respondents_amcu_washingtonlegalfoundation.authcheckdam.pdf.

they share an interest in the proper application of severability doctrine, and they believe their views on the question will be helpful to the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici's goal in filing this brief is limited. This brief takes no position on whether plaintiffs have a justiciable claim. Nor does it address plaintiffs' argument that the minimum coverage provision (commonly called the individual mandate) is unconstitutional in light of Congress's reduction to zero of the penalties associated with it. Instead, the brief assumes the answer to both questions is yes in order to reach the question of severability. Under the settled approach to severability that this Court has followed consistently for more than 100 years, the question here is not debatable: the mandate is severable from the rest of the ACA. Any other conclusion would be a judicial usurpation of Congress's lawmaking power.

Yet the district court, the plaintiffs, and the United States assert that the entire ACA must fall if the individual mandate is unconstitutional. In their view, a mandate with no enforcement mechanism—eliminated by the same Congress that *left the rest of the ACA standing*—is somehow essential to the law as a whole. The United States has taken that stunning position even though it said just the opposite before the district court, emphasizing that Congress provided "proof of its intent that the bulk of the ACA would remain in place" without the individual mandate. Federal Defendants'

Memorandum in Response to Plaintiffs' Application for Preliminary Injunction at 18, No. 18-cv-167 (N.D. Tex. June 7, 2018), ECF No. 92 ("U.S. D. Ct. Br."); *see California* Pet. App. 63a (noting the United States' "significant change in litigation position").

In Amici's view, this is a uniquely easy severability case. The cornerstone of severability doctrine is congressional intent. When part of a statute becomes unenforceable, a court usually must ask whether Congress would have preferred what remains of the statute to no statute at all. Typically, it is a court that renders a provision unenforceable, and the court must hypothesize what Congress would have intended in that scenario. Courts also will sometimes assess whether the statute functions without the provision—a proxy for legislative intent.

But this case is unusual. It presents no need for any of these difficult inquiries because Congress itself—not a court—eliminated enforcement of the provision in question and left the rest of the statute standing. So congressional intent is clear; it is embodied in the text and substance of the statutory amendment itself. In these circumstances, a guessing-game inquiry is not only unnecessary—it is unlawful. A court's insistence on nonetheless substituting its own judgment for that of Congress—as the district court did here—usurps congressional power, turns the court into a legislator, and violates black-letter principles of severability.

The district court contravened these principles by disregarding the actions and intent of the 2017 Congress that enacted the amendment to the ACA at issue here. Worse still, it focused almost entirely on the intent of the 2010 Congress that first enacted the ACA—a version of the ACA quite different from the ACA as it exists today. The court thus unconstitutionally entrenched the views of an earlier Congress over later Congresses that had full authority to change the law.

The Fifth Circuit majority correctly recognized that the district court's severability decision was flawed in multiple respects, including by privileging the views of the 2010 Congress over those of the 2017 Congress. Rather than resolve the issue, however, the court of appeals remanded for the district court to "conduct a more searching inquiry into which provisions of the ACA Congress intended to be inseverable from the individual mandate." *California* Pet. App. 68a. Yet no such inquiry—"searching" or otherwise—is necessary or even appropriate. Congress already made those decisions itself when it left the rest of the ACA intact. Congress unmistakably intended that *all* provisions of the ACA remain without an enforceable individual mandate, as that is what Congress did. If this Court reaches the question, it should hold that the individual mandate is severable from the rest of the ACA.

ARGUMENT

I. WHEN CONSIDERING SEVERABILITY, COURTS MUST LIMIT THE DAMAGE TO THE STATUTE AND BE GUIDED BY CONGRESSIONAL INTENT

Severability doctrine rests on two foundational principles. These principles, unlike many other issues in statutory interpretation, are uncontroversial. An unbroken line of this Court's severability precedent for over a century has rested on these "well established" propositions. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *see, e.g.*, *El Paso & Ne. Ry. Co. v. Gutierrez*, 215 U.S. 87, 96 (1909). All of the sitting Justices have applied them.

First, "the 'normal rule' is 'that partial, rather than facial, invalidation is the required course.'" *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)). Courts must "try not to nullify more of a legislature's work than is necessary" because "'[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)). "'[W]hen confronting a constitutional flaw in a statute,'" courts thus must "'try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" *Free Enter. Fund*, 561 U.S. at 508 (quoting *Ayotte*, 546 U.S. at 328-29).

Second, 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 (quoting *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part)). "After finding an application or portion of a statute unconstitutional," a court "must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" *Ibid.* "Unless it is 'evident' that the answer is no, [a court] must leave the rest of the Act intact." *NFIB*, 567 U.S. at 587 (opinion of Roberts, C.J.); *see Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1482 (2018) (to invalidate additional provisions as inseverable, "it must be 'evident that [Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not'" (quoting *Alaska Airlines*, 480 U.S. at 684)).

Where the intent of Congress is not clear, courts sometimes try to assess congressional intent by asking whether the remaining parts of the statute "remain[] 'fully operative as a law'" with the unconstitutional provision "excised." *Free Enter. Fund*, 561 U.S. at 509 (quoting *New York v. United States*, 505 U.S. 144, 186 (1992)). If so—and if "nothing in the statute's text or historical context makes it 'evident'" that Congress would want the rest of the statute to fall—then the court should sever the invalid provision. *Ibid.* (quoting *Alaska Airlines*, 480 U.S. at 684).

Courts sometimes describe themselves as engaged in a thought experiment when conducting severability

analysis. After a court invalidates part of a statute, it must determine what it "believe[s]" Congress would have wanted to happen to the rest of the law if Congress had hypothetically been "[p]ut to the choice." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1700 (2017). But whether a modified statute is operative and what Congress hypothetically wanted are, at bottom, merely proxies for the "touchstone" of "legislative intent." *Ayotte*, 546 U.S. at 330.

II. CONGRESS INTENDED THAT THE REST OF THE ACA REMAIN IN PLACE WITH AN UNENFORCEABLE INDIVIDUAL MANDATE

A. Under Established Severability Doctrine, The Individual Mandate Is Severable From All Other ACA Provisions

No thought experiments or reliance on loose conceptions of "intent" are necessary here. Congress itself rendered the relevant provision unenforceable. The text of the 2017 enactment shows as clearly as possible what Congress intended: even with no enforceable individual mandate, Congress let all other remaining ACA provisions live on.

In 2017, Congress zeroed out all the penalties the ACA had imposed for not satisfying the individual mandate. *See* Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017). When Congress did so, as the dissent below noted, it "knew that repealing the shared-responsibility payment would have the same essential effect on the ACA's statutory scheme as would repealing the coverage requirement." *California* Pet. App.

106a (King, J., dissenting) (citing Congressional Budget Office, *Repealing the Individual Health Insurance Mandate: An Updated Estimate* 1 (Nov. 2017) ("2017 CBO Report") ("If the individual mandate penalty was eliminated but the mandate itself was not repealed, the results would be very similar to" if the individual mandate itself were repealed)).[13] Yet it left everything else undisturbed.

That simple fact should be the beginning and end of the severability analysis. It was *Congress*, not a court, that made the mandate unenforceable. And when Congress did so, it left the rest of the scheme intact. In other words, Congress in 2017 made the judgment that it wanted the rest of the ACA to remain even in the absence of an enforceable individual mandate. This case thus gives unique insight into Congress's intentions because Congress is the one that acted.

Consideration of whether the remaining parts of the law remain "fully operative" is thus unnecessary and inappropriate. *Cf. Free Enter. Fund*, 561 U.S. at 509. As already noted, that inquiry is often used in severability analysis as a proxy for congressional intent. *See ibid.*; *supra* p. 10. But because Congress's intent was explicitly and duly enacted into statutory law, no such proxy is needed here.

But any such inquiry would only weaken the plaintiffs' argument that the entire statute must fall.

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[13] https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53300-individualmandate.pdf.

That is because the remaining portions of the ACA, as amended by Congress in 2017, are "fully operative" without the penalty-less mandate. *Free Enter. Fund*, 561 U.S. at 509. The 2017 Congress acted with evidence—unavailable in 2010—from new market studies and years of experience with the ACA that the law could remain operational without an enforceable mandate. 2017 CBO Report, *supra*; *see infra* pp. 20-21. The functional severability inquiry is thus unusually easy here: because Congress's own 2017 amendment removed the mandate penalty and left the rest of the law operational, it is clear that Congress thought the revised version of the ACA could function sufficiently well. Congress made that judgment based on evidence that insurance markets would remain stable if the individual mandate were rendered unenforceable. *See infra* pp. 20-21. Severability doctrine requires the court to respect Congress's judgment, not substitute its own.

For these reasons, the court need not conduct any inquiry into hypothetical congressional intent. There is no need to parse legislative history or other extra-textual evidence of Congress's wishes. Nor is there any room here for "courts to rely on their own views about what the best statute would be." *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring). Congress's 2017 amendment resulted in an ACA without an enforceable mandate but with all its other provisions intact. That is the statute the 2017 Congress chose.

Nor is it the court's role to hypothesize about whether some members of Congress would have liked

to excise more of the statute if only they could have found the votes. Federal courts do not do statutory interpretation that way. Congress tried and failed to repeal various provisions of the ACA more than 50 times before the 2017 tax law's enactment. *See* C. Stephen Redhead & Janet Kinzer, Cong. Research Serv., R43289, *Legislative Actions in the 112th, 113th, and 114th Congresses to Repeal, Defund, or Delay the Affordable Care Act* (2017);[14] *California* Pet. App. 8a. To implement the preferences of members of Congress who lost those votes would be undemocratic and in violation of the requirements of bicameralism and presentment in Article I, Section 7 of the Constitution. *INS v. Chadha*, 462 U.S. 919, 951 (1983) (requiring that "the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure"); *City of Milwaukee v. Illinois*, 451 U.S. 304, 332 n.24 (1981) ("[U]nsuccessful attempts at legislation are not the best of guides to legislative intent." (citation omitted)); *Johnson v. Transp. Agency*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting) ("[O]ne must ignore rudimentary principles of political science to draw any conclusions regarding [legislative] intent from the *failure* to enact legislation.").

As even the United States itself once recognized in this very case before its abrupt switch in position, "the severability analysis should be one of statutory construction, not parliamentary probabilities." U.S. D. Ct.

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[14] https://fas.org/sgp/crs/misc/R43289.pdf.

Br. 19. Accordingly, a "court should not hypothesize about the motivations of individual legislators, or speculate about the number of votes available for any number of alternatives." *Ibid.* All that matters here is that Congress eliminated the individual mandate penalties while leaving the rest of the statute intact.

B. The Same Result Follows Under Alternative Approaches To Severability

Although severability doctrine is deeply grounded in more than a century of consistent precedent, some Justices have recently suggested alternative approaches. Importantly, those approaches would even further narrow the extent to which courts strike down Congress's enactments, and they would further support Amici's position here.

Justice Kavanaugh, for example, has proposed "institut[ing] a new default rule" of "sever[ing] an offending provision from the statute to the narrowest extent possible unless Congress has indicated otherwise in the text of the statute." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2148 (2016). Under this approach, the rest of the ACA must be preserved because Congress nowhere expressly indicated that the individual mandate is inseverable. Indeed, Congress's preservation of the rest of the statute at the same time it rendered the mandate toothless indicates just the opposite.

In a different vein, Justice Thomas has expressed the desire to align severability doctrine with "traditional limits on judicial authority" and eschew any

"nebulous" inquiries into "hypothetical congressional intent." *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring). Justice Thomas has stated that the practice in early American courts was simply to "decline to enforce" any unconstitutional provision "in the case before them." *Id.* at 1485-86 (citing Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 755-66 (2010)). "[T]here was no 'next step' in which courts inquired into whether the legislature would have preferred no law at all to the constitutional remainder." *Id.* at 1486 (quoting Walsh, *supra*, at 777); *see* Walsh, *supra*, at 757 (noting that Chief Justice Marshall in *Marbury v. Madison* did not consider which other parts of the Judiciary Act would stand or fall after deciding not to enforce the unconstitutional provision against the parties in the case).

Under Justice Thomas's approach, courts cannot reach out to declare other provisions of the ACA unconstitutional, as Congress certainly never indicated through any "text that ma[de] it through the constitutional processes of bicameralism and presentment" that it wanted the entire ACA to fall if the individual mandate were held unconstitutional. *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring). To the contrary, the only relevant text enacted through bicameralism and presentment was the law rendering the mandate unenforceable while leaving the rest of the statute in place.

III. THE DISTRICT COURT MISAPPREHENDED SEVERABILITY DOCTRINE BY ENTRENCHING THE VIEWS OF AN EARLIER CONGRESS OVER A LATER ONE

The district court ignored these settled severability principles by effectively disregarding the intent of the 2017 Congress, devoting less than three pages of a 55-page opinion to that issue. To make matters worse, the court focused instead on the intent of the 2010 Congress that first enacted the ACA. It thereby elevated the 2010 Congress's judgment over that of the 2017 Congress, contravening the fundamental principle that a later Congress remains free to alter a statute enacted by an earlier one.

The district court's severability analysis amounted to the following: In 2010, the district court concluded, Congress intended "that the Individual Mandate not be severed from the ACA." *California* Pet. App. 208a. And the district court posited that in 2017, "Congress had no intent with respect to the Individual Mandate's severability," and "even if it did," it "must have agreed" that the mandate "was essential to the ACA" because it did not expressly repeal 2010 congressional findings about the importance of the individual mandate or the individual mandate itself. *California* Pet. App. 228a-229a.

As the Fifth Circuit majority recognized, the district court's analysis was flawed in multiple respects. *California* Pet. App. 59a, 65a. Most fundamentally, it unconstitutionally favored the view of an earlier

Congress over a later Congress that had equal power to change the law and had different views about how the ACA could and should operate.

A. The District Court Erroneously Assessed Congressional Intent As Of 2010, Rather Than 2017

The district court's exclusive focus on the 2010 Congress and disregard of the one that came seven years later misapplies severability doctrine and misunderstands the legislative process. By expressly amending the statute in 2017 and setting the penalty at zero while retaining the rest of the law, Congress eliminated any need to examine earlier legislative findings or to theorize about what an earlier Congress would have wanted. Congress told us what it wanted through its own 2017 legislative actions, which necessarily supersede any earlier Congress's actions: "One determines what Congress would have done by examining what it did." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 560 (2001) (Scalia, J., dissenting). Whatever the 2010 Congress may have believed about the connection among the ACA's various provisions, the relevant question is what the *2017 Congress* intended when it took the action that provides the basis for plaintiffs' challenge, *i.e.*, when it reduced the mandate's penalty to zero.

The legitimacy of that 2017 judgment is not undermined just because an earlier Congress—operating seven years earlier based on different facts under different circumstances—might have disagreed. Yet the

district court erroneously treated Congress's 2017 legislation as subordinate to its 2010 legislation. This Court has explained that "statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified." *Dorsey v. United States*, 567 U.S. 260, 274 (2012). "And Congress remains free to express any such intention either expressly or by implication as it chooses." *Ibid.*; *cf.* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 327 (2012) ("When a statute specifically permits what an earlier statute prohibited * * * the earlier statute is (no doubt about it) implicitly repealed.").

The district court's erroneous focus on the intent of the 2010 Congress fails for another reason. The 2010 Congress could not possibly have answered the severability question here. It was addressing a different version of the ACA and lacked the years of on-the-ground experience with the law that the 2017

Congress had.[15] Whatever the merits of the 2010 findings, they addressed a different mandate—one with an enforceable penalty—than exists today. As the Fifth Circuit recognized, regardless of what the 2010 Congress predicted about the importance of a mandate, "the 2017 Congress had the benefit of hindsight over the 2010 Congress: it was able to observe the ACA's actual implementation." *California* Pet. App. 65a. It took a different view of what was necessary, and it was entitled to do so.

For these reasons, the district court erred in relying on the legislative findings from 2010. *See California* Pet. App. 209a-213a (citing 42 U.S.C. § 18091(2)). To start, those findings, which were about the effect on interstate commerce, aimed only to justify the mandate as a valid exercise of the Commerce Power. 42 U.S.C. § 18091(2). Five Justices in *NFIB* rejected that justification for the law, rendering those findings irrelevant to anything going forward.

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[15] Even before 2017, the ACA had changed since its enactment in 2010. *See, e.g.*, Protecting Access to Medicare Act of 2014, Pub. L. No. 113-93, § 213, 128 Stat. 1040, 1047 (2014) (repealing deductible limit for small group health plans); Protecting Affordable Coverage for Employees Act, Pub. L. No. 114-60, § 2, 129 Stat. 543, 543 (2015) (amending ACA definition of small employer); Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 604, 129 Stat. 584, 599 (2015) (repealing requirement that employers with more than 200 employees automatically enroll employees in qualifying health plan); Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, div. P, § 101, 129 Stat. 2242, 3037 (2015) (delaying effective date of the excise tax commonly known as the "Cadillac tax" from 2018 to 2020).

Second, the 2017 Congress reached a new conclusion about whether the mandate was essential. It made clear that the ACA can stand without an enforceable mandate—and it did so in the operative provisions of the statute, not merely in findings.

No judicial second-guessing of Congress's 2017 judgment that the rest of the statute would be fully operative without an enforceable mandate is necessary or appropriate. *See supra* pp. 10-14. But Congress had a reasonable basis for so concluding. Before Congress acted in 2017, the Congressional Budget Office had analyzed the effects both of repealing the individual mandate *and* of eliminating the penalties while keeping the mandate in place. *See* 2017 CBO Report, *supra*. Its conclusion for both scenarios: "Nongroup insurance markets would continue to be stable in almost all areas of the country throughout the coming decade." *Id.* at 1; *see also* Congressional Budget Office, *Options for Reducing the Deficit: 2017 to 2026*, at 237 (Dec. 2016) (concluding that adverse selection problems created by repeal of individual mandate would be "mitigated" by premium subsidies, which "would greatly reduce the effect of premium increases on coverage among subsidized enrollees").[16] While there is room for reasonable disagreement about the extent of the impact on the insurance markets of eliminating the mandate penalty, this analysis at the very least creates a reasonable basis for 2017 legislators to conclude that they could

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[16] https://www.cbo.gov/system/files?file=2018-09/52142-budgetoptions2.pdf.

sensibly take this step while leaving the ACA's insurance reforms (and the rest of the statute) in place.

Finally, the 2010 findings address a different version of the statute, one with a mandate that had an enforcement mechanism. The 2017 Congress thus would not have viewed those findings as applicable. It was operating not on the basis of pre-enactment findings, but on the basis of seven years of experience with the ACA and four years of on-the-ground implementation of its major provisions, including the individual mandate.

The district court thus erred in relying on Congress's 2010 finding that the individual mandate, enforced with a penalty, was necessary *in 2010* to accomplish Congress's goal of extending health insurance coverage. *California* Pet. App. 209a-213a (citing 42 U.S.C. § 18091(2)). The 2017 Congress was in no way bound by that prior finding. It had plenary authority to determine that a mandate with a penalty was unnecessary to achieve its goals. To second-guess that judgment, as the district court did, is to impermissibly assume that Congress purposefully enacted a law that was dysfunctional.

Indeed, Congress has continued to amend the ACA after zeroing out the mandate in 2017, providing further proof of its intent that the rest of the ACA would remain in place and further evidence of Congress's intent to expand and strengthen the law rather than destroy it. In 2018, for example, Congress amended numerous ACA provisions, including those concerning

community health centers, payments to hospitals serving low-income populations, Medicaid, taxes on medical devices, and so-called "Cadillac insurance plans." *See, e.g.*, Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 50901, 132 Stat. 64, 282-89; Suspension of Certain Health-Related Taxes, Pub. L. No. 115-120, div. D, §§ 4001-4003, 132 Stat. 28, 38-39 (2018). And the two most recent statutes to amend the ACA—the CARES Act and the Families First Act, both enacted to address the current public-health emergency—rely on the ACA's existence, expand on its insurance benefits, and refer to the ACA in numerous other provisions. *See, e.g.*, CARES Act, Pub. L. No. 116-136, §§ 3201 (requiring all insurers to forgo cost sharing for all COVID-19 diagnostic testing), 3203 (extending the ACA's requirements that insurers provide designated preventative services with no cost-sharing to a future COVID-19 vaccine on a fast-track basis), 3211 (expanding on the ACA's community health center provisions), 134 Stat. 281, 366-70 (2020); Families First Coronavirus Response Act, Pub. L. No. 116-127, § 6001, 134 Stat. 178, 201-02 (2020) (further waiving cost-sharing for COVID-19 testing for all insurance plans). If Congress in 2017 did not intend the rest of the ACA to exist with a toothless mandate, it would not later have relied on it as the backbone of its public-health response to a global pandemic. As this Court has recognized on numerous occasions, later-enacted statutes or statutory provisions inform construction of earlier ones. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("At the time a statute is enacted, it may have a range of plausible meanings. Over time,

however, subsequent acts can shape or focus those meanings."). The President himself, of course, signed all of these ACA-sustaining, referencing, and expanding acts as well.

At bottom, a toothless mandate is essential to nothing. A mandate with no enforcement mechanism cannot somehow be essential to the law as a whole. That is so regardless of the finer points of severability analysis or congressional intent. The district court's contrary conclusion makes no sense.

B. The District Court Also Erred By Focusing On Pre-2017 Decisions And By Discounting The 2017 Law Because Of The Legislative Procedure Congress Used

The district court also erred in concluding that various opinions of this Court bolster its view of Congress's intent. The district court asserted that all the opinions in *NFIB* and the majority opinion in *King v. Burwell* support its view that the individual mandate is "essential to the ACA." *California* Pet. App. 214a-220a. Put aside that the joint dissent in *NFIB* is the only one of those opinions to even address the individual mandate's severability. More importantly, all of those opinions interpreted the ACA as enacted in 2010. None addressed the current ACA, as amended in 2017 in light of years of on-the-ground experience with the law to make the mandate unenforceable and therefore "essential" to nothing.

The federal government's litigating position in *NFIB* is irrelevant for the same reason: it too was

based on the 2010 version of the ACA. *Contra California* Pet. App. 214a n.29. Nevertheless, it is telling that, in 2018, before the United States abruptly changed its litigating position here, the Attorney General wrote to Congress reaffirming the federal government's view that almost the entire ACA was severable from the individual mandate. Letter from Jefferson B. Sessions III to Paul Ryan 3 (June 7, 2018) ("[T]he Department will continue to argue that" the individual mandate "is severable from the remaining provisions of the ACA" besides the guaranteed-issue and community-rating provisions).[17] And yet the government now argues that none of the statute should survive. Regardless, the United States' 2012 litigating position is irrelevant to the intent of the 2017 Congress.

Equally erroneous was the district court's conclusion that the 2017 Congress had no intent "with respect to the ACA qua the ACA" because its amendment was part of an omnibus bill that passed through a budget reconciliation procedure. *California* Pet. App. 226a-227a; *see also California* Pet. App. 157a & n.72. Regardless of what else the omnibus bill contained or the internal mechanism by which it passed, Congress amended the ACA through that legislation. The district court was not entitled to discount the 2017 legislation any more than a court could discount other provisions of the ACA that were themselves enacted through reconciliation, *see* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124

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[17] https://www.justice.gov/file/1069806/download.

Stat. 1029 (2010), or any other law amended by a later enactment.

Federal courts do not hold that a law should receive less respect because of the type of legislative vehicle employed to enact it. Would one say the many programs added by the 2009 stimulus statute are weak law simply because they were part of an omnibus package? Or that other provisions in the 2017 tax law at issue here, such as the reduction in the corporate tax rate, are less valid than other statutes because those provisions were passed through reconciliation? How about Congress's 2018 amendments to the ACA, such as delaying the medical device and excise taxes and providing millions of dollars for community health centers, graduate medical education, and maternal health—are those less than fully effective because enacted through an omnibus vehicle? Of course not.

Article I, Section 5 of the Constitution gives Congress control over its own procedures. This Court has never second-guessed Congress's internal, procedural choices. *Cf. Field v. Clark*, 143 U.S. 649, 671-73 (1892). The district court, however, impermissibly second-guessed Congress's choice by giving less weight to the 2017 legislation due to the procedures Congress used to enact it. All that matters is that the 2017 amendment is a law passed through bicameralism and presentment whose text unequivocally expresses Congress's choice to let this version of the ACA stand with no enforceable mandate.

The district court was required to respect Congress's choices in 2017 and thereafter. To do otherwise would be to entrench the views of an earlier Congress over a later one and give duly enacted laws different weights. That would be unconstitutional.

* * *

The district court got severability exactly backward. It disregarded the clearly expressed intent of Congress and invalidated statutory provisions that Congress chose to leave intact. Its judicial repeal of the ACA under the guise of "severability" usurped Congress's role and injected incoherence into this critical area of law.

IV. THE FIFTH CIRCUIT GAVE NO VALID REASON FOR REMANDING

The Fifth Circuit majority correctly identified serious flaws in the district court's severability analysis, including the "little attention" the district court paid "to the intent of the 2017 Congress" and its failure to address "how the individual mandate fits within the post-2017 regulatory scheme of the ACA." *California* Pet. App. 59a, 65a. Inexplicably, however, the Fifth Circuit majority then remanded for the district court to "pars[e] through the over 900 pages of the post-2017 ACA" and determine "which provisions of the ACA Congress intended to be inseverable from the individual mandate." *California* Pet. App. 65a, 68a.

Both the remand and the laborious analysis the court of appeals envisioned are unnecessary and unlawful. To begin, severability is a question of law that appellate courts can review de novo. The district court is no better positioned than the court of appeals or this Court to resolve the severability question.

More important, it takes no "searching inquiry" with a "fine[ ]-toothed comb," *California* Pet. App. 68a, to resolve this case. For the reasons discussed above, *all* provisions of the ACA are severable from an unenforceable individual mandate. Congress *itself* rendered the individual mandate unenforceable while leaving the remainder of the ACA intact, clearly demonstrating that the ACA should survive even if the mandate falls. *See* supra pp. 10-14.

The Fifth Circuit's instruction to parse through the ACA's provisions is not only unneeded—it is also unconstitutional. It invites the district court to exercise the "editorial freedom" that "belongs to the Legislature, not the Judiciary." *Free Enter. Fund*, 561 U.S. at 510. The court of appeals' suggestion that the district court take a second look and decide the severability question for itself—a question Congress already answered—was profoundly wrong.

CONCLUSION

Although views on the merits of the ACA as a matter of law and policy vary widely—including among Amici—those positions are irrelevant to severability. When a court finds a portion of a statute unconstitutional and considers what that means for the rest of

the law, its task implicates fundamental questions of separation of powers and the judicial role. For that reason, courts have always been rightfully cautious when considering severability, homing in on any available evidence of congressional intent and seeking to salvage rather than destroy. "When courts apply doctrines that allow them to rewrite the laws (in effect), they are encroaching on the legislature's Article I power." Kavanaugh, *supra*, at 2120.

For these reasons, if the Court finds that plaintiffs have standing and concludes that the individual mandate is unconstitutional, Amici urge that it find the mandate severable from the rest of the ACA.

Respectfully submitted,

JOSEPH R. PALMORE
Counsel of Record
SAMUEL B. GOLDSTEIN
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave. NW
Washington, DC 20006
(202) 887-6940
JPalmore@mofo.com

JAMES R. SIGEL
MORRISON & FOERSTER LLP
425 Market St.
San Francisco, CA 94105

JOSHUA L. HEDRICK
HEDRICK KRING, PLLC
1700 Pacific Ave., Ste. 4650
Dallas, TX 75201

Counsel for Amici Curiae

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