

19-10011

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

---

STATE OF TEXAS, <i>ET AL.</i> ,	:	
Plaintiffs,	:	On Appeal from the
	:	United States District Court
v.	:	for the Northern District of Texas
UNITED STATES OF AMERICA,	:	
Defendants,	:	Case No. 4:18-cv-00167-O
and	:	
CALIFORNIA, ET AL.,	:	
Intervenor Defendants	:	

---

**BRIEF OF *AMICUS CURIAE* STATES OF OHIO AND  
MONTANA IN SUPPORT OF NEITHER PARTY**

---

TIMOTHY C. FOX  
Montana Attorney General

DAVE YOST  
Ohio Attorney General

JONATHAN BENNION  
Chief Deputy Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620

BENJAMIN M. FLOWERS\*  
*\*Counsel of Record*  
State Solicitor  
30 E. Broad Street, 17th Floor  
Columbus, OH 43215  
614-466-8980  
bflowers@ohioattorneygeneral.gov

*Counsel for Amicus Curiae  
State of Montana*

*Counsel for Amicus Curiae  
State of Ohio*

## SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

No. 19-10011

*State of Texas, et al. v. United States of America.*

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities have an interest in this *amicus curiae* brief. These representations are made so the judges of this court may evaluate potential disqualification or recusal.

Amicus Curiae States: Ohio, Montana

Counsel for *Amicus Curiae* States: Ohio Attorney General Dave Yost; Montana Attorney General Tim Fox

/s/ Benjamin M. Flowers  
Benjamin M. Flowers  
Counsel for *Amicus Curiae*  
State of Ohio

## TABLE OF CONTENTS

	<b>Page</b>
SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iii
INTRODUCTION AND INTEREST OF AMICUS CURIAE .....	1
ARGUMENT.....	4
I.    The individual mandate is unconstitutional. ....	5
II.   There is no basis, in either the Supreme Court’s precedents or the Constitution’s original meaning, for striking down the entire Affordable Care Act based on the individual mandate’s unconstitutionality.....	7
A.   Under binding Supreme Court precedent, the individual mandate is “severable” from the rest of the Affordable Care Act.....	8
B.   The modern severability doctrine is contrary to the Constitution’s original meaning, subject to abuse, and in need of being checked. ....	14
CONCLUSION.....	23
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Alaska Airlines, Inc. v. Brock</i> , 480 U.S. 678 (1987).....	9, 10
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001).....	8
<i>Alvarez v. City of Brownsville</i> , 904 F.3d 382 (5th Cir. 2018) .....	21
<i>Ariz. Christian Sch. Tuition Org. v. Winn</i> , 563 U.S. 125 (2011).....	21
<i>Ayotte v. Planned Parenthood</i> , 546 U.S. 320 (2006).....	8, 9
<i>Burlington N. Santa Fe Ry. v. Loos</i> , No. 17-1042 (2019) .....	12
<i>Clapper v. Amnesty Int’l USA</i> , 568 U.S. 398 (2013).....	19
<i>Denver Area Educ. Telecomms. Consortium v. FCC</i> , 518 U.S. 727 (1996).....	10
<i>Dodd v. United States</i> , 545 U.S. 353 (2005).....	10
<i>EC Term of Years Trust v. United States</i> , 550 U.S. 429 (2007).....	13
<i>Elec. Bond &amp; Share Co. v. SEC</i> , 303 U.S. 419 (1938).....	11
<i>Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.</i> , 561 U.S. 477 (2010).....	passim
<i>Frothingham v. Mellon</i> , 262 U.S. 447 (1923).....	16

*INS v. Chadha*,  
 462 U.S. 919 (1983)..... 11

*Johnson v. United States*,  
 135 S. Ct. 2551 (2015).....16

*King v. Burwell*,  
 135 S. Ct. 2480 (2015) .....1, 22

*Lawson v. FMR LLC*,  
 571 U.S. 429 (2014).....20

*Legal Servs. Corp. v. Velazquez*,  
 531 U.S. 533 (2001).....11

*Marbury v. Madison*,  
 1 Cranch 137 (1803) .....15

*Murphy v. NCAA*,  
 138 S. Ct. 1461 (2018).....passim

*National Federation of Independent Business v. Sebelius*,  
 567 U.S. 519 (2012).....passim

*Planned Parenthood v. Casey*,  
 505 U.S. 833 (1992).....7

*SAS Inst., Inc. v. Iancu*,  
 138 S. Ct. 1348 (2018).....20

*Texas v. United States*,  
 340 F. Supp. 3d 579 (N.D. Tex. 2018).....7, 11

*United States v. Mitra*,  
 405 F.3d 492 (7th Cir. 2005) .....19

*Util. Air Regulatory Grp. v. EPA*,  
 573 U.S. 302 (2014).....12

*Valley Forge Christian Coll. v. Ams. United for Separation of Church &  
 State*,  
 454 U.S. 464 (1982).....19

*Vermont Agency of Nat. Res. v. United States ex rel. Stevens*,  
529 U.S. 765 (2000).....15

*Wash. St. Grange v. Wash. St. Republican Party*,  
552 U.S. 442 (2008).....8

*Washington v. Glucksberg*,  
521 U.S. 702 (1997).....8

*Whitman v. Am. Trucking Ass’ns*,  
531 U.S. 457 (2001).....13

**Statutes, Rules, and Constitutional Provisions**

26 U.S.C. § 5000A.....5, 6

42 U.S.C. § 18091(2).....11

U.S. Const., art. I, § 8 .....5, 6

U.S. Const., art. III, § 1 .....14

**Other Authorities**

Brian Charles Lea, *Situational Severability*, 103 Va. L. Rev. 735 (2017) ..... 18, 19

David H. Gans, *Severability as Judicial Lawmaking*, 76 Geo. Wash. L. Rev. 639 (2008) .....20

The Federalist (Cooke ed., 1961) ..... 4, 15, 21

Frank H. Easterbrook, *Statutes’ Domains*, 50 U. Chi. L. Rev. 533 (1983) .....20

John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 Geo. Wash. L. Rev. 56 (2014) .....15

Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933 (2018) .....15

Kevin C. Walsh, *Partial Unconstitutionality*, 85 NYU L. Rev. 738 (2010) ..... 15, 16, 17

Mark L. Movsesian, *Severability in Contracts and Statutes*, 30 Ga. L.  
Rev. 41 (1995) .....18

Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*,  
70 U. Chi. L. Rev. 887 (2003) .....16

## INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Supreme Court first considered the Affordable Care Act in *National Federation of Independent Business v. Sebelius* (“*NFIB*”), 567 U.S. 519 (2012). It did so again in *King v. Burwell*, 135 S. Ct. 2480 (2015). Both decisions had their critics. Among them, Justice Scalia, who faulted the majorities in *NFIB* and *King* for “chang[ing] the usual rules” to protect the Affordable Care Act. *King*, 135 S. Ct. at 2506 (Scalia, J., dissenting). Each case, he wrote, stood for “the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites.” *Id.* at 2507.

Some agree with these criticisms. Others do not. But no one can disagree that courts should adhere to neutral principles, even in cases involving the Affordable Care Act. Whether those principles support the Act or undermine it is, or at least should be, of no concern. That is what it means to have a government of laws, and not of men.

The District Court below committed the very sin that Justice Scalia decried in *King*: throwing out all the usual rules in a case about the Affordable Care Act. *See* 135 S. Ct. at 2506. The Act’s individual mandate—the provision that orders most Americans to buy health insurance—is unconstitutional. The Supreme Court upheld the mandate as a tax in *NFIB*, reasoning that nothing else in Article I would

empower Congress to pass such a law. *See* 567 U.S. at 561–74. But Congress amended the Act in 2017, eliminating the penalty for refusing to buy health insurance. As a result, the mandate cannot raise any revenue, and therefore cannot be upheld as an exercise of Congress’s taxing power.

This raises the question of what to do with the remainder of the Act. Does the mandate’s unconstitutionality require striking down the entire law, or is the mandate “severable”? The District Court invalidated the whole thing. That part of its decision cannot be squared with the Constitution’s original meaning or binding Supreme Court precedent. As an original matter, the federal courts have no power to “strike down” entire laws; “when early American courts determined that a statute was unconstitutional, they would simply decline to enforce it in the case before them.” *Murphy v. NCAA*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring). The power to go any further is an invention of the courts, not the Framers.

As a matter of binding doctrine, courts *can* strike down entire laws based on the unconstitutionality of a single provision. But they may do so only if the remainder of the law is “incapable of functioning independently,” or if it is otherwise “evident” that Congress would have preferred no law at all to a law without the unconstitutional provision. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010) (citations omitted). This severability analysis usually en-

tails asking about the hypothetical intent of a hypothetical Congress. Not here. Congress's 2017 amendment effectively repealed the individual mandate by reducing the penalty for non-compliance to \$0. That effective repeal objectively establishes that the law *is* capable of functioning without the mandate (it already does), and that Congress would have preferred such a law to no law at all. The mandate is therefore severable, and its unconstitutionality has no bearing on the rest of the Act.

The District Court erred in coming out the other way. It failed to ask whether the now-inoperative mandate is essential to the Affordable Care Act as *currently* codified. (How could it be?) Instead, it asked whether the *original* version of the individual mandate—the one that Congress made enforceable with a penalty—was central to the *original* version of the Affordable Care Act. The Court thus invalidated the current version of the Affordable Care Act by assessing the importance of an earlier version of the mandate to an earlier version of the Act. To describe the approach is to refute it.

If the effect of the District Court's decision were simply to bungle constitutional doctrine in Texas, then Ohio and Montana would likely sit this one out. The trouble is, the District Court's decision purports to invalidate the Affordable Care Act for the entire nation—from Big Bend country to Big Sky and Big Ten country.

The court’s decision, if affirmed, will deprive *millions* of non-elderly Ohioans and Montanans of coverage for pre-existing conditions. It will also negatively affect countless others who organized their affairs in reliance on the Act’s many unrelated provisions. To be sure, the fact that a ruling has negative consequences does not mean it is wrong. Let justice be done, though the heavens may fall. But the District Court’s ruling *is* wrong, and its errors threaten harm to millions of people in the Buckeye and Treasure states. That is why Ohio and Montana are filing this brief.

## ARGUMENT

If the Constitution has a theme, it is power—who has it, how it may be wielded, and how others can counteract it. It vests the federal government with limited power, divides that power among three co-equal branches, and then gives each branch “the necessary constitutional means” to check the others. *See* The Federalist No. 51, at 349 (J. Madison) (Cooke ed., 1961).

Power—Congress’s and the judiciary’s—is the theme of this case, too. The case involves Congress’s power because it asks whether the Affordable Care Act’s individual mandate exceeds Congress’s authority to regulate commerce and impose taxes. The answer to that question is yes; the individual mandate is unconstitutional. But that raises a question about the judiciary’s power. Specifically, does the

mandate’s unconstitutionality permit the courts to throw out the entire Affordable Care Act, effectively repealing it? The answer to that question is no; courts, with exceptions not relevant here, must respond to unconstitutional provisions in legislation by invalidating those provisions, not by invalidating every other provision in the same legislation.

This is the rare case that involves constitutional overreach by two separate branches. Congress acted unconstitutionally by enacting the individual mandate and the court below exceeded its power by striking down the Affordable Care Act in full. Assuming anyone has standing to bring this suit—a topic this brief leaves to others—this Court should hold the individual mandate unconstitutional but leave the rest of the Affordable Care Act in place.

**I. The individual mandate is unconstitutional.**

The Affordable Care Act orders most Americans to maintain a “minimum” level of “essential coverage.” 26 U.S.C. § 5000A. This command, known as the individual mandate, demands that people engage in commerce. Does the Commerce Clause permit Congress to pass such a law?

No. The Commerce Clause empowers the legislature “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const., art. I, § 8, cl. 3. The “power to *regulate* commerce presup-

poses the existence of commercial activity to be regulated.” *NFIB*, 567 U.S. at 550 (opinion of Roberts, C.J.). “The individual mandate, however, does not regulate existing commercial activity.” *Id.* at 552. To the contrary, it regulates *non-commercial* activity—the refusal to purchase insurance—by ordering individuals to enter into commerce. *Id.* That exceeds the limits of the Commerce Clause. *Id.*

The individual mandate similarly exceeds Congress’s power to “lay and collect Taxes.” U.S. Const., art. I, § 8, cl. 1. The Supreme Court, in *NFIB*, upheld the pre-2017 version of the mandate as an exercise of Congress’s taxing power. Its reasoning rested on the fact that those who did not comply with the individual mandate were, at the time of the decision, made to pay a fine. Congress expressly labeled this fine a “penalty,” not a tax. 26 U.S.C. § 5000A. Notwithstanding that language, the Court held that the law could be characterized as a tax on the failure to purchase rather than a command to purchase insurance in the first place. *NFIB*, 567 U.S. at 563–74 (majority).

Whatever the merits of the taxing-power argument in 2012, it is meritless today. The Tax Cuts and Jobs Act of 2017 reduced the penalty for failure to comply with the mandate to \$0. This means the mandate does not, and cannot under any circumstance, raise revenue. If taxes share one common denominator, it is that they are at least *capable* of raising revenue. *NFIB*, 567 U.S. at 564 (majority) (“the

essential feature” of a tax is that “[i]t produces at least some revenue for the Government”). Because the individual mandate does not share that feature, it does not qualify as a “tax,” and can no longer be upheld as an exercise of the taxing power. *See Texas v. United States*, 340 F. Supp. 3d 579, 598–601 (N.D. Tex. 2018).

Nothing in Article I besides the Commerce Clause or the taxing power could even conceivably justify the individual mandate. Accordingly, the mandate is unconstitutional and may not be enforced.

**II. There is no basis, in either the Supreme Court’s precedents or the Constitution’s original meaning, for striking down the entire Affordable Care Act based on the individual mandate’s unconstitutionality.**

The next question is what to do about the individual mandate’s unconstitutionality. The challengers, and now the United States, argue that the proper remedy is to invalidate the entire Affordable Care Act.

The Supreme Court’s precedents do not support this remedy. Neither does the Constitution’s original meaning. The latter point is important. The Supreme Court has greatly expanded the power of courts to “strike down” legislative acts based on a constitutional infirmity in a single provision. That should come as no surprise; “no government official is tempted to place restraints upon his own freedom of action.” *Planned Parenthood v. Casey*, 505 U.S. 833, 981 (1992) (Scalia, J., dissenting). “Lord Acton did not say ‘Power tends to purify.’” *Id.* But the same

tendency of officials to aggrandize their power is what makes it so admirable when courts acknowledge and observe the limits of judicial power. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001); *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997). This case gives the Court a chance to do just that. In the process, it can keep Article III’s “judicial Power” from drifting still further from its original meaning.

**A. Under binding Supreme Court precedent, the individual mandate is “severable” from the rest of the Affordable Care Act.**

1. “Generally speaking, when confronting a constitutional flaw in a statute,” courts “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 (internal quotation marks and citation omitted). This principle recognizes that a “ruling of unconstitutionality frustrates the intent of the elected representatives of the people.” *Ayotte v. Planned Parenthood*, 546 U.S. 320, 323 (2006) (citation omitted). Courts apply the law; they do not make it. Broadly invalidating every law that contains an unconstitutional subpart would “short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.” *Wash. St. Grange v. Wash. St. Republican Party*, 552 U.S. 442, 451 (2008).

This presumption in favor of severing unconstitutional portions of otherwise-valid laws is just that—a presumption. Courts will strike down entire laws based on the unconstitutionality of a single provision if, but only if, it is “evident that [Congress] would not have enacted” the remaining provisions independently of the unconstitutional ones. *Murphy*, 138 S. Ct. at 1482 (majority). Courts conduct this inquiry by asking two questions. First, will the law, without its unconstitutional subparts, “function in a manner consistent with the intent of Congress”? *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (emphasis omitted). Second, would the legislature have “preferred what is left of its statute to no statute at all?” *Ayotte*, 546 U.S. at 330.

Here, the answer to both of these questions is “yes.” When Congress passed the Tax Cuts and Jobs Act, it reduced the penalty for non-compliance to \$0. This effectively repealed the mandate. True, the U.S. Code still tells Americans to purchase insurance. But it does not penalize non-compliance, meaning the mandate has no real-world effect. At the same time that Congress made the mandate inoperative, it left in place the remainder of the Affordable Care Act. As a result, the application of the severability doctrine in this case requires no “nebulous inquiry into hypothetical congressional intent.” *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring) (citation omitted). To the contrary, the Court can see for itself what

Congress wanted by looking to what it did. Now that Congress passed the Tax Cuts and Jobs Act to effectively repeal the individual mandate, we *know* that the Act without a mandate will “function in a manner consistent with the intent of Congress.” *Alaska Airlines*, 480 U.S. at 685. The mandate’s effective repeal likewise confirms that Congress “would have preferred what is left of its statute to no statute at all.” *Ayotte*, 546 U.S. at 323.

In cases like this one, where the text of congressionally enacted law objectively proves what Congress “wanted,” the severability analysis should begin and end with the text. Courts are always supposed to evaluate Congress’s intent by at least considering the statutory language and structure. *See, e.g., Alaska Airlines*, 480 U.S. at 687; *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 767 (1996) (plurality). Since Congress generally “says in a statute what it means and means in a statute what it says there,” *Dodd v. United States*, 545 U.S. 353, 357 (2005) (citation omitted), there is no need to go beyond the text if it definitively establishes a preference for severability (or non-severability) on its face.

*NFIB* itself illustrates this text-focused approach. There, the Court held that Congress exceeded the scope of its Spending Clause powers in the Medicaid expansion. *See* 567 U.S. at 575–85 (opinion of Roberts, C.J.). But the Court refused to strike down the Medicaid expansion in its entirety. Why? Because Congress en-

acted a severability clause applicable to Medicaid, thereby indicating what outcome it would have preferred. *Id.* at 586; *id.* at 645–46 (opinion of Ginsburg, J.); *see also INS v. Chadha*, 462 U.S. 919, 932 (1983); *Elec. Bond & Share Co. v. SEC*, 303 U.S. 419, 434–35 (1938).

This case is even easier than *NFIB*. That case involved a severability clause that Congress passed years before the Affordable Care Act and that applied to the Medicaid program generally. Here, in contrast, the Court can “determine[] what Congress would have done by examining what it did” in passing the now-codified version of the Affordable Care Act. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 560 (2001) (Scalia, J., dissenting). Congress already enacted a law that contains no operative individual mandate—a law materially identical to the one that would result from striking down the individual mandate and leaving everything else in place. The law therefore establishes, on its face, that Congress preferred the Affordable Care Act without a mandate to no Affordable Care Act at all.

2. The District Court paid lip service to these principles. *Texas*, 340 F. Supp. 3d at 606–07. For example, it based its non-severability determination on legislative findings that Congress enacted as part of the Affordable Care Act. *Id.* at 608–09. Those findings state that the individual mandate is “essential” to the Act’s success. 42 U.S.C. § 18091(2)(H), (I), (J). Relying on this language, and on

judicial opinions analyzing the individual mandate’s place in the pre-2017 statutory scheme, the District Court concluded that Congress would have preferred no law at all to an Affordable Care without an individual mandate.

The problem with the District Court’s approach is that it assessed severability with reference to a statutory scheme that no longer exists—the pre-2017 Affordable Care Act. As noted, Congress passed the legislative findings that declared the mandate “essential” to the original 2010 Act. That language is still on the books. But it has to be read in light of the Act’s statutory history—“the history of *enacted* changes Congress made to the relevant statutory text,” as opposed to the “unenacted legislative history.” *Burlington N. Santa Fe Ry. v. Loos*, No. 17-1042, slip op., at 22 (2019) (Gorsuch, J., dissenting). That history shows that, when Congress enacted its findings about the mandate’s importance in 2010, it did so with respect to the operative individual mandate that it included within the same legislation. It did not make—it could not possibly have made—findings about the inoperative mandate that would not exist for another seven years. Congress’s findings relating to the importance of an individual mandate that no longer exists have no bearing on whether the mandate that exists today is “essential” to the Act.

What is more, the Court must read the “essential” language in light of the law as a whole, including the 2017 amendment. *See Util. Air Regulatory Grp. v.*

*EPA*, 573 U.S. 302, 321 (2014). There are two ways of doing that. The first is to read the language to describe the now-inoperative mandate as “essential.” Whatever it means to call the inoperative mandate “essential,” it does *not* mean that the mandate is “essential” in the sense relevant to the severability doctrine. Congress amended the Affordable Care Act in 2017 against the backdrop of a presumption strongly favoring severability. *Free Enter. Fund*, 561 U.S. at 508. In light of that background presumption, Congress would have been crystal clear if it had wanted to do something as extreme as making the entire Act rise or fall with the constitutionality of a completely inoperative provision. Congress does not “hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001). Legislative findings about the importance of an earlier version of the individual mandate would be an awfully small mousehole in which to hide an elephant like the Act’s non-severability.

The other way to read the Act as a whole is to recognize that the findings and the amended mandate are in irreconcilable conflict. Under this reading, there is simply no way to square Congress’s findings with its later decision to make the mandate *inessential*. But if the two are in irreconcilable conflict, the later-enacted amendment gets preference over—it impliedly repeals—the earlier findings. *EC Term of Years Trust v. United States*, 550 U.S. 429, 435 (2007).

3. Because Congress amended the Affordable Care Act to effectively eliminate the individual mandate, the mandate is severable from the rest of the Act.

**B. The modern severability doctrine is contrary to the Constitution’s original meaning, subject to abuse, and in need of being checked.**

The foregoing shows that invalidating the entire Affordable Care Act in this case would require expanding the judiciary’s power to “strike down” laws. So it is worth considering whether courts even have, as an original matter, the power to “strike down” entire laws based on a constitutional flaw in one provision. The history shows quite clearly that they do not. The idea that a court may scrap a constitutionally enacted statute, instead of simply refusing to apply it in the case before it, is a modern gloss on the “judicial Power” that has no basis in the original understanding of Article III. We recognize that this Court is bound by the Supreme Court’s precedents permitting the wholesale invalidation of partially unconstitutional statutes. But the fact that those precedents improperly expand the judicial power is a good reason to avoid expanding them any further.

1. Article III of the Constitution vests the “judicial Power” in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. Const., art. III, § 1. These courts may exercise the judicial power only in “Cases” and “Controversies.” *Id.* at § 2. The judicial power is thus the power to resolve concrete legal disputes—cases and controversies, as

opposed to abstract legal debates. *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000).

Judicial review is a “byproduct” of the courts’ power to resolve discrete cases and controversies. *Murphy*, 138 S. Ct. at 1485 (Thomas, J., concurring). The Constitution “is superior to any ordinary act of the legislature.” *Marbury v. Madison*, 1 Cranch 137, 178 (1803). Thus, when a statute conflicts with the Constitution, the Court is duty bound to give effect to the Constitution, and to deny effect to the unconstitutional statute. *Id.* That is what Chief Justice Marshall meant when he declared it “emphatically the province of the judicial department to say what the law is.” *Id.* at 177. His point was not that courts have a freestanding power to assess statutes’ constitutionality. It was that, in resolving discrete cases and controversies, courts must evaluate the constitutionality of statutes to know whether those statutes can be given effect. See Kevin C. Walsh, *Partial Unconstitutionality*, 85 NYU L. Rev. 738, 755–57 (2010); John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 Geo. Wash. L. Rev. 56, 86 (2014); see also *The Federalist* No. 78, at 524 (A. Hamilton).

“When a court announces that a statute violates the Constitution, it is common for judges and elected officials to act as though the statute ceases to exist.” Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 935–36

(2018). “They will say that the statute has been ‘struck down’ or rendered ‘void’ by the court’s decision.” *Id.* at 936. That language confuses the judicial role. Courts “have no power per se to review and annul acts of Congress on the ground that they are unconstitutional.” *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). Judicial review “amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right.” *Id.*; *Johnson v. United States*, 135 S. Ct. 2551, 2568 (2015) (Thomas, J., concurring in the judgment). In other words, because the judicial power is the power to resolve cases, the power (and duty) of courts extends no further than declining to enforce unconstitutional laws in cases that come before them. *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring).

That is the way courts conceived of the judicial power for much of American history. *See id.* at 1485–86; *see also* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 914 (2003); Walsh, *Partial Unconstitutionality*, 85 NYU L. Rev. at 755–57. And from the founding through the middle-to-late 19th century, judicial review involved the application of a “basic principle”: “Statutes are invalid so far as they are repugnant to superior law, but no further.” Walsh, *Partial Unconstitutionality*, 84 NYU L. Rev. at 768. The principle worked well. “Operating within an intellectual framework in which judicial review consist-

ed of a refusal to give effect to inferior law that was repugnant to superior law, federal and state courts were able to vindicate” numerous constitutional provisions “without massive displacement of partially unconstitutional” laws. *Id.* at 757–58. This approach thus succeeded in checking legislative overreach. But it also succeeded in preventing *judicial* overreach, since it kept the courts from nullifying the constitutional aspects of Congress’s work.

In sum, until the rise of the severability doctrine in the middle-to-late 19th century, “courts routinely held an unconstitutional law void to the extent of repugnancy, but no further; there 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 777. This second step “injects into judicial review the possibility that invalidity extends beyond unconstitutionality.” *Id.* No one at the time of the Constitution’s ratification, or for years thereafter, understood the “judicial power” as permitting that.

2. Times have changed. “Despite this historical practice,” the Supreme Court’s “modern cases treat the severability doctrine as a ‘remedy’ for constitutional violations and ask which provisions of the statute must be ‘excised.’” *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring). Absent statutory text addressing the issue, courts address severability by asking a counterfactual question about

what Congress would have wanted if some discrete part of a larger legislative act were held unconstitutional. If they determine that Congress would have wanted courts to scrap the whole act, that is what they will do.

There are any number of problems with this approach. The first is that it is hard to square with the Court’s decisions (correctly) disclaiming the power to “blue-pencil” provisions of a partly unconstitutional law. *Free Enter. Fund*, 561 U.S. at 509–10. As the Chief Justice put it when writing for the Court in *Free Enterprise Fund*, the “editorial freedom” to rewrite statutes “belongs to the Legislature, not the Judiciary.” *Id.* at 510. That is no doubt true. But if blue-penciling a partially unconstitutional statute is a legislative act, so is editing the same statute by deciding which parts to excise. See Mark L. Movsesian, *Severability in Contracts and Statutes*, 30 Ga. L. Rev. 41, 58 (1995). Either way, the court is doing Congress’s work—and going well beyond the judicial task of interpreting the law and applying it to a concrete case. The appropriate *judicial* response would be to leave the “fate of the remainder of the partially invalid law” to be settled in “the political arena, where it properly belongs on the court’s understanding of Article III.” Brian Charles Lea, *Situational Severability*, 103 Va. L. Rev. 735, 803–04 (2017).

That points to another problem: the practice of striking down entire laws bumps up against Article III’s standing requirements. Again, Article III permits

courts to exercise the judicial power only in “Cases” and “Controversies,” thereby prohibiting them from issuing advisory opinions or resolving legal questions unrelated to a concrete dispute. This “tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982). More fundamentally, it keeps “the judicial process from being used to usurp the powers of the political branches.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013). Modern severability principles run contrary to these principles, as they “often require[] courts to weigh in on statutory provisions that no party has standing to challenge, bringing courts dangerously close to issuing advisory opinions.” *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring); *see also* Lea, *Situational Severability*, 103 Va. L. Rev. at 790–805.

Then there is the problem of practicability. As already discussed, the severability doctrine requires courts to peer into congressional intent, asking whether Congress would have wanted to preserve the law if part of it had been held unconstitutional. This inquiry is flawed at the outset. Congress is a “they,” not an “it,” and so the body as a whole has no intent. *See United States v. Mitra*, 405 F.3d 492,

495 (7th Cir. 2005) (Easterbrook, J.). More fundamentally, the People agreed to be bound by the enacted laws of Congress, not by the unenacted intentions of that body's members. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359 (2018); *Lawson v. FMR LLC*, 571 U.S. 429, 459–60 (2014) (Scalia, J., concurring in part and concurring in the judgment). In any event, it is magical thinking to suggest that courts can ascertain and meaningfully aggregate the intentions of 535 individuals.

But put all that aside. Suppose that there is such a thing as congressional intent, and suppose courts can sometimes discern it. Even then, Congress's intent on severability will usually be undiscoverable, because it will be “unlikely that the enacting Congress had any intent” regarding severability; “Congress typically does not pass statutes with the expectation that some part will later be deemed unconstitutional.” *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring). It is impossible for a court to say anything about what Congress “would have done with a proposal it did not consider in fact.” Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 548 (1983).

The undiscoverability of such legislative intent leads inevitably to judicial policymaking. Without “actual evidence of intent, the severability doctrine invites courts to rely on their own views about what the best statute would be.” *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring); *see also* David H. Gans, *Severability as*

*Judicial Lawmaking*, 76 Geo. Wash. L. Rev. 639, 663 (2008). In other words, the severability doctrine winds up giving courts exactly what it is designed to withhold: the “editorial freedom” to rewrite statutes. *Free Enter. Fund*, 561 U.S. at 510. When a doctrine is self-defeating, it is probably flawed.

\* \* \*

There is more at stake here than the future of the Affordable Care Act. As noted at the outset, the real issue in this case is power—and in particular, the limits of judicial power. In the ratification debates, opponents of the new Constitution expressed concern that life-tenured judges might substitute their will for the will of the People. Hamilton assured them they had nothing to worry about. The courts, he explained, would have “no influence over either the sword or the purse”; they would have “neither Force nor Will, but merely Judgment.” The Federalist No. 78, at 523. Moreover, “the judicial power established in Article III of the Constitution” would “‘be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.’” *Alvarez v. City of Brownsville*, 904 F.3d 382, 397–98 (5th Cir. 2018) (en banc) (Ho, J., concurring) (quoting The Federalist No. 78 (A. Hamilton)). Fidelity to those strict rules and precedents would “‘avoid an arbitrary discretion in the courts.’” *Id.*

No sound application of neutral rules and precedents—whether based on the Constitution’s original public meaning or Supreme Court precedent—could lead a court to strike down an entire congressional act based on the unconstitutionality of a single, inoperative provision within it. The District Court exerted a power it did not have. It exercised precisely the sort of “arbitrary discretion” that “strict rules and precedents” are supposed to prevent.

It is understandable that some who dislike the Affordable Care Act would cheer the result below. But they should remember that what goes around comes around. If allowed to stand, the decision below “will be cited by litigants endlessly, to the confusion of honest jurisprudence.” *King*, 135 S. Ct. at 2507 (Scalia, J., dissenting). It will be used to invalidate any number of federal and state laws. If one court can ignore the strict rules and precedents governing non-severability for the Affordable Care Act, what is to stop others from doing the same when some other law is at issue? Absolutely nothing.

The Supreme Court recently recognized, in a related context, that “[f]ew exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them.” *Ariz. Christian Sch. Tuition Org. v.*

*Winn*, 563 U.S. 125, 145–46 (2011). That is what the District Court’s ruling portends. This Court must nip in the bud decisions, like the one below, that extend judicial power any further beyond its constitutional limits than the severability doctrine already does.

### CONCLUSION

This Court should reverse the District Court’s severability determination.

TIMOTHY C. FOX  
Montana Attorney General  
JONATHAN BENNION  
Chief Deputy Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620

*Counsel for Amicus Curiae*  
*State of Montana*

DAVE YOST  
Ohio Attorney General

*/s/ Benjamin M. Flowers* \_\_\_\_\_  
BENJAMIN M. FLOWERS\*  
*\*Counsel of Record*  
State Solicitor  
30 E. Broad Street, 17th Floor  
Columbus, OH 43215  
614-466-8980  
bflowers@ohioattorneygeneral.gov

*Counsel for Amicus Curiae*  
*State of Ohio*

## CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Rule 29(a)(5) of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 29.3 because, excluding the parts of the document exempted by Federal Rule 32(f) and Fifth Circuit Rule 32.2, this document contains 5,275 words.
2. I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

April 1, 2019

/s/ Benjamin M. Flowers  
Benjamin M. Flowers  
*Counsel for Amicus Curiae*  
*State of Ohio*

## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Brief of Amicus Curiae States of Ohio and Montana in Support of Neither Party* has been served through the Court's CM/ECF system on April 1, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Benjamin M. Flowers  
Benjamin M. Flowers  
*Counsel for Amicus Curiae*  
*State of Ohio*