United States Court of Appeals

for the

Fifth Circuit

Case No. 19-10011

STATE OF TEXAS; STATE OF WISCONSIN; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MISSISSIPPI, by and through Governor Phil Bryant; STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF NORTH DAKOTA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TENNESSEE; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF ARKANSAS; NEILL HURLEY; JOHN NANTZ,

Plaintiffs-Appellees,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH IN CASE NO. 4:18-CV-167 HONORABLE REED CHARLES O'CONNOR, U.S. DISTRICT JUDGE

BRIEF FOR *AMICI CURIAE* WALTER DELLINGER AND DOUGLAS LAYCOCK IN SUPPORT OF INTERVENOR DEFENDANTS-APPELLANTS SUPPORTING REMAND AND DISMISSAL

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– v. –

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; ALEX AZAR, II, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF INTERNAL REVENUE; CHARLES P. RETTIG, in his Official Capacity as Commissioner of Internal Revenue,

Defendants-Appellants,

STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF KENTUCKY; STATE OF MASSACHUSETTS; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF VIRGINIA; STATE OF WASHINGTON; STATE OF MINNESOTA,

Intervenor Defendants-Appellants.

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in 5th Circuit Rule 28.2.1, have an interest in the outcome of this case. This representation, supplemental to that of the parties and other *amici*, is made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Walter Dellinger, Douglas Laycock, *Amici Curiae*
2. Caitlin Halligan, Jessica E. Underwood, Ryan W. Allison, Selendy & Gay PLLC, Attorneys for *Amici Curiae*

/s/ Caitlin Halligan
Attorney for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*[1]

Walter Dellinger is the Douglas B. Maggs Professor Emeritus of Law at Duke University, and a partner at O'Melveny & Myers LLP.[2] Professor Dellinger has studied and written on the scope of the Article III jurisdiction of federal courts, including issues related to Article III standing, and is committed to the public interest and to the enforcement of proper limits on the scope of judicial power. Chief Justice John G. Roberts, Jr. relied upon and quoted Professor Dellinger's *amicus* brief in the majority opinion in the landmark standing case of *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013).

Douglas Laycock is the Robert E. Scott Distinguished Professor of Law at the University of Virginia and the Alice McKean Young Regents Chair in Law Emeritus at the University of Texas. Professor Laycock has taught and published widely on constitutional law and on the law of remedies, including standing to seek legal and equitable remedies.

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[1] Pursuant to FRAP 29(a)(4)(E), counsel for *amici curiae* certifies that no party or counsel for a party in this appeal authored this brief in whole or in part or made a monetary contribution to fund its preparation or submission. *Amici* further certifies that no person or entity other than *amici* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

[2] Institutional affiliations are listed for identification purposes only. None of the mentioned universities takes any position on the issues in this case.

Based on their study of the applicable precedent and principles, *amici* believe that Plaintiffs Neill Hurley and John Nantz (collectively, "Individual Plaintiffs") and the Plaintiff-States (the "States," and together with Individual Plaintiffs, "Plaintiffs") have no standing to challenge the constitutionality of the so-called "Individual Mandate" of the Patient Protection Act and Affordable Care Act (the "ACA"), 26 U.S.C. § 5000A.

PRELIMINARY STATEMENT

This case presents fundamental questions about the proper role of Article III courts. The statute Plaintiffs challenge "is not a legal command to buy insurance." *Nat'l Fed. of Indep. Bus. v. Sebelius* ("*Sebelius*"), 567 U.S. 519, 563 (2012). Rather, it offers individuals a choice, which today has no legal consequences: purchase health insurance and owe no additional tax, or do not purchase health insurance and owe the $0 tax prescribed by Congress in 2017. *See id.* at 561-63; Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092. Unable to prove that § 5000A commands them to act or attaches any consequences to their conduct, Plaintiffs lack standing to bring this challenge, and this Court should vacate the District Court's judgment and remand with instructions to dismiss for lack of jurisdiction.

This case underscores the critical gatekeeping role that Article III's standing requirement plays in the American judicial system. "The law of Article III standing,

which is built on separation-of-powers principles, serves to prevent 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). The Article III standing requirement "preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that 'the legal questions presented ... 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.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)).

The Supreme Court's statement in *NFIB v. Sebelius* that § 5000A is not an exercise of Congress's Commerce Clause powers, and thus "not a legal command to buy insurance," 567 U.S. at 563, precludes Plaintiffs from showing that the choice presented by § 5000A as amended causes them any concrete and particularized harm. *See Lujan*, 504 U.S. at 560-61, 574. Accordingly, it is dispositive of this case. Instead of obligating individuals to purchase insurance, § 5000A as originally enacted merely presented individuals with a choice to buy health insurance or pay an additional tax if they chose not to do so. *See id.*

In 2017, Congress amended the ACA to reduce the tax in § 5000A to $0. 131 Stat. at 2092. This amendment removed any consequence that could flow to individuals who decline to purchase health insurance. Individual Plaintiffs now have a choice of buying insurance and owing no additional tax, or not buying insurance and owing no additional tax. Under § 5000A as amended, absolutely nothing turns on whether Individual Plaintiffs do or do not buy insurance. Because § 5000A does not oblige Individual Plaintiffs to purchase health insurance and no longer imposes any concrete harm on individuals who decline to purchase insurance, Individual Plaintiffs cannot establish an injury-in-fact. *See infra* Sec. II.

The States' claim of standing is even weaker. The States assert they are injured by § 5000A because the statute forces individuals to enroll in Medicaid and CHIP insurance programs, which will in turn increase the States' costs of running those programs. This argument lacks any factual support and rests on a misconception of how the provision operates. Section 5000A does not force anyone to purchase insurance, and the States' claim of indirect injury caused by § 5000A's regulation of individuals is even more speculative than the basis for standing asserted by Individual Plaintiffs. *See Clapper*, 568 U.S. at 410 (rejecting "highly speculative" theory of standing). The States' fallback argument—that they are injured by *other provisions* of the ACA that cannot be severed from § 5000A—fares no better. This Court has rejected similar attempts to use the severability doctrine as a work-around

for standing, holding instead that Article III requires a plaintiff to establish an injury-in-fact stemming from each challenged statutory provision. *Nat'l Fed. of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 209 (5th Cir. 2011); *see infra* Sec. III.

ARGUMENT

I. ARTICLE III'S "CASES OR CONTROVERSIES" REQUIREMENT IS A FOUNDATIONAL PRINCIPLE OF OUR DEMOCRACY

Recognizing the need for constraints on the powers accorded to each of the three branches of government, the Framers limited the federal courts' jurisdiction to only "Cases" and "Controversies." Through standing doctrine, the federal courts have developed principles for delineating "cases and controversies" appropriate for adjudication under Article III. *See Lujan*, 504 U.S. at 560.

This framework borrows from the traditions of the English judicial system. *Coleman v. Miller*, 307 U.S. 433, 460 (1939); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (Article III limits federal courts to "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process"). In the English legal tradition, the existence—or imminent threat—of concrete harm is a necessary element of every judicial dispute. *See* F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 298-99 (1929); 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *115-166 (1st ed. 1768) (enumerating "several injuries cognizable by the courts of common law, with … respective remedies applicable to each particular injury"). For instance, in 1625, Justice Dodderidge

explained in *Cable v. Rogers* that, "*injuria* and *damnum* are the two grounds for the having all actions...: if there be *damnum absque injuria* [harm without an actionable wrong], or *injuria absque damno* [or, injury without damage], no action lieth." 3 Bulst. 312, 312, 81 Eng. Rep. 259, 259 (K.B. 1625).[3]

Thus, Article III restricts the Judiciary's power to "redress[ing] or prevent[ing] actual or imminently threatened injury to persons caused by private or official violation of law." *Summers*, 555 U.S. at 492. This requirement of concrete harm "prevent[s] the judicial process from being used to usurp the powers of the political branches." *Clapper*, 568 U.S. at 408; *see also Valley Forge*, 454 U.S. at 471, 473 (because the exercise of judicial power "can so profoundly affect the lives, liberty, and property of those to whom it extends," it is "legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy").

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[3] Claims of unjust enrichment are based on defendant's gains rather than plaintiff's loss, and very occasionally, a plaintiff may have a claim for unjust enrichment derived from an intentional violation of plaintiff's legal rights even though plaintiff suffered no tangible or provable harm. *Restatement (Third) of Restitution and Unjust Enrichment* § 1 cmt. *a*, § 3 cmt. *c*. This exception to the usual rule is irrelevant here. Plaintiffs have not alleged a claim for unjust enrichment, and any such claim would only confer standing to recover for unjust enrichment—not standing to seek an injunction against enforcement of the ACA. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Even if Plaintiffs had alleged a claim for unjust enrichment, that claim would fail: As explained below, *see infra* Sec. III, § 5000A has no capacity or tendency to change anyone's behavior in any way, so it can neither produce losses to Plaintiffs nor gains to anyone else; nor would the government be enriched if Plaintiffs bought health insurance. The United States does not sell health insurance policies under the ACA, and it spent some $685 billion in 2018 to subsidize the purchase of insurance under the ACA. Congressional Budget Office, *Federal Subsidies for Health Insurance Policies for People Under Age 65: 2018-2028*, https://www.cbo.gov/system/files?file=2018-06/53826-healthinsurancecoverage.pdf [https://perma.cc/4CPK-4QNC].

A rigorous examination of the standing requirements is especially necessary "when reaching the merits of the dispute would force [the courts] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'" *Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015) (citing *Clapper*, 568 U.S. at 408).

The District Court below acknowledged these bedrock principles, but nonetheless held Individual Plaintiffs had standing because, "[a]t a minimum, [Individual Plaintiffs] would be freed from … arbitrary governance" if they prevail.[4] ROA.2628. But as explained below, neither Individual Plaintiffs nor the States come close to satisfying Article III's requirements.

II. INDIVIDUAL PLAINTIFFS HAVE NOT SHOWN ANY CONCRETE AND PARTICULARIZED HARM

While Individual Plaintiffs claim, and the District Court held, that "they are injured by the 'obligation to comply with the individual mandate,'" ROA.2626 (quoting ROA.528-29), the Supreme Court held in *Sebelius* that § 5000A does not impose a mandate. *See* 567 U.S. at 575. Rather, Individual Plaintiffs have simply chosen to obtain minimum essential coverage. Their voluntary choice to do so—absent any requirement or threat of consequence—cannot serve as the basis of Article III standing to challenge § 5000A. And contrary to the District Court's opinion,

[4] Because the District Court found that Individual Plaintiffs had met Article III's standing requirements, it did not reach the issue of State Plaintiffs' standing. *See* ROA.2628-29.

the Tax Cuts and Jobs Act of 2017 (the "TCJA"), which reduced § 5000A's tax penalty to $0, *see* 131 Stat. at 2092, did not convert § 5000A into a mandate. It simply eliminates any adverse consequence for declining to purchase health insurance, guaranteeing that Individual Plaintiffs will not suffer any concrete harm arising from their choice to forego insurance.

A. Section 5000A Does Not Require Individual Plaintiffs to Purchase Coverage

Individual Plaintiffs' asserted basis for Article III standing is that § 5000A "force[s] them] to purchase … health insurance that they neither need nor want." Brief for Plaintiffs at 40 & n.5, *Texas v. United States*, 325 F. Supp. 3d 665 (N.D. Tex. 2018) (No. 4:18-cv-00167-O) (hereinafter, "Pls.' Br."). This argument is foreclosed by the statement in *Sebelius*—reinforced by the TJCA—that § 5000A "is not a legal command to buy insurance." 567 U.S. at 563.

Sebelius considered, *inter alia*, the constitutionality of § 5000A's requirement that individuals maintain minimum essential insurance coverage on penalty of owing the Internal Revenue Service a "shared-responsibility" payment. 567 U.S. at 530-31.[5] Chief Justice Roberts, writing for the majority, rejected the Government's argument that the individual minimum coverage requirement was permissible under the Commerce Clause. *Id.* at 548-49, 552. The Court concluded that § 5000A—if

[5] *Sebelius*'s discussion of the constitutionality of the Medicaid Expansion is not pertinent to the instant appeal. *See id.* at 531.

construed as a mandate—would "force[] individuals into commerce precisely because they elected to refrain from commercial activity," which would exceed Congress's power to regulate existing commercial activity. *Id.* at 558. Pointing to the shared-responsibility payment, the Court concluded that § 5000A could fairly be read as a lawful exercise of Congress' taxation power that presented a *choice* either to purchase insurance or to pay a tax for failing to do so. *Id.* at 566-67. On this point, the Court was unequivocal: "Neither the [ACA] nor any other law attached negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. … [I]f someone chooses to pay rather than obtain health insurance, they have fully complied with the law." *Id.* at 568. Declining to read the word "shall" in § 5000A as imposing a mandate, the Court held that § 5000A imposes "incentives" to engage in certain actions deemed by Congress to have social utility. *Id.* at 568-69. Accordingly, the Court upheld § 5000A as a tax.

Sebelius thus confirms that § 5000A is not a stand-alone, legally enforceable obligation, but instead presents individuals with a choice: obtain minimum coverage or pay the shared-responsibility payment as outlined in the Act. Once the TCJA set that payment at $0, failure to obtain minimum coverage imposed no consequences at all. Thus, the Individual Plaintiffs cannot show any injury-in-fact. Indeed, even the District Court implicitly recognized that without a *mandate* to purchase health insurance, Individual Plaintiffs cannot allege any concrete harm. *See, e.g.*,

ROA.2626 (concluding that Individual Plaintiffs had standing because §5000A "requires them to purchase and maintain certain health-insurance coverage"). There is no such mandate—and with neither a mandate nor a penalty, there can be no cognizable Article III harm. *See Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) ("To have standing, a litigant must seek relief for an injury that affects him in a personal and individual way." (citations omitted)).

Individual Plaintiffs contend that by stripping § 5000A of its accompanying tax, the TCJA transformed the provision into a mandate. *See* Pls.' Br. at 40. Not so. Although the TCJA reduced the ACA's shared-responsibility payment to $0, effective January 1, 2019, *see* 131 Stat. at 2092, Congress took no other action with respect to § 5000A. It simply adjusted the "cost-benefit" analysis, reducing the tax for failing to have health insurance to zero, and eliminating *any* consequence for choosing not to purchase insurance. *See Sebelius*, 567 U.S. at 566.

Nothing in the TCJA suggests that Congress intended to recast §5000A—interpreted in *Sebelius* as permitting a *choice* to obtain health insurance coverage—as a *mandate* to obtain health insurance coverage. The amendment did not repeal the shared-responsibility payment, add the word "mandate," or otherwise suggest that *failing* to purchase health insurance coverage would subject individuals to any fines or other consequence. Nor have Plaintiffs cited any legislative history to the contrary. Absent a clear indication from Congress that it intended to alter § 5000A's

meaning in enacting the TJCA, this Court is bound to apply *Sebelius*'s construction of § 5000A in assessing whether Plaintiffs have standing. *See* ANTONIN SCALIA & BRYAN GARNER, Reading Law 331 (2012); *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017). That point has particular force here: Given *Sebelius*'s holding that the Commerce Clause does not empower Congress to impose an individual mandate on individuals to purchase insurance, interpreting the 2017 law to *intend* that result would make no sense.

B. Because the Tax Imposed By § 5000A Is Now Zero Dollars, Individual Plaintiffs Cannot Demonstrate an Injury-in-Fact

Because the TCJA reduced the only consequence for failure to purchase insurance coverage to $0, Individual Plaintiffs' contention that they are harmed by their "obligation to comply with the individual mandate," despite their desire not to purchase health insurance, ROA.528-29, lacks any basis. Being provided with a *choice* to obtain coverage and pay nothing, or not to obtain coverage and pay nothing, does not constitute a "concrete and particularized injury." *Lujan*, 504 U.S. at 560-61. Congress has now *ensured* that Individual Plaintiffs will not suffer any of the forms of concrete harm the Supreme Court has found sufficient to satisfy Article III's injury-in-fact requirements, *e.g.*, pecuniary loss; lost business opportunities; loss of enjoyment of public resources; discriminatory treatment based on race, sex,

or some other prohibited characteristic; or viable threat of a government enforcement action.[6]

1. Individual Plaintiffs' Generalized Disagreement with § 5000A Is Not a Concrete and Particularized Injury

Neither the District Court nor Individual Plaintiffs dealt squarely with the undisputed fact that, after the TCJA, § 5000A imposes no adverse consequence for choosing not to purchase minimum essential health insurance coverage. Individual Plaintiffs' mere belief that § 5000A is an unconstitutional exercise of Congress's commerce power, or their political disagreement with the ACA, is not an injury-in-fact that can support Article III standing. *See Valley Forge*, 454 U.S. at 476.

In *Valley Forge*, the Supreme Court considered an Establishment Clause challenge to the Department of Health, Education, and Welfare's disposal of surplus property to a religious college. *Id.* Plaintiffs argued that they had standing to challenge the property disposal because the conveyance injured their right to a government that does not establish a religion. 454 U.S. at 485-86. The Supreme Court held that such an injury was not sufficient, explaining: "Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any

[6] *Hardin v. Ky. Utils. Co.*, 390 U.S. 1, 5-6 (1968) (pecuniary loss and lost business opportunities); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 180-83 (2000) (loss of enjoyment of public resources); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (fear of government enforcement); *Heckler v. Matthews*, 465 U.S. 728, 739-40 (1984) (discriminatory treatment).

personal injury suffered by them … other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485.

The same result holds here: After the TCJA removed the tax enforcement mechanism, Individual Plaintiffs' complaint about § 5000A is, at most, a political disagreement with Congress's refusal to strike the provision from the ACA. The District Court itself characterized the Individualized Plaintiffs' injury-in-fact as the inability to be "free from what they essentially allege to be arbitrary governance." ROA.2628. This kind of generalized grievance—the desire to be free of arbitrary governance—untethered to any concrete effect on Individual Plaintiffs, does not meet the "cases and controversies" requirement set forth in Article III. *See Hollingsworth*, 570 U.S. at 705-06 (mere desire to "vindicate the constitutional validity of a generally applicable … law" does not confer standing); *Pub. Citizen, Inc. v. Bomer*, 274 F.3d 212, 219 (5th Cir. 2001) (an injury "common to all citizens or litigants" is nothing more than a generalized grievance).

Because the tax penalty of § 5000A is now $0, Individual Plaintiffs cannot show any economic injury or any *other* concrete injury to support their standing to bring this action, and their generalized political disagreement with the ACA is not enough.

2. An Alleged Desire to Comply Voluntarily with § 5000A Is Not an Injury-in-Fact

Nor can Individual Plaintiffs justify their standing based on their perceived "obligation" or desire to comply with the individual requirement, when the only consequence for failing to do so is a zero-dollar shared-responsibility payment.

The Supreme Court instructed in *Poe v. Ullman* that "[t]he party who invokes the power (to annul legislation on grounds of its unconstitutionality) must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement." 367 U.S. 497, 504-05 (1961) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)). Moreover, "[s]uch law must be brought into *actual or threatened operation*." *Id.* at 504. In other words, to invoke standing a plaintiff must show the law at issue has been enforced, resulting in an injury-in-fact, or will be enforced and likely cause a redressable injury. *See id.*

The Court applied this principle in *Poe* to conclude that plaintiffs lacked standing to challenge a Connecticut ban on birth control that had not been enforced for eighty years, where the prosecutor—despite agreeing that the conduct plaintiffs sought to engage in would violate the statute—had no intention of enforcing the ban. *Id.* at 501-02. "The fact that Connecticut has not chosen to press the enforcement of this statute deprive[d] these controversies of the immediacy which is an

indispensable condition of constitutional adjudication," and the Supreme Court declined to "umpire … debates concerning harmless, empty shadows." *Id.* at 508.

Similarly, in *Crane v. Johnson*, this Court dismissed for lack of standing a challenge brought by ICE agents to the Deferred Action for Childhood Arrivals ("DACA") program, where the agents could not demonstrate any risk of harm stemming from DACA. 783 F.3d at 254-55. *Crane* rejected the agents' contention that DACA would require them to either comply and violate federal law, or refuse to do so and face employment sanctions, noting that there was no evidence that employment sanctions had been imposed for refusing to comply with DACA, nor had any warnings or threats of sanctions been issued. *Id.*[7]

Poe makes clear that even the existence of a statute *criminalizing* conduct that a plaintiff wishes to engage in cannot supply an injury-in-fact for purposes of Article III absent some "realistic fear of prosecution." 367 U.S. at 508. The argument made by Individual Plaintiffs here is even less compelling than the standing argument in *Poe*. After the TCJA, there is no mandate to purchase insurance, and absolutely no

[7] Courts routinely reject constitutional challenges where there is no legitimate threat of prosecution. *See, e.g.*, *Plunderbund Media, LLC v. DeWine*, 753 F. App'x 362, 367-72 (6th Cir. 2018) (dismissing bloggers' challenge to statute prohibiting harassing telecommunications where plaintiffs could show no history of enforcement or intention to enforce); *Joint Heirs Fellowship Church v. Akin*, 629 F. App'x 627, 631-32 (5th Cir. 2015) (per curiam) (rejecting church's argument that "the very existence of the statute" prohibiting churches from becoming involved in efforts to recall elected officials was "a credible threat of its enforcement"); *Doe v. Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986) (rejecting challenge to Virginia's fornication and cohabitation statutes where plaintiffs "face[d] only the most theoretical threat of prosecution").

threat that Individual Plaintiffs will be subjected to some consequence for failing to do so. Section 5000A's shared-responsibility payment is now $0, and there cannot be any viable threat of a government enforcement action—the IRS could not bring a suit against a taxpayer for failure to pay $0 even if it wanted to, and of course the Plaintiffs have offered absolutely no evidence that the IRS intends to do such a foolish thing. The dispute presented by Individual Plaintiffs is thus no more than a "harmless, empty shadow." *See Poe*, 367 U.S. at 508.

3. Individual Plaintiffs Cannot Manufacture Standing by Purchasing Health Insurance to "Comply" with § 5000A

Individual Plaintiffs cannot manufacture standing simply by purchasing health insurance, as *Clapper* confirms. The Plaintiffs in *Clapper* sought to challenge a provision of the Foreign Intelligence Surveillance Act ("FSIA") allowing surveillance of foreign individuals. *Id.* at 401. Plaintiffs contended that although they were U.S. citizens, there was a reasonable likelihood their communications would be acquired pursuant to FSIA, and that, in the meantime, they were already suffering economic harm because the *threat* of surveillance was causing them to take costly measures to avoid surveillance. *Id.* at 401-02. The Court found Plaintiffs' concerns were merely speculative; the challenged provision did not *mandate* or *direct* the surveillance—it merely *authorized* surveillance, and the parties and Court could only speculate as to how the Attorney General and Director of National Intelligence would choose to exercise their discretion. *Id.* at 412. And because the risk of harm

was not "certainly impending," plaintiffs' choice to spend money to avoid surveillance was merely self-inflicted harm, which does not supply Article III standing. *Id.* at 416.

That conclusion applies with even more force here. *Sebelius* establishes that § 5000A does not *mandate* that Individual Plaintiffs purchase insurance, and the TCJA reduces to zero any payment for those who choose not to purchase it. Thus, Individual Plaintiffs have not shown *any* risk of harm, much less a "certainly impending" risk of harm. Any costs attributable to their decision to purchase health insurance to fulfill their *own* desire to comply with the requirement are entirely self-inflicted, and thus cannot support standing. *See Zimmerman v. City of Austin*, 881 F.3d 378, 394 (5th Cir.) ("An injury sufficient to confer standing cannot be manufactured for the purpose of litigation." (internal quotation marks omitted)), *cert. denied* 139 S. Ct. 639 (2018).

III. THE STATES LACK STANDING BECAUSE THEY ARE NOT INJURED BY § 5000A

To invoke the judicial power of Article III, a State must establish that it directly suffered "an injury in fact," that there is a "causal connection between the injury and the conduct complained of," and that the injury is likely redressable by a favorable decision. *Crane*, 783 F.3d at 251 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014)). The States cannot do so here, and their claims must be dismissed as well.

The States cannot claim that § 5000A injures them directly because § 5000A never purported to regulate the States. Congress designed § 5000A only to encourage *private individuals* to purchase health insurance—not to require *the States* to take or refrain from any action. Section 5000A therefore cannot, standing alone, cause the States any injury-in-fact.

Apparently recognizing that § 5000A does not cause them any direct injury, the States claimed below that § 5000A "forces" citizens into Medicaid and CHIP programs, increasing the cost of those programs. Pls.' Br. at 42. This argument fails. To establish standing by challenging the "regulation (or lack of regulation) of *someone else*," the States must demonstrate a sufficient connection between the regulation of that someone else and their claimed injury. *See Lujan*, 504 U.S. at 562. Claiming standing by way of injury to another is "ordinarily substantially more difficult" than establishing standing by way of direct injury to the plaintiff, *id.* (internal quotation marks omitted), because the causal connection between the regulation and the injury is often "too speculative for Article III purposes," *Crane*, 783 F.3d at 251 (quoting *Clapper*, 568 U.S. at 409).

The States' claim of injury by virtue of increased Medicaid and CHIP costs is too speculative to support standing. As an initial matter, the States have offered *no* evidence that § 5000A actually will increase enrollment in these insurance programs. Unadorned suspicion about the impact of § 5000A is insufficient to establish

standing. *See, e.g.*, *Three Expo Events, LLC v. City of Dallas*, 907 F.3d 333, 345 (5th Cir. 2018) (party's mere statement of willingness and ability to enter challenged contract "fails to establish standing").

Contrary to the States' explanation of the provision, § 5000A does not force individuals to enroll in State-backed healthcare programs. As explained above, § 5000A puts individuals to a choice: purchase insurance or do not purchase insurance and pay any "tax levied on that choice," *Sebelius*, 567 U.S. at 574, and the tax levied on that choice is now $0. Section 5000A "is not a legal command to buy insurance." *Id.* at 562.

There is no indication in the record that the choice presented by § 5000A will incentivize enrollment in Medicaid or CHIP or punish Medicaid- or CHIP-eligible individuals who choose not to enroll in State-backed health insurance programs. Although § 5000A(f)(ii) and (iii) provide that enrollment in Medicaid or CHIP satisfies the Minimum Coverage Provision, § 5000A does not expand eligibility for those programs. Nothing in § 5000A's statement that Medicaid or CHIP enrollment satisfies the now-unenforceable directive to purchase health insurance makes it any more or less likely that individuals will want to enroll in State-backed health insurance because of § 5000A. Moreover, any compulsion that Medicaid- or CHIP-eligible individuals may have felt to enroll in those programs to avoid paying the tax previously levied by § 5000A is gone, now that the TCJA reduced the tax to $0.

Whether a private individual will enroll in Medicaid or CHIP is thus an "unfettered choice[]" unaffected by § 5000A, which cannot support Article III standing for the States. *See Lujan*, 504 U.S. at 562 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.)).

In *Crane*, discussed above, this Court rejected a similar standing argument. There, Mississippi also claimed standing to challenge DACA based on the average yearly cost of paying for government benefits for its undocumented residents. 783 F.3d at 252. This Court held that Mississippi failed to demonstrate standing because the State merely speculated, rather than proved, that DACA would lead to an increase in the undocumented population and a consequent increase in the cost of benefits. *Id.* Mississippi's speculation was more plausible than the State's speculation here, but still was not enough to confer standing. Here, the ACA with a $0 tax creates zero incentive for anyone to enroll in Medicaid or CHIP. The States' speculation is implausible to the point of impossibility. They have wholly failed to prove that § 5000A will cause an increase in the States' Medicare and CHIP expenditures.

As with Individual Plaintiffs' standing arguments, the standing arguments raised by the States here also closely resemble those rejected by the Supreme Court in *Clapper*, 568 U.S. at 410-18. The States' assertion of standing based on § 5000A's regulation of others echoes the *Clapper* plaintiffs' failed standing theory based on speculation "that the Government will target [for surveillance] *other*

individuals—namely, [plaintiffs'] foreign contacts." *Id.* at 411. And the States' speculation about how Medicaid- and CHIP-eligible individuals will react to § 5000A's recent transformation into an unfettered choice without tax consequences fails because, as *Clapper* explained, standing cannot "rest on speculation about the decisions of independent actors." *Id.* at 414.

Nor can the States predicate standing on any injury caused by provisions of the ACA not at issue in this lawsuit, such as the so-called "employer mandate" and "mandatory Medicaid" provisions, simply by arguing that those provisions are inseverable from § 5000A. "[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). The States "bear the burden to demonstrate standing for each claim they seek to press." *Nat'l Fed. of the Blind*, 647 F.3d at 209; *see also Summers*, 555 U.S. at 493 (plaintiff "bears the burden of showing that he has standing for each type of relief sought" (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)).

If accepted, the States' argument for standing based on asserted inseverability would undermine the separation of powers concerns that underlie standing doctrine. *Cf. Lewis*, 518 U.S. at 357 ("[Standing doctrine] would hardly serve [its] purpose … if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy all inadequacies in that administration."). The 900-page ACA includes a wide variety of provisions sprinkled

throughout the U.S. Code. The States' position would, for example, presumably permit a chain restaurant to seek an injunction against the ACA's command that the restaurant post nutritional information, *see* 21 U.S.C § 343(q)(5)(H), based on that provision's alleged inseverability from § 5000A.

Perhaps because of the absurd consequences that would result, no relevant authority supports the States' argument,[8] and two recent decisions of this Court have rejected the argument that injury caused by one statutory provision confers standing to challenge a different statutory provision, even when the provisions are "intertwined" and raise "similar constitutional concerns." *Nat'l Fed. of the Blind*, 647 F.3d at 209; *see Legacy Cmty. Health Servs. Inc. v. Smith*, 881 F.3d 358, 369 (5th Cir. 2018).[9]

CONCLUSION

Both the Individual and State Plaintiffs have failed to meet Article III's standing requirements. Accordingly, this Court must vacate the District Court's judgment and remand with instructions to dismiss for lack of jurisdiction.

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[8] The States' sole authority below, *Alaska Airline, Inc. v. Brock*, 480 U.S. 678 (1987), is silent on standing and therefore inapposite. *See Steel Co.*, 523 U.S. at 91 ("[D]rive-by jurisdictional rulings … have no precedential effect."); *see also* Kevin C. Walsh, *The Ghost that Slayed the Mandate*, 64 STAN. L. REV. 55, 76 (2012) ("*Alaska Airlines* is … far removed from the circumstances facing the [S]tates who seek to challenge [§ 5000A] ….").

[9] The States also cannot claim *parens patriae* standing because, as explained above, *see* Sec. II, § 5000A does not "injur[e] … an identifiable group of individual[s]" and therefore does not impinge any "quasi-sovereign interest." *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2019, I electronically filed the foregoing document through the court's Electronic Case Filing (ECF) system, which will send notifications to counsel of record for all parties.

DATED: April 1, 2019

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the word limit of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,855 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in Times New Roman 14-point font, a proportionally spaced typeface, using Microsoft Word.

DATED: April 1, 2019

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