No. 19-10011

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, ET AL.,

Plaintiffs-Appellees,

v.

USA, ET AL.,

Defendants-Appellants.

and

CALIFORNIA, ET AL.,

Intervenors-Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas, Fort Worth, Case No. 4:18-cv-00167, Hon. Reed Charles O'Connor.

BRIEF OF AMICI CURIAE JONATHAN H. ADLER, NICHOLAS BAGLEY, ABBE R. GLUCK, AND ILYA SOMIN IN SUPPORT OF INTERVENORS-DEFENDANTS-APPELLANTS

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record provides this statement of those with an interest in this amicus brief.

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Abbe R. Gluck

Ilya Somin

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Respectfully submitted,

Dated: April 1, 2019 /s/ Joseph R. Palmore

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IDENTITY AND INTEREST OF AMICI[1]

Amici—Jonathan H. Adler, Nicholas Bagley, Abbe R. Gluck, and Ilya Somin—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. And they do not necessarily share the same views on severability doctrine and how it should apply in every case. Yet they agree on this: The district court's decision holding the insurance mandate inseverable from the other provisions of the ACA is inconsistent with settled law. 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 Center for Business Law and Regulation. He joined an amicus brief arguing against the constitutionality of the individual mandate in *National Federation of Independent*

[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than Amici Curiae or their counsel, contributed money that was intended to fund preparing or submitting this brief.

Business v. Sebelius, 567 U.S. 519 (2012) (*NFIB*).[2] The work of Professor Adler (with Michael Cannon) provided the basis for 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 of federalism scholars in *King v. Burwell* arguing that the federal government does have authority under the ACA to issue premium subsidies for

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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.

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] She is also the co-author of a leading casebook on legislation and administrative law.[9]

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. 2nd ed., 2016), *The Grasping Hand:* Kelo v. City of New London

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

and the Limits of Eminent Domain (2015), and coauthor of *A Conspiracy Against Obamacare: The Volokh Conspiracy and the Health Care Case* (2013), a book about the Supreme Court's decision in *NFIB v. Sebelius,* 567 U.S. 519 (2012), 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.[10]

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, 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.

[10] *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.

ARGUMENT

Amici's goal in filing this brief is limited. This brief takes no position on whether plaintiffs have a justiciable claim or on whether they are correct 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. That question is not debatable under established doctrine—the mandate is severable from the rest of the ACA.

Yet according to the district court, the plaintiffs, and (now) the United States, the entire ACA must fall if the individual mandate is unconstitutional. In their view, a mandate with no enforcement mechanism—eliminated by Congress itself—is somehow essential to the law as a whole. The United States takes 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 18, Dkt. No. 92 (N.D. Tex. June 7, 2018) ("U.S. D. Ct. Br."). Before the district court, the United States had contended that the statute's guaranteed-issue and community-rating provisions alone are inseverable from the individual mandate.

In Amici's view, both of the United States' inseverability positions are based on a fundamental misunderstanding of severability.

The cornerstone of severability doctrine is congressional intent. Under current Supreme Court doctrine, when part of a statute becomes unenforceable, a court 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. In hypothesizing what Congress would have intended in that scenario, courts will sometimes assess the statute's functionality without the provision as a proxy for discerning legislative intent.

But this case is unusual in all of these respects. It presents no need for those 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 usurps congressional power and violates black-letter principles of severability. Yet that is what the district court did here. Its severability decision should be reversed.

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 Supreme Court 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 & Northeastern Ry. Co. v. Gutierrez*, 215 U.S. 87, 96 (1909). All of the sitting Justices have applied these principles.

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 Northern New England*, 546 U.S. 320, 329 (2006) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)). Accordingly, "'when confronting a constitutional flaw in a statute,'" courts 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); *see* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2148

(2016) (explaining why courts should "sever an offending provision from the statute to the narrowest extent possible unless Congress has indicated otherwise in the text of the statute").

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?" *Id.* "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. *Id.* (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); *cf. Murphy*, 138 S. Ct. at 1485-87 (Thomas, J., concurring) (criticizing severability doctrine as requiring the courts to "as[k] a counterfactual question" and make "a nebulous inquiry into congressional intent" but concluding that "hypothetical intent is exactly what the severability doctrine turns on, at least when Congress has not expressed its fallback position in the text") (citing Kevin Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 752-53, 777 (2010)).

But whether a modified statute is operative and what Congress hypothetically wanted are, at bottom, proxies for the "touchstone" of "legislative intent" rather than direct evidence of it. *Ayotte*, 546 U.S. at 330. At the end of the day, if it is not "evident" that the legislature intended for the statute to fall without the unconstitutional provision, a court "must sustain its remaining provisions." *Free Enter. Fund*, 561 U.S. at 509.

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

No hypothesizing or inquiry into functionality is required here. And we need not rely on loose conceptions of "intent." Congress itself rendered the relevant provision unenforceable. The text of that enactment shows clearly what Congress intended: even with no enforceable individual mandate, all other 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 at 2092. Yet it left everything else undisturbed, including the guaranteed-issue and community-rating provisions. 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, including those two insurance reforms, in place. In other words, Congress in 2017 made the judgment that it wanted the insurance reforms and the rest of the ACA to remain even in the absence of an enforceable individual mandate.

Because Congress's intent was explicitly and duly enacted into statutory law, consideration of whether the remaining parts of the law remain "fully operative"—an inquiry courts often use in severability analysis as a proxy for congressional intent, *e.g.*, *Free Enter. Fund*, 561 U.S. at 509—is unnecessary. But such an inquiry would only make the district court's conclusion weaker. The

remaining portions of the ACA, as amended by Congress in 2017, are "fully operative," *id.*, without the penalty-less mandate. 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. Congressional Budget Office, *Repealing the Individual Health Insurance Mandate: An Updated Estimate* (Nov. 2017);[11] *see infra* 16-17. 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 ACA could function without a penalty-enforced mandate. 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. 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 (2018) (Thomas, J., concurring). Congress's "intentions" were "enshrined in a text that ma[de] it through the constitutional processes of bicameralism and presentment." *Id.* at 1486-87 (Thomas, J., concurring). And that text resulted in an ACA without an enforceable mandate.

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

It is not the court's role to hypothesize about whether some members of Congress wished to excise more of the statute if only they could have found the votes. Federal courts do not do statutory interpretation that way. To implement the preferences of members of Congress who lost the vote 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 & Michigan*, 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. Transportation Agency, Santa Clara Cty., Cal.*, 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 the United States itself recognizes, "the severability analysis should be one of statutory construction, not parliamentary probabilities." U.S. D. Ct. 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." *Id.* All that matters here is that Congress eliminated the individual mandate penalties while leaving the rest of the statute intact.

III. THE DISTRICT COURT FUNDAMENTALLY MISAPPREHENDED SEVERABILITY DOCTRINE

The district court held otherwise because it effectively disregarded the intent of the 2017 Congress, instead focusing on the intent of the 2010 Congress, which first enacted the ACA. In 2010, the district court concluded, Congress intended "that the Individual Mandate not be severed from the ACA." ROA.2647. And the district court concluded 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. ROA.2664. The court's analysis was flawed in multiple respects and unconstitutionally entrenched the view of an earlier Congress over a later Congress that had equal power to change the law.

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

The district court's time-shifting of congressional intent fundamentally 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 Congress would have wanted. Congress told us what it wanted through its 2017 legislative 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 these provisions, the relevant question now 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, devoting less than three pages of a 55-page opinion to Congress's intent in 2017, concluded that the 2017 Congress merely "entrenched the intent manifested by the 2010 Congress." ROA.2647, ROA.2662-2664. That erroneously treats Congress's 2017 legislation as subordinate to its 2010 legislation. The Supreme 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." *Id.*; *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. That Congress could not possibly have answered the severability question here. Congress was addressing a different version of the ACA in 2010 and lacked the years of on-the-ground experience with the law that the 2017 Congress had.[12] Regardless of what the 2010 Congress predicted about the importance of a mandate, the 2017 Congress, which had the benefit of information about how the ACA actually works in practice, took a different view of what was necessary. It was entitled to make that judgment.

For these reasons, the district court erred in relying on the legislative findings from 2010. *See* ROA.2648-2651 (citing 42 U.S.C. § 18091(2)). To start,

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[12] 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 (Apr. 1, 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 (Oct. 7, 2015) (amending ACA definition of small employer); Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 604, 129 Stat. 584, 599 (Nov. 2, 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 (Dec. 18, 2015) (delaying effective date of the excise tax commonly known as the "Cadillac tax" from 2018 to 2020).

And Congress has continued to amend the ACA after zeroing out the mandate in 2017. *See* U.S. D. Ct. Br. 18 (collecting examples and explaining that with these amendments, "Congress has provided further proof of its intent that the bulk of the ACA would remain in place").

those findings—regarding "[e]ffects on the national economy and interstate commerce"—aimed 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.

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. The 2010 findings are irrelevant here, but even if they did somehow merit consideration, they could not defeat a later congressional enactment.

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* Section II, *supra*. 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 Repealing the Individual Health Insurance Mandate: An Updated Estimate*, *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").[13] While there is room for reasonable disagreement about the ultimate impact of eliminating the mandate penalty, this analysis at the very least creates a reasonable basis for 2017 legislators to conclude that they could 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 five years of on-the-ground implementation. The district court thus relied erroneously 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. ROA.2648-2650 (citing 42 U.S.C. § 18091(2)). The 2017 Congress, operating with information from the intervening years, was in no way bound by that prior finding and had plenary authority to determine that a mandate with a penalty was unnecessary to achieve its goals. To

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

second-guess that judgment, as the district court did, is to impermissibly assume that Congress purposefully enacted a law that was dysfunctional.

The 2010 Congress believed that 2010's penalty-backed mandate was necessary to induce a significant number of healthy people to purchase insurance, and thereby "significantly reduc[e] the number of the uninsured." 42 U.S.C. § 18091(2)(E). But because the neutered mandate of 2017 lacks a penalty, it could not have been based on those earlier findings. They are thus irrelevant. The earlier findings have been overtaken by Congress's developing views—based on years of experience under the statute—that the individual marketplaces created by the ACA can operate without penalizing Americans who decline to purchase health insurance.

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 conclusion makes no sense.

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

The district court also erred in concluding that various Supreme Court opinions 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*, 135 S. Ct. 2480

(2015), confirm that the individual mandate is "essential to the ACA." ROA.2651-2656. 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—and the federal government's brief in *NFIB*—interpreted the ACA as enacted in 2010. None addressed the current ACA, as amended in 2017 to make the mandate unenforceable and therefore "essential" to nothing.

The district court also erred in concluding 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. ROA.2662; ROA.2781. Regardless of what else the omnibus bill contained or the internal mechanism by which it passed, Congress amended the ACA. 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 Stat. 1029.

Federal courts do not hold that one piece of legislation should be treated as less effective than another 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 a large package? Or that other provisions in the 2017 tax law at issue here are less valid than other statutes

because those provisions were passed through reconciliation? Of course not. The enacted 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 that choice. To do otherwise would be to hypothesize about the preferences of a minority of Congress, enact those preferences, and give duly enacted laws different weights. That would be unconstitutional.

* * *

Although views on the merits of the ACA as a matter of law and policy vary widely, 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, *Fixing Statutory Interpretation*, *supra*, at 2120.

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.

CONCLUSION

If the Court finds that plaintiffs have standing and concludes that the individual mandate is unconstitutional, Amici ask that it find the mandate severable from the rest of the ACA, including its guaranteed-issue and community-rating provisions.

Dated: April 1, 2019

Respectfully submitted,

/s/ Joseph R. Palmore

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Fed. R. App. P. 32(g), counsel for Amici Curiae hereby certify as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 4,666 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, including serifs, using Microsoft 2010 in Times New Roman 14-point font.

Dated: April 1, 2019 /s/ Joseph R. Palmore

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system on April 1, 2019.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: April 1, 2019 /s/ Joseph R. Palmore