CALIFORNIA V. TEXAS: THE DENOUEMENT OF THE AFFORDABLE CARE ACT'S LEGAL CHALLENGES?

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INTRODUCTION

In 2008, forty-four million Americans lacked health insurance.[1] The Affordable Care Act (ACA or "The Act"),[2] the Obama Administration's seminal legislative achievement, created a federally-facilitated marketplace where Americans could purchase quality health insurance at an affordable price, regardless of any pre-existing conditions.[3] Expanding consumer access to the health insurance market was an expensive undertaking, and the ACA assigned most of those costs to the federal government.[4] As for substantive reforms, the ACA

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1. Jennifer Tolbert et al., *Key Facts about the Uninsured Population*, KFF (Nov. 6, 2020), https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/#:~:text=However%2C%20beginning%20in%202017%2C%20the,2016%20to%2010.9%25%20in%202019.

2. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 26 and 42 U.S.C.)

3. *See* Troy J. Oechsner & Magda Schaler-Haynes, *Keeping It Simple: Health Plan Benefit Standardization and Regulatory Choice Under the Affordable Care Act*, 74 ALB. L. REV. 241, 283, 294 (2010) (explaining several ACA reforms).

4. *See* 26 U.S.C. § 4980H (2018) (requiring companies with more than a certain number of full-time equivalent employees to provide health coverage or pay a penalty). *See also* President Barack Obama, Remarks by the President and Vice President at Signing of the Health Insurance Reform Bill (Mar. 23, 2010) (transcript available at http://www.white house.gov/the-press-office/remarks-president-and-vice-president-signing-health-insurance-reform-bill) (noting that the ACA "lift[s] a decades-long drag on our economy" and extends coverage throughout the country).

mandated that health insurance issuers[5] accept any eligible individual who applies for health insurance[6] (known as the guaranteed issue requirement) and that health insurance policies within a given geographic region be offered to all individuals at the same price regardless of pre-existing conditions (known as the community-rating requirement).[7] Furthermore, the ACA prohibited *employers* from charging individuals a higher premium based on their health status.[8] The individual mandate required all Americans to obtain health insurance or pay an associated tax penalty equivalent to two and a half percent of household income.[9] The ACA became fully operative in 2016, but was substantially rolled back in 2017 after the enactment of the Tax Cut and Jobs Act rendered the penalty zero – effectively eliminating the ACA's only enforcement mechanism.[10]

In February of 2018, Texas and nineteen other states filed suit against the federal government seeking to have the entire ACA struck down. In the consolidated case *California v. Texas*, the Court is considering four questions: First, whether Texas and the individual plaintiffs have standing to challenge the individual mandate; Second, whether the Tax Cut and Jobs Act[11] renders the individual mandate unconstitutional; Third, whether the rest of the ACA can stand even if the mandate is unconstitutional; Finally, if the entire ACA is found invalid, whether the Act should be unenforceable nationwide or whether it should only be unenforceable as to the individual plaintiffs in the suit.[12]

I. FACTS

In 2012, the Supreme Court upheld the constitutionality of the ACA's individual mandate (§ 5000(A))[13] and characterized the fee for

5. U.S. Gov't Accountability Off., GAO-12-768, *Patient Protection and Affordable Care Act: Estimates on the Effect on the Prevalence of Employer-Sponsored Health Coverage* (2012).

6. 42 U.S.C. §§ 300gg-1, 300gg-3, 300gg-4(a) (2018).

7. *See* Mark A. Hall, *Evaluating the Affordable Care Act: The Eye of the Beholder*, 51 HOUS. L. REV. 1029, 1034–35 (2014) (describing the Affordable Care Act's mechanisms for universal insurability).

8. *Id*.

9. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 26 and 42 U.S.C.).

10. Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11001(a), 131 Stat. 2054, 2054-58 (2017).

11. *Id*.; *see also* Josh Blackman, *Undone: The New Constitutional Challenge to Obamacare*, 23 Tex. REV. L. & POL. 1, 28–51 (2018) (The Act eliminated the penalty for individuals who chose to not obtain health insurance on a state or federal exchange).

12. Texas v. United States, 945 F.3d 355, 393 (5th Cir. 2019).

13. 26 U.S.C. § 5000A(a) (2012).

not purchasing health insurance as a tax rather than a penalty.[14] In 2017, a Republican-controlled Congress amended the ACA with the Tax Cut and Jobs Act,[15] reducing the tax penalty for remaining uninsured to zero dollars, thus nullifying any real effect of the individual mandate. The remainder of the ACA was left intact.

Texas, several other states,[16] and individual plaintiffs filed a lawsuit in federal court arguing that because the penalty was zero dollars, it could no longer be characterized as a tax.[17] For that reason, the plaintiffs argued, the provision was untethered to Article I and thus outside the scope of Congress' enumerated powers.[18] California, the District of Columbia, and other states[19] joined the lawsuit, arguing that the individual mandate remained a valid exercise of Congress' power to "lay and collect taxes"[20]—reiterating the Court's reasoning in *NFIB v. Sebelius*.[21]

The Northern District of Texas held that the individual mandate was unconstitutional and inseverable from the rest of the ACA, overturning the ACA in its entirety.[22] The Fifth Circuit affirmed the district court's holding as to the individual mandate's unconstitutionality but remanded the issue of severability to the district court.[23] Severing the mandate from the rest of the ACA would preserve those provisions of the Act that could operate independent of the individual mandate.[24] But a determination that the individual mandate was inseverable would invalidate the entire ACA.

The United States House of Representatives, California, D.C., and the other Petitioner states filed a petition for the Supreme Court to

14. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 702 (2012) (Scalia, J., dissenting).

15. 26 U.S.C. §§ 164(a)(1)-(3), (b)(5).

16. These states include: Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Louisiana Mississippi, Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Utah, and West Virginia.

17. Brief for the Federal Respondents at 8, California v. Texas, 140 S. Ct. 1262 (2020) (Nos. 19-840 & 19-841).

18. Brief for Plaintiffs at 5, Texas v. United States, 945 F.3d 355 (5th Cir. 2019) (No. 19-10011).

19. These states are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington. The joined parties also include Andy Beshear, the Governor of Kentucky, and the District of Columbia.

20. U.S. CONST. Art. I, § 8, cl. 1.

21. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 702 (2012) (Scalia, J., dissenting).

22. Texas v. United States, 340 F. Supp. 3d 579, 618 (N.D. Tex. 2018).

23. Texas v. United States, 945 F.3d 355, 401–02 (5th Cir. 2015).

24. *Id.* at 403.

intervene before the district court could hear the severability arguments.[25] Texas, the U.S. Department of Justice, and the other State Respondents objected to their petition for certiorari.[26] The Supreme Court ultimately granted cert to decide whether the ACA's individual mandate is unconstitutional, and if so, whether it is severable from the rest of the Act.[27]

II. LEGAL HISTORY

In 2012, the Court decided the constitutionality of the individual mandate provision of § 5000(A), which is also at issue in *California v. Texas*. The provision required individuals without health insurance to pay a "shared responsibility payment."[28] Congress, however, described the "shared responsibility payment" not as a "tax" but as a "penalty."[29]

The Court determined that although Congress (and President Obama) had described the shared responsibility payment as a penalty, rather than a tax,[30] these statements were not binding for the purposes of constitutional interpretation.[31] The Court upheld the mandate under the taxing power, noting that Congress has the authority to present individuals with a choice: either buy health insurance or pay an alternative tax.[32] In *Sebelius*, the Court concluded that § 5000A would exceed Congress's authority under the Commerce Clause if it were understood as requiring individuals to *purchase* health insurance.[33] The Commerce Clause authorizes Congress to regulate commerce, but what

25. Texas v. United States, No. 19-1001, Order (5th Cir. Feb. 14, 2019).

26. Brief for the Federal Respondents, *supra* note 17, at 8 (discussing the federal government and individual states' opposition to Petitioner's motion).

27. Motion to Expedite Consideration of the Petition for a Writ of Certiorari and To Expedite Consideration of This Motion, California v. Texas, 140 S. Ct. 1262 (2020) (Nos. 19-840 & 19-841). California filed a petition for writ of certiorari to the Supreme Court by January 3, 2020 asking for the case to be heard on an expedited schedule "because of the practical importance of the questions presented for review and the pressing need for their swift resolution by this Court." *See also* Response of the Federal Respondents in Opposition to Petitioners; Motions to Expedite Consideration of the Petitions for Writs of Certiorari, 140 S. Ct. 1262 (2020) (Nos. 19-840 & 19-841) (Texas and the other respondent states filed a petition in February 2020 urging the Court to deny expedited review as it was not ripe for review).

28. 26 U.S.C. § 5000A(b) (2018).

29. *Id.* § 5000A(b), (g)(2).

30. *See* ABC NEWS, *President Obama in 2009: Mandate is Not a Tax*, YOUTUBE (Jun. 30, 2012), https://www.youtube.com/watch?v=_0ZUBMqMnWs; *see also* Byron Tau, *Obama Campaign: It's a penalty, not a tax,* POLITICO (June 29, 2012), https://www.politico.com/blogs/politico44/2012/06/obama-campaign-its-a-penalty-not-a-tax-12772.

31. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 549 (2012).

32. *Id*. at 574.

33. *Id*. at 572.

Congress cannot do is require individuals to "*become* active in commerce" by purchasing health insurance.[34] The Court upheld the individual mandate, requiring all uninsured individuals to maintain minimum essential coverage or pay a price, as a valid exercise of the tax power.[35]

Under the principle of constitutional avoidance, if there are two possible interpretations of a statute—one unconstitutional and one valid—the Court must adopt the construction which saves the Act.[36] Construing § 5000A as a whole, it was "fairly possible" to read the provision as imposing a tax on taxpayers who do not have health insurance, and the Court upheld the mandate.[37] Consequently, the Court left the severability question for another day.

In *King v. Burwell,* the Court reviewed the ACA provision that allocates individuals' tax credits for the purchase of health insurance on state and federal healthcare exchanges.[38] The ACA creates state-run healthcare exchanges but also stipulates that should a state choose to not establish an exchange, "the Secretary of Health and Human Services will create 'such Exchange.'"[39] In *King*, the plaintiffs argued that individuals who had purchased their insurance on a federal exchange were barred from receiving tax credits.[40] Textually, the ACA only provided tax credits to citizens who had purchased insurance through *state* exchanges, rather than federal exchanges.[41] Nevertheless, the Court interpreted exchanges "established by the state" to include federal agency-created exchanges. [42] As a result, the Court recognized subscribers to HHS exchanges as eligible for tax credits.[43]

This case reinforced the ACA's central purpose: expanding access to health insurance to all Americans. Seven and a half million people in the thirty-four states that used the federal exchange would have lost their health insurance coverage if the Supreme Court determined that the subscribers to agency-created exchanges were ineligible for tax credits.[44] Monthly premiums for these 7.5 million individuals would

34. *Id*. at 550, 552.
35. *Id*. at 574.
36. *Id.* at 562 (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927)).
37. *Id.* at 563.
38. King v. Burwell, 576 U.S. 473, 479 (2015).
39. 42 U.S.C. § 18031(b).
40. *King*, 576 U.S. at 474–75.
41. 26 U.S.C. § 36B(b)-(c).
42. *King*, 576 U.S. at 498.
43. *Id.*
44. *The Day After* King v. Burwell, COMMONWEALTH FUND (Mar. 4, 2015),

have increased on average by 47 percent as healthy people dropped their coverage.[45] These increased premiums would have significantly altered the cost-benefit calculus of millions: People across the country would have chosen not to enroll over paying the higher out-of-pocket expenses that the ACA was specifically designed to mitigate.

III. CALIFORNIA V. TEXAS

A. Standing

The first issue in *California v. Texas* is whether the Respondent-Plaintiffs have standing to bring the suit. The doctrine of standing arises out of Article III's case and controversy requirement and "not only serves to limit which persons may bring a lawsuit" but has also "developed into a larger cultural doctrine, concerned with the role of the courts in a democratic society."[46] To satisfy Article III's standing requirements, a plaintiff must have suffered "an injury in fact that is fairly traceable to the challenged conduct of the defendant" and is "likely to be redressed by a favorable judicial decision."[47]

Under the federal standing doctrine, Respondent-plaintiffs (Texas joined by nineteen other states, and the two individual plaintiffs) bear the burden of showing that they satisfy each element of standing.[48] Petitioners argue that none of the Respondents have standing to challenge the ACA's constitutionality. The Individual Respondents have not been harmed by the statute because it does not require them to purchase health insurance.[49] When standing is addressed at the summary judgment stage, a plaintiff cannot rest on mere allegations and must set forth an affidavit and actual evidence.[50]

First, Petitioners argue that neither the individual nor the State Respondents have established any legally cognizable harm.[51] Prior to the enactment of TCJA, individuals would have had to buy insurance on an ACA exchange or pay an annual tax penalty. But because the TCJA lowered the individual mandate penalty to $0, this amendment

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https://medium.com/@CommonwealthFund/the-day-after-king-v-burwell-88907f633c5a.

45. *Id*.

46. Godfrey v. State, 752 N.W.2d 413, 417–18 (Iowa 2008).

47. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

48. *Id.* at 561.

49. Brief for the Petitioners at 18, California v. Texas, 140 S. Ct. 1262 (2020) (No. 19-840).

50. *Id*. *See also Standing*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining standing as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right").

51. Brief for the Petitioners, *supra* note 49, at 16.

to § 5000A eliminated the provision's sole enforcement mechanism. The lower court disagreed—finding that when Congress enacted the TCJA, it transformed the individual mandate into a command that *Sebelius* had held as unconstitutional.[52] Second, Petitioners argue that even if the individual mandate was a command to purchase insurance after the 2017 amendment, the Respondents would nonetheless lack standing because they would not face any adverse legal consequence for disobeying the command to purchase health insurance.[53] In *Babbitt v. Farm Workers*, the Court noted a Plaintiff must "demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement."[54] Prior to the zeroing of the penalty, the Court stated that paying the shared responsibility payment to the IRS was the only negative consequence of foregoing health insurance.[55] Therefore, violating the "command" to purchase health insurance would trigger no legal ramifications.[56] Third, Petitioners argue that even if individuals felt compelled to buy health insurance (even absent legal consequences for choosing to forego such insurance),[57] any concomitant financial "harm" would be "self-inflicted."[58]

The Petitioners also contend that, likewise, the State Respondents have not established standing.[59] The State Respondents argue that the individual mandate imposes two financial harms to support standing. First, Respondents claim that according to the CBO report, individuals will obtain health insurance, "solely 'out of a willingness to comply with the law'" and enroll in Medicaid or Children's Health Insurance Program (CHIP) to fulfill insurance requirements.[60] Second, states bore

52. *Id*. at 17.

53. *Id*. at 16.

54. 442 U.S. 289, 298 (1979) (The Court discussed the threshold for determining when a plaintiff's injury constitutes a "direct injury" as a result of the statute's operation or enforcement.).

55. Brief for the Petitioners, *supra* note 49, at 15.

56. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 568 (2012) ("Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS.").

57. Brief for the Petitioners, *supra* note 49, at 23.

58. *Id.* at 15 (citing King v. Burwell, 576 U.S. 473 (2015)).

59. The states that are a party to the suit will be referred to as "State Respondents", as opposed to individual person plaintiffs, hereinafter referred to as "individual Respondents."

60. Brief for the Petitioners, *supra* note 49, at 21; *see also* Brief for Respondent/Cross-Petitioner States at 10, California v. Texas, 140 S. Ct. 1262 (2020) (No. 19-840) (citing CBO 2008 REPORT at 9–10; CBO, REPEALING THE INDIVIDUAL HEALTH INSURANCE MANDATE: AN UPDATED ESTIMATE, at 1, 3 (Nov. 8, 2017), https://tinyurl.com/CBO2017Report (CBO 2017 REPORT) (describing the increase to States' Medicaid expenditures and other fiscal harms incurred by the States)).

increased administrative costs to report, manage, and track insurance coverage.[61] The State Respondents contend that the amended § 5000A would coerce some state employees to purchase health insurance.[62] To establish standing under either theory, the State Respondents had to introduce evidence that there was a "likelihood" or "substantial risk" that people would enroll in state-run healthcare exchanges because of the amended § 5000A.[63]

The Petitioners argue that Respondents did not provide evidence that the individual mandate would inflict any fiscal injury once the tax was set to zero.[64] The Respondents merely presented declarations from officials who described the costs and burdens of the ACA as a whole — which was not enough to satisfy the evidentiary burden.[65] While the Respondents did introduce expert testimony, they did not present evidence of a concrete fiscal injury.[66]

Individual Respondents argue that they have standing because the ACA curtails insurance coverage options and raises insurance costs, thus imposing an injury on them.[67] State Respondents relied on the Fifth Circuit's conclusion that the ACA caused "fiscal injuries as employers" subject to various ACA requirements.[68] The brief also noted that even if the state plaintiffs did not have standing, the case could still proceed because the *individual* plaintiffs have standing.[69]

State Respondents focused on the low burden to justify standing, emphasizing that the Court requires that a plaintiff only show a sufficient stake in the outcome of the case.[70] The "quantum of the injury" does not matter, and Article III "requires no more than *de facto* causality."[71] They urge the Court to affirm the Fifth Circuit ruling on the basis that the record contains plenty of evidence showing that the

61. Brief for the Petitioners, *supra* note 49, at 21.

62. *Id.*

63. Brief for State Respondents at 6, California v. Texas, 140 S. Ct. 1262 (2020) (Nos. 19-840 & 19-841) (noting that removing the individual mandate from 42 U.S.C. § 18091(2)(I) would cause a "market-wide adverse-selection death spiral")).

64. Brief for the Petitioners, *supra* note 49, at 22.

65. J.A. at 79–191, 339–63, California v. Texas, 140 S. Ct. 1262 (2020) (Nos. 19-840 & 19-1019).

66. Brief for the Petitioners, *supra* note 49, at 24.

67. Brief for State Respondents, *supra* note 63, at 17.

68. Texas v. United States, 945 F.3d 355, 384 (5th Cir. 2015).

69. Brief for the Federal Respondents, *supra* note 17, at 7.

70. Brief for State Respondents, *supra* note 63, at 16 (citing Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U. S. 787, 803 (2015)).

71. *See id.*; *see also* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2566 (2019) (quoting Block v. Meese, 793 F.2d 1303, 1309 (D.C. Cir. 1986)).

individual mandate increased costs to states and employers.[72]

B. Constitutionality

Petitioners argues that the individual mandate is constitutional because it does not *command* Americans to purchase health insurance. Petitioners cite the longstanding presumption that Congress legislates with constitutional limitations as its guideposts.[73] And it is assumed that when Congress amends a statute, it is "full[y] cognizan[t]" of the Court's prior interpretation of the statute.[74] When Congress amended the mandate in 2017, the only substantive change made was to reduce the alternative tax to zero. Petitioners nevertheless contend that even with the tax at zero, the mandate is still a tax because it "provides a structure through which future taxpayers could be directed to pay a tax."[75] Therefore, because Congress could increase the tax in the future, the individual mandate still arises out of Congress's tax power in Article I. On the other hand, Respondents argue that "future taxpayers could [always] be directed to pay a tax" if they refuse to purchase health insurance now and Congress later decides to impose a non-zero tax onto those who do not comply.[76] Therefore, the Respondents posit that the zeroed-out penalty is only a temporary panacea employed to illustrate a lack of enforcement mechanism which can easily be amended in the future to impose a tax on Americans.

Petitioners adopt the view that because the TCJA eliminated the penalty, there are now no consequences for choosing to forego health insurance.[77] The individual mandate became merely an expression of "national policy or words of encouragement."[78] Additionally, Petitioners contend that the word "shall" is permissive and does not necessitate a command; Therefore "shall" would mean that each state would have the *opportunity* to establish its own exchange.[79] Likewise, if a State did not establish an Exchange, the federal government would do so.[80] Under the doctrine of constitutional avoidance, because there

72. Brief for State Respondents, *supra* note 63, at 17.
73. Brief for the Petitioners, *supra* note 49, at 26.
74. *Id.* (citing Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992)).
75. Brief for State Respondents, *supra* note 63, at 26.
76. *Id.*
77. Brief for the Petitioners, *supra* note 49, at 19.
78. *Id.* at 28 (citing Texas v. United States, 945 F.3d 355, 416 (5th Cir. 2019) (King, J., dissenting)).
79. *Id.* at 30 (citing Me. Cmty. Health Options v. United States, 140 S. Ct. 1308, 1323 (2020)) (noting legal writers sometimes use "shall" to mean "should").
80. *Id.* at 31 (discussing 42 U.S.C. § 18041(c)(1)).

is more than one plausible interpretation of the mandate, the Petitioners argue that the "better reading is that Section 5000A now at most encourages Americans to purchase health insurance, but does not require them to do so or impose any legal consequence if they do not."[81]

The Respondents endorse the Fifth Circuit's holding that the individual mandate is unconstitutional. Respondents invoke *Sebelius*, which noted that Congress cannot, for example, use its power to order Americans to buy a new car or broccoli.[82] Even though the penalty is now zero, the Respondents contend that the individual mandate compels individuals to enter the stream of commerce in violation of *Sebelius* and Congress's Article I powers.[83]

C. Severability

The Court has traditionally conducted a three-step severability inquiry.[84] The Court asks whether it "must retain those portions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute."[85] There is a presumption in favor of severability: if a statutory provision is found unconstitutional, the legislature will ask whether Congress would have preferred "'what is left [of its statute] to no statute at all."[86]

Petitioners rely on Congress's explicit notation that it preferred an ACA without the individual mandate over no ACA at all.[87] Accordingly, Petitioners contend that Congress intended for the rest of the ACA to remain intact even in the absence of the individual mandate. The Petitioners argue that the Court cannot "use its remedial powers to circumvent the intent of the legislature" and replace the will of the enacting Congress by using the individual mandate to eliminate the Act in its entirety.[88]

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81. *Id.* at 29.

82. Brief for State Respondents, *supra* note 63, at 23 (citing Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U. S. 519, 547–61 (2012)).

83. *Id.* (citing 567 U.S. 519, 549, 552 (2012)).

84. United States v. Booker, 543 U.S. 220, 258–59 (2005) (internal quotation marks and citations omitted).

85. *Id.*

86. Brief for the Petitioners, *supra* note 49, at 40 (citing Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 330 (2006)).

87. *Id.* at 39; *see also* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11001(a), 131 Stat. 2054, 2054–58 (2017) (Congress repealed the associated penalty for failing to enroll for health insurance but did not disavow the entirety of the act when it had the opportunity to do so).

88. Brief for State Respondents, *supra* note 63, at 36 (citing Ayotte v. Planned Parenthood

Further, Petitioners support this argument by noting that the TCJA "declawed" the individual mandate but maintained the rest of the ACA.[89] With respect to severability, Petitioners note that when evaluating whether the deletion or replacement of a provision renders the entirety of a statute toothless, "we ask whether the law remains 'fully operative' without the invalid provisions."[90] So although the TCJA "rendered Section 5000A(a) toothless, all of the remaining provisions of the ACA continued to operate as intended."[91] Petitioners claim that if Congress had intended for the ACA's life to depend on the survival of the individual mandate, it would not have preserved the remainder of the ACA when it enacted the 2017 amendment.[92] In other words, Congress must have considered the minimum coverage provision indispensable because it did not repeal the individual mandate.[93] The combination of these two purposeful choices evinces Congress' intent to preserve the ACA even in the absence of the individual mandate.

The Court also asks whether the remainder of a statute will function the way Congress intended.[94] In *Alaska Airlines v. Brock*, the Court found that "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted."[95] Petitioners contend that the ACA functions the same, and solves the same healthcare provision issues that it was designed to confront even in the absence of the individual mandate.[96] Respondents contend that, according to *Alaska Airlines*, a provision becomes inseverable if, once the offending language is removed, the statute would not function in a manner consistent with the intent of Congress.[97] The individual mandate, "*not* the associated tax penalty, is critical to

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of N. New Eng., 546 U.S. 320, 330 (2006)).

89. Brief for the Petitioners, *supra* note 49, at 15.

90. *Id.* at 38 (citing Murphy v. NCAA, 138 S. Ct. 1461, 1482 (2018) (quoting Free Enter. Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 509 (2010))).

91. *Id.*

92. *Id.* at 37 (arguing that it is "'inconceivable that Congress would have' made the minimum coverage provision unenforceable while leaving the rest of the Act in place") (citing J.A. at 481, California v. Texas, 140 S. Ct. 1262 (2020) (Nos. 19-840 & 19-1019)).

93. *Id.* at 26. Supporting this claim, the lower court also chose not to disregard the legislative findings in 42 U.S.C. § 18091, which spelled out the ACA's effect on the national economy and interstate commerce.

94. *Id.*

95. 480 U.S. 678, 685 (1986).

96. Brief for the Petitioners, *supra* note 49, at 38.

97. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987).

the functioning of the ACA's major features."[98] Respondents look to § 18091(2)(1), explaining that if there was not a requirement to buy health insurance, adverse selection would likely arise—people would likely wait until they became sick to obtain health coverage.[99] Further, Respondents argue that because the individual mandate penalty is "toothless," it stymies the Act's original purpose of reducing adverse selection, broadening the health insurance risk pool, and decreasing the cost of premiums.[100] Therefore, a tax penalty is necessary to effectuate the ACA's purpose of ensuring access to healthcare for all Americans regardless of pre-existing conditions or geographic locale.

Petitioners also argue that in 2017, Congress had the opportunity to "repudiate or otherwise supersede" the Court's holdings in *Sebelius* and *King* but instead chose to leave the remainder of the ACA unaltered.[101] Accordingly, Congress acquiesced in these decisions. Respondents argued that congressional findings included in the ACA's text indicate that Congress intended other provisions of the Act—namely the guaranteed-issue and community-rating provisions—to survive in the absence of the individual mandate.[102] Therefore, Respondents endorse the view that Congress's lack of action does not indicate a preference for the individual mandate to remain.

IV. ORAL ARGUMENT

The Court heard oral arguments for *California v. Texas* on November 10, 2020.[103] The Court focused on the issue of standing for a substantial portion of the oral argument. Chief Justice Roberts and Justice Thomas questioned Petitioners about standing—specifically, whether the mandate has imposed on Respondents a cognizable injury, despite the fact that there is no legal consequence for failing to purchase insurance.[104] Justice Thomas analogized the zero-dollar penalty to a local requirement requiring citizens to wear masks, reasoning that both actions have no legal consequences for violating

98. Brief for State Respondents, *supra* note 63, at 30.

99. *Id.* at 38. Adverse selection refers to the phenomenon wherein individuals waited until they became sick to purchase health insurance. As a result, insurers increased insurance premiums to offset for the increased costs of covering a higher proportion of sick people than initially expected.

100. Brief for the Petitioners, *supra* note 49, at 45.

101. *Id*. at 44.

102. Brief for the Federal Respondents, *supra* note 17, at 13.

103. Transcript of Oral Argument at 1, California v. Texas, 140 S. Ct. 1262 (2020) (No. 19-840).

104. *Id.* at 93.

the law.[105] He followed up the analogy by questioning whether public disapproval is a valid reason to grant a challenger standing.[106] Petitioners responded that because the mandate is toothless and harmless, Respondents neither incurred, nor would it be possible to incur, an injury requisite for standing.[107] Regarding the states' increased costs for tracking and calculating eligibility, Justice Alito asked whether the increased cost could constitute an injury.[108] Petitioners' counsel responded that the reporting costs incurred by each State's health exchange, the claimed injury, did not relate to the mandate.[109] Justice Kavanaugh questioned whether it mattered that there is no enforcement mechanism, since people generally feel obliged to follow the law.[110] Justice Barrett began to shift the conversation away from standing and towards the merits, asking whether it mattered that Congress reduced the mandate penalty to zero instead of repealing it.[111] Petitioners' counsel took this question as an opportunity to address severability by noting that even if the mandate is unconstitutional, the rest of the law should not be invalidated.[112] The Court did not substantially push back on the Petitioners' argument.

Respondents' counsel endured intensive questioning, punctuated by a series of metaphors that illustrated the Court's hesitancy to find the entire ACA unconstitutional. During Respondents' argument, the Court again focused on standing. Justice Breyer analogized the individual mandate to laws passed by Congress that encourage people to do things but lack an enforcement mechanism—like buying war bonds or planting a tree.[113] He noted that although these laws aim to incentivize action, failing to act triggers no negative repercussions. Therefore, if all penalty-less mandates were held unconstitutional, "there will be an awful lot of language in an awful lot of statutes that will suddenly be the subject of Court constitutional challenge."[114] Justice Kavanaugh's statement that he saw the mandate as severable from the rest of the ACA signaled the Court's reliance on past

105. *Id.* at 8.
106. *Id*.
107. *Id*. at 9.
108. *Id*. at 13–15.
109. *Id.* at 15.
110. *Id.* at 27.
111. *Id*. at 29.
112. *Id*. at 31.
113. *Id*. at 69, 98.
114. *Id.* at 69–70.

precedent to employ a saving construction.[115] When it appeared that the Justices were unconvinced by counsel's severability argument, the Respondent conceded that the mandate is at least inseverable from the guaranteed-issue and community-ratings provisions.[116] Although the Court spent some time on statutory interpretation and public policy arguments, it largely focused on the standing inquiry and indicated its reluctance to find the individual mandate inseverable. The oral argument suggests that the Court will find standing and rule on the Act's constitutionality. The Court is likely to uphold the individual mandate and thus avoid the question of severability.

V. ANALYSIS

The individual mandate does not injure any of the Respondent-plaintiffs and therefore they do not have standing. The two individual Respondents face a lawful choice: purchase health insurance or don't — in either scenario, Respondents face no pecuniary or legal consequence.[117] Any harm incurred would be self-inflicted — a mere *feeling* of compulsion rather than a legally imposed injury.[118] The Court previously articulated that, "Respondents cannot manufacture standing based on "hypothetical future harm" when there is a perceived threat that individuals will be subjected to the enforcement of an Act.[119] Here, the notion that individuals "may" feel compelled to enroll in health insurance parallels the central issue in *Clapper*, wherein individuals thought that they "might" be subjected to surveillance.[120] In *Clapper*, the Court held that Respondents' self-inflicted injuries were not traceable to federal activity and the mere fear of surveillance does not lend itself to a tenable argument for standing.[121] Therefore, the injury that the Respondents claim to have incurred is one that is purely "self-inflicted."[122] When Congress amended the individual mandate with the TCJA, it had the opportunity to repeal the rest of the ACA. But importantly, Congress chose not to do so.[123] The only fact relevant in ascertaining intent is Congress's choice to leave the rest of the statute

115. *Id.* at 113
116. *Id.* at 114.
117. Brief for the Petitioners, *supra* note 49, at 8.
118. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 416 (2013) ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves . . . .").
119. *Id.* at 402.
120. *Id.* at 404.
121. *Id.* at 415–18.
122. *Id.*
123. *Id.*

intact when it eliminated the penalty for failing to purchase health insurance.

A textualist interpretation supports an argument in favor of the individual mandate's constitutionality.[124] The use of the word "shall" alone is not dispositive and does not create an unlawful obligation to purchase health insurance. In *Sebelius*, the Court noted that the use of the word "shall" historically connotes the word "should."[125] Interpreting "shall" to imply a command would also be inconsistent with the precedent established by *King v. Burwell*.[126] There, the Court emphasized the provision, "[e]ach State shall . . . establish an American Health Benefit Exchange . . . for the State" and noted that if a state chose not to establish its own exchange, the federal government would create an insurance marketplace in which citizens could purchase health insurance.[127] Courts always strive to interpret terminology within the same act consistently; because the Court previously interpreted "shall" in a way that is harmonious with use in statutes concerning the same subject and consistent with the other uses of "shall" within the ACA itself, it is logical to for the Court to continue to interpret "shall" permissively.[128] Therefore, the Respondents err in arguing that the only interpretation of the individual mandate is that of an unconstitutional command.[129] The doctrine of constitutional avoidance also supports this interpretation. When there are two plausible constructions, one that is constitutional and one that is not, the Court will adopt the constitutionally-sound construction. Therefore, the use of "shall" in the ACA cannot be seen as denoting a command, as previous Court decisions have rejected this conclusion.

If the individual mandate is found unconstitutional, it is still severable from the rest of the Affordable Care Act. Severability doctrine relies on two main principles rooted in statutory

124. LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 130–31 (Carolina Academic Press, 2d ed. 2018).

125. 567 U.S. 519, 522–23 (2012). Likewise, in *New York v. United States*, the Court interpreted "shall" to be permissive. The Court stated that the phrase "*shall* be responsible for providing . . . for the disposal of . . . low-level radioactive waste" was inclusive and even though the Court could presumably interpret *shall* "alone and in isolation" it could be also interpreted as a command. 505 U.S 144, 170 (1992).

126. 576 U.S. 473, 487 (2015).

127. *Id.* at 483 (discussing 42 U.S.C. § 18031(b)(1)).

128. *See* JELLUM, *supra* note 124, at 131 (noting that, "when the legislature uses the same word in different parts of the same act, the legislature intended those words to have the same meaning. And contrariwise, if the legislature uses a word in one part of the act, then changes to a different word in the same act, the legislature intended to change the meaning").

129. 505 U.S 144, 177 (1992).

interpretation. First, 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."[130] If the Court determines that there is a "constitutional flaw," it is required to sever the "problematic portions while leaving the remainder intact."[131] Second, the Court must analyze Congress's legislative intent as the Court is not permitted to "use its remedial powers to circumvent the intent of the legislature."[132] The Court must ask whether the legislature would prefer to have a portion of the statute or no statute at all.[133] When the intent of Congress is unclear, the Court often tries to discern their collective intent by asking whether the surviving portions of the statute will "remain[] 'fully operative as a law' with the unconstitutional provision 'excised.'"[134] Here, Congress intended that the rest of the ACA remain in place with an unenforceable individual mandate. Congress, rather than the Court, eliminated the enforcement mechanism for the individual mandate. When Congress did so, it left the rest of the provisions in place. During the enactment of the TCJA, Congress could have amended the statute to remove the individual mandate and leave other provisions like the community-rating and guaranteed issue requirements in place. In short, inaction is a choice. By way of negative inference, choosing not to repeal the individual mandate altogether clearly illustrated Congress's intent to keep the ACA alive.

CONCLUSION

If the ACA is repealed, millions of Americans stand to lose their health insurance, nearly doubling the number of people without coverage.[135] The individual mandate currently has no enforcement mechanism so any injury sustained is self-inflicted. As a result, the

130. *Id.*

131. Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 331 (2006) (quoting Califano v. Westcott, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part) (internal quotations omitted)).

132. *Id.* at 330 (quoting Califano v. Westcott, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part)).

133. *Id.*

134. *See* Free Enter. Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 509 (2010) (holding that unconstitutional portions of the Sarbanes-Oxley Act were severable because "[w]ith the tenure restrictions excised, the Act remains 'fully operative as a law'") (quoting New York v. United States, 505 U.S. 144, 186 (1992)).

135. *How Would Repealing the Affordable Care Act Affect Health Care and Jobs in Your State?*, ECON. POLICY INST. (2016), https://www.epi.org/aca-obamacare-repeal-impact/.

Respondent-plaintiffs do not have standing. Nevertheless, the mandate is constitutional because a lawful choice is presented to all consumers, and because it is a valid exercise of Congressional power. If, however, the Court deems the mandate unconstitutional, the mandate is still severable from the remainder of the ACA. Congressional action shows that they intended for the rest of the ACA to remain in place even if the individual mandate is struck down. The Court should uphold the individual mandate as a constitutional exercise of Congressional power and ensure that all Americans have access to health insurance coverage.