Case No. 19-10011

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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; PAUL LEPAGE, Governor of Maine; 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,

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.

On Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE, SUPPORTING APPELLEES AND PARTIAL AFFIRMANCE

JAY ALAN SEKULOW
Counsel of Record
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

Attorney for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

The ACLJ is a non-profit legal corporation dedicated to the defense of constitutional liberties secured by law. The ACLJ has no parent corporation and issues no stock.

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INTEREST OF *AMICUS*[1]

Amicus, the American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys regularly appear before the U.S. Supreme Court, federal courts of appeals (including this Court), and other courts as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), addressing a variety of constitutional law issues. The ACLJ is dedicated to the founding principles of a limited federal government and the corollary that individual liberty is secured best when the boundaries established in the Constitution are respected.

The ACLJ was active in litigation concerning the Patient Protection and Affordable Care Act of 2010 ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), Pub. L. No. 111-152, 124 Stat. 1029 (2010), in particular, with regard to the "individual mandate" provision, 26 U.S.C. § 5000A, which required millions of

[1]All parties consented to the filing of this amicus brief. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

Americans to purchase and maintain Federal Government-approved health insurance. The ACLJ has filed amici curiae briefs in support of the following challenges to the ACA: *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *King v. Burwell*, 135 S. Ct. 2480 (2015); *Virginia v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010), and 656 F.3d 253 (4th Cir. 2011); and *Florida v. United States Dep't of Health & Human Servs*., 648 F.3d 1235 (11th Cir. 2011).

The ACLJ and over 440,000 of its members file this brief urging affirmance of the district court's decision holding that the individual mandate has been rendered unconstitutional by the Tax Cuts and Jobs Act of 2017.

ARGUMENT

I. The Individual Mandate No Longer Functions as a Tax and Cannot be Sustained as a Constitutional Exercise of Congress's Power to Tax.

In *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012) ("*NFIB*"), five Justices held that the ACA's individual mandate exceeded Congress's power under the Commerce and Necessary and Proper Clauses. *Id*. at 546-61 (Roberts, C.J.); *id*. at 657 (joint dissent of Scalia, Kennedy, Thomas, Alito, JJ.). The only possible remaining Constitutional authority for the individual mandate was Congress's power to tax. Chief Justice Roberts, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan held that it was "fairly possible," *id*. at 563, to

interpret the individual mandate as a tax because the penalty imposed for noncompliance with the individual mandate "looks like a tax in many respects." *Id*. at 566. The first feature of the penalty ("shared responsibility payment"), 26 U.S.C. § 5000A(b)), was that taxpayers pay it into Treasury when they file their tax returns. *NFIB*, 567 U.S. at 563. The second key feature was that it was calculated in accordance with "familiar factors as taxable income, number of dependents, and joint filing status." *Id*. (citing 26 U.S.C. §§ 5000A(b)(3), (c)(2), (c)(4)). And finally, the penalty "yields the essential feature of any tax: It produces at least some revenue for the Government. Indeed, the payment is expected to raise about $4 billion per year by 2017." *NFIB*, 567 U.S. at 564.

Thus even though the penalty's primary purpose was to induce Americans to purchase health insurance, and not to raise revenue, five Justices held that it could still be upheld as a tax because it functioned as a tax. *Id*. Chief Justice Roberts cited the example of cigarette taxes which serve the dual purpose of encouraging people to quit smoking as well as raising revenue. *Id.* at 567. Because "Congress had the power to impose the exaction in § 5000A under the taxing power, and . . . § 5000A need not be read to do more than impose a tax, [t]hat is sufficient to sustain it." *Id*. at 570.

For five years, the individual mandate generated revenue. For example, in 2015, the Commissioner of the IRS reported that approximately 7.5 million taxpayers paid a total of $1.5 billion in individual shared responsibility payments. Letter from John A. Koskinen, IRS Commissioner, to Members of Congress (July 17, 2015) (on file with the IRS). In December 2017, however, Congress passed the Tax Cuts and Jobs Act of 2017 ("TCJA"), which stripped the individual mandate of its revenue-generating feature. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11081(b), 131 Stat. 2054, 2092 (2017)(). Specifically, section 11081, which is entitled "elimination of shared responsibility payment for individuals failing to maintain minimum essential coverage" removed the penalty for noncompliance with the individual mandate, effective December 31, 2018. The statute provides:

Section 5000A(c) is amended -

(1) in paragraph (2)(B)(iii), by striking "2.5 percent" and inserting "Zero percent", and

(2) in paragraph (3) -

(A) by striking "$ 695" in subparagraph (A) and inserting "$ 0", and

(B) by striking subparagraph (D).

All three features that supported the *NFIB* Court's "saving construction," *NFIB*, 567 U.S. at 575, of the individual mandate as a tax are now effectively nonexistent. This year, Americans were no longer required to make the shared responsibility payment with their income tax returns and were therefore not responsible for calculating their payment in accordance with such "familiar factors as taxable income, number of dependents, and joint filing status." *NFIB*, 567 U.S. at 563. Because no payments have been made, no revenue will be generated.

In passing the TCJA provision which reduced to zero the shared responsibility payment, Congress eliminated the *NFIB* majority opinion's rationale for upholding §5000A as a tax. Section 5000A is now a bare "command" to Americans to purchase health insurance. *Id*. at 562. ("the most straightforward reading of the mandate . . . commands individuals to purchase insurance").

Section 5000A(a) provides that "an applicable individual *shall* for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month." 26 U.S.C. §§ 5000A (emphasis added). The use of the word "shall" connotes a mandatory requirement. *E.g., National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007). And because the mandatory

requirement no longer triggers a tax payment generating revenue for the government, the individual mandate is unmoored from any of Congress's enumerated powers. It is unconstitutional under the Commerce and Necessary and Proper Clauses, 576 U.S. at 561, and it is now unconstitutional under Congress's taxing power.

II. A Decision From this Court Holding the Individual Mandate Unconstitutional Is Consistent with the Supreme Court's *NFIB* decision and Does not Trench Upon the Supreme Court's Prerogative to Overrule its Own Decisions.

Although this Court is bound to follow the dictates of the Supreme Court, *Helms v. Picard*, 151 F.3d 347, 371 (5th Cir. 1998), a decision from this Court holding that the individual mandate is no longer constitutional as a tax does not conflict with the Supreme Court's *NFIB* decision upholding the individual mandate as a tax. Holding the individual mandate unconstitutional would in no way impinge upon the Supreme Court's "prerogative of overruling its own decisions." *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc*., 490 U.S. 477, 484 (1989)).

Congress effected a major change in the shared responsibility payment when it zeroed out the penalty exacted in § 5000A. The individual mandate the *NFIB* court sought to preserve from unconstitutionality is not the same statute before this Court. This case accordingly is no different from other cases where Congress passed a

statute amending a law that the courts have already interpreted. Provided that the amended provision does not direct findings or impose a rule of decision, the courts are bound to give effect to Congress's latest enactment, *Plaut v. Spendthrift Farm*, 514 U.S. 211, 227 (1995) – even if it contravenes an earlier Supreme Court decision. *See, e.g., Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1572 (9th Cir. 1993) (applying Lanham Act amendment which changed limitations period from that determined in Supreme Court statutory interpretation decision).

The TCJA amendment zeroing out the shared responsibility payment removed every justification for the *NFIB* Court's holding that the individual mandate could be fairly viewed as a tax. This Court may therefore hold the individual mandate unconstitutional without any concern that it is impinging upon the Supreme Court's prerogative of overruling its own precedent.

CONCLUSION

For the foregoing reasons, Amicus respectfully asks this Court to affirm the district court's judgment that the individual mandate is unconstitutional.

Respectfully Submitted,

/s/ Jay Alan Sekulow
JAY ALAN SEKULOW
Counsel of Record
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]