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Symposium: The individual plaintiffs in *California v. Texas* suffer a greater Article III injury than did the individual plaintiffs in *NFIB v. Sebelius*

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Obamacare is back at the Supreme Court, again. This time, the justices will be called upon to decide the constitutionality of the individual mandate and, if necessary, how much of the rest of the Affordable Care Act has to fall.

But wait, didn't the world-historical litigation culminating in *National Federation of Independent Business v. Sebelius* settle those questions in 2012? Remember, Chief Justice John Roberts changed his vote and transmogrified the penalty for not complying with the mandate to purchase health insurance into a tax? Well yes, but since Congress zeroed out that tax-penalty in 2017, we have to replay this script all over again.

In short, the case now oddly known as *California v. Texas* — isn't the ACA a federal program? — presents three questions. First, does the ACA's individual mandate inflict an injury sufficient to give the plaintiffs standing under Article III of the Constitution? Second, can Section 5000A of the ACA still be construed as a constitutional tax after the penalty was reduced to $0? Third, can the individual mandate be severed from the remainder of the ACA?

Our amicus brief on behalf of the Cato Institute ties these three issues together. We contend that the individual plaintiffs have standing and Section 5000A can no longer be saved. And in our view, the remedy is dictated by the standing analysis, which is the focus of this symposium essay. The court need only declare unconstitutional the parts of the ACA that injure those individual plaintiffs. We'll put our bottom line up front: People who like Obamacare can keep Obamacare. And those who object to being forced to purchase unwanted policies will have other options off the ACA exchanges. This remedy would be consistent with the limits imposed by Article III and would thread the needle through the court's fragmented severability jurisprudence.

Our analysis begins, as it must, with the text and structure of the ACA. Section 5000A(a) of the law created a "[r]equirement to maintain minimum essential coverage," which, *NFIB* explained, has been "commonly referred to as the individual mandate." And Section 5000A(b) codified the shared responsibility payment, which is also known as the "penalty" for not complying with the individual mandate. Congress structured the individual mandate and the shared responsibility payment as separate provisions; some people were subject to the mandate but were exempt from the penalty.

In *NFIB*, two private plaintiffs, Kaj Ahlburg and Mary Brown, challenged the constitutionality of the individual mandate. They did not challenge the shared responsibility payment; their Article III injuries were premised solely on the mandate, not the penalty. Indeed, Ahlburg and Brown

would have never been subject to the penalty, because they planned to obtain qualifying insurance. *NFIB* considered, and apparently rejected, arguments that the mandate was "toothless" without the penalty. Part III of Roberts' controlling opinion considered the constitutionality of the individual mandate. Part III-A held that the mandate could not be sustained under the commerce clause or the necessary and proper clause. Part III-B acknowledged that sustaining the mandate under the taxing power was not "the most natural interpretation." And Part III-C developed and applied a "saving construction." Roberts explained that "[t]he exaction the Affordable Care Act imposes on those without health insurance" — that is, the shared responsibility payment — "looks like a tax in many respects."

The saving construction read both parts of Section 5000A as a single entity: The mandate and the penalty, when fused together, presented an individual with "a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice." The saving construction may be treated as a gloss on the ACA. Outside the saving construction, however, "[t]he most straightforward reading of the mandate is that [Section 5000A] commands individuals to purchase insurance." The shared responsibility payment, as drafted by Congress, was not a tax. And Section 5000A, as drafted by Congress, did not offer a "lawful choice." Instead, it imposed — and to this day, still imposes — an unconstitutional mandate to purchase insurance.

Fast forward to 2017. Congress enacted the Tax Cuts and Jobs Act, which reduced the shared responsibility payment to $0. As a result, Section 5000A can no longer be read as offering a "lawful choice" to purchase insurance or pay a tax. Congress thus peeled off the ACA's protective gloss, leaving only the unvarnished and unconstitutional individual mandate. Shortly after the TCJA was enacted, Texas and other states challenged the constitutionality of the ACA. The states were joined by two individual plaintiffs, Neill Hurley and John Nantz, who are subject to the individual mandate.

Although *NFIB* did not address standing, the court would have had to find that the individual mandate inflicted an Article III injury on Ahlburg and Brown. Their injuries rested entirely on the individual mandate. The individual plaintiffs here, Hurley and Nantz, assert an even greater injury. Ahlburg and Brown had to take steps to obtain insurance before the mandate went into effect in 2014. Hurley and Nantz, however, do not merely anticipate a future injury; they are *already* subject to the mandate. That command to purchase insurance is, by itself, sufficient to establish an Article III injury.

California contends that "the TCJA rendered Section 5000A(a) toothless" because there are no longer any "'negative legal consequence[s]' of not buying health insurance." This argument is not new. Indeed, *NFIB* considered and apparently rejected California's position in 2012. During oral argument in *NFIB,* Roberts posed a question that largely presaged the jurisdictional inquiry here: "Why would you have a requirement that is completely toothless? You know, buy insurance or else. Or else what? Or else nothing." Gregory Katsas, now a judge on the U.S. Court of Appeals for the District of Columbia Circuit but then representing Ahlburg and Brown, replied: "Because Congress reasonably could think that at least some people will follow the law precisely because it is the law." His brief explained that a 2008 Congressional Budget Office report "readily confirms the common-sense proposition that the interest of law-abiding citizens in challenging burdensome legal requirements exists independently of the sanction that would be imposed for non-compliance." That report found that certain people would comply with an

individual insurance mandate, even without a penalty. This argument mirrors the one Hurley and Nantz advance.

The U.S. Court of Appeals for the 5th Circuit highlighted another colloquy from *NFIB*. Justice Elena Kagan asked "whether [Katsas] thought 'a person who is subject to the [individual] mandate but not subject to the [shared responsibility payment] would have standing.'" Under Congress' design, some people were subject to the mandate, but were not subject to the penalty — for example, members of Native American tribes. Katsas replied that such people would have standing, because they would be "injured by compliance with the mandate." He explained, "When that person is subject to the mandate, that person is required to purchase health insurance. That's a forced acquisition of an unwanted good. It's a classic pocketbook injury."

California argues that, post-TCJA, Hurley and Nantz stand in a different position than did Ahlburg and Brown. On this reading, the two Texans are no longer subject to "any legal consequences." California maintains that, because Hurley and Nantz no longer have to pay the penalty for failing to maintain insurance, they assert no cognizable injury. This argument conflates the merits analysis from Part III-C of *NFIB* with the necessary threshold inquiry of standing in Part III-A. If the *NFIB* plaintiffs lacked an Article III injury, then the challenge to the mandate should have been dismissed for lack of subject-matter jurisdiction. But *NFIB*'s standing analysis was apparently so obvious that Roberts did not even bother to address it. The individual plaintiffs asserted Article III injuries because they planned to purchase unwanted insurance policies to comply with the mandate, even though they would not be subject to the penalty.

That analysis remains accurate, and reinforces the merits analysis: If the mandate creates a legal requirement, then it also creates an Article III injury. The individual plaintiffs in *California v. Texas* assert an even greater Article III injury than did the individual plaintiffs in *NFIB*.

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