No. 11-400

IN THE
Supreme Court of the United States

FLORIDA, *ET AL.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, JANIS CHESTER, M.D., MARK J. HAUSER, M.D., LEAH S. MCCORMACK, M.D., GUENTER L. SPANKNEBEL, M.D., AND GRAHAM L. SPRUIELL, M.D., IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does severance of the individual mandate of Section 1501 from the remainder of the Patient Protection and Affordable Care Act amount to a judicial line item veto that violates the Bicameral Clause?

2. Does simultaneous enactment and revision of Section 1501 violate the Presentment Clause?

3. Does the Commerce Clause require a dyadic transaction?

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae ("*Amici*") are individual physicians and a national association of physicians. *Amici* file this brief to assist the Court in defining the issues for review by this Court in the above captioned Petition.

[1] This brief is filed with the filed written consent of all parties, with timely notice provided in compliance with Sup. Ct. Rule 37.2(a). Pursuant to Sup. Ct. Rule 37.6, counsel for *amici curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici*, members of *amicus* AAPS, or *amici*'s counsel make a monetary contribution to the preparation or submission of this brief.

Since 1943, *Amicus* Association of American Physicians and Surgeons, Inc. ("AAPS") has been dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has filed numerous *amicus curiae* briefs in noteworthy cases like this one. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 933 (2000) (citing an AAPS *amicus* brief). Because AAPS has also commenced an action against one of the Petitioners which contains overlapping allegations of unconstitutionality, the disposition of this Petition may affect the rights of AAPS and its members. *Association of American Physicians and Surgeons, Inc. v. Sebelius*, Case No. 1:10-cv-0499-ABJ (D.D.C.).

Amicus Leah S. McCormack, M.D., privately practices dermatology in New York City, New York. She earned certification from the American Board of Dermatology and is a fellow of the American Academy of Dermatology. She is the immediate Past-President of the Medical Society of the State of New York.

Amicus Guenter L. Spanknebel, M.D., privately practiced gastroenterology. He is a Past-President of the Massachusetts Medical Society and is currently chair of its History Committee. He has served as a Trustee of the Health Foundation of Central Massachusetts and on the faculties of the medical schools at Tufts University and the University of Massachusetts.

Amicus Janis Chester, M.D., privately practices psychiatry in Delaware, serves as chair of the Department of Psychiatry at a community hospital, is a member of the faculty at Jefferson Medical College and holds a variety of positions with organized medicine and psychiatry, locally and nationally.

Amicus Mark J. Hauser, M.D. privately practices psychiatry and forensic psychiatry in Massachusetts and Connecticut.

Amicus Graham Spruiell, M.D., privately practices forensic psychiatry and psychoanalysis in the Boston area.

Amici have followed attempts in recent years to enact health care reform legislation. As active members of the medical profession and pursuant to their ethical obligations, *Amici* have carefully studied the introduction, passage and partial early implementation of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) ("ACA"), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010) ("HCERA" or "Reconciliation Act").

For the reasons set forth below, *Amici* believe that the Eleventh Circuit correctly held that Section 1501 is unconstitutional, but incorrectly severed Section 1501 from the remainder of ACA. *Amici* believe that ACA undermines, in fundamental and dangerous ways, the practice of medicine and harms patients. *Amici* expect *certiorari* to be granted because three separate petitions have been filed by the parties in this case.[2] Those petitioning parties include: (1) three departments of the federal government[3] and their corresponding Secretaries[4] ("Federal Petition-

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[2] The decision of the Eleventh Circuit has been included in the Petitioner's Appendix ("Pet. App.") to Petition No. 11-398 at pages 1a-273a ("*Florida v. HHS*").

[3] United States Departments of the Treasury, Labor, and Health and Human Services.

[4] Timothy F. Geithner, Hilda L. Solis, and Kathleen Sebelius, respectively.

ers") in Case No. 11-398; (2) a majority of the States ("State Petitioners")[5] in Case No. 11-400; and (3) three private parties ("Private Petitioners")[6] in Case No. 11-393. Consequently, if *certiorari* is granted in any of these cases, *Amici* respectfully suggest that the Court reconsider its approaches to the Commerce Clause, U.S. CONST. art. I, sec. 8, cl. 3 ("Commerce Clause"), and to severability. Thus, *Amici* submit this brief to provide the Court with greater clarity on those issues and to suggest that a statutory provision may not be enacted and amended simultaneously.

ARGUMENT

I. *CERTIORARI* SHOULD BE GRANTED BECAUSE THE SEVERABILITY INVOKED BELOW OPERATES AS A JUDICIAL LINE ITEM VETO IN VIOLATION OF THE BICAMERAL CLAUSE.

As this Court knows, the District Court concluded that the individual mandate of Section 1501 is not severable from the remainder of ACA and declared ACA invalid in its entirety, Pet. App. at 3a, 363a-64a, 366a. In contrast, the Eleventh Circuit concluded that the individual mandate of Section 1501 is severable from ACA. Pet. App. at 5a, 185a-86a, 188a. Although these courts both performed the traditional

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[5] Florida, South Carolina, Nebraska, Texas, Utah, Louisiana, Alabama, Michigan, Colorado, Pennsylvania, Washington, Idaho, South Dakota, Indiana, North Dakota, Mississippi, Arizona, Nevada, Georgia, Alaska, Ohio, Kansas, Wyoming, Wisconsin, Maine, and Iowa.

[6] National Federation of Independent Business, Kaj Ahlburg, and Mary Brown.

severability test they came to different conclusions. This Court should review the severability issue *de novo* and reconsider its test for severability.

The traditional test for severability is well-known:

> "The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987) (internal quotation marks omitted). While the Act itself contains no statement of whether its provisions are severable, "[i]n the absence of a severability clause,... Congress' silence is just that – silence – and does not raise a presumption against severability." *Id.* at 686....

New York v. United States, 505 U.S. 144, 186 (1992). As a matter of logic and judicial consistency, Congressional silence should not raise a presumption favoring severability. Therefore, *Amici* question the presumption of severability used by the Eleventh Circuit. The Eleventh Circuit stated:

> In analyzing [the severability of the individual mandate of Section 1501 from ACA,] we start with the settled premise that severability is fundamentally rooted in a respect for separation of powers and notions of judicial restraint. *See Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329-30 [(2006)]. Courts must "strive to salvage" acts of Congress by severing any constitutionally infirm provisions "while leaving the remainder intact." *Id.* at

> 329... "[T]he presumption is in favor of severability. *Regan v. Time, Inc.*, 468 U.S. 641, 653 [1984].

Pet. App. at 172a.[7]

Amici challenge the "notion" that severance is an act of judicial restraint. Rather, *Amici* ask the Court to consider that severance of the individual mandate of Section 1501 from ACA would be an act of judicial activism at its zenith, not its nadir, because such severance amounts to a judicial line item veto in that it allows the Judiciary to determine the content of a law after it has been enacted. Therefore, severance is a doctrine of judicial activism that allows, and possibly even encourages, constitutional sloppiness by Congress and the President.

Although *Amici*, like the State Petitioners and Private Petitioners, believe that the individual mandate of Section 1501 is not severable from ACA under the existing severability standard, *Amici* also believe that unless Congress enacts a severability clause as part of a statute, the Bicameral Clause deprives courts of power to sever any provision found to be unconstitutional. U.S. CONST. art. I, sec. 1, cl. 1 ("Bi-

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[7] The Eleventh Circuit stated: "In the overwhelming majority of cases, the Supreme Court has opted to sever the constitutionally defective provision from the remainder of the statute." *Florida v. HHS*, 648 F.3d 1235, 1321 (11th Cir. 2011), Pet. App. at 172a-173a (citations omitted). The Eleventh Circuit supports its analysis with references to the House and Senate drafting manuals. 648 F.3d at 1322, Pet. App. at 175a-176a ("First, both the Senate and House legislative drafting manuals state that, in light of Supreme Court precedent in favor of severability, severability clauses are unnecessary unless they specifically state that all or some portions of a statute should *not* be severed") (citations omitted, emphasis in original).

cameral Clause") ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives").

There is no reason to believe that the Constitution allows the Judiciary to retain a judicial line item veto because Presidential line item vetoes are unconstitutional, *Clinton v. City of New York*, 524 U.S. 417, 447-49 (1998), and Congressional vetoes are unconstitutional, *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 959 (1983). Although this Court has previously severed defective provisions from federal statutes, *see e.g.*, *Alaska Airlines*, 480 U.S. at 697, that remedy should be unavailable to courts without a Congressionally enacted severability clause considering *Clinton and Chadha*. The Bicameral and Presentment Clauses require the House and Senate to pass precisely the same text – not a single word or punctuation may vary between the bills passed by each chamber. *See Clinton*, 524 U.S. at 448. The judiciary, like the President, has no power to rewrite a statute. Furthermore, the idea that the judiciary be joined with the executive in a "council of revision" was considered and expressly rejected by the Drafters of the Constitution. Brief of Senators Robert C. Byrd, Daniel Patrick Moynihan, and Carl Levin as *Amici Curiae* in Support of Appellees 9-10 in *Clinton v. City of New York* (Docket No. 97-1374). The Constitution's Bicameral Clause gives "ALL" legislative power to Congress. Because the power to sever is the power to determine the content of legislation it may not be exercised by the courts.

It is clear from the Presentment Clause and as held in *Clinton* that partial vetoes are not permitted.

This *in toto* requirement was understood by Presidents Washington[8] and Taft[9] as well as the late Senator Moynihan,[10] a noted constitutional scholar. The *in toto* requirement should apply to the deconstruction of a statute by the courts in the same way that it applies to the deconstruction of a statute by the President.

The dangers of a legislature ceding its power to others are real. Over a five month period, Senator Byrd lectured his colleagues that ceding the Senate's power to control the content of a statute is analogous to actions taken by the Roman Senate which ultimately led to the decline and fall of the Roman Empire. 139 Cong. Rec. S 5475-79, 5724-27, 5975-78, 6395-98, 6982-85, 7157-60, 7539-42, 8157-60, 8582-85, 9097-9100, 9786-89, 10971-75, 11953-56, 13561-65 (103rd Cong., 1st Sess. 1993).

In light of *Clinton*, *Amici* strongly urge the Court to reconsider its approach to severability.

Furthermore, application of the existing severability standard is impractical, if not impossible, in this case. The Court would have to consider Section 1501's relationships with each of ACA's other provi-

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[8] *Accord* Letter from George Washington to Edmund Pendleton (Sept. 23, 1793), *reprinted in* 33 The Writings of George Washington 94, 96 (John C. Fitzpatrick, ed. 1940) ("From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto"). President Washington also served as President of the 1787 Convention that promulgated the Constitution.

[9] William H. Taft, *The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations*, at 11 (1916) (The President "has no power to veto part of the bill and allow the rest to become a law "). President Taft also served as Chief Justice of this Court.

[10] *See* 141 Cong. Rec. S4443-4449 (104th Cong., 1st Sess. 1995).

sions as well as various combinations of ACA's other provisions.[11] To illustrate this point, consider that there are 511 possible relationships among the nine Justices of this Court.[12] Assuming *arguendo* ACA contains 450 separate provisions (as recognized by the District Court), a court might have to consider as many as $2^{449} - 1$ separate relationships among ACA's remaining provisions to conduct a thorough severability analysis.[13] Courts lack the time, manpower and computer resources to conduct such an analysis.

In addition to violating the Constitution's letter and spirit, the practice of severing a defective provision from a statute lacking a severability clause is bad policy because: (1) it facilitates legislative sloppiness – a bill's author knows the constitutionality of its provisions will be addressed piecemeal; (2) it allows judicial activism - a court can substitute its own judgment for the legislative bargain that was struck in Congress and agreed to by the President;[14] and (3)

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[11] Tom Campbell, *Severability of Statutes*, 62 Hastings L. J. 1495, 1507-08, 1525 (July 2011) (concluding that *Chadha* and *Clinton* require a conclusive presumption of inseverability).

[12] Calculated by adding together the number of 1, 2, 3, 4, 5, 6, 7, 8, and 9 Justice combinations. That sum equals $2^9 - 1$.

[13] This number can be expressed with approximately 135 digits – which is 35 digits longer than the number googol, which is one followed by one hundred zeros.

[14] Congress, like other legislatures, is an institution that is conducive to vote trading and log-rolling activities. To enact a law, a majority coalition must be formed. Consequently, members of Congress often cooperate to further an individual or collective agenda. Passage of a bill might require the vote of a single member of Congress or Senator. If ACA had contained a severability clause, the legislative bargain made by members of Congress probably would not have been reached. Indeed, a severa-

it encourages omnibus legislation – which members of Congress may not have sufficient time to read and understand prior to casting their votes.[15]

Regardless of the deference accorded to Congress, this Court may not sever a defective provision from a statute in the absence of a severability clause because such severance is a judicial line item veto. This practice substantially alters the dispersion of powers incorporated into the Constitution. It is time to return "all legislative power" to Congress as required by the Constitution's first clause. U.S. CONST. art. I, sec. 1, cl. 1.

II. THE COMMERCE CLAUSE IS NOT TRIGGERED BECAUSE SECTION 1501 LACKS "COMMERCE" DUE TO THE ABSENCE OF INVOLVEMENT BY TWO PARTIES.

The Federal Petitioners' Commerce Clause argument fails and should not be addressed by the Court because the individual mandate of Section 1501 does not involve any commerce. The plain language and structure of article I, section 8 make this absolutely clear. Under clause 3, the power is "to regulate" and the object of that power is "commerce". The Constitu-

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bility clause was included in an early version of H.R. 3590, but was excluded from ACA, as enacted.

[15] The Presentment Clause directs "reconsideration" of vetoed bills - implicitly requiring members of Congress to actually "consider" a bill. The lack of "consideration" is apparent since it took almost two months after ACA and HCERA were enacted for the Office of Legislative Counsel of the House of Representatives to produce its ACA Compilation Report and for Ernst & Young, one of the Big 4 accounting/consulting firms to issue its summary of the statutes, E&Y Summary. *See infra* n.17.

tion does not give Congress power to regulate all commerce. Rather, the Constitution restricts Congress to regulating a set of only three types of commerce: (1) "with" foreign Nations; (2) "among" the several States; and (3) "with" the Indian Tribes. U.S. CONST. art. I, sec. 8, cl. 3. All three members of this set necessarily involve at least a dyad or pair of parties. Without two or more parties, the words "with" and "among" are meaningless.

Therefore, in deciding this matter, the Court should undertake a two-step analysis. First, it should determine if Congress attempted to regulate "commerce." Only if this question is answered affirmatively should the Court undertake step two, an analysis of the "interstate commerce" sub-clause. Petitioners have addressed only step two. They have ignored step one. Consequently, the Federal Petition (11-398) should be rejected.

With regard to step one, the key is to understand that "commerce" may be viewed as the interrelationship, traffic, agreement or transaction between parties. For example, we may see vendors paired with vendees; sellers paired with buyers; lessors paired with lessees; borrowers paired with lenders; and debtors paired with creditors. Expressed in mathematical terms, "commerce" is Euclid's line between two points or Einstein's interval between two points on an ideal rigid body, where the points represent the two parties and the line or interval represents the commercial transaction, agreement, traffic or interrelationship. Euclid, *Elements of Geometry* 6 (Greek Text of J.L. Heiberg (1883-1885)) (R. Fitzpatrick, ed. & translator) ("And the extremities of a line are points"); Albert Einstein, *The Meaning of Relativity* 4 (5th ed. 1956) (posthumously).

This Court has long understood and still understands that "commerce", by definition, necessarily involves two or more parties, *i.e.*, a party and a counterparty. *See United States v. Lopez*, 514 U.S. 549, 553 (1995); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (Marshall, C.J.).

III. THE PRESENTMENT CLAUSE WAS VIOLATED BY SECTION 1501 BECAUSE IT WAS SIMULTANEOUSLY ENACTED AND AMENDED.

Congress simultaneously enacted Sections 1501 and 10106 of ACA, but such simultaneity is not permitted by the Constitution. Accordingly, the Court need never address the Commerce Clause argument proffered by the Federal Petitioners. Section 1501 creates 26 U.S.C. §5000A, 124 Stat. at 244, which defines "penalty amount," while Section 10106 simultaneously changes the definition in 26 U.S.C. §5000A, 124 Stat. at 909.

Congress may not simultaneously enact and revise any provision within the same statute because such simultaneity violates the Presentment Clause, the "single, finely wrought and exhaustively considered, procedure" which is used to enact Federal legislation. *Chadha*, 462 U.S. at 951; *Clinton*, 524 U.S. at 439-440.

"[R]epeal of statutes, no less than enactment, must conform to Art. I." *Clinton*, 524 U.S. at 438. The same principle applies to revisions and amendment of statutes. Consequently, 26 U.S.C. §5000A could not and should not have been enacted and revised within the same statute. This unconstitutional practice completely infects ACA. Indeed, pursuant to

Title X, Congress attempted to amend scores of other ACA provisions that were simultaneously enacted.[16]

During debate over the Constitution's ratification, James Madison stated laws should be understandable, not too long, and "not be revised before they are promulgated." THE FEDERALIST No. 62, at 381 (Madison) (C. Rossiter, ed. 1961). He wrote:

> The internal effects of a mutable policy are still more calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice if the laws be so ***voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated***, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?

Id. (emphasis added). Congress ignored Madison's warning and passed H.R. 3590, a 2400 page bill, which became ACA upon the President's signature. Within days of passing ACA, Congress also passed H.R. 4872 which further amended ACA and became the Reconciliation Act.

Although simultaneously enacting and revising 26 U.S.C. §5000A may have led to needless complexity, incongruity, and ambiguity for our citizenry and judiciary, the critical constitutional problem is that both the original and revised versions of Section 5000A were presented to the President at the same time. In

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[16] 124 Stat. at 883-1024.

fact, 26 U.S.C. §5000A did not exist at the times the House and Senate passed H.R. 3590 nor did it exist when H.R. 3590 was presented to the President. Consequently, Section 10106 merely attempts to amend a nullity. For 26 U.S.C. §5000A to be revisable, Section 10106 must be enacted after section 1501, not simultaneously with it.

Furthermore, given ACA's length and the number of simultaneously enacted and amended provisions, James Madison surely would have considered ACA too long and too incoherent to be understood. Indeed, ACA's length and complexity did not go unnoticed by the District Court. "[ACA], as previously noted, is obviously very complicated and expansive. It contains about 450 separate provisions with different time schedules for implementation." Order, dated March 3, 2011, Pet. App. at 388a; *see also* Michael O. Leavitt, "Health reform's central flaw: Too much power in one office," Washington Post (February 18, 2011) (referring to nearly 2000 powers given to the HHS Secretary by ACA). Further attesting to ACA's complexity and its internal changes is Print No. 111-1 of the United States House of Representatives, a 955 page report produced by the Office of Legislative Counsel for use by the United States House of Representatives almost two months after ACA and HCERA were enacted.[17] This report, which highlights and explicit-

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[17] Office of the Legislative Counsel, United States House of Representatives, 111th Cong.. 2d Sess., Compilation of Patient Protection and Affordable Care Act [As Amended Through May 1, 2010] at 833 *et seq*. ("ACA Compilation Report") *available at* http://docs.house.gov/energycommerce/ppacacon.pdf (viewed 10/23/11). *See also* Ernst & Young, LLP, Summary of the Patient Protection and Affordable Care Act, incorporating The

ly references many of ACA's internal amendments, would have been of great help to members of Congress before they voted on ACA and HCERA.

CONCLUSION

For the foregoing reasons, Petition 11-400 (and the related Petition 11-393) should be granted, and the related Petition 11-398 should be denied.

October 25, 2011

Respectfully submitted,

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Health Care and Education Reconciliation Act (May 2010) (This summary is 159 pages long) ("E&Y Summary").