Nos. 11-393 and 11-400

In the Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, et al.,
Petitioners,

v.

KATHLEEN SEBELIUS, Secretary of Health and Human Services, et al.,
Respondents.

STATE OF FLORIDA, et al.,
Petitioners,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,
Respondents.

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

BRIEF OF THE FAMILY RESEARCH COUNCIL AND 30 MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

KENNETH A. KLUKOWSKI
FAMILY RESEARCH COUNCIL
801 G Street N.W.
Washington, D.C. 20001
(202) 637-4617

NELSON LUND
Counsel of Record
GEORGE MASON UNIVERSITY SCHOOL OF LAW
3301 Fairfax Drive
Arlington, Virginia 22201
(703) 993-8045
nlund@gmu.edu

October 27, 2011

Attorneys for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether certiorari should be granted on the severability issues that will be presented if any provisions of the Patient Protection and Affordable Care Act are held unconstitutional.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

The Family Research Council ("FRC") is a 501(c)3 nonprofit public-policy organization headquartered in Washington, D.C., that exists to develop and analyze governmental policies that affect families in the United States. Founded in 1983, FRC advocates policy enactments that protect and strengthen family rights and autonomy, and assists in legal challenges of governmental actions detrimental to family interests.

Various provisions of the Patient Protection and Affordable Care Act are contrary to family interests. These provisions—and regulations enacted pursuant thereto—impair family autonomy regarding health care choices, coerce individual decisionmaking, fund abortions, and make health care less affordable for families. These interests are central to FRC's mission, and will be fully vindicated only by holding the Act unconstitutional in its entirety.

Remaining *amici curiae* are 30 Members of the House of Representatives in the United States Congress seeking complete invalidation of the Act, each of whom represents constituents whose interests are implicated by the issues presented in this case. Those Members are listed alphabetically in the Appendix to this brief.

---

[1] Nelson Lund and Kenneth A. Klukowski authored this brief for *amici curiae*. No counsel for any party authored this brief in whole or in part and no one apart from *amici curiae* made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief.

REASONS FOR GRANTING THE PETITIONS

I. THE COURT BELOW MISAPPLIED THE LAW OF SEVERABILITY.

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) [collectively, "ACA" or "the Act"] contains one or more unconstitutional provisions, as the court below recognized. Faced with a statute that is unconstitutional in part, courts must decide which of the statute's remaining provisions, if any, may be given effect. Beginning with its earliest cases, this Court has consistently regarded the resolution of this question as a matter of faithfully effectuating the legislature's intent. *See, e.g.*, Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 Harv. L. Rev. 76, 106 (1937).

At one time it was common for the Court to find that unconstitutional provisions were nonseverable. *Id*. at 107–09 (collecting cases). Beginning around the turn of the twentieth century, legislatures began including clauses specifying that invalid provisions should be treated as severable. *Id*. at 115. Although such clauses do not resolve all severability questions, this Court has in recent decades encountered relatively fewer cases in which unconstitutional provisions have been found to be nonseverable. *See, e.g.*, John C. Nagle, *Severability*, 72 N.C. L. Rev. 203, 220-21 (1993); *see also Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1275 (11th Cir. 2005) (Birch, J., specially concurring) ("In most cases where unconstitutional sections of a statute have been severed the legislation has contained a severability clause.").

The leading modern case, *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), reviewed the precedents and provided a detailed summary of the law. The key principle is that the "relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress. . . . The final test . . . is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Id*. at 685 (footnote omitted).

As the Court has acknowledged, this inquiry can be "elusive." *INS v. Chadha*, 462 U.S. 919, 932 (1983). It is "eased" when the statute includes a severability clause because such a clause creates a presumption that Congress did not intend the validity of the statute as a whole to depend on the validity of an unconstitutional provision. *Alaska Airlines*, 480 U.S. at 686.[2] The presumption created by a severability clause obviously cannot exist in a case involving a statute without a severability clause, like the ACA.[3] In the absence of such a clause, courts must recur to the standard techniques for ascertaining the intent of

---

[2] This presumption can be overcome, as in cases where "the balance of the legislation is incapable of functioning independently" and would have to be judicially rewritten in order to operate at all. *Alaska Airlines*, 480 U.S. at 684 (citation omitted).

[3] The Court has also noted that "[i]n the absence of a severability clause, however, Congress' silence is just that—silence—and does not raise a presumption against severability." *Alaska Airlines*, 480 U.S. at 686 (citations omitted).

Congress: by looking "in the language and structure of the [statute] and in its legislative history." *Id*. at 687.

This Court recently observed that when confronting a statute with a constitutional flaw, "we try to limit the solution to the problem," and the Court seeks to avoid rewriting the statute or unnecessarily invalidating the statute as a whole. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010) (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–29 (2006)). Accordingly, "the normal rule is that partial, rather than facial, invalidation is the required course." *Id.* (citation and internal quotation marks omitted).

It remains the law, however, that the Court must not sustain a statute's otherwise valid provisions when "it is evident that the Legislature would not have enacted those provisions . . . independently of that which is [invalid]." *Id*. (quoting *Alaska Airlines*) (internal quotation marks omitted). Accordingly, the Court has reaffirmed that severability is "essentially an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999). Applying that principle to an Executive Order, for example, the Court concluded that the President intended the Order to stand or fall as a whole. *Id*. at 191–95. Similarly, the Court has refused to sever invalid campaign contribution limits from others that might remain fully operative because it was unable to "foresee which of many different possible ways the legislature might respond to the constitutional objections we have found." *Randall v. Sorrell*, 548 U.S. 230, 262 (2006) (plurality opinion).

The fundamental principle reaffirmed in *Alaska Airlines*—effectuating congressional intent—thus remains in place. Many federal statutes create a presumption of severability by including a severability clause in their texts. With statutes like the ACA, however, indicia of congressional intent must be found elsewhere—in the structure of the text, in the legislative history, and in the nature of the relationship among the effects the legislature intended various provisions to have. That inquiry must be conducted on a case-by-cases basis, and there is no independent or background presumption of severability in the law recognized and consistently adhered to by this Court.

A. The court below misinterpreted this Court's precedents.

The court below misinterpreted this Court's precedents, apparently reading them to create a virtually insurmountable presumption in favor of severability, even in the absence of a severability clause.[4] By discounting or ignoring numerous indicators that Congress would not have enacted the remainder of the statute without the so-called individual mandate in Section 1501 of the Act, the

---

[4] In its enthusiastic search for support of this misinterpretation, the court below went so far as to cite *United States v. Morrison*, 529 U.S. 598 (2000). *See* NFIB Pet. App. 181a. In that case, the parties did not raise any issue about severability and the Court performed no severability analysis. Severability was not at issue in the case, and the Court's decision can lend no support to the Eleventh Circuit's search for authorities to support its misguided analysis.

Eleventh Circuit misapplied the law and frustrated the intent of Congress.

As the court below acknowledged, there is evidence that Congress did not intend invalid provisions to be severable. First, the version of this statute that initially passed the House of Representatives included a severability clause. *See* H.R. 3962, 111th Cong. § 255 (2009) (as passed by House, Nov. 7, 2009). After receiving and considering this bill, the Senate substituted a revised bill that did *not* include such a clause, and that bill was eventually enacted. *See* H.R. 3590, 111th Cong. (2009) (as passed by Senate, Dec. 24, 2009). This can only be regarded as a deliberate choice by Congress to reject the inclusion of a severability clause, and this choice implies that Congress did not intend to create a presumption of severability.

The court below, however, dismissed this legislative history on the authority of congressional drafting manuals, which counsel that a severability clause is unnecessary except when the drafter wants to guarantee that a provision will be held *nonseverable*. NFIB Pet. App. 183a–184a. That a severability clause may often prove to be unnecessary, however, does not imply that such clauses are *meaningless* or that they are mere superfluities. And the congressional drafting manuals certainly do not say or imply that the deliberate *removal* of a severability clause during the legislative process cannot be evidence of congressional intent. The court below nonetheless concluded that the removal of the severability clause during the legislative process in this case "has no probative impact on the severability question before us." *Id*. at 184a. This conclusion was error.

The court below also discounted other indications from Congress that it would not have enacted the remainder of the ACA without the individual mandate provision. First, as the court recognized, the statute itself specifically says that the individual mandate "is *essential* to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of preexisting conditions can be sold." *Id*. (quoting ACA § 1501(a)(2)(I), to be codified at 42 U.S.C. § 18091(a)(2)(I)) (emphasis added). This provision of the statute alone is sufficient to confirm, at a minimum, that Congress did not intend for the guaranteed issue and other preexisting conditions provisions in Section 1201 of the statute to take effect without the individual mandate.[5]

Compounding its mistaken reading of the congressional drafting manuals, however, the court below refused to credit what Congress actually said in the text of the ACA. Instead, the court misinterpreted the congressional drafting manuals to imply that if that is what Congress really meant it should have inserted an expressly worded *nonseverability* clause. *See* NFIB Pet. App. 183a–184a. This Court has never so much as suggested that Congress is required to express its intent in the way that the court below demanded, or that Congress must comply with the

---

[5] What the court of appeals referred to as the provision securing "coverage of pre-existing conditions" is sometimes referred to as the "community-rating" provision. The guaranteed-issue provision ensures that individuals with preexisting conditions cannot be denied coverage, while the community-rating provision ensures that such individuals cannot be charged higher (or lower) insurance premium payments due to individual health factors.

Eleventh Circuit's mistaken inferences from congressional drafting manuals. Once again, the reasoning of the court below is untenable.

The court below also argued at length that removing the individual mandate would have only limited effects on the operation of the statute. *Id*. at 188a–193a. The Eleventh Circuit may not think that the individual mandate is "essential" to the operation of other provisions of the ACA, but Congress thought differently *and said so in the statute*. Under this Court's severability decisions, Congress' view is dispositive and is not to be second-guessed by the courts.

In *Free Enterprise*, this Court accepted *Alaska Airlines*' focus on congressional intent and found that "*nothing* in the statute's text or historical context makes it 'evident' that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will." 130 S. Ct. at 3162 (emphasis added) (citations to *Alaska Airlines* and *Ayotte* omitted). The *Free Enterprise* Court obviously looked at the text and historical context and found *nothing* to suggest that the unconstitutional removal provision was intended to be nonseverable. What this Court did *not* do was look in those sources and reject multiple indicia of congressional intent as insufficient to overcome a judicially created presumption of severability. And for good reason: No such presumption exists. Neither *Free Enterprise* nor any other decision of this Court licensed the court below to systematically discount or reject evidence of congressional intent in the text of the statute and in its legislative history.

B. The court below misapplied the law in considering partial severability.

The court below was "not persuaded that it is *evident* (as opposed to possible or reasonable) that Congress would not have enacted the [guaranteed issue and preexisting conditions] reforms in the absence of the individual mandate." NFIB Pet. App. 193a. This Court's cases have used the word "evident," but certainly not in the sense of "proven beyond any doubt." The reason the court below was not persuaded was that it refused to credit the kind of evidence that this Court has insisted must be credited. Even the Solicitor General has recognized that the Eleventh Circuit's conclusion is untenable. *See id.* at 194a n.144.

Even assuming, *arguendo*, that Congress might have intended some provisions of the ACA to go into effect without the statute's invalid provisions, the petitions should be granted so that the Court can consider whether certain other provisions cannot be severed from those that are unconstitutional. Even under its flawed approach, the Eleventh Circuit acknowledged that it is a much closer question whether the individual mandate provision can be severed from the provisions dealing with guaranteed issue and preexisting conditions. *Id.* at 184a.

Section 1501 of the Act includes a congressional finding that without the individual mandate, persons taking strategic advantage of the guaranteed-issue and preexisting conditions provisions of the ACA would render Section 1201 of the Act unworkable because of adverse selection problems. The consequences of this adverse selection would seriously (and perhaps fatally) undermine what Congress

regarded as a desirable reform of the health care insurance market.[6] The Solicitor General conceded at oral argument in the court below that the guaranteed-issue and community-rating provisions must stand or fall with the individual mandate, yet the Eleventh Circuit expressly rejected the agreement of *all parties* on this point. *See id.* at 194a n.144.

This Court should grant certiorari to consider whether this extraordinary rejection of the Government's own concession, as well as the lower court's refusal to credit the evidence supporting the Government's concession, may stand.

---

[6] The relevant provision of the Act provides:

> Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act), if there were no [individual-mandate] requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

ACA § 10106 (amending § 1501(a)(2)(I)), 124 Stat. 908.

II. THE LOWER COURTS HAVE STRUGGLED TO APPLY THIS COURT'S SEVERABILITY JURISPRUDENCE TO THE ACA.

An additional reason to grant the writs is that the lower courts are struggling to apply this Court's severability doctrine. Several cases challenging the ACA illustrate this point.

As seen in this case, the district court and the court of appeals took diametrically opposed positions. The district court concluded that the entire statute must fall, *id.* at 378a–379a, while the Eleventh Circuit concluded that only the individual mandate need be invalidated, *id.* at 184a, 194a.

In the Fourth Circuit, the Eastern District of Virginia invalidated the individual mandate, and then held that the invalid provision was completely severable from the remainder of the Act. The court's discussion of severability, however, was very brief, and evinced an understanding of the applicable doctrine that was quite different from either of the courts in the Eleventh Circuit. *See Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 789–90 (E.D. Va. 2010), *vacated on jurisdictional grounds*, 2011 U.S. App. LEXIS 18632 (4th Cir. Sept. 8, 2011), *petition for cert. filed*, No. 11-420 (U.S. Sept. 30, 2011).

Recently, the Middle District of Pennsylvania concluded that its invalidation of the individual mandate provision required that it also strike the guaranteed-issue and preexisting conditions provisions in ACA § 1201, but not the entire statute. *Goudy-Bachman v. U.S. Dep't of Health and Human Servs.*,

2011 U.S. Dist. LEXIS 102897, at *69–70 (M.D. Pa. Sept. 13, 2011).

Thus far four federal courts—one circuit court and three district courts—have invalidated Section 1501 and thus had occasion to consider severability. Those four courts have now split three ways on how this Court's established doctrine applies to this statute. This confusion among the lower courts reinforces the importance of granting certiorari on the severability issues.

III. IF THIS COURT FINDS ANY PROVISION OF THE ACA UNCONSTITUTIONAL, IT SHOULD SIMULTANEOUSLY RESOLVE THE SEVERABILITY ISSUE.

If this Court invalidates any of the challenged provisions in this litigation, it should also resolve the question of severability.

Depending on the format, the statute at issue is either 975 pages or approximately 2,700 pages long. *See* NFIB Pet. App. at 179a, 376a. The provisions challenged in this litigation are part of a complex and delicately balanced restructuring of a large sector of the Nation's economy. *See id*. at 380a–381a. The statute includes mandates and programs dealing with such interrelated matters as requiring individuals to buy specified insurance products, requiring employers to provide health care plans and certain health-related accommodations, requiring insurers to provide certain policy benefits, and requiring States to expand a massive grant-in-aid program and to create insurance exchanges. Many of the statute's provisions further authorize Executive Branch officers to promulgate

regulations with additional complex and interrelated effects on the public and private sectors of the economy.

Uncertainty about which, if any, of the ACA's provisions will prove to be enforceable has a deleterious effect not only on State governments and the private health care sector, but on the Nation's economy as a whole. *See, e.g.*, Paul Howard, The Impact of the Affordable Care Act on the Economy, Employers, and the Workforce (Feb. 9, 2011), *available at* http://www.manhattan-institute.org/pdf/testimony_02092011PH.pdf (last visited Oct. 21, 2011).

Should this Court invalidate any of the challenged provisions of the ACA, it would be counterproductive to await an additional round of briefing on the severability issue, let alone to remand that issue to the lower courts, where confusion has already emerged. The national interest strongly counsels in favor of resolving this issue along with the constitutional issues.

The Court should therefore grant certiorari on the question of severability along with other issues presented in this case.

CONCLUSION

The Court should grant both of the petitions that raise severability issues, Nos. 11-393, 11-400. For the reasons given in the petitions and in this *amicus* brief, those issues are certworthy and of considerable and immediate practical significance.

Respectfully submitted,

NELSON LUND
Counsel of Record
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
3301 Fairfax Drive
Arlington, Virginia 22201
(703) 993-8045
nlund@gmu.edu

KENNETH A. KLUKOWSKI
FAMILY RESEARCH COUNCIL
801 G Street N.W.
Washington, D.C. 20001
(202) 637-4617
kklukowski@frc.org

Attorneys for Amici Curiae

October 27, 2011

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

A total of 30 Members of the House of Representatives in the United States Congress have joined this brief as *amici curiae*. These Members of Congress are:

Rep. Roscoe Bartlett of Maryland, 6th district

Rep. Joe Barton of Texas, 6th district

Rep. Diane Black of Tennessee, 6th district

Rep. Marsha Blackburn of Tennessee, 7th district

Rep. Charles Boustany, M.D., of Louisiana, 7th district

Rep. Dan Burton of Indiana, 5th district

Rep. Steve Chabot of Ohio, 1st district

Rep. Tom Cole of Oklahoma, 4th district

Rep. Blake Farenthold of Texas, 27th district

Rep. Mike Fitzpatrick of Pennsylvania, 8th district

Rep. Jeff Fortenberry of Nebraska, 1st district

Rep. Louie Gohmert (former Judge) of Texas, 1st district

Rep. Tom Graves of Georgia, 9th district

Rep. Andy Harris, M.D., of Maryland, 1st district

Rep. Duncan Hunter of California, 52nd district

Rep. Steve King of Iowa, 5th district

Rep. Raul Labrador of Idaho, 1st district

Rep. Doug Lamborn of Colorado, 5th district

Rep. Jeff Landry of Louisiana, 3rd district

Rep. James Lankford of Oklahoma, 5th district

Rep. Dan Lungren of California, 3rd district

Rep. Randy Neugebauer of Texas, 19th district

Rep. Steve Pearce of New Mexico, 2nd district

Rep. Mike Pompeo of Kansas, 4th district

Rep. Tom Price, M.D., of Georgia, 6th district

Rep. Reid Ribble of Wisconsin, 8th district

Rep. Steve Scalise of Louisiana, 1st district

Rep. Jean Schmidt of Ohio, 2nd district

Rep. Lamar Smith of Texas, 21st district, Chairman, House Committee on the Judiciary

Rep. Joe Walsh of Illinois, 8th district