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 Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE FAMILY RESEARCH COUNCIL AND 27 MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND REVERSAL ON THE ISSUE OF SEVERABILITY

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QUESTION PRESENTED

Whether the Patient Protection and Affordable Care Act must be invalidated in its entirety because it is nonseverable from the individual mandate that exceeds Congress' limited and enumerated powers under the Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

LEGISLATIVE MATERIALS

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., which 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 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.

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[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. All parties have consented to the filing of this brief, and were timely notified.

SUMMARY OF ARGUMENT

If the Court finds that the individual mandate in the Patient Protection and Affordable Care Act is unconstitutional, as *amici* believe it is, the Court should invalidate the entire statute. The Court's well established severability doctrine has one fundamental principle: effectuating congressional intent. Both the text of the statute and its legislative history make it evident that Congress would not have enacted the package of legislative provisions that remain after the individual mandate is excised.

The Court's precedents show that a presumption of severability exists only where Congress has included a severability clause in the statute. No such clause can be found in this Act, and the omission was no accident. The bill passed by the House of Representatives included a severability clause, and the Senate chose not to include it in the bill that was eventually enacted.

Because the Act does not include a severability clause, congressional intent must be ascertained using the normal technique of statutory interpretation: close attention to the statutory language, to the relationships among the various provisions of the statute, and to the legislative history. In this case, all of these indicia of congressional intent point in exactly the same direction. The individual mandate is the linchpin of the Act, and the congressional objectives cannot be achieved once that linchpin is removed.

Nor can the Court possibly identify which individual provisions, if any, would have been enacted independently of the individual mandate. In addition

to the complex and interrelated balance of policies in the Act, the statute became law only because of a fragile legislative bargain resulting from aggressive logrolling in the Senate.

The indicia of congressional intent on the severability issue are so clear as to be dispositive. In addition, however, the principle of judicial restraint counsels in favor of invalidating the entire statute. What is left after excision of the individual mandate is not a text that was ever passed by Congress or presented to the President. Any judicial attempt to salvage some fragments of this Act will invade the legislative domain and create a "law" that was enacted without the formalities required by Article I of the Constitution. When Congress returns to the subject of health care reform, as it inevitably must, it is going to face challenges aplenty without having to figure out how to fix a law it never voted for.

ARGUMENT

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) [collectively, "ACA" or "the Act"] contains one or more unconstitutional provisions, including at a minimum the individual mandate provision.[2] Faced with a

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[2] Congress's purposes and findings regarding the individual mandate are set out in ACA § 1501(a), 42 U.S.C. § 18091. The statutory command that non-exempt citizens purchase federally-approved forms of health insurance beginning in 2014, and suffer a penalty for noncompliance, is set out in ACA § 1501(b), 26 U.S.C. § 5000A.

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). Notwithstanding some confusion among the lower courts, and notably in the opinion of the court below, this Court has never abandoned the fundamental principle that has guided its severability jurisprudence for well over a hundred years. In this case, fidelity to congressional intent requires that the ACA be invalidated in its entirety.

I. No presumption of severability applies in this case.

A. A presumption of severability applies only when Congress has established one by enacting a severability clause.

At one time it was common for the Court to find that unconstitutional provisions were nonseverable. *See id*. at 107-09 (collecting cases). This may have reflected a sense that leaving part of a statute in place is in tension with the bicameralism and presentment requirements of Article I. *See* U.S. Const. art. I, § 7, cl. 2. Both Houses of Congress presented the President with a specific text, and courts would justifiably be reluctant to assume that a fragment of this text would

have been enacted without the invalid provisions.[3] Early in the twentieth century, Congress began including clauses specifying that invalid provisions should be treated as severable. Stern, *supra*, at 115-16. Although such clauses do not resolve all severability questions, they do help to protect courts from inadvertently intruding on the legislative function. Not surprisingly, with the increased use of severability clauses, there have been 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 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).

This inquiry can be "elusive," *INS v. Chadha*, 462 U.S. 919, 932 (1983), but it is "eased" when the statute

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[3] *Cf.*, *e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936); *Williams v. Standard Oil Co.*, 278 U.S. 235, 241-42 (1929); *Trade-Mark Cases*, 100 U.S. 82, 99 (1879).

includes a severability clause because such a clause "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision," *Alaska Airlines*, 480 U.S. at 686.[4] The presumption created by a severability clause obviously cannot exist in a case involving a statute without a severability clause,[5] let alone in a case dealing with a statute, like the ACA, where Congress deliberately removed a severability clause during the legislative process.[6] In

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[4] This presumption can sometimes 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).

[5] To create something implies that it did not already exist. *See* Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?*, 16 Tex. Rev. L. & Pol. 1, 88 (2011). *Alaska Airlines* 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." 480 U.S. at 686 (citations omitted).

[6] The version of the ACA 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 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.

the absence of such a clause, courts must recur to the standard technique for ascertaining the intent of Congress: carefully looking at what is found "in the language and structure of the [statute] and in its legislative history." *Id*. at 687.

The Court recently reaffirmed that it will 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]." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010) (quoting *Alaska Airlines*, 480 U.S. at 684) (internal quotation marks omitted) (brackets in the original). When confronting a statute with a constitutional flaw, the Court does try "to limit the solution to the problem," and seeks to avoid rewriting the statute or unnecessarily invalidating the statute as a whole. *Id.* (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–29 (2006)). This formulation cannot be read as a rejection of the established focus on congressional intent, for the *Free Enterprise* Court emphasized that "*nothing* in the statute's text or historical context makes it 'evident' that Congress, faced with the limitations imposed by the Constitution,

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U.S. Pet. App. 175a. 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 176a. That conclusion was mistaken.

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 looked at the text and historical context and found *nothing* to suggest that the unconstitutional removal provision was intended to be nonseverable. What the Court did *not* do was look in those sources and then disregard indicia of congressional intent because they were somehow 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 has created a license to reject or discount evidence of congressional intent in the text of the statute and in its legislative history.

Now, as always, severability is "essentially an inquiry into legislative intent," *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) (citation omitted), and that inquiry proceeds on a case-by-case basis. Applying this principle to an Executive Order, for example, the Court studied the entire Order and concluded that the President intended it to stand or fall as a whole. *Id*. at 191–95.[7] Similarly, invalid campaign contribution limits have not been severed from others that might have remained fully operative when it was impossible to "foresee which of many different possible ways the legislature might respond to the constitutional objections we have found."

[7] The Court assumed without deciding that severability principles apply to Executive Orders in the same way that they apply to legislation. 526 U.S. at 191.

Randall v. Sorrell, 548 U.S. 230, 262 (2006) (plurality opinion).

The reasoning in *Randall* has deep roots in the Court's severability jurisprudence:

> It remains to inquire whether it is plain that Congress would have enacted the legislation [without its constitutionally infirm provisions]. . . . If we are satisfied that it would not, or that the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional feature, then the statute must fall.

El Paso & Ne. Ry. Co. v. Gutierrez, 215 U.S. 87, 97 (1909) (citations omitted).

The fundamental principle reaffirmed in *Alaska Airlines* and many other cases—effectuating congressional intent—applies in all severability cases, though its application is sometimes heavily influenced by the presumption created by a severability clause. But even when a statute does contain a severability clause, and even when the only issue is an unconstitutional application of an otherwise valid statutory provision, the Court has emphasized that the presumption created by the severability clause can be overcome by evidence that the "legislators preferred no statute at all" to one in which the unconstitutional application must be barred. *Ayotte*, 546 U.S. at 331.

With a statute that lacks a severability clause (and *a fortiori* with a statute like the ACA, from which such a clause was removed during the legislative process), indicia of congressional intent must be found in the

language and 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 like any other exercise in statutory interpretation, and there is no independent or background presumption of severability in the law established by this Court.

B. This Court has not cryptically established a presumption of severability through its use of the word "evident."

In *Alaska Airlines*, 480 U.S. at 684, the Court noted that it has repeatedly said that it will refuse to sever an unconstitutional provision when it is "evident" that Congress would not have enacted the other provisions in the statute:

> 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.'" *Buckley* v. *Valeo,* 424 U. S. 1, 108 (1976) *(per curiam),* quoting *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma,* 286 U. S. 210, 234 (1932). Accord: *Regan* v. *Time, Inc.,* 468 U. S. [641,] 653 [(1984) (plurality opinion)]; *INS v. Chadha,* 462 U. S., at 931-932; *United States v. Jackson,* 390 U. S. 570, 585 (1968).

The word "evident" *cannot* mean indubitable, certain, or conclusive.[8] What it *can* mean, and in this context does mean, is "seeming or apparent."[9] This Court apparently first used the word in the context of severability in *Huntington v. Worthen*, 120 U.S. 97, 102 (1887):

> It is only when different clauses of an act are so dependent upon each other that it is evident the legislature would not have enacted one of them without the other—as when the two things provided are necessary parts of one system—that the whole act will fall with the invalidity of one clause. When there is no such connection and dependency, the act will stand, though different parts of it are rejected.

Here the Court presents two alternatives: one where mutual connection and dependency make it evident that different clauses were meant to stand or fall together, and one where there is *no* such connection and dependency.[10] The logical relation

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[8] The word could have been used in such senses as recently as the seventeenth century, but these usages are now obsolete. 5 *Oxford English Dictionary* 470 (2d ed. 1989).

[9] *Oxford Modern English Dictionary* 363 (1992); s*ee also American Heritage Dictionary of the English Language* 455 (1969) (usage note under the word "evident": "*Evident* and *apparent* are often interchangeable and imply the presence of visible signs or circumstances that make the thing in question clear to the eye, or, by inference, to the mind.").

[10] The logical relation between the two alternatives presented by *Huntington* makes it clear that the Court was not suggesting that courts should sever any provisions that are capable of operating

between these alternatives shows that the Court's focus was on the nature of the mutual connection and dependency, not on creating anything like a presumption of severability.

Huntington, moreover, was echoing in slightly different words what the Court had said only a few years earlier in *Allen v. City of Louisiana*, 103 U.S. 80, 83-84 (1881) (emphases added):

> It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. "But," as was said by Chief Justice Shaw, in *Warren* v. *Mayor and Aldermen of Charlestown* (2 Gray ([68] Mass.), 84[, 98-99 (1854)]), "if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other *as to warrant a belief* that the legislature intended them as a whole, and that, if all could not be carried into

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independently. (The reference to two things being "necessary parts of one system" was offered by the Court only as an example.) Here, as always, the test is whether the connection and dependency between provisions is such that the legislature would not have enacted one without the other. The connection and dependency might be technical in nature, but it need not be. The requisite connection might have to do with the relation between the provisions in serving the legislature's purpose, or it might even be entirely political, as when different provisions were essential elements of what *Alaska Airlines* called "the original legislative bargain." *See* 480 U.S. at 685.

> effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to *what appears to have been* the intent of the legislature.

When *Huntington* used the word "evident," it was apparently using it to mean what *Allen* conveyed with the words "as to warrant a belief" and "what appears to have been." That is consistent with normal English usage of the word "evident," and inconsistent with an interpretation of the word that would create a presumption of severability.

When *Alaska Airlines* used the word "evident," 480 U.S. at 684, the Court cited five decisions in support of its summary of existing law. None of those decisions indicates that a presumption of severability should be applied to a statute that lacks a severability clause.

- *Buckley v. Valeo* specifically said that "[o]ur discussion of 'what is left' leaves *no doubt* that the value of public financing is not dependent on the existence of a generally applicable expenditure limit." 424 U.S. at 109 (emphasis added).

- *Champlin* was a case in which Congress had included a severability clause in the statute. 286 U.S. at 235.

- The plurality opinion in *Regan v. Time* does refer to a presumption of severability, but this is not a statement of the Court and it has no foundation in any of the majority opinions cited by the plurality. The plurality, moreover, went on to say (on the same page cited in *Alaska Airlines*) that "we are *quite sure* that the policies Congress sought to advance by enacting § 504 can be effectuated even though the purpose requirement is unenforceable." 468 U.S. at 653 (emphasis added).

- Like *Champlin*, *Chadha* involved a statute that included a severability clause, which was specifically referenced in the passage from *Chadha* cited in *Alaska Airlines*. *See* 462 U.S. at 931-32.

- Without referring to any presumption, *Jackson* analyzed the statute at issue in the case and concluded that "it is *quite inconceivable* that the Congress which decided to authorize capital punishment in aggravated kidnapping cases would have chosen to discard the entire statute if informed that it could not include the death penalty clause now before us." 390 U.S. at 586 (emphasis added).

In sum, *Alaska Airlines* used the word "evident" consistently with normal usage and with the way the word had repeatedly been used by the Court in previous opinions. The word creates no presumption of severability. Nor does it detract from the Court's acknowledged obligation to ask whether what is left of a statute after the excision of an unconstitutional provision would have been enacted by Congress.

II. Invalidation of the individual mandate provision of the ACA requires invalidation of the entire Act.

The primary purpose of the ACA was to restructure the health care and health care insurance industries so as to effect a significant expansion of insurance coverage to previously uninsured segments of the population and a significant lowering of health care costs due to economies of scale resulting from this expansion of coverage. The text of the statute itself says as much. *See* ACA § 1501(a)(2)(C), 42 U.S.C. § 18091(a)(2)(C) (individual mandate, together with the other provisions of this Act, "will increase the number and share of Americans who are insured"); *id*. § 1501(a)(2)(D), 42 U.S.C. § 18091(a)(2)(D) (individual mandate "achieves near-universal coverage"); *id.* § 1501(a)(2)(I), 42 U.S.C. § 18091(a)(2)(I) (individual mandate will "broaden the health insurance risk pool to include healthy individuals"); *id*. § 1501(a)(2)(J), 42 U.S.C. § 18091(a)(2)(J) (individual mandate, together with the other provisions of the Act, will lower health insurance premiums by increasing economies of scale).

On the day the ACA passed the House in its final form, Speaker Nancy Pelosi said the following on the House floor, summarizing the central objectives of the legislation:

> With this action tonight, with this health care reform, 32 million more Americans will have health care insurance and those who have insurance now will be spared being at the mercy of the health insurance industry with their obscene increases in premiums, their rescinding of policies at the time of illness, their cutting off

> of policies even if you have been fully paying but become sick. The list goes on and on about the health care reforms that are in this legislation: insure 32 million more people, make it more affordable for the middle class, end insurance company discrimination based on preexisting conditions, improve care and benefits under Medicare and extending Medicare's solvency for almost a decade, creating a healthier America through prevention, through wellness and innovation, create 4 million jobs in the life of the bill and doing all of that by saving the taxpayer $1.3 trillion.

156 Cong. Rec. H1896 (daily ed. Mar. 21, 2010) (statement of Rep. Pelosi).

On the eve of introducing the health care reform legislation in the House, Majority Leader Steny Hoyer explained the purpose of the Act by declaring, "This legislation will ensure peace of mind, quality care, and reliable [health insurance] coverage that can never be taken away . . . And it will bring down health care's crippling costs."[11]

In voting to adopt the bill that the President signed into law, House Assistant Democratic Leader James Clyburn explained that he was voting for this legislation because the ACA is "landmark legislation that enacts the toughest insurance reforms in history,

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[11] Hoyer Statement on Introduction of America's Affordable Health Choices Act, July 13, 2009, *available at* http://hoyer.house.gov/index.php?option=com_content&task=view&id=1718&Itemid=50.

reduces the cost of health care [and has other desirable effects]."[12]

After the Senate passed the version of the ACA that was later signed into law, the Chairmen of the three House committees with jurisdiction issued a joint statement saying: "Both bills [i.e. the bill passed by the Senate and the somewhat different bill passed earlier by the House] will slow the growth of out-of-control health care costs . . . [and] make unprecedented reforms to the insurance industry to hold insurers accountable and protect consumers from delays or denials based on pre-existing conditions, from rescissions, and from exorbitant out-of-pocket expenses . . . ."[13]

Senate Majority Leader Harry Reid says on his official website: "This reform will not only lower costs, but improve choices, competition and offer more assistance to ensure that all Americans can afford health insurance."[14] When the individual mandate takes effect, Reid adds, the "Act ensures a competitive insurance marketplace where millions of Americans and small businesses will be able to purchase

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[12] Clyburn Floor Statement on Historic Health Insurance Reform Legislation, Mar. 21, 2010, *available at* http://clyburn.house.gov/press-release/clyburn-floor-statement-historic-health-insurance-reform-legislation.

[13] Press Release, Congressmen George Miller, Charles B. Rangel, and Henry A. Waxman, Dec. 24, 2009, *available at* http://rangel.house.gov/news/press-releases/2009/12/rangel-senate-vote-brings-health-reform-closer-to-reality.shtml.

[14] Harry Reid Senate Website, Issues, Health Care, http://www.reid.senate.gov/issues/healthcare.cfm.

affordable coverage . . . ."[15] Reid further says the ACA "will help families that can't afford insurance, individuals facing discrimination for pre-existing conditions and small businesses that have been unable to offer health benefits to their employees."[16]

These statements by congressional leaders, and others that could be cited, vividly confirm what the text of the statute makes clear. The central objective of the ACA was to broaden insurance coverage and reduce health care costs. Stripped of essential provisions that Congress believed necessary for accomplishing those objectives, the residue of the ACA cannot operate in the manner intended by the legislature.

A. At an absolute minimum, the preexisting conditions provisions of the ACA must fall along with the individual mandate.

The key mechanism that Congress chose to accomplish its central goal was a series of new statutory regulations forbidding insurance companies to reject applicants because of their preexisting conditions and to price their products so as not to discriminate against such applicants.[17] Congress

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[15] *Id*.

[16] Harry Reid Senate Website, Issues, Access to Health Care, http://www.reid.senate.gov/issues/healthinsurance.cfm.

[17] *See* ACA § 1201(2)(A)-(B), (3), 42 U.S.C. §§ 300gg-1(a), 300gg-3(a); § 1201(4), 42 U.S.C. § 300gg. The ACA does permit

recognized the obvious fact that these new statutory regulations, standing alone, would cause the insurance market to collapse because individuals could wait until they got sick to purchase coverage. Accordingly, Congress devised the individual mandate to address this adverse selection problem. ACA § 1501(a)(2)(I), 42 U.S.C. § 18091(a)(2)(I).

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.* (emphasis added). This provision of the statute alone is sufficient to confirm that Congress did not intend for the guaranteed-issue and community-rating provisions in the statute to take effect without the individual mandate. This conclusion is so clearly compelled by the statutory language that even the Solicitor General has conceded its validity in the Government's response to the petitions for certiorari. *See* Consolidated Brief for [Federal] Respondents at 10, 31-33, Nos. 11-393, 11-400; *see also* U.S. Pet. App. 186a n.144.

B. The text of the ACA indicates that the individual mandate is the linchpin of the entire statute.

Should the Court invalidate the individual mandate, this Court must invalidate the entire ACA because that mandate is a central component of "the

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discrimination on four narrow bases, such as a person's age or tobacco use. *See* ACA § 1201(1), 42 U.S.C. § 300gg.

original legislative bargain" codified in the statute. *See Alaska Airlines*, 480 U.S. at 685.

In some cases, it is plain that a statute can serve the congressional purpose even after excision of an unconstitutional provision. In *New York v. United States*, 505 U.S. 144 (1992), for example, Congress enacted three separate and independent incentives for States to provide for the disposal of low-level radioactive waste. The Court held that one of the incentives was unconstitutional, and drew the obvious inference that the congressional objective would be served by allowing the other two incentives to remain in effect. The ACA could hardly be more different from the statute at issue in *New York v. United States*.

The individual mandate and related new insurance regulations, which even the Government concedes must stand or fall together, constitute the linchpin of Congress's effort to restructure the market for health care. This is not speculation. It is what the text of the statute says.

In six separate findings, Congress indicated that the individual mandate was intended to operate "together with the other provisions of this Act" to restructure the health care market. *See* ACA §§ 1501(a)(2)(C), (E), (F), (G), (I), (J), 42 U.S.C. §§ 18091(a)(2)(C), (E), (F), (G), (I), (J). The plain meaning of "*the* other provisions" is *all* of the other provisions, not just some of them.

The plain meaning of this statutory language is confirmed by the specific congressional findings, which are not confined to dealing with the adverse selection problem or even with the new statutory regulations

that would otherwise create the adverse selection problem. Congress expected the individual mandate, "together with the other provisions of the Act," to have a broader array of effects, including an increase in both the supply and demand for health care, a reduction of administrative costs, and a decrease in health care premiums. *See id*. subsections (C), (J).

These findings recognize what would in any case be evident: The ACA is an intricately balanced effort to restructure a massive and complex sector of the economy. It was intended to work as an integrated whole, and it had as its indispensable linchpin the individual mandate and the associated new regulations of insurance policies. Pull that linchpin out, and you destroy the new structure that Congress sought to build. Congress could not have intended the flotsam of this wreckage to be treated as a seaworthy vessel, and its express textual findings make it evident that it did not intend any such thing.

The Government has actually conceded this point. In defending the individual mandate provision in the Eastern District of Virginia, Secretary Sebelius characterized the individual mandate as the "linchpin" of the statutory scheme created by the ACA. *See Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 789 (E.D. Va. 2010).[18] Excising a statutory provision that is aptly described by the Government

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[18] *See also, e.g.*, Def's Mot. to Dismiss at 3, Mem. in Supp. of Def.'s Mot. for Summ. J. at 26, *Cuccinelli*, 728 F. Supp. 768 (3:10-cv-188-HEH). The Fourth Circuit subsequently dismissed Virginia's suit for lack of standing, 656 F.3d 253, 273 (4th Cir. 2011), and a petition for certiorari in that case is currently pending before this Court, No. 11-420 (U.S. Sept. 30, 2011).

itself as the statute's linchpin would rewrite what *Alaska Airlines* called the "original legislative bargain." 480 U.S. at 685. The individual mandate is indeed the linchpin of the ACA, and it cannot be severed without violating congressional intent.

C. It is impossible to identify which isolated provisions of the ACA Congress would have enacted without the individual mandate.

Once the Court decides that the individual mandate and the related insurance provisions must be invalidated, the next question is whether Congress would have enacted the remainder of the Act *as a package*. It is extremely important to recognize that the question is not whether Congress could have or might have enacted *some* of the remaining provisions. There presumably are some provisions that Congress would have enacted even without the individual mandate and the related new insurance regulations. This Court, however, has no way to ascertain which ones they are.

What we *can* ascertain is that the ACA contains provisions that certainly would *not* have been enacted except for logrolling during the legislative process. Senator Ben Nelson of Nebraska, for example, originally announced his opposition to the ACA bill.[19] Senator Nelson then met with Majority Leader Reid, and immediately afterward reversed his position,

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[19] *See* Greg Hitt & Janet Adamy, *Sen. Nelson Holds Up Health Bill*, Wall St. J., Dec. 18, 2009, *available at* http://online.wsj.com/article/SB126108229914495975.html.

announcing that he would support the bill.[20] It became public shortly thereafter that Reid had offered to include in the ACA a subsidy for Nebraska's share of the cost of the ACA's Medicaid expansion in Nelson's home state.[21] The subsidy was included in the Act. *See* ACA § 10201(c), 124 Stat. 918.[22]

Similarly, after initially expressing opposition to the bill, Senator Mary Landrieu of Louisiana emerged from a meeting with Majority Leader Reid in which she was offered $300 million in federal funds for

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[20] *See Nelson Accused of Selling Vote on Health Bill for Nebraska Pay-Off*, Fox News, Dec. 20, 2009, http://www.foxnews.com/politics/2009/12/20/nelson-accused-selling-vote-health-nebraska-pay/.

[21] *See* Susan Davis, *Heat Rises on Nebraska's Nelson*, Wall St. J., Jan. 2, 2010, *available at* http://online.wsj.com/article/SB126239070215313011.html.

[22] This Medicaid subsidy for the State of Nebraska was found in H.R. 3590 § 10201, which was enacted on March 23, 2010, as the Patient Protection and Affordable Care Act § 10201(c), 124 Stat. 918. The subsidy was later repealed on March 30, 2010 by the Health Care and Education Reconciliation Act §§ 1201, 1202, 1203, 124 Stat. 1051-53. Thus unlike many other inducements to vote in favor of the ACA, this Nebraska provision is no longer in the Act as amended. It was, however, vital to the passage of the ACA.

Louisiana.[23] This, too, was included in the ACA. *See* ACA § 2006, 42 U.S.C. § 1396d(aa).[24]

There are at least three other examples as well. Senator Bill Nelson suggested that he would not have voted for the bill had it not contained his amendment subsidizing 800,000 senior citizens who participate in Medicare Advantage in his home state of Florida.[25] *See* ACA § 3602, 42 U.S.C. § 1395w-21 note. Senator Chris Dodd received $100 million in federal funds intended for a university hospital in his home state of Connecticut.[26] *See* ACA § 10502, 124 Stat. 1003.[27]

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[23] *See* Gail Russell Chaddock, *Healthcare's dealbreakers: Mary Landrieu likes her $300 million*, Christian Sci. Monitor, Nov. 24, 2009, http://www.csmonitor.com/USA/Politics/2009/1124/healthcares-dealbreakers-mary-landrieu-likes-her-300-million.

[24] This section provides the additional funds for any State which "the President has declared a major disaster" area within the past "7 fiscal years." ACA § 2006(2), 124 Stat. 285. Louisiana was the only State that met this criterion.

[25] *See Senator Nelson's Statement on Thursday's Health Care Vote*, WCTV.com, Dec. 24, 2009, http://www.wctv.tv/news/headlines/80056362.html.

[26] *See* Editorial, *Health bill deals just business as usual*, Athens Banner-Herald, Dec. 23, 2009, *available at* http://onlineathens.com/stories/122309/opi_538645002.shtml.

[27] This $100 million appropriation was for a hospital that is "affiliated with an academic health center at a public research university . . . that contains a State's sole public academic medical and dental school." ACA § 10502(a), 124 Stat. 1003. Senator Dodd engineered the provision with the expectation that the funds would go to the University of Connecticut, and publicly said that he was "terribly disappointed" when the grant later went to Ohio State University months after the ACA was enacted. *See* Arielle

Moreover, Senator Max Baucus secured additional Medicare funding for asbestos-related illnesses from mining operations in his home state of Montana. *See* ACA § 10323, 42 U.S.C. § 1395rr-1.

Indeed, Majority Leader Reid openly acknowledged that he built a carefully balanced package with just enough votes to pass, and that he was systematically including financial inducements to add one vote at a time to reach the necessary 60 votes to invoke cloture. Reid publicly stated, "I don't know if there's a senator that doesn't have something in this bill that was important to them. . . And if they don't have something in it important to them, then it's—doesn't speak well of them. That's what this legislation is about: It's the art of compromise."[28]

These home-state incentives were pivotal to passage of the ACA. The vote to invoke cloture on this legislation in the Senate succeeded by a single vote.[29] Due to a public outcry, the Nebraska Medicaid subsidy was later repealed, *see* 124 Stat. 1051-53, and is not in the amended ACA now before the Court. But the

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Levin Becker, *UConn misses out on $100 million federal hospital grant*, Conn. Mirror, Dec. 29, 2010, *available at* http://ctmirror.org/story/8840/uconn-misses-out-100-million-federal-hospital-grant.

[28] David Welna, *On Health Bill, Reid Proves The Ultimate Deal Maker*, National Public Radio, Dec. 23, 2009, http://www.npr.org/templates/story/story.php?storyId=121791736.

[29] *See* Rec. Vote 395, U.S. Senate, 111th Congress, 1st Sess. Dec. 23, 2009 (invoking cloture on H.R. 3590 by a 60-39 vote), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00395.

others remain. *See* ACA §§ 2006, 3602, 10323, 42 U.S.C. §§ 1395rr-1, w-21, 1396d(aa). It is evident that preserving such provisions would frustrate congressional intent by retaining provisions whose inclusion in the statute was so clearly predicated on enacting a package whose linchpin has been judicially excised. Doing so would turn the application of this Court's established severability doctrine on its head.

The legislative history simply confirms what the text of the Act makes clear: What is left of the ACA after the excision of the individual mandate and related new insurance regulations would never have passed Congress, and this residue does not constitute a coherent whole that Congress would have believed capable of accomplishing the legislature's objective. Because the ACA minus the individual mandate, or minus the mandate and the related new statutory insurance regulations, does not constitute a legislative package that would have been enacted, the entire statute must be struck down.

III. Judicial restraint requires that the entire ACA be struck down.

The Court's willingness to enforce statutes from which an unconstitutional provision has been excised rests on questionable constitutional foundations. The fragment of the statute that remains after an excision is not a text that was adopted by both Houses of Congress and presented to the President. At the very least, the practice of severing unconstitutional provisions is in considerable tension with the Court's disapproval of something like a line-item veto in *Clinton v. City of New York*, 524 U.S. 417 (1998). Congress may not authorize the President to excise a

statutory provision while leaving the remainder of the statute in effect, *id*. at 437-39, but Congress may authorize the courts to excise a statutory provision while leaving the remainder in effect. At the very least, this creates a puzzle that the Court has not addressed.[30]

It may be too late for the Court to rethink its existing severability jurisprudence. But it is not too late to recognize that a finding of nonseverability is the more constitutionally cautious approach. Whenever the Court severs an unconstitutional provision, it leaves in place a statute that did not pass through the rigorous formalities of Article I, Section 7, and it runs a real risk of creating a law that would not have been adopted in compliance with those formalities.

That risk is significantly reduced when Congress includes a severability clause, and there no doubt are some cases in which it really is quite evident that Congress would have enacted the same statute without the unconstitutional provision. *See, e.g.*, *New York v. United States*. The ACA, however, is not such a statute. If anything, it is clear beyond doubt that Congress would *not* have enacted what is left after the individual mandate is removed, or what is left after the mandate and the inseparably related insurance regulations are removed. At the very least, it is "evident" that the surviving fragments do not constitute a legislative package that Congress would have adopted.

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[30] *See generally* Tom Campbell, *Severability of Statutes*, 62 Hastings L.J. 1495 (2011).

It would be a grave mistake to adopt the Eleventh Circuit's misguided understanding of judicial restraint, according to which the individual mandate is mere jetsam that can safely be tossed overboard because the remaining provisions are technically capable of operating as law. In this context, judicial restraint does not mean doing as little as possible, or salvaging as much as technically possible of what is left when the individual mandate is gone. What judicial restraint does require is judicial caution lest the nation find itself subject to an incoherent statute that was never enacted by Congress, and that Congress in no way ever indicated that it would have enacted.

Without the individual mandate, the ACA cannot "function in a *manner* consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685. What is left after the removal of that provision would not accomplish Congress's objective, and cannot operate in the manner Congress intended. Accordingly, this mutilated leftover should not be treated as though it were a law. When Congress returns to the subject of health care reform, as it inevitably must, it should not be forced to clean up after a "statute" that was effectively enacted by a misguided application of judicial severability doctrine. The legislature is going to face challenges aplenty without having to fix a law it never voted for.

CONCLUSION

If this Court finds that the individual mandate is unconstitutional, the Court should also hold that the entire statute must be invalidated, reversing the judgment of the Court of Appeals for the Eleventh Circuit in relevant part.

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January 6, 2012

APPENDIX

TABLE OF CONTENTS

APPENDIX A

A total of 27 Members of the House of Representatives in the Congress of the United States have joined this brief as *amici curiae*. These Members of Congress are the Honorable:

Rep. Michele Bachmann of the 6th District of Minnesota

Rep. Spencer Bachus of the 6th District of Alabama

Rep. Diane Black of the 6th District of Tennessee

Rep. Charles Boustany, M.D., of the 7th District of Louisiana

Rep. Dan Burton of the 5th District of Indiana

Rep. Tom Cole of the 4th District of Oklahoma

Rep. John Culberson of the 7th District of Texas

Rep. Mike Fitzpatrick of the 8th District of Pennsylvania

Rep. John Fleming, M.D., of the 4th District of Louisiana

Rep. Trent Franks of the 2nd District of Arizona
Chairman, Subcommittee on the Constitution

Rep. Louis Gohmert of the 1st District of Texas
Former Judge

Rep. Tom Graves of the 9th District of Georgia

Rep. Vicky Hartzler of the 4th District of Missouri

Rep. Tim Huelskamp of the 1st District of Kansas

Rep. Jim Jordan of the 4th District of Ohio

Rep. Mike Kelly of the 3rd District of Pennsylvania

Rep. Steve King of the 5th District of Iowa

Rep. Raul Labrador of the 1st District of Idaho

Rep. Jeff Landry of the 3rd District of Louisiana

Rep. James Lankford of the 5th District of Oklahoma

Rep. Mick Mulvaney of the 5th District of South Carolina

Rep. Stevan Pearce of the 2nd District of New Mexico

Rep. Mike Pence of the 6th District of Indiana

Rep. Ed Royce of the 40th District of California

Rep. Steve Scalise of the 1st District of Louisiana

Rep. Jean Schmidt of the 2nd District of Ohio

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