1-1-2011

Florida v. HHS - Amicus Brief of Family Research Council

Family Research Council

Nos. 11-11021 & 11-11067

In the
United States Court of Appeals
for the Eleventh Circuit

STATE OF FLORIDA, by and through Attorney General Pam Bondi, et al.,
Plaintiffs-Appellees/Cross-Appellants,

and

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,
Defendants-Appellants/Cross-Appellees,

On Appeal from the United States District Court
for the Northern District of Florida

BRIEF OF *AMICUS CURIAE* FAMILY RESEARCH COUNCIL IN SUPPORT OF APPELLEES/CROSS-APPELLANTS AND AFFIRMANCE IN PART

KENNETH A. KLUKOWSKI
Counsel of Record
FAMILY RESEARCH COUNCIL
801 G Street N.W.
Washington, D.C. 20001-3729
(202) 393-2100
(202) 393-2134

Attorney for Amicus Curiae

**CERTIFICATE OF INTERESTED PERSONS AND
FED. R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT**

Pursuant to the Federal Rules of Appellate Procedure, *Amicus Curiae* Family Research Council declares the following:

The Family Research Council has not issued stock to the public, has no parent company, and no subsidiary. No publicly-held company owns 10% or more of its stock, as the Family Research Council is a 501(c)3 organization and has issued no stock. Pursuant to 11th Cir. R. 26.1-1, undersigned counsel certifies that, to the best of his knowledge, the list of persons or entities that have or may have an interest in the outcome of this case is adequately set forth in Appellants' opening brief and the subsequently filed briefs of the other *amici* in this case, including that the aforementioned list references the following:

Amicus Curiae

Family Research Council

Counsel for Amicus Curiae

Klukowski, Kenneth A.

Dated May 11, 2011

Respectfully submitted,

s/ Kenneth A. Klukowski
Kenneth A. Klukowski

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

INTEREST OF *AMICUS CURIAE*[1]

The Family Research Council 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 legislative and regulatory enactments that protect and strengthen family rights and autonomy, and assists in legal challenges of statutes and administrative actions detrimental to family interests. FRC informs and represents the interests of 39 state organizations and over 500,000 citizens on a daily basis.

Various provisions of Patient Protection and Affordable Care Act (ACA) are contrary to family values and family interests. They impair the ability of families to make medical decisions in consultation with healthcare providers, imposing mandates upon individuals limiting healthcare choices, upon employers that reduce the options they can extend to employees, upon insurers that will increase the costs of premiums and thereby make insurance less affordable. These interests are thus central to FRC's organizational mission, and will only be fully addressed by ACA being held unconstitutional in its entirety.

[1] *Amicus curiae* certifies that all parties have consented to the filing of this brief, that no party or counsel for any party authored this brief in whole or in part, and no person other than *amicus curiae* contributed any money intended to fund this brief's preparation or submission.

STATEMENT OF THE ISSUES

1. Whether Congress's authority to regulate interstate commerce includes the power to compel individuals to enter into commerce so that the federal government may regulate them.

2. Whether it is coercive for Congress to condition all existing federal Medicaid funding—billions of dollars representing approximately 40% of all federal funding to the States—on the States' acceptance of new expansions to the Medicaid program.

3. Whether the unconstitutional provisions are nonseverable from the remainder of the Act given their close relationship and the Government's repeated insistence that the Individual Mandate is necessary for the Act's other insurance reforms.

4. Whether all or only some of the Plaintiffs have standing to challenge the Individual Mandate.

SUMMARY OF ARGUMENT

Severability doctrine usually enables a court to excise an unconstitutional provision from a statute while preserving the remainder. In other situations, it requires invalidation of much or all of the statute.

Under the "Individual Mandate" of Section 1501 of the Patient Protection and Affordable Care Act (ACA), most Americans must purchase federally-approved health insurance beginning in 2014. Appellee States and National Federation of Independent Business (NFIB) argue both that this provision is unconstitutional, and that it cannot be severed from the remainder of ACA.

Severability presents two alternatives regarding a statute's nature. One is that Congress intended a statute as a bundle of separate legislative embodiments, which are bundled together in a single enactment like a series of shorter, stand-alone laws. The second is that a statute embodies a carefully-balanced legislative deal, which Congress negotiated to address competing policy priorities, any modification of which could result in the bill failing. ACA falls into the latter category.

The Supreme Court's most recent restatement of severability doctrine in 2010 reaffirms that the relevant part of a severability analysis examines congressional intent. A court must determine whether the "legislative bargain" embodied in the statute can still be fulfilled without the invalid provision. Given

the admitted purposes of ACA, the statute's main purpose cannot be achieved without the Individual Mandate.

The Supreme Court expounded three principles underlying severability in 2006. The second of these is that is that a court cannot reformulate a statute in order to save it. The third is that a court cannot circumvent legislative intent by severing a provision Congress regards as central to the statute. Both of these principles would be violated without the Individual Mandate.

The text of ACA also requires holding the Individual Mandate nonseverable. Congress declared in the statute's text that Section 1501 is essential to ACA functioning as intended. Under the canon against surplusage, this Court must give effect to Congress's words in the statute.

Alternatively, if this Court declines to invalidate ACA in its entirety, at minimum there are various provisions that must be invalidated with the Individual Mandate. These include the guaranteed-issue and community-rating provisions, the Medicaid expansion, and the Employer Mandate, among others. Each of these is inextricably linked to the Individual Mandate, and stand or fall with Section 1501.

ARGUMENT

Severability doctrine is comprised of the rules by which a court can invalidate one provision of a statute while preserving the remainder intact. Under most circumstances, severability enables a court to surgically excise an unconstitutional provision from a statute without doing violence to the remainder. In other situations, it requires invalidation of much—or all—of the statute at bar.

After 2013 most Americans must purchase health insurance under Section 1501 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 243 (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"). The purpose of the Act is to achieve "near-universal" healthcare coverage. ACA § 1501(a)(1)(D). Appellees (twenty-six States, the National Federation of Independent Business (NFIB), and private individuals) argue that Section 1501 (the "Individual Mandate") both is unconstitutional and cannot be severed from the remainder of the Act, such that invalidating the Individual Mandate and accompanying statutory penalty require this Court to invalidate ACA in whole or in substantial part.

The question in this case is not whether *any* of the provisions in ACA can be severed; instead the question is whether the *specific* provisions challenged in this case can be severed, especially Section 1501. All Appellees also argue that various

other provisions of ACA are either unconstitutional or nonseverable from the Individual Mandate, and Appellee States further argue that the Medicaid expansions of the Act are unconstitutional and nonseverable from the Act. For the following reasons, holding the Individual Mandate unconstitutional requires this Court to invalidate the Act in its entirety, or alternatively at minimum certain other sections of the Act in particular.

I. MODERN SEVERABILITY DOCTRINE IS A TWO-STEP INQUIRY EXAMINING CONGRESS'S INTENT.

Severability doctrine is a doctrine of judicial restraint under which a court can often invalidate one provision of a statute while preserving the remainder intact. "The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions." *Champlin Refining Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 234 (1932). In some—but not all—circumstances, it enables a court to surgically excise an unconstitutional provision from a statute without doing violence to the remainder of the Act. "If an unconstitutional [provision] of a statutory scheme is severable . . . we will not invalidate the entire scheme." *United States v. Romero-Fernandez*, 983 F.2d 195, 196 (11th Cir. 1993).

As *Amicus* FRC argued in the district court and the district court agreed, the question of severability is a judicial inquiry of two alternatives regarding the nature of a statute. One possibility is that Congress intended a given statute as a bundle of

separate legislative embodiments, which for the sake of convenience, avoiding redundancy, and contextual application, are bundled together in a single legislative enactment. This effectively makes a statute a series of short laws, every one of which is designed to stand alone, if needs be. The second possibility is that a given statute embodies a carefully-balanced legislative bargain, in which Congress weighs competing policy priorities, and through negotiations and deliberation crafts a package codifying this delicate balance. Congress is thus not voting for separate and discrete provisions. Instead, Congress is voting on a package as a whole, any modification of which could result in the bill failing to achieve passage in Congress. The instant appeal falls into the latter category, not the former.

A. *Free Enter. Fund* restated severability as a two-step inquiry focused on congressional intent in codifying a "legislative bargain."

The Supreme Court recently restated severability doctrine in *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010). In *Free Enter. Fund*, the Court held that severability is a two-step inquiry. First, the remainder of the statute must continue to be "fully operative as a law" absent the invalid provisions. *Id.* at 3161 (citations omitted). If the remainder would be fully operative, the second step is to uphold the truncated statute "unless it is evident that the Legislature would not have enacted those provisions … independently of that which is invalid." *Id.* (citation omitted).

The parties rightly agree that ACA would not become incomprehensible absent Section 1501. Therefore the instant appeal turns on the second prong of severability, ascertaining congressional intent. The Supreme Court's recent restatement of this intent inquiry reiterated what has been a consistent rule for 135 years. *Compare id.* at 3161−62 *with Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685−86 (1987); *Champlin*, 286 U.S. at 234; *United States v. Reese*, 92 U.S. 214, 221 (1876). "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 if fully operative as a law." *Champlin*, 286 U.S. at 234 (citing various cases).

These cases stand for the proposition that a statute can only function in the manner Congress intended if it fulfills the overall purpose for which the statute was passed. Consequently, the rule is that an invalid provision is nonseverable if it is essential to the clear purpose of the statutory scheme, since Congress would not have passed the remaining statute if it fails to achieve Congress's overall objective. That is to say, Congress would not vote to enact a legislative package that does not achieve the core of the "legislative bargain."

In *Alaska Airlines* the Court held that legislative intent turns on whether the overall statutory scheme created by the challenged statute can function in the manner Congress intended when initially enacting the legislation:

> The more 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.

480 U.S. at 685. Thus, this Court's "inquiry boils down to the likely legislative intent," *Ala. Power Co. v. United States Doe*, 307 F.3d 1300, 1307 (11th Cir. 2002), in terms of whether ACA can function in the manner Congress desires without the effect of the Individual Mandate on ACA's overall statutory scheme.

B. This appeal turns on whether the "legislative bargain" intended by Congress can be achieved if Section 1501 is invalid.

Although various aspects of severability doctrine have changed throughout our Nation's history, the aspect involving legislative intent has remained consistent throughout. "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*, 480 U.S. at 684 (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (quoting in turn *Champlin*, 286 U.S. at 234)). In addition, *Alaska Airlines* made clear that even without a severability clause statutes are presumed severable, though that presumption is weaker absent an express clause. *See id.* at 686. And in all cases, a judicial inquiry into congressional intent must determine whether the truncated statute still achieves Congress's purpose in crafting "the original legislative bargain." *Id.* at 685.

The Government attempts to shield the remainder of ACA from Section 1501's invalidity with one Supreme Court footnote, which states the "ultimate determination of severability will rarely turn on the presence or absence of such a [severance] clause." U.S. Br. at 58 (quoting *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968)). But that citation is inapposite; all parties here agree that statutes are usually severable. Moreover, as already shown, the touchstone is congressional intent regarding the overall significance of the invalid provision. As such, the presence of a clause is rarely pivotal to a severability inquiry, and never dispositive. This *Jackson* citation thus gives the misleading impression that the absence of a clause is of no moment. But the entirety of the Supreme Court's severability doctrine proves that *Jackson*'s isolated footnote stands for no such proposition. Indeed, even in *Jackson*, the Court went on to find the challenged provision severable because it was "functionally independent" of the other provisions, and as such it was "quite inconceivable" that Congress "would have chosen to discard the entire statute." *Id.* at 586. In so holding, the Court expressly cited a similar question from 1894, where the Court held the invalid provision severable because the "main purpose of the statute" would not be frustrated. *Id.* at 586 n.28 (quoting *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 396 (1894)). That is exactly the opposite of the instant appeal, where the main purpose of the statute clearly would be defeated without the Individual Mandate.

C. Supreme Court instruction regarding statutory purposes, judicial doubt, and presumptions are essential to the instant appeal.

Both the Federal Government and the States have brought to this Court's attention several Supreme Court severability precedents relevant to the instant appeal. *See* Br. of Appellee States 59−66; Br. of Appellee NFIB 59−62; Br. of U.S. 55−60. However, there are various other principles and instructions from the Court that are of critical importance for this Court to consider.

The citations in the parties' briefs only provide a portion of modern severability doctrine, as the Supreme Court has set forth in considerable detail how this Court is to determine whether Congress's intent is sufficiently satisfied after invalidating a statutory provision for this Court to retain the remainder of the statute. The Supreme Court's holdings in those cases require this Court to hold the Individual Mandate nonseverable from the remainder of the Act.

The Supreme Court articulates the test of congressional intent in the following manner:

> [I]n order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another. Perhaps a fair approach to a solution of the problem is to suppose that while the bill was pending in Congress a motion to strike out the [invalid provision] had prevailed, and to inquire whether, in that event, the statute should be so construed as to justify the conclusion that Congress, not-withstanding, probably would not have passed the [remainder of the statute].

Carter v. Carter Coal Co., 298 U.S. 238, 313 (1936). While such hypothesizing is not without difficulty, a court must nonetheless envision such a scenario in its severability analysis.

If there is significant doubt as to whether Congress would have enacted the statute without the invalid provision, this doubt is sufficient to require this Court to invalidate the entire Act. This Court must "inquire whether it is *plain* that Congress would have enacted the legislation had the act been limited to" its effect without the invalid provision. "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. v. Gutierrez*, 215 U.S. 87, 97 (1909) (emphases added). It need not be clearly evident that the truncated statute would not have been enacted. If the invalid provision is important enough to the overall enactment to cause considerable doubt, a court is to err on the side of caution by invalidating the entire statute and returning the issue to Congress for reconsideration.

Furthermore, a court must determine whether Congress's policy goals can be effectively achieved without the unconstitutional provision to retain the remainder of a statute. In holding an invalid provision severable, a plurality of the Court in *Regan v. Time* found that the "policies Congress sought to advance" would still be

effectuated by the remaining statute, thus achieving "the main purposes" of the statute. 468 U.S. 641, 653−55 (1984) (plurality opinion).

Such a holding is consistent with judicially determining "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." *Allen v. City of Louisiana*, 103 U.S. 80, 84 (1881). The Court set forth how to construe this test, adopting at length by quoting in *Allen* the reasoning of an 1854 Massachusetts state case:

> Such an act has all the forms of law, and has been passed and sanctioned by the duly constituted legislative department of the government; and if any part is unconstitutional, it is because it is not within the scope of legitimate legislative authority to pass it. Yet other parts of the same act may not be obnoxious to the same objection, and therefore have the full force of law, in the same manner as if these several enactments had been made by different statutes. But this must be taken with this limitation, that the parts, so held respectively constitutional and unconstitutional, must be *wholly* independent of each other. But if they are so mutually connected with and dependent on each other . . . *as to warrant a belief that the legislature intended them as a whole*, and that, if all could not carried into 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.

Warren v. Charlestown, 68 Mass. (2 Gray) 84, 98−99 (1854) (emphases added).

Referring to these severability principles as "well settled" by 1902, the Supreme Court elaborated upon the rule concerning legislative intent that:

> If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may

> stand and be enforced. But if an obnoxious provision is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative.

Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 565 (1902). *Allen* and subsequent cases have been reaffirmed in recent case law, confirming that the modern severability rule concerning congressional intent has been consistently applied for more than a century. *See, e.g.*, *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985).

The presumption of severability—a presumption that as explained in Part III is considerably diminished if Congress elects not to include a severability clause—can be overcome if the remaining statute does not fulfill Congress's purpose in enacting the statute:

> [T]his presumption must be overcome by considerations that make evident the inseparability of the provisions or the clear probability that the legislature would not have been satisfied with the statute unless it had included the invalid part.

Utah Power & Light Co. v. Pfost, 286 U.S. 165, 185 (1932) (internal citations omitted). "The presumption in favor of separability does not authorize the court to give the statute 'an effect altogether different from that sought by the measure viewed as a whole.'" *Carter*, 298 U.S. at 313 (quoting *R.R. Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330, 362 (1935)).

For the reasons set forth in the States' and NFIB's briefs, there is not a clear probability that Congress would have been "satisfied" that ACA would achieve its "main purposes" without Section 1501. The "original legislative bargain" codified in the Act cannot be realized without the effect of millions of people purchasing insurance pursuant to the Individual Mandate. Therefore Section 1501 cannot be severed from ACA.

II. THIS INQUIRY INCORPORATES THREE PRINCIPLES UNANIMOUSLY ADOPTED BY THE SUPREME COURT IN THE 2006 *AYOTTE* CASE.

The Supreme Court has clarified and elaborated upon severability doctrine since *Alaska Airlines*, which serves to confirm the argument of the States and NFIB. The Court in 2006 expounded three principles that this Court must apply in conducting a severability examination in a unanimous opinion written by Justice O'Connor. The Court in *Ayotte v. Planned Parenthood of N. New England* was considering a New Hampshire statute involving parental notification before a minor could obtain an abortion, a statute which the Court noted contained an express severability clause. 546 U.S. at 323−24, 331. This unanimous opinion revolved around severability, in which the Court declared three principles that form the rationale underlying severability doctrine:

> Three interrelated principles inform our approach to remedies. First, we try not to nullify more of a legislature's work than is necessary . . . . Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting [a] law to conform it to constitutional requirements even as we try to salvage

> it. . . . Third, the touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature.

Id. at 329−30 (brackets and citations omitted). These principles were referenced and applied by the Court in 2010 in *Free Enterprise Fund*. *See* 130 S. Ct. at 3161−62. While the first principle is uncontested by the parties here, the second two are pivotal in the instant case.

The Supreme Court elaborated on the second principle in *Ayotte* thus:

> Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from "rewrit[ing] [a] law to conform it to constitutional requirements" even as we try to salvage it. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988). Our ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly we have already articulated the background constitutional rules at issue . . . But making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a "far more serious invasion of the legislative domain" than we ought to undertake. [*United States v. Treasury Employees*, 513 U.S. 454, 479 n.26 (1995)].

Ayotte, 546 U.S. at 329−30. Thus, the Court reasoned that surgical exercises to cleanly remove an unconstitutional provision is one thing, but having to rebalance a statutory scheme becomes a "far more serious invasion," and is impermissible.

This too is consistent with over a century of Supreme Court precedent. The Supreme Court has repeatedly instructed that courts cannot sever valid provisions from invalid ones when doing so would reformulate the legislation's central effects. *See Trade-Mark Cases*, 100 U.S. 82, 98 (1879). "So here, to give the

sections in question the effect suggested it would be necessary to reject" Congress's intent for this statute. "To do this would be to introduce a limitation where Congress intended none and thereby to make a new . . . statute, which, of course, [courts] may not do." *Butts v. Merchants & Miners Transp. Co.*, 230 U.S. 126, 135 (1913).

This relates to the third principle in *Ayotte*, which the Court expounded as follows:

> Third, the touchstone for any decision about remedy is legislative intent, for a court cannot "use its remedial powers to circumvent the intent of the legislature." After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all? All the while, we are wary of legislatures who would rely on our intervention, for "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside" to announce to whom the statute may be applied. "This would, to some extent, substitute the judicial for the legislative department of the government."

Ayotte, 546 U.S. at 330 (citing, *inter alia*, *Alaska Airlines*, 480 U.S. at 684; *Reese*, 92 U.S. at 221) (other internal citations omitted); *accord INS v. Chadha*, 462 U.S. 919, 931−32 (1983).

In *Carter* the Supreme Court held regarding several presumably valid statutory provisions that they:

> are so related to and dependent upon the [invalid] provisions … as to make it clearly probable that the latter being held bad, the former would not have been passed. The fall of the latter, therefore, carries down with it the former.

298 U.S. 238, 316 (1936) (citing *Int'l Textbook Co. v. Pigg*, 217 U.S. 91, 113 (1910); *Warren*, 68 Mass. (2 Gray) at 98−99).

The Court has stated in a recent severability case that "where Congress has enacted a statutory scheme for an obvious purpose, and where Congress has included a series of provisions operating as incentives to achieve that purpose, the invalidation of one of the incentives should not ordinarily cause Congress' overall intent to be frustrated." *New York v. United States*, 505 U.S. 144, 186 (1992). The Court in *New York* suggested severability is more likely when the invalid provision is merely an aid to the "main purpose" of a statute, *id.* at 186−87, suggesting that where excising the offensive provision would undermine the statute's manifest purpose, this factor counsels against severability. Applying *Alaska Airlines*, in severing the unconstitutional provision which was unshielded by a severability clause, the *New York* Court held that the invalid provision could be severed both because the remainder of the statute "is still operative and it still serves Congress' objective . . . ." *Id.* at 187. Post-*Alaska Airlines*, courts place even greater emphasis on considering the purpose of the statutory scheme in assessing whether a given provision is separable. The Court reinforced this aspect of its holding by concluding, "The purpose of the Act is not defeated by the invalidation of the [faulty provision], so we may leave the remainder of the Act in force." *Id.*

These latter two principles from *Ayotte* are of central importance in the instant appeal. This Court is required to consult this case's entire record on appeal. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984). As Appellee NFIB sets forth for this Court in its brief, the Government conceded on the record below that various other provisions of ACA "cannot survive if the minimum coverage provision is stricken." R.E. 1765. This is because the Individual Mandate and accompanying statutory penalty for noncompliance constitute the "linchpin" of the entire statutory scheme embodied in ACA.

It is clear from the States' and NFIB's briefs that ACA would be reformulated into a *de facto* different statute without Section 1501. It is manifestly clear that Congress's intent was not to enact a statute that did not achieve near-universal coverage, and without the Individual Mandate millions of individuals would remain uninsured and there would not be sufficient cash flowing into the insurance market to compensate for the various other provisions that will draw cash out of the insurance market. Applying the principles unanimously affirmed by the Supreme Court in *Ayotte*, it is clear that the Individual Mandate is nonseverable from the statute in whole and in part, requiring this Court to invalidate ACA in whole or in substantial part if this Court holds Section 1501 unconstitutional.

III. THE TEXT OF ACA REQUIRES HOLDING SECTION 1501 NONSEVERABLE.

The lack of a severability clause weakens the presumption of severability. However, this case goes beyond normal presumptions, as ACA's text contains an expression of Congress's intent that Section 1501 is essential to ACA functioning in the manner Congress intended. This Court must give effect to these words in the statute, and therefore in invalidating the Individual Mandate this Court must strike down the Act *in toto*.

A. The lack of a severability clause weakens the presumption of severability.

Statues with a severability clause are presumed severable. *Alaska Airlines*, 480 U.S. at 686. This is because when a severability clause is included:

> when validity is in question, divisibility and not integration is the guiding principle. Invalid parts are to be excised and the remainder enforced. When we are seeking to ascertain the congressional purpose, we must give heed to this explicit declaration.

Electric Bond & Share Co. v. Securities & Exchange Comm'n, 303 U.S. 419, 434 (1938).

While the lack of a severability clause is not automatically fatal to an entire statute, it carries a significant effect. It is usually an "elusive inquiry" to determine congressional intent on severability without a severability clause. *Chadha*, 462 U.S. at 932. This is because a severability clause:

> furnishes assurances to courts that they may properly sustain separate sections or provisions of a partly invalid act with out [sic] hesitation

> or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. But it does not give the court power to amend the act.

Hill v. Wallace, 259 U.S. 41, 77 (1922).

Critically, the reason ascertaining intent is usually difficult is not problematic in the instant appeal. The Court explains:

> The inquiry is eased when Congress has explicitly provided for severance by including a severability clause in the statute. This Court has held that the inclusion of 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. In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute. In 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 (internal citations omitted). "Drawing meaning from silence is particularly inappropriate" when "Congress has shown that it knows how to [declare its intent] in express terms." *Kimbrough v. United States*, 552 U.S. 85, 103 (2007). But Congress and the Federal Government are anything but silent regarding the importance of the Individual Mandate to ACA functioning as Congress intended.

B. Congress's declaration that Section 1501 is essential to ACA achieving Congress' purpose is an expression of congressional intent.

Congress is not silent on whether Section 1501 can be severed; Congress indicates in the very text of the statute that Section 1501 is nonseverable. Many

other provisions of the Act would doubtless be severable from the whole if those provisions were held unconstitutional. But those provisions are not at issue in the case at bar. Instead, Congress explicitly found regarding the Individual Mandate:

> [I]f there were no 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.

Pub. L. No. 111-148 § 1501 (a)(2)(G), 124 Stat. 119, 243 (2010) (emphasis added). Congress then reiterated this finding a second time in amendments. *Id.* § 10106 (a)(2)(I), 124 Stat. 908 (codified at 42 U.S.C. § 18091(a)(2)(I)).

Even without this finding, the removal of a severability clause from an earlier version of ACA—a fact the Government concedes, *see* U.S. Br. at 59 n.10—is itself significant. As NFIB quotes from the Ninth Circuit, *see* NFIB Br. at 61, while removing the clause is not dispositive, "it does suggest that Congress intended to have the various components of the [healthcare] package operate together or not at all." *Gubiensio-Ortiz v. Kanahele*, 857 F.3d 1245, 1267 (9th Cir. 1988). The Ninth Circuit has recently reaffirmed that same principle, holding:

> When Congress deliberately makes a decision to omit a particular provision from a statute—a decision that it is aware may well result in the statute's wholesale invalidation . . . we would not be faithful to its legislative intent were we to devise a remedy that in effect inserts the

> provision into the statute contrary to its wishes. Such an action would be inconsistent with our proper judicial role.

Planned Parenthood Fed'n of Am. v. Gonzales, 435 F.3d 1163, 1187 (9th Cir. 2006), *rev'd sub nom. on other grounds Gonzales v. Carhart*, 550 U.S. 124 (2007).

The removal of the severability clause from the entire legislation, conjoined with Congress expressly finding the Individual Mandate particularly essential to the statute, leads to the conclusion that while perhaps other sections of ACA might be severable, Section 1501 is definitely nonseverable.

C. The canon against surplusage requires this Court to give effect to Congress's finding of the Individual Mandate's necessity.

Under the canon against surplusage, this Court is required to give some legal effect to this declaration of congressional intent. The only plausible reading of Congress declaring the Individual Mandate "essential to creating effective health insurance markets"—which is manifestly the "main purpose" of ACA's statutory scheme—is to hold the Individual Mandate nonseverable from the Act.

In the formative years of judicial power, the Supreme Court stated that regarding a legal text, it "cannot be presumed that any clause . . . is intended to be without effect . . . unless the words require it." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803) (*dictum*). Although the *dictum* in *Marbury* specifically referenced the Constitution, that canon against surplusage has long since been elevated to a holding regarding not only the Constitution, but also statutes. *See*,

e.g., *Begay v. United States*, 553 U.S. 137, 153 (2008); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). Simply put, if a provision is found within the four corners of the statute's text, then any court must assign a legal effect to that provision unless there is some compelling reason not to do so.

While the Court set aside Congress's findings in *United States v. Morrison*, 529 U.S. 598 (2000)—a case heavily implicated in the Commerce Clause aspect of the instant appeal—the Supreme Court's reasoning in *Morrison* is inapposite here. In the statute at issue in *Morrison*, Congress had made congressional findings pertaining to the impact on interstate commerce of the violence at issue in that statute. *See id.* at 610−14. However, the Court in *Morrison* set aside those findings as factual matters that would result in the Commerce Clause being eviscerated of any meaningful way to constrain federal power by casting too broad a net under the auspices of the Commerce Clause. *See id.* at 612−17.

Here, by contrast, in a severability inquiry this Court is not examining findings of fact, and is instead looking for indicia of Congress's intent. Whether Congress's finding that the Individual Mandate as a factual matter is truly essential to comprehensive reform of the health insurance market is irrelevant to the self-evident fact that by making such a declaration, Congress *believed* the Individual Mandate essential. Therefore Congress *intended* Section 1501 to be nonseverable because Congress would not have voted to enact ACA without the Individual

Mandate if Congress believed Section 1501 necessary to ACA functioning in the *manner* Congress intended.

IV. THIS COURT MUST AT MINIMUM HOLD SPECIFIC PROVISIONS OF ACA NONSEVERABLE FROM SECTION 1501.

Although for all the reasons set forth in Parts I, II, & III, this Court should invalidate ACA in its entirety, in the alternative there are a number of provisions that must at minimum stand or fall with the Individual Mandate. The Supreme Court has occasionally found statutes partially severable. *E.g.*, *Planned Parenthood v. Danforth*, 428 U.S. 52, 83 (1976); *Buckley*, 424 U.S. at 108−09; *Alton*, 295 U.S. at 361.

"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." *Allen*, 103 U.S. at 83−84 (emphases added). If this Court rightly holds the Individual Mandate unconstitutional, but declines to invalidate ACA *in toto*, this Court must then determine whether various provisions are not wholly independent of Section 1501, in which case those provisions must fall along with the Individual Mandate.

A. ACA's text requires, and the Government concedes, that Sections 1001 and 1201 cannot be severed from Section 1501.

First, as shown above, ACA's text declares that the Individual Mandate is essential the guaranteed-issue and community-rating provisions of the Act. Those provisions in ACA §§ 1001, 1201, disallow excluding people with preexisting conditions and require insurance premiums to reflect aggregate health conditions as opposed to the health risk factors of individuals. The government has conceded that these provisions stand or fall with Section 1501. R.E. 1765. The district court considered all this in stating that these provisions are inextricably linked. R.E. 2069, 2074. Taking these factors together, there is no basis in judicial precedent whatsoever for this Court to hold that Section 1501 can be severed from ACA §§ 1001, 1201.

B. Moreover, ACA's Medicaid expansion cannot be severed from Section 1501.

In addition, the Medicaid expansion cannot be severed from the Individual Mandate because they work together to achieve the same purpose. The goal of the statute, as previously noted, is to achieve "near-universal" coverage. The Individual Mandate is intended to do this by forcing those who allegedly have the means to currently afford health insurance to purchase it. The Act also vastly expands Medicaid, ACA § 2001, and low-income subsidies, §§ 1401, 1402. This expansion is to provide coverage for individuals who cannot afford to comply with

the Individual Mandate. The States correctly argue on cross-appeal that this expansion is an unconstitutional coercion of the States by exceeding Congress's power under the Spending Clause. That aside, this Medicaid expansion is inextricably linked to the Individual Mandate as they operate in tandem to fulfill Congress's purpose for the Act.

The purpose of partial invalidation is "to allow the statute to operate in a manner consistent with congressional intent." *United States v. Booker*, 543 U.S. 220, 227 (2005). Without both the Individual Mandate and the Medicaid expansion, the Act cannot "function in a *manner* consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685. Therefore if this Court invalidates Section 1501, this Court must also invalidate the Medicaid expansion.

C. Various additional sections cannot be severed from Section 1501.

There are various other provisions of ACA that also cannot be severed from the Individual Mandate.

Above all remaining sections of the Act, this Court cannot separate the Individual Mandate from the "Employer Mandate" requiring all employers with 50 or more employees to provide federally approved forms of healthcare insurance, and subjecting non-complying employers to a draconian per-employee penalty. ACA § 1513. The Employer Mandate is nonseverable for the same reasons that the Medicaid expansion cannot be severed. It is the third of three major ACA

components to achieve near-universal healthcare coverage, by seeking to ensure that every person employed by a large organization has access to healthcare. Coupled with the Individual Mandate compelling individuals that may be self-employed or employed with a small or mid-sized employer to purchase insurance, and the Medicaid expansion covering low-income and unemployed persons, the Employer Mandate is how Congress would achieve its purchase.

Likewise, the CLASS Act cannot be severed from the Individual Mandate. This title creates a healthcare system for community living. *See* ACA tit. VIII, § 8001. Although not on the scale of ACA §§ 1001, 1201, 1501, 1513, 2001, nonetheless ACA § 8001 creates a system targeting a particular segment of the American population for health insurance to achieve near-universal coverage, providing that population with various benefits. It is designed to act in tandem with millions of newly-insured, mostly-healthy individuals as a result of the Individual Mandate, specifically taking advantage of the billions of dollars injected into the national health-insurance pool as a result of Section 1501. Without the Individual Mandate, Section 8001 must fall.

D. Beyond these, Congress's clear purpose for ACA would be frustrated unless all ACA provisions burdening the insurance industry are held nonseverable from Section 1501.

As this list demonstrates, there are many provisions of the Act that become unworkable without the Individual Mandate. For example, other provisions that are

particularly linked to the financial impact of the Individual Mandate, and thus should fall with Section 1501, include ACA § 9001 (limiting financial health savings account benefits); § 9003 (restricting obtaining over-the-counter medications); § 9010 (health insurance industry fees); § 9015 (Medicare taxes).

These provisions share a common denominator. Along with ACA §§ 1001, 1201, 1501, 1513, 8001, these provisions all have a cash-flow impact on the healthcare insurance industry. They are part of the equation for achieving near-universal coverage.

There are many other such provisions in ACA. The Act contains approximately 450 sections. R.E. 2074. Section 1501 is the "linchpin" of the statute because it ensures the cash flow into the insurance market necessary to offset the resulting costs. Congress would therefore not have introduced the provisions depleting the market of funds without the primary revenue measure to bring funds into that market. Thus if this Court invalidates Section 1501 but declines to invalidate ACA entirely, this Court should instead invalidate all the provisions of the Act that impact the cost of healthcare premiums, in addition to the provisions enumerated above.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the U.S. District Court for the Northern District of Florida in part, in invalidating Section 1501 and holding Section 1501 nonseverable, thus invalidating the Act in its entirety.

Respectfully submitted,

s/ Kenneth A. Klukowski
Kenneth A. Klukowski
Counsel of Record

Attorney for Amicus Curiae
Family Research Council

May 11, 2011

CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for *amicus curiae* affirms and declares as follows:

This brief complies with the type-volume limitation of Fed. R. App. 29(d) and Fed. R. App. P. Rule 32(a)(7) for a brief utilizing proportionally-spaced font, because the length of this brief is 6,954 words, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(a)(7)(B)(iii).

This brief also complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in proportionally-spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Executed this 11th day of May, 2011.

s/ Kenneth A. Klukowski
Kenneth A. Klukowski

Attorney for Amicus Curiae
Family Research Council

CERTIFICATE OF SERVICE

I hereby certify that on May11, 2011, I caused the original and six copies of the foregoing to be sent by Next Day service, to the following:

Clerk of Court,
United States Court of Appeals for the Eleventh Circuit,
56 Forsyth Street, N.W.,
Atlanta, Georgia 30303

and one copy to be sent by Next Day service to each of the following counsel:

Thomas M. Bondy
Attorney, Appellate Staff
Civil Division, Room 7531
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001
(202) 514-5089

Paul D. Clement
Bancroft PLLC
1919 M Street. N.W. Suite 470
Washington, D.C. 20036
(202) 234-0090

Gregory G. Katsas
Jones Day
51 Louisiana Ave. N.W.
Washington, D.C. 20001
(202) 879-3939

Executed this 11th day of May, 2011.

s/ Kenneth A. Klukowski
Kenneth A. Klukowski

Attorney for Amicus Curiae
Family Research Council