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# Florida v. HHS - amicus Brief of American Physicians and Surgeons et al.

American Physicians and Surgeons

No. 11-11021

IN THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATE OF FLORIDA, *et al,*
*Plaintiffs-Appellees*,

v.

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

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

# BRIEF OF THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC., JANIS CHESTER, M.D., MARK J. HAUSER, M.D., LEAH S. McCORMACK, M.D., GUENTER L. SPANKNEBEL, M.D., AND GRAHAM L. SPRUIELL, M.D., AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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May 11, 2011

*State of Florida, et al. v. United States*
*Dep't of Health & Human Svcs., et al.*
No. 11-11021

# CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for *Amici Curiae* certifies that the certificate supplied with Appellants' Brief, served April 1, 2011, and the certificates supplied with Appellees' Briefs, served May 4, 2011, appear complete with the following additions.

Counsel for *Amici* state:

(A) *Amici Curiae*

The Association of American Physicians and Surgeons, Inc.

Janis Chester, M.D.

Mark J. Hauser, M.D.

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No. 11-11021

Counsel for The Association of American Physicians and Surgeons, Inc., makes the following additional disclosure:

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation that is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

/s/ Karen B. Tripp_____ Dated: May 11, 2011
Karen B. Tripp
Attorney for *Amici Curiae*

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## INTERESTS OF *AMICI CURIAE*[1]

*Amici Curiae* ("*Amici*"), which file this Brief with the consent of all the parties, are individual physicians and an association of physicians having a membership that spans the nation. *Amici* file this brief in support of the plaintiffs-appellees, which consist of more than half the states, two private individuals and the National Federation of Independent Business (collectively, "Appellees"),[2] and in opposition to the defendants-appellants, which consist of the United States Department of Health and Human Services, Department of Labor, and Department of the Treasury, and their respective Secretaries (Sebelius, Solis and Geithner)(collectively, "Appellants").[3]

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of this Brief.

[2] The 29 Plaintiffs/Appellees are: Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Commonwealth of Pennsylvania, South Carolina, South Dakota, Texs, Utah, Washington, Wisconsin, Wyoming, Mary Brown, Kaj Ahlburg, and the National Federation of Independent Business.

[3] Appellants were Defendants below.

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

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

*Amicus* Janis Chester, M.D., privately practices psychiatry in Delaware, serves as chair of the Department of Psychiatry at a community hospital, is a member of the faculty at Jefferson Medical

College and holds a variety of positions with organized medicine and psychiatry, locally and nationally.

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

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

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

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

Virginia's Rule 11 Petition to the United States Supreme Court (Docket No. 10-1014) and an *amici curiae* brief to the United States Court of Appeals for the Fourth Circuit in support of the Commonwealth of Virginia (as Appellee and Cross-Appellant)(Docket Nos. 10-1057 &10-1058).

For the reasons set forth below, *Amici* believe ACA is unconstitutional. If upheld, ACA will harm patients and undermine, in fundamental and dangerous ways, the practice of medicine. *Amici* submit this brief in support of the Appellees and urge the Court to affirm Section 1501's unconstitutionality and to further hold that Section 1501 is not severable from the remainder of ACA.

## PRELIMINARY STATEMENT

ACA has divided our nation prior to enactment, during enactment and since enactment. Cf. Abraham Lincoln, Speech of June 16, 1858(Springfield, Ill.) *reprinted in* Yale Book of Quotations 460 (F.R. Shapiro ed. 2006)( "[a] house divided against itself cannot stand").

This appeal and the cross-appeal arise from a challenge, by more than half the States and three other plaintiffs, to Section 1501's and

ACA's constitutionality. *Florida v. United States Department of Health and Human Services* (N.D. Fl.), Case No.: 3:10-cv-91("*Florida Action*"), *appeal docketed*, No. 11-11021-HH (11th Cir.) ("*Florida Appeal*"), The United States District Court for the Northern District of Florida declared Section 1501 to be unconstitutional and not severable from the remainder of ACA.[4] *Florida Action*, Doc 151.

In another case, Virginia has challenged the constitutionality of the individual mandate contained in Section 1501 of ACA ("Section 1501") and of ACA itself. The United States District Court for the Eastern District of Virginia held Section 1501 is unconstitutional and severable from the remainder of ACA and both parties appealed. *Commonwealth of Virginia, ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010)("*Virginia Action*"), *appeals docketed*, Nos. 11-1057 & 1058 (4th Cir.)("*Virginia Appeal*"). Virginia has filed and was denied a Petition for Writ of Certiorari before Judgment.[5] United States Supreme Court Docket No. 10-1014(Denied on April 25, 2011).

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[4] Oklahoma has also commenced a separate action. *Oklahoma v. Sebelius*, Case No.: 6:11-cv-00030 (E.D. Ok.).

[5] Pursuant to Rule 11 of the Rules of the Supreme Court.

Conversely, in *Liberty University v. Geithner*, __ F. Supp. 2d __, 2010 WL 4860299 (W.D. Va. Nov. 30, 2010)("*Liberty Action*"), *appeal docketed*, No.10-2347 (4th Cir.) ("*Liberty Appeal*"), *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882 (E.D. Mi. 2010)("*TMLC Action*"), *appeal docketed*, No. 10-2388(6th Cir.)("*TMLC Appeal*"), and *Mead v. Holder*, __ F.Supp. 2d ___, 2011 WL 611139 (D.D.C.)("*Mead Action*"), *appeal docketed*, 11-5047 (D.C. Cir.)("*Mead Appeal*"), the courts found Congress has power to enact Section 1501 under the Commerce Clause. In total, more than twenty cases have been commenced challenging ACA and its provisions. Plaintiffs/Appellants Petition for Initial *En Banc* Hearing, *Mead Appeal*, at 8 ("*Mead En Banc* Petition").

In addition to Section 1501, *Amici* believe that ACA contains scores of unconstitutional provisions which are not severable from the remainder of ACA.[6] It is axiomatic that whenever a statute contains any unconstitutional provision that is not severable from the remainder of the

[6] These provisions, including Section 1501, violate Article I, Section 7, Clause 2 of the Constitution ("Presentment Clause") because they were simultaneously enacted and amended. *See* Section I, B, 1, *infra*. Furthermore, the test for severability should be reexamined because severance of an unconstitutional provision from a statute lacking a severability clause is a judicial line item veto, a judicial remedy which itself violates the Presentment Clause. *See* Section II, *infra*.

statute, no provision of that statute may be treated as the Supreme Law of the Land pursuant to Article VI. U.S. CONST. art. VI.

Consequently, quickly affirming ACA's unconstitutionality would unburden the federal Judiciary and the Executive Branch as well as the states from years of unnecessary and costly litigation. Furthermore until ACA is declared unconstitutional all the states (including the 26 state plaintiffs herein), consumers, employers and others would spend additional billions of dollars to comply with an unconstitutional statute and billions of dollars will be withdrawn from the Treasury based upon an unconstitutional law. Daily expenditures to comply with ACA unquestionably provide each plaintiff state with standing to challenge ACA's constitutionality.

## SUMMARY OF ARGUMENT

*Amici* believe Congress lacks power to enact Section 1501 for two reasons. First, there is no power to regulate commerce because there is no commerce. *See* U.S. CONST. art. I, sec. 8, cl. 3 ("Commerce Clause"). Second, Section 1501 fails to comply with the Constitution's procedural requirements and substantive restrictions. Procedurally, Congress

violated the Presentment Clause by simultaneously enacting and amending Section 1501. Substantively, Section 1501 invades the "private enclave" enjoyed by patients since the time of Hippocrates. *See United States v. Westinghouse Electric Corp.*, 638 F.2d 570 (3d Cir. 1980); *Miranda v. Arizona*, 384 U.S. 436 (1966).

Appellants' argument that Section 1501 is severable from ACA cannot succeed. Congress has declared, 124 Stat. at 244 and 908-909, and Appellants have argued that Section 1501 is "essential" to ACA, Brief for Appellants at 3 and 28. Furthermore, even if Appellants could establish Section 1501's severability under *Alaska Airlines v. Brock*, 480 U.S.678 (1987), severance (from a statute lacking a severability clause) is a judicial line item veto that transfers legislative power from Congress to the judiciary in violation of the Bicameral and Presentment Clauses - ignoring the principles set forth in *Clinton v. City of New York*, 524 U.S. 417 (1998). Severance is not, as previously held by the U.S. Supreme Court, a doctrine of judicial restraint. *Cf.* Order Granting Summary Judgment, *Florida Action*, Doc 150 at 64; Memorandum Opinion, *Virginia Action*, Doc 161 at 40.

> The Court observed that "[s]everability is a doctrine of judicial restraint," and that "just this past year," the Supreme Court

> reaffirmed that courts should "try to limit the solution to the problem," severing any problematic portions while leaving the remainder intact," and that the normal rule is that partial invalidation is proper. Op. 64 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S.Ct. 3138, 3161 (2010).

Memorandum in Support of Defendants' Motion to Clarify, *Florida Action*, Doc 156 ("*Clarification Motion*") at 3. Rather, severance is a doctrine of judicial activism that allows, and possibly even encourages, constitutional sloppiness by Congress and the President. In light of *Clinton*, *Amici* suggest *Alaska Airlines* and its progeny no longer apply.

## ARGUMENT

### I. SECTION 1501 IS UNCONSTITUTIONAL

"Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Those powers are constrained by the Constitution's procedural requirements, *see e.g.*, U.S. CONST., art. I, sec. 7, and substantive restrictions, *see e.g.*, *id. at* sec. 9.

#### A. Section 1501 is Not Based on Congress' Power to Regulate Commerce

Appellants have argued that Congress may enact Section 1501

under the Commerce Clause. *Brief for Appellants*, at 24-32, *cf. Id.* at 32-50. Because Section 1501 does not involve any commerce, their argument fails.

Since ACA was enacted last year, the question of whether Congress has the power to enact Section 1501 under the Commerce Clause has arisen in many cases. Section 1501 was upheld in the *Liberty, Mead* and *TMLC Actions* but was declared unconstitutional in the *Florida* and *Virginia Actions*.[7]

Given the disparate district court opinions, the gravity of the issue, and the novelty of the issue before this Circuit, *Amici* offer the following analysis to the Court.

1. The individual mandate involves no commerce

Congress lacks power to enact Section 1501 under the Commerce Clause. The language and structure of article I, section 8 make this clear. Under clause 3, the power is "to regulate" and the object of that power is "commerce". The Constitution does not give Congress power to regulate *all*

[7] The district courts in the *Florida* and *Virginia Actions* disagreed on whether Section 1501 is severable from ACA. The *Virginia Action* held Section 1501 is severable. The *Florida Action* held it is not severable.

commerce. Rather, the Constitution restricts Congress to regulating a set of only three types of commerce: (1) "with" the Indians; (2) "among" the several States; and (3) "with" foreign nations. All three members of this set necessarily involve at least a dyad or pair of parties. Without two or more parties, the words "with" and "among" are meaningless.

Therefore, in deciding this matter, the Court should undertake a two-step analysis. First, it should determine if Congress attempted to regulate "commerce." Only if this question is answered affirmatively, should the Court undertake step two, an analysis of the "interstate commerce" sub-clause.

With regard to step one, the key is to understand that "commerce" may be viewed as the interrelationship, traffic, agreement or transaction between parties. For example, we may see vendors paired with vendees; sellers paired with buyers; lessors paired with lessees; borrowers paired with lenders; and debtors paired with creditors. Expressed in mathematical terms, "commerce" is Euclid's line between two points or Einstein's interval between two points on an ideal rigid body, where the points represent the two parties and the line or interval represents the commercial transaction, agreement, traffic or interrelationship. Euclid,

*Elements of Geometry* 6 (Greek Text of J.L. Heiberg (1883-1885))(R. Fitzpatrick, ed. & translator) ("And the extremities of a line are points"); Albert Einstein, *The Meaning of Relativity* 4 (5th ed. 1956)(posthumously); *cf.*, Paul A. Samuelson, *Economics* 3 (10th ed., 1976) (Similar to the definition of commerce, "economics" is defined as requiring at least a dyadic relationship. "Economics... is the study of those activities which, with or without money, involve exchange transactions among people") (emphasis added).[8]

The U.S. Supreme Court has long understood and reiterated that "commerce", by definition, necessarily involves two or more parties.

> The commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed ..." The *Gibbons* Court, however, acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause.
>
> > It is not intended to say that these words comprehend that commerce, which is completely internal, which is *carried on between man and man* in a State, or between different parts of the same State, and which does not extend to or affect other States....

[8] Professor Samuelson's treatise was the most popular economics textbook of the second half of the twentieth century. He was Economic Advisor to President Kennedy and received the second Nobel Prize in Economics in 1970. Apparently, the 111th Congress, Appellants and *amici* who support them, ignore Samuelson's definition of "economics" in order to establish "substantial economic effects."

*United States v. Lopez*, 514 U.S. 549, 553 (1995)(*quoting Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824)(Marshall, Ch. J.)(emphasis added).

While "commerce" may occur between two people, between two entities, or between a person and an entity, there is no "commerce" when a single person or entity is involved. Since Section 1501 is an individual mandate, it does not pertain to a transaction, agreement, traffic or interrelationship between two parties. Rather Section 1501 attempts to regulate individuals where no counterparty exists. The individual mandate involves no "commerce". Without "commerce", there is no need to examine the interstate commerce sub-clause.

2. Courts may not rely on Section 1501's "findings" to establish Congressional power under the Commerce Clause

*Amici* believe the "substantial effects" test leads to false positive results and should not be the sole basis to establish Section 1501's constitutionality under the Commerce Clause.

Appellants have pointed to a litany of Congressional "findings" to argue that Congress properly enacted Section 1501 under the Commerce Clause - on the basis that the lack of adequate insurance coverage has a

substantial effect upon the economy. Defendant's Motion for Summary Judgment, *Virginia Action*, Doc 91, at 4, 7, 8, 11-13, 15-16, 21, 26-27, 33 (pointing to findings in §§ 1501(a) & 10106(a). Applying this rationale, a court could easily find the other enumerated powers of Congress superfluous. The powers to declare war, U.S. CONST. art. I, sec. 8, cl. 11, establish post offices, *Id.* at cl. 7, and provide exclusivity for inventors, *Id.* at cl. 8, obviously have substantial economic effects. Under the Appellants' theory, these clauses are unnecessary.

While a court may refer to Congressional findings to support its conclusion that Congress has power to enact a provision, a court must be able to examine Congressional "findings" if judicial review is to have any meaning.[9] No deference is warranted. In this case, Congress presented findings which were based on numerous assumptions and extrapolations, some of which contradict each other. *Compare* Sections 1501(a)(2)(E) *and* 10106.

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[9] When a court blindly accepts Congressional findings as facts, it amounts to a dereliction of its duties. Long ago, the U.S. Supreme Court said: "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1Cr.) 137, 177 (1803). It is not free to "close [its] eyes on the Constitution, and see only the law, [*e.g.* ACA]." *Id.* at 178.

Whenever Congress presents "findings", those so-called "findings" are not facts at all, but rather something else - a conclusion based on a vote. Congressional "findings" often involve numerous extrapolations based on a plethora of assumptions. More than a century ago, Mark Twain humorously expressed the dangers of extrapolation as follows:

> In the space of one hundred and seventy-six years the Lower Mississippi has shortened itself two hundred and forty-two miles. That is an average of a trifle over one mile and a third per year. Therefore, any calm person, who is not blind or idiotic, can see that in the Old Oolitic Silurian Period, just a million years ago next November, the Lower Mississippi River was upward of one million three hundred thousand miles long, and stuck out over the Gulf of Mexico like a fishing-rod. And, by the same token any person can see that seven hundred and forty-two years from now the Lower Mississippi will be only a mile and three-quarters long....

Daniel Huff, *How to Lie with Statistics* 142 (1954)(*quoting* Mark Twain, *Life on the Mississippi*).

Saying something is a fact does not make it so. For example, under Section 1501(a)(2)(E), Congress made the following finding: "Half of all personal bankruptcies are caused in part by medical expenses...." In Section 10106 (which amended Section 1501), Congress made the following contradictory finding: "62 percent of all personal bankruptcies are caused in part by medical expenses." It is impossible for both "findings" to be true. Perhaps, neither is true.

Considering this internal contradiction and the inherent dangers associated with extrapolating a decade into the future, *Amici* respectfully suggest that the Court not defer to the Congressional findings concerning Section 1501 to establish the power of Congress to enact the individual mandate. Rather, the Court should question the validity of the underlying assumptions and extrapolations.

B. Congress May Not Violate Constitutional Constraints

It is axiomatic that a federal law must comply with the entire Constitution as amended. ACA has not come close. As physicians, *Amici* are concerned by the mandated invasion of patient privacy required by ACA. As citizens, *Amici* are concerned that Congress repeatedly violated the Presentment Clause by simultaneously enacting and amending many of ACA's provisions, including Section 1501. Therefore, this Circuit should affirm the unconstitutionality of Section 1501.

1. Section 1501 may not be enacted and amended simultaneously

Congress has simultaneously enacted Sections 1501 and 10106 of ACA. The former provision creates 26 U.S.C. §5000A, 124 Stat. at 244, while the latter provision revises some portions of 26 U.S.C. §5000A, 124 Stat. at 909. These provisions contain incompatible definitions of "penalty

amount".

Congress may not simultaneously enact and revise any provision within the same statute because that simultaneity violates the Presentment Clause, the "single, finely wrought and exhaustively considered, procedure" which is used to enact Federal legislation. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951(1983); *Clinton*, 524 U.S. at 439-440.

Although simultaneously enacting and revising 26 U.S.C. §5000A may have led to needless complexity, incongruity, and ambiguity for our citizenry and judiciary, the critical constitutional problem is that both the original and revised versions of Section 5000A were presented to the President at the same time. Consequently, 26 U.S.C. §5000A did not exist at the times the House and Senate passed H.R. 3590 nor did it exist when H.R. 3590 was presented to the President. Consequently, Section 10106 merely attempts to amend a nullity. For 26 U.S.C. §5000A to be revisable, Section 10106 must be enacted after section 1501, not simultaneously with it.

Under the Presentment Clause, the President may only approve or veto a bill in its entirety. Because Sections 1501 and 10106 contained

incompatible definitions of "penalty amount", it is impossible for the President to have approved H.R. 3590 (which became ACA) in its entirety. The President's approval of the definition in 1501 contradicted the definition presented to him in 10106 and the President's approval of the definition in 10106 contradicted the definition in 1501. The incompatible definitions of "penalty amount" contained in Sections 1501 and 10106 prevented the House and Senate from having agreed on the definition of "penalty amount." In other words, the House's definition under 1501 negated the Senate's definition under 10106 and the House's definition under 10106 negated the Senate's definition under 1501.

"[R]epeal of statutes, no less than enactment, must conform to Art. I." *Clinton*, 524 U.S. at 438. The same principle applies to revisions and amendment of statutes. Consequently, 26 U.S.C. §5000A should not have been enacted and revised within the same statute. This unconstitutional practice completely infects ACA. Indeed, pursuant to Title X, Congress attempted to simultaneously enact and amend more than ninety ACA provisions.[10]

[10] 124 Stat. at 883-1024.

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

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

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

Given ACA's length and the number of simultaneously enacted and amended provisions, James Madison surely would have considered ACA too long and too incoherent to be understood. Indeed, ACA's length and complexity have not gone unnoticed. *See* Order, *Florida Action*, Doc 167 at 16 ("[ACA], as previously noted, is obviously very complicated and expansive. It contains about 450 separate provisions with different time

schedules for implementation."); *see also* Michael O. Leavitt, "Health reform's central flaw: Too much power in one office," Washington Post (February 18, 2011)(referring to nearly 2000 powers given to The Secretary by ACA); *see also* Ernst & Young, LLP, Summary of the Patient Protection and Affordable Care Act, incorporating The Health Care and Education Reconciliation Act (May 2010)(This *summary* is presented in a small font and is 159 pages long).

2. Congress may not invade a patient's privacy

The individual mandate is an assault on the confidentiality of the physician-patient relationship.[11] For more than two millennia, physicians and patients have understood that a patient receives better care if the patient candidly discloses private information, *e.g.* medical history, symptoms, and treatments, to the physician. U.S. Congress, Office of Technology Assessment, *Protecting Privacy in Computerized Medical Information*, OTA-TCT-576 (pages 5-6, 26-30)(U.S. G.P.O., Sept. 1993). To mandate the purchase of medical insurance and then to require disclosure of that insurance is tantamount to providing the government, as well as

[11] This assault is compounded by Section 1502's compelled disclosure of coverage.

entities it outsources to, with a roadmap to patients' medical information. Under the Constitution, a patient has a right to a "private enclave" where his or her medical care and information are private. The individual mandate obliterates that enclave.

In *Westinghouse*, the Third Circuit eloquently applied the "private enclave" principle to a case involving confidentiality of medical information.

> There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection. Information about one's body and state of health is matter which the individual is ordinarily entitled to retain within the "private enclave where he may lead a private life."

638 F.2d at 577 (*quoting United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956)(Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)). In *Grunewald*, Judge Frank said:

> That right is the hallmark of our democracy. The totalitarian regimes scornfully reject that right. They regard privacy as an offense against the state. Their goal is utter depersonalization. They seek to convert all that is private into the totally public, to wipe out all unique "private worlds," leaving a "public world" only, a la Orwell's terrifying book, "1984." They boast of the resultant greater efficiency in obtaining all the evidence in criminal prosecutions. We should know by now that their vaunted efficiency too often yields, unjust, cruel decisions, based upon unreliable evidence procured at the sacrifice of privacy. We should be aware of moving in the direction of totalitarian methods, as we will do if we

eviscerate any of the constitutional privileges.

*Grunewald*, 223 F.2d at 582. Previously, Judge Frank described the right to a "private enclave" in *United States v. On Lee*, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting), *aff'd*, 343 U.S.747 (1952).

> "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty – worth protecting from encroachment. A sane, decent, civilized society must provide some oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle."

*On Lee*, 193 F.2d at 315-16.[12]

The right to a "private enclave" underlies Fourth and Fifth Amendment jurisprudence. *Miranda,* 384 U.S. at 460; *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 55 (1964)(privilege against self-incrimination); *Tehan v. United States ex rel. Shott, 382* U.S. 406, 415-16 (1966)(both the Fourth and Fifth Amendments involve the "right of the individual to be let alone"); *O'Connor v. Ortega,* 480 U.S. 709,717 (1987)(Fourth Amendment rights of public employees).

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[12] This passage was quoted in *Silverman v. United States*, 365 U.S. 505, 511-12 n.4 (1961).

In *Miranda*, the Court showed a concern regarding creeping encroachments on individual liberties and also quoted *Grunewald* at a crucial point in its analysis.

> Those who framed the Constitution and the Bill of Rights were aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing ... by silent approaches and slight deviations from legal modes of procedure... The privilege was elevated to constitutional status and has always been "as broad as the mischief against which it seeks to guard..."
>
> Thus we may view the historical development of the privilege [against self-incrimination] as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." [*Grunewald*, 233 F.2d at 579, 581-582]. We have recently noted that the privilege against self-incrimination – the essential mainstay of our adversary system – is founded on a complex of values ... All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government – state or federal – must accord to the dignity and integrity of its citizens.

*Miranda*, 384 U.S. at 459-60(emphasis added)(citations omitted).

To protect personal medical information, the most private of private enclaves, an individual must be allowed to pay for medical care directly and not be required to purchase health insurance. Typically, at the moment a health insurance carrier enrolls an individual, it requires that individual to disclose his or her complete medical history. *See, e.g.*,

Empire BlueCross/BlueShield Form ENR-02968 (Rev1/11) at 5. Furthermore, as an insurance carrier pays claims to physicians, hospitals, pharmacies, *etc.*, on an individual's health insurance policy, the carrier amasses more of that individual's private medical information. By forcing individuals to purchase medical insurance, ACA destroys a patient's right and ability to keep medical information private.[13]

To put a patient's constitutional rights in perspective, consider the victim and perpetrator of a violent crime. While *Miranda* allows a perpetrator to retreat into a "private enclave," ACA appears to prevent a victim-patient from totally remaining silent by compelling the victim-patient to disclose certain private information. The victim-patient's private enclave is thereby compromised. The victim-patient is put in a worse position than his or her alleged attacker.

[13] The risk of loss of private information is real. Today, many private insurers, federal agencies and their respective business associates outsource at least part of their operations. GAO, PRIVACY: Domestic and Offshore Outsourcing of Personal Information in Medicare, Medicaid, and TRICARE, Report No. 06-676 (Sept. 2006). Therefore, a patient has little actual knowledge or control over who sees his or her confidential information.

## II. ACA IS UNCONSTITUTIONAL BECAUSE SECTION 1501 IS NOT SEVERABLE

The traditional test for severability is well-known:

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

*New York v. U.S.*, 505 U.S. 144, 186 (1992). Nor, as a matter of logic and judicial consistency, should that Congressional silence raise a presumption in favor of severability.

Appellants are prevented from arguing that Section 1501 is severable if it is unconstitutional for two reasons. First, Congress has declared that Section 1501 is "essential" to ACA. 124 Stat. at 244 ("The requirement is <u>essential</u> to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs"), 908 ("The requirement is <u>essential</u> to creating effective health insurance markets in which improve health insurance products that are guaranteed issue and do not exclude coverage of

preexisting conditions can be sold") and 909 ("The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs") (emphases added).

Second, Appellants have consistently and repeatedly admitted that the individual mandate is "essential" to ACA. Brief for Appellants at 3 ("minimum [essential] coverage provision is "essential" to the Act's reforms that prevent insurers from denying coverage because of an individual's medical condition or history…") and at 28 ("The minimum [essential] coverage provision is essential to the Act's guaranteed-issue and community-rating insurance reforms")(emphases added); Defendant's Motion for Summary Judgment, *Virginia Action* Doc 91 at 1, 13-16, 25-29; Order Granting Summary Judgment, *Florida Action* Doc 150 at 63-64 ("the defendants concede that [the individual mandate] is absolutely necessary for the Act's insurance market reforms to work as intended. In fact, they refer to it as an 'essential' part of the Act at least fourteen times in their motion to dismiss"); Brief for Appellant, *Virginia Appeal*, Doc 21 at 34-39; Order, dated March 3, 2011 [Clarifying Order Granting Summary Judgment, dated January 31, 2011], *Florida Action* Doc 157 at

6-8.

Furthermore, neither Section 1501 nor any other unconstitutional provision in ACA may be severed to save the remainder of ACA because severance is a judicial line item veto. In *Clinton,* Presidential line item vetoes were declared unconstitutional. 524 U.S. at 447-449. In *Chadha,* Congressional vetoes were declared unconstitutional. 462 U.S. at 959. Although the U.S. Supreme Court has, on occasion, severed defective provisions of federal statutes, *see e.g.*, *Alaska Airlines*, 480 U.S.678, that remedy should be unavailable to courts in light of *Clinton and Chadha*. The Bicameral and Presentment Clauses require the House and Senate to pass precisely the same text – not a single word or punctuation may vary between the bills passed by each chamber. *Clinton*, 524 U.S. at 448. The judiciary, like the President, has no power to rewrite a statute. Furthermore, the idea that the judiciary be joined with the executive in a "council of revision" was considered and expressly rejected by the Drafters of the Constitution. Brief of Senators Robert C. Byrd, Daniel Patrick Moynihan, and Carl Levin as *Amici Curiae* in Support of Appellees 9-10 in *Clinton v. City of New York* (Docket No. 97-1374).

In addition to violating the Constitution's letter and spirit, the

practice of severing a defective provision from a statute lacking a severability clause is bad policy because: (1) it facilitates legislative sloppiness – a bill's author knows the constitutionality of its provisions will be addressed piecemeal; (2) it allows judicial activism - a court can substitute its own judgment for the legislative bargain that was struck in Congress and agreed to by the President;[14] and (3) it encourages omnibus legislation – which members of Congress may not have sufficient time to read and understand prior to casting their votes.[15]

Regardless of the deference accorded to Congress, this Court may not sever a defective provision from a statute in the absence of a severability clause because severance is a judicial line item veto. This practice substantially alters the dispersion of powers incorporated into the

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[14] Congress, like other legislatures, is an institution that is conducive to vote trading and log-rolling activities. To enact a law, a majority coalition must be formed. Consequently, members of Congress often cooperate to further an individual or collective agenda. Passage of a bill might require the vote of a single member of Congress or Senator. If ACA had contained a severability clause, the legislative bargain made by members of Congress probably would not have been reached. Indeed, a severability clause was included in an early version of H.R. 3590, but was excluded from ACA, as enacted.

[15] The Presentment Clause directs "reconsideration" of vetoed bills - implicitly requiring members of Congress to actually "consider" a bill.

Constitution. It is time to return "all legislative power" to Congress as required by the Constitution's first section. U.S. CONST. art. I, sec. 1.

## CONCLUSION

For the foregoing reasons, *Amici* believe that this Court should affirm that Section 1501 is unconstitutional and that Section 1501 is not severable from the remainder of ACA.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief has been prepared using fourteen point, proportionately spaced, serif typeface: Microsoft Word 2003, Century Schoolbook, 14 point. Excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)B)(iii), this brief contains 5,832 words.

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## CERTIFICATE OF SERVICE

This is to certify that after filing the foregoing Brief of The Association of American Physicians and Surgeons, Inc., et al., as *Amici Curiae* in Support of Plaintiffs-Appellees with the Clerk of the Court and serving same on all parties by commercial courier on May 11, 2011, subsequently on May 12, 2011, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF System, which will also send notification of such filing to registered CM/ECF users.

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