Nos. 11-393 & 11-400

In The
Supreme Court of the United States

NAT'L FED. OF INDEP. BUSINESS, ET AL.,
Petitioners,
v.
KATHLEEN SEBELIUS, ET AL.,
Respondents.

STATE OF FLORIDA, ET AL.,
Petitioners,
v.
U.S. DEPT. OF HEALTH & HUMAN SVCS., ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* THE WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW BLACK LUNG CLINIC IN SUPPORT OF AMICUS CURIAE COUNSEL ON SEVERABILITY

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QUESTIONS PRESENTED

Whether it is evident that Congress, in light of its goal for systemic health-care overhaul, would have preferred no reform at all to a reform law without the individual mandate.

Alternatively, whether the Court should preserve section 1556 of the ACA because Congress would have preferred these provisions to survive from the Act's otherwise invalid parts.

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STATEMENT OF *AMICUS* INTEREST[1]

The Black Lung Clinic ("Clinic") is a legal clinic at the Washington and Lee University School of Law in Lexington, Virginia. The Clinic represents former coal miners and survivors who are pursuing federal black lung benefits. The Clinic's clients are represented by a member of the law school faculty licensed to practice law who works closely with students in the Clinic. Students evaluate claims; develop evidence; conduct discovery, depositions, and hearings; and write motions, arguments, and appellate briefs. In attempting to collect benefits, miners and survivors face formidable teams of lawyers, paralegals, and doctors that the coal companies assemble to challenge these claims. The Clinic currently represents thirty-seven former coal miners and their spouses. Nineteen of these clients are receiving benefits as a direct result of the changes to the Black Lung Benefits Act made in the Affordable Care Act.

Section 1556 of the Act makes two major changes to the Black Lung Benefits Act. These changes remove limiting language to make it simpler for disabled miners and their families to establish that they are entitled to federal benefits. First, § 1556(a) reinstates the fifteen-year rebuttable presumption, which presumptively entitles former

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[1] Pursuant to Supreme Court Rule 37, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of *amicus* briefs and have filed letters reflecting their blanket consent with the Clerk.

coal miners to benefits if they have worked over fifteen years underground and have a totally disabling pulmonary disease. The second, § 1556(b), reinstates a continuation of benefits for surviving spouses whose coal-mining spouse was receiving benefits at the time of their death. The clients of the Clinic already have benefitted from these amendments: nineteen clients who are currently receiving black lung benefits will stop receiving those benefits if the Act is invalidated. Thirteen widows and six former miners, all of whom are receiving benefits, will be left without income on which they rely if the Act is struck down in its entirety. The Clinic has a profound interest in the possibility of the invalidation of the Act. If the Act is totally struck down it would adversely affect our clients; not only the ones currently enjoying benefits under the amendments, but all coal miners or surviving spouses who will bring cases in the future.

SUMMARY OF ARGUMENTS

The Affordable Care Act ("Act" or "ACA") marks an unprecedented expansion in federal government, while simultaneously transforming the health-care industry. Pub. L. No. 111-148, 124 Stat. 119 (2010). In that light, the Court must determine whether, if the individual mandate is struck, Congress would have preferred "no Act" to "an Act severed." The doctrines of separation of powers and judicial restraint curtail the Court's remedial power. The Act's text, purpose, and functionality show Congress's preference for "an Act severed" to "no Act." Legislative history and the day's political realities reaffirm such preference. The debate surrounding health-care reform highlights

Congress's true intention—to pass a reform measure that expands coverage, transforms the health-care industry, and garners sixty votes in the Senate. The Act does just that, even in the mandate's absence. Thus, if the mandate is unconstitutional, the Court should sever it from the remainder of the Act in accordance with Congress's intent.

Alternatively, the uniqueness of the ACA presents the Court with another option. The Act, despite drastically affecting health care, works as an omnibus package of reforms. Some are related to health care, some are not. Specifically, § 1556 bears no relation to either the individual mandate or health care generally. Thus this Court should sever § 1556 from the otherwise invalid ACA. In doing so, the Court works within both precedent and the parameters of separation of powers and judicial restraint.

ARGUMENTS

I. The Court should sever the individual mandate from the remainder of the Act because Congress would have preferred "an Act severed" to "no Act" at all.

In assessing severability, the standard 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." *Champlin Ref. Co. v. Corp. Comm'n*, 286 U.S. 210, 234 (1932). This test has two prongs: first, whether the remaining provisions are constitutionally valid and independently operative; second, whether it is

evident that Congress would not have enacted the law but for the unconstitutional provision. Throughout this analysis, the doctrines of separation of powers and judicial restraint guide the outcome. *See generally Regan v. Time, Inc.*, 468 U.S. 641, 652–53 (1984).

The first prong requires little attention here. This Court will decide whether the expansion of Medicaid is constitutional.[2] The remaining provisions are valid and the mandate's absence does not affect their operation. Yet if the Court deems the individual mandate unconstitutional, the focal question arises: Whether Congress would have preferred "no Act" to "an Act severed." *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) ("The inquiry into whether a statute is severable is essentially an inquiry into legislative intent."). Four factors—text, purpose, functionality, and legislative history—require but one conclusion: "an Act severed."

Demand for overhaul, coupled with Democratic control in Congress and the White House, made health-care reform inevitable. *Cf.* Private Pet'r's Br. 2–5 (discussing the impetus for "[c]omprehensive change of the Nation's system" during the 2008 presidential election and thereafter). The only open issue turned on the

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[2] This brief does not presume the constitutionality of Medicaid expansion under amended 42 U.S.C.A. §§ 1396a, 1396d, which this Court will address in *Florida v. Department of Health & Human Services*, No. 11-400 (U.S. Nov. 14, 2011). Rather, this brief focuses on whether the individual mandate is severable from the remainder of the Act, excluding the Medicaid-expansion provisions.

means. The 111th Congress would have passed this Act, an Act without the mandate, or any other act so long as it expanded coverage, restricted discriminatory practices, and garnered sixty votes in the Senate. *See* Robert Pear, *Senate Passes Health Care Overhaul on Party-Line Vote*, N.Y. TIMES, Dec. 25, 2009, at A1. Only one thing is certain: Congress would pass reform. That was the reality of the health-care debate, and that was the reality of Congress's intent. Therefore, the remainder of the Act must stand even if the mandate does not.

A. The doctrines of separation of powers and judicial restraint set parameters for the Court's relief.

The Court's severability analysis focuses on the appropriate remedy once a statutory provision is struck as unconstitutional. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 329–30 (2006). Separation of powers, however, qualifies that remedy and requires courts to "act cautiously" as the "ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Regan*, 468 U.S. at 652. Thus "court[s] should refrain from invalidating more of the statute than is necessary." *Id.* Anything more ignores the constitutional parameters imposed by the separation of powers doctrine. *Cf. United States v. Reese*, 92 U.S. 214, 221 (1875) (cautioning against the substitution of the "judicial for the legislative department of the government").

The Court also restrains itself and lets Congress fix constitutional infirmities. *See Ayotte*, 546 U.S. at 329–30. In *Ayotte*, the Court recognized

that, as members of the judiciary, "we restrain ourselves from rewriting [ ] law to conform it to constitutional requirements even as we strive to salvage it." 546 U.S. at 329 (internal quotations and citations omitted). The Court must "devise a judicial remedy that does not entail quintessentially legislative work" and leave the otherwise valid remnants for Congress to fix with its pen. *Id.*; *see also Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162 (2010) ("[S]uch editorial freedom . . . belongs to the Legislature, not the Judiciary."). Preference is for severability, and judicial restraint ensures that outcome. *See Ayotte*, 546 U.S. at 329.

These doctrines taken together guide the Court in determining severability. In *Randall v. Sorrell*, 548 U.S. 230, 262 (2006), for example, the Court refused to sever unconstitutional provisions from Vermont's otherwise valid campaign-financing laws. Severance would have required the Court "to write words into the statute . . . , or to leave gaping loopholes . . . , or to foresee which of many different possible ways the legislature might respond to the constitutional objections [the Court] found." *Id.* Under such circumstances, Congress leaves courts no choice but to strike the entire law, and even the most reserved judge or Justice cannot rely on separation of powers or judicial restraint. But if the problematic statute poses few constitutional issues, the Court need only strike the problem, nothing more. *See Ayotte*, 546 U.S. at 329–330 (suggesting that clearly defined constitutional issues beget clearly defined line-drawing for severability) (citing *United States v. Nat'l Treasury Employees Union*,

513 U.S. 454, 479 n.26 (1995)). The ACA, unlike the statute in *Randall*, follows this scenario.

The doctrines of separation of powers and judicial restraint apply with equal force here. On one hand, as discussed below, the Court is asked to assume its "legislative hat" and determine "What Would Congress Have Done?" *but for* the unconstitutional provision. On the other, the Court must act with restraint. It must refrain from violating the "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." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) (quoting *Allen v. Louisiana*, 103 U.S. 80, 83–84 (1881)). And the latter "hat," the Court's own hat, is worn throughout the analysis.

B. The remaining provisions of the Act are valid and operate independently without the individual mandate.

The first prong of severability, a threshold inquiry, turns on the validity and operation of the remaining provisions. *See United States v. Booker*, 543 U.S. 220, 258–59 (2005). The Court need not determine congressional intent "if the balance of the legislation is incapable of functioning independently." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). Yet so long as the remaining provisions are valid and "fully operative as law," the analysis proceeds. *Id.*; s*ee, e.g.*, *Free Enterprise Fund*, 130 S. Ct. at 3161 (declaring the remaining

provisions of the Sarbanes-Oxley Act as "fully operative" without much inquiry).

The remainder of the Act is both constitutionally valid and "fully operative as law" without the individual mandate. *Alaska Airlines, Inc.*, 480 U.S. at 684. Even the most contentious provisions—guaranteed issue, 42 U.S.C.A. §§ 300gg-1, 3, community ratings, 42 U.S.C.A. § 300gg, and the employer mandate, 26 U.S.C.A. § 4980H—"not only stand on their own" but "are independent of" the individual mandate. *Alaska Airlines, Inc.*, 480 U.S. at 689. The mere fact that the mandate is part of the Act's overall scheme does not affect the independent operation of the remaining provisions. This matter is clear, and satisfies the first prong of the severability analysis. *Cf.* Private Pet'r's Br. 42–60 (focusing argument on congressional intent—not whether the remaining provisions are "fully operative as law"); State Pet'r's Br. 36 (same).

C. Congress, through the Act, intended to provide widespread coverage, prohibit discriminatory insurance practices, and transform the health-care system, and the absence of the individual mandate does not disturb that result.

In early 2009, the federal government embarked upon an unparalleled attempt to reconfigure health care. Faced with exorbitant costs and forty-nine million uninsured Americans, a Democratically-controlled Congress passed the ACA through an equally unparalleled legislative process. This Act not only imposes an individual mandate but affects every aspect of this country's health-care

system. Simply, the Act is pervasive. It reaches from the federal government to municipalities, from multinational corporations to Main Street diners, from insurance companies to individuals. Traditional areas of government involvement are expanded; new frontiers are crossed. The end product fundamentally alters this country's health-care system, and the individual mandate serves as a small measure of this massive reform.

Thus, the central issue: whether, if the individual mandate is struck, Congress would have preferred "no Act" to "an Act severed." *See Free Enterprise Fund*, 130 S. Ct. at 3162 (asking whether Congress, faced with the unconstitutional provision, would have preferred "no act" to "an act severed"); *Ayotte*, 546 U.S. at 330 (same); *Booker*, 543 U.S. at 265 (same); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 768 (1996) (plurality) (same); *Brockett*, 472 U.S. at 506–507 (same). The answer is "no." Congress would have preferred this Act, albeit without the mandate, to no reform. The Act's text, purpose, and functionality require this conclusion; the legislative history mandates it; and the political realities reaffirm it. Between a Democratic president, whose platform centered on overhaul, and Democratic supermajorities in both Houses, health-care reform was happening irrespective of the individual mandate. *See* President Barack Obama, State of the Union Address to Joint Session of Congress (Feb. 24, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress ("[W]e can no longer afford to put health care reform on hold."); 155 CONG. REC.

S13800 (daily ed. Dec. 23, 2009) (statement of Sen. Kaufman) ("Make no mistake, we need health care reform now. The status quo—what I call the present health care system—is simply unsustainable."). The challenging parties cannot prove that "it is evident" that Congress would have acted differently without the mandate, and this Court should preserve Congress's intent through severance. *See Alaska Airlines, Inc.*, 480 U.S. at 684.

1. To determine intent, the text itself provides the starting point. *See Booker*, 543 U.S. at 220; *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 390–91 (2000) (Scalia, J., concurring) ("The *only* reliable indication of that intent . . . is the words of the bill that [Congress] voted to make law."). In *Alaska Airlines, Inc.*, the Court stated that "[t]he inquiry is eased when Congress has explicitly provided for severance by including a severability clause in the statute." 480 U.S. 685. In its absence, "silence is just that—silence—and does not raise a presumption against severability." *Id.* at 686

As the Eleventh Circuit aptly noted, the Act lacks a severability clause, even though such a clause was included in an earlier version of the bill. *See Florida v. U.S. Dept. of Health & Human Servs.*, 648 F.3d 1235, 1322 (11th Cir. 2011); *see also* H.R. Rep. No. 111-299, pt. 3, at 114 (2009), *reprinted in* 2010 U.S.C.A.A.N. 474, 537. The clause's removal, however, bears no affect, and it should not cut against severability. The Court favors severability in accord with separation of powers, and Congress's drafting materials acknowledge such preference. *See Brockett*, 472 U.S. at 504 (recognizing severability as the "normal" rule); *Florida*, 648 F.3d at 1322.

Moreover, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968). Applying *Jackson*'s language here, the lack of a severability clause carries little force generally. Even more, the "presence or absence of such a clause" in an unenacted version of the law warrants no weight. *Id.*

The Act's text is telling in that, aside from the congressional findings at 42 U.S.C.A. § 18091, it makes no mention of the mandate or its implications. The Act does not cross-reference the mandate with the guaranteed-issue provisions or any other section. *See* 42 U.S.C.A. §§ 300gg-1, 3. Instead, the mandate textually stands alone. *Cf. Booker*, 543 U.S. at 260 (severing the unconstitutional provision along with "critical cross-references").

2. The statute's purpose further reveals Congress's intent. *See New York v. United States*, 505 U.S. 144, 186–87 (1992). "Common sense suggests 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." *Id.* at 186. So long as "the great body of the statute have operative force, and the force contemplated by the legislature," the failure of one provision, although furthering that purpose, need not take down the remainder. *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 396 (1984).

Health-care reform had two purposes: increase coverage and lower costs. *See* § 18091; 155 CONG. Rec. S12745 (daily ed. Dec. 9, 2009) (statement of Sen. Bacchus) ("The goal of health care reform is to lower costs and provide quality, affordable coverage to American families, businesses, and workers."). The Act, even without the individual mandate, does just that.

From the more significant provisions, such as the employer mandate and the creation of state exchanges, to the less, such as the extension of dependent coverage, the Act expands coverage to the uninsured and dissatisfied consumers. 26 U.S.C.A. § 4980H (employer mandate); 42 U.S.C.A. § 18031 (state exchanges); 42 U.S.C.A. § 300gg-14 (extension of dependent coverage). The Act accomplishes this in multiple ways, none of which hinges on the individual mandate. First, employer coverage, as a result of the employer mandate, will increase by 14.4 million insured individuals.[3] THE LEWIN GROUP, PATIENT PROTECTION AND AFFORDABLE CARE ACT

[3] This number, however, is offset by 17.2 million who will lose employer coverage. *See* LEWIN GROUP 17. From an economic standpoint, employers will find it less costly to drop coverage and allow their employees to obtain Medicaid or premium subsidies through state exchanges. *Id.* Yet this shift is innocuous. Of the 17.2 million losing coverage, 8.6 million will receive premium subsidies in the exchange, 3.7 million will enroll in Medicaid, and 3.9 million will be covered in the exchange without subsidies. *Id.* Only 1 million will go uninsured. *Id.* Arguably, the net effect is de minimis and, if anything, highlights the significance of the employer mandate. Couple that with the small-business tax credits per 26 U.S.C.A. § 45R, and the employer mandate plays a substantial role in expanding coverage notwithstanding the individual mandate.

(PPACA): LONG TERM COSTS FOR GOVERNMENTS, EMPLOYERS, FAMILIES, AND PROVIDERS 17 (2010) [hereinafter "LEWIN GROUP"], *available at* http://www.lewin.com/content/publications/LewinGroupAnalysis-PatientProtectionandAffordableCareAct2010.pdf. Several factors account for this increase, such as new employer penalty payments, lower premiums from the elimination of health status ratings, and the new employer tax credit. *See* LEWIN GROUP 17. The individual mandate, however, affects none of these.

Second, state exchanges, implemented under § 18031, will expand coverage through the creation of an unprecedented open-market for insurance. *See* LEWIN GROUP i (referring to the Act's exchange as the "centerpiece" of the legislation, which "presents consumers with a selection of health care coverage alternatives"). Through these exchanges, individuals and small employers may compare and purchase "qualified health plans"[4] as they deem appropriate—some of whom will receive premium and cost-sharing subsidies from the federal government. *See* CONGRESSIONAL RESEARCH SERVICE, PRIVATE HEALTH INSURANCE PROVISIONS IN PPACA (P.L. 111-148) 18 (2010) [hereinafter CRS, PRIVATE HEALTH PROVISIONS]. According to the Congressional Budget Office ("CBO"), approximately 24 million people will obtain coverage through these exchanges. *See* CBO, SELECTED CBO PUBLICATIONS

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[4] "Qualified health plans" mean plans certified by the Secretary, which will provide a number of "essential health benefits" prescribed by the Secretary, such as ambulatory patient services, hospitalization, and maternity and newborn care. *See generally* 42 U.S.C.A. § 18021.

RELATED TO HEALTH CARE LEGISLATION, 2009–2010, "Final Cost Estimate, March 20, 2010" 4 (2010) [hereinafter "CBO SELECTED PUBLICATIONS"], *available at* http://www.cbo.gov/ftpdocs/120xx/doc12033/12-23-SelectedHealthcarePublications.pdf. Although this number includes the individual mandate, it still highlights the significance of the exchanges' open-market effect. Moreover, the unprecedented nature of the exchanges follows Congress's demand for health-care overhaul. Regardless of the mandate, the mere availability of coverage through an open-market mechanism, such as the state exchanges, will create an influx of participants.

Third, the guaranteed-issue provisions bring in another portion of previously denied consumers, and guaranteed renewability maintains them. 42 U.S.C.A. §§ 300gg-1–3. These provisions operate independently of the mandate, albeit part of the same regulatory scheme. *But see* Resp't's Pet. 10, 31–33 (arguing that if the individual mandate is unconstitutional, the guaranteed-issue and community-rating provisions should fall as well). Displeased as insurance companies may be with severability, the inquiry focuses on the intent of Congress—not the insurance companies' preferences. In light of the impetus for systemic reform, the 111th Congress favored consumers over the insurer. The Act as a whole is a byproduct of that impetus and Congress's intent. *See, e.g.*, 155 CONG. REC. S13820 (daily ed. Dec. 23, 2009) (statement of Sen. Rockefeller) ("Reform is not about reaching perfect agreements on a perfect piece of legislation. Reform is making things better for people, as much as you can for as long as you can, with as much money as

you can possibly collect to pay for it."). The Court need not consider the insurance companies' demands, only Congress's purpose. And the Act fulfills that purpose even in the individual mandate's absence.

Concededly, the mandate's removal may affect the overall cost-structure in light of Congress's goal of reducing the costs. Congress implemented the mandate, along with the guaranteed-issue and community-ratings provisions, to expand coverage to at-risk individuals while containing the costs of premiums. 42 U.S.C.A. § 18091(a)(2)(I) ("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."); *see also* 42 U.S.C.A. §§ 300gg-1, 3 (guaranteed issue); 42 U.S.C.A. § 300gg (community ratings). The removal of the mandate may upset the supply-demand structure, which otherwise would keep premiums low. As a result, subsidies for exchange purchases likely will increase, as will the costs of premiums outside the exchanges.

The severity of this effect is speculative, however, and the Government misplaces its reliance on it. *See* Resp't's Pet. 32. First, data are not available to determine the stress imposed on insurers with the removal of the mandate. Admittedly, empirical studies for states show a negative impact when insurers encounter similar market reforms. *See, e.g.*, Mark A. Hall, *An Evaluation of New York's Reform Law*, 25 HEALTH POL. POL'Y & L. 71, 91–92 (2000) (discussing how a pure community-rating system caused some insurers

to flee New York for fear of insolvency). On a federal level, however, multistate exchanges will increase the risk pool, thereby alleviating the impact of similar market reforms. Any analogy drawn between a state's experience and the projected impact federally is inapposite. Second, § 300gg(a)(2)(B) presumably enables the Secretary of Health and Human Services to assess community ratings state-by-state, with the ability to make adjustments. Both the states and the Secretary can adapt accordingly if the mandate's removal upsets the ratings system. *See also infra* Part I.C.3 (discussing administrative mechanisms that lessen the effects of the mandate's removal).

The mandate's absence also would have a de minimis effect as a revenue generator. The CBO estimates that the Act will reduce the federal deficit by $143 billion over a ten-year period from 2010–2019. CRS, PRIVATE HEALTH PROVISIONS 2. This reduction results from, among other offsetting measures, $17 billion in penalty payments for non-compliance with the individual mandate. *Id.* Absent this figure, the net cost of coverage provisions still would be $805 billion, up from $788 billion with the mandate, which is more than offset by other changes in spending and revenue under the Act. *Id.* Thus, absent the mandate, the Act still reduces the deficit by $126 billion. *Id.* The loss of $17 billion obtained from penalty payments, in this era of government spending, cannot render the Act contrary to Congress's purpose of reducing the deficit. Even so, the deficit still will be reduced without the mandate according to the CBO's calculations. *Id.* Furthermore, any emphasis on the revenue-raising feature of the mandate's penalty payments may be

misplaced. The mandate's enforcement mechanism allows for nothing more than a tax refund withholding. 26 U.S.C.A § 5000A(g). Such toothless enforcement cannot serve as a significant measure to offset costs.

Congress sought health-care reform under the twin goals of expanding coverage and lowering costs. The Act accomplishes these purposes, with or without the mandate. The challenging parties cannot deny the extension of coverage. State exchanges will provide the means, while the private-market-insurance reforms will remove the hurdles. Moreover, the employer mandate, coupled with small-business credits, will open health-care coverage for low-wage, yet full-time, employees. *See* CRS, PRIVATE HEALTH PROVISIONS 7–10. Admittedly, the mandate's removal may affect Congress's goal of reducing costs. Without the mandate, the guaranteed-issue and community-ratings provisions may stress the insurer and Government's ability to cover costs, as well as the overall supply-demand structure intended by Congress. 42 U.S.C.A. § 18091(a)(2)(C), (I). The severability inquiry, however, focuses on Congress's intent, and whether it is evident that Congress would have preferred "no Act" to "an Act severed." *See Denver Area*, 518 U.S. at 768 ("We can find no reason why [according to its objective] Congress would have preferred no provisions at all to the permissive provision."). The Court's precedent requires severability here, while the record precludes any challenge to it.

3. The functionality of the statute without the struck provision serves as yet another guidepost for

legislative intent. *See INS v. Chadha*, 462 U.S. 919, 935 (1983). In *Chadha* for example, the Court severed § 244(c)(2) of the Immigration and Nationality Act, which unconstitutionally provided Congress with a one-House veto over the Executive's deportation stays. 462 U.S. at 931–35. In severing, the Court noted that the remainder of § 244(c) "survives as a workable administrative mechanism" to effectuate Congress's intent. *Id.* at 935.

Absent the mandate, the remainder of the Act functions both independently and according to Congress's goal of expanding coverage and regulating discriminatory practices. Significant provisions, such as the state exchanges, function independently of the individual mandate. Additionally, the Secretary retains substantial authority over the exchanges. 42 U.S.C.A. § 18031(c). This "administrative mechanism," *Chadha*, 462 U.S. at 935, enables the Secretary to adjust standards for the exchanges, including the issuance of plans, reinsurance, and risk adjustment, if the individual mandate is struck. *Id.* The guaranteed-issue and community-ratings provisions also further Congress's intent to rein in the insurance companies' discriminatory practices. And again, the Secretary presumably may adjust each state's ratings system absent the mandate. 42 U.S.C.A. § 300gg(a)(2)(B). These two "administrative mechanism[s]" ameliorate any distortion caused by the mandate's removal. *Chadha*, 462 U.S. at 935.

Furthermore, provisions that take effect before the individual mandate evince Congress's intent for swift and broad overhaul. *See* CRS,

PRIVATE HEALTH PROVISIONS 3. To name a few: the Secretary must establish a temporary high-risk pool program to provide coverage for eligible individuals no later than ninety days after enactment (42 U.S.C.A. § 18001); insurers are prohibited from rescinding coverage once an insured becomes sick, effective six months after enactment (42 U.S.C.A. § 300gg-12); insurers are prohibited from imposing lifetime benefits caps, effective six months after enactment (42 U.S.C.A. § 300gg-11); and insurers must allow young adults to stay on their parents' plan until the age of twenty six, effective six months after enactment (42 U.S.C.A. § 300gg-14). The list continues. *See* CRS, PRIVATE HEALTH PROVISIONS app. A at 32–40 (detailing "immediate individual and group market reforms" that occur before the mandate's implementation date, January 1, 2014); *see also* HHS, REDUCING COSTS, PROTECTING CONSUMERS: THE AFFORDABLE CARE ACT ON THE ONE YEAR ANNIVERSARY OF THE PATIENT'S BILL OF RIGHTS (2011).

The series of provisions that take effect before the mandate show a clear and definite intent of Congress: Start reform now. None of these provisions, or even provisions implemented after January 1, 2014, relies on the mandate. Rather, the Act functions independently of the mandate. The fact that it may not operate in the same manner is not the inquiry here. Instead, the proper inquiry focuses on Congress's preferred action without the unconstitutional provision. To scrap the entire Act would run counter to Congress's concerted effort to transform the health-care industry.

4. The legislative history, supplemented by the historical context and realties of the legislative bargain, reaffirms Congress's preferred action: "an Act severed" to "no Act." *See Alaska Airlines, Inc.*, 480 U.S. at 685 (evaluating importance of severed provision in the "original legislative bargain"); *Warren v. City of Charlestown*, 68 Mass. (2 Gray) 84, 99 (Mass. 1854). The bargain theory mirrors the inquiry into congressional intent. If the "statute created in [the severed provision's] absence is legislation that Congress would not have enacted," then the entire statute must fall. *Alaska Airlines, Inc.*, 480 U.S. at 685 (discussing "bargain theory" in severability analysis); *see also* Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 60–62 (1995).

In *Warren v. City of Charlestown*, Massachusetts Chief Justice Lemuel Shaw drew upon the bargain theory as applied to severability. 68 Mass. (2 Gray) at 99. There, the state legislature enacted a statute annexing Charlestown to Boston, which took effect upon an affirmative vote of the city's inhabitants and certification by the mayor and board of alderman. *Id.* at 89–90. The mayor and board, however, maintained that some of the statute's provisions were unconstitutional and refused to certify the result. *Id.* at 85, 97. The inhabitants then sought a writ of mandamus from the state supreme court. *Id.* at 84. Chief Justice Shaw found against the plaintiffs, maintaining that the unconstitutional provisions were not severable from the otherwise constitutional provisions. *Id.* at 107. He noted that a statute could encompass both valid and invalid provisions, but:

> [I]f 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 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.

Id. at 99 (emphasis added).

As in contract law, the "conditions, considerations or compensations" agreed upon by the legislature in *Warren* constituted a bargain. The absence of any provision would have precluded mutual consent among the parties—that is, members of the legislature. *See* Movsesian, *supra*, at 61–63. The same applies to the 111th Congress and the ACA; only the individual mandate was not a "condition[ ], consideration[ ] or compensation[ ]" necessary for the legislative bargain. *Warren*, 68 Mass. (2 Gray) at 99. Rather, the legislative history shows that the public option, not the mandate, was the only issue precluding passage.

The challenging parties misinterpret the real legislative bargain here. *See* Private Pet'r's Br. 56–59. The individual mandate played a part in the Act's passage, but so did the state exchanges, the guaranteed-issue provisions, the employer mandate, Medicaid expansion, and the community ratings. 42 U.S.C.A. § 18031 (state exchanges); 42 U.S.C.A.

§§ 300gg-1, 3 (guaranteed issue); 26 U.S.C.A. § 4980H (employer mandate); 42 U.S.C.A. §§ 1396a, 1396d (Medicaid expansion) 42 U.S.C.A. § 300gg (community ratings). All were part of a "legislative bargain" sufficient for the seismic shift in health care. The Act, however, would have passed without any of them. For that matter, any law would have passed so long as it reformed health care and mustered sixty votes in the Senate. Those were the political realities of the day. The real legislative bargain thus turned on how the Act obtained sixty votes in the Senate. *See* Pear, *Senate Passes Health Care Overhaul on Party-Line Vote*, *supra* (discussing the Act's peculiar passage on a sixty-member, party-line vote in the Senate).

From the very outset, the individual mandate divided political parties. Yet Democrats could have passed reform, and ultimately did, without Republicans. The only variable existed among Democrats, and that variable was the public option. *See* Robert Pear & David M. Herszenhorn, *Senate Says Health Plan Will Cover Another 31 Million*, N.Y. TIMES, Nov. 18, 2009, at A1 (discussing the Senate's public option and the difficulty of obtaining sixty votes with it). Once Senator Reid introduced the Senate's initial health-care reform bill, which included a public option, he faced resistance immediately from fellow Democrats. *See* H.R. 3590, 111th Cong. § 1323 (Nov. 19, 2009) (unenacted version with public option). Senator Lincoln (D-AR) staked her position: "I am opposed to a new government-administered health care plan as part of a comprehensive health insurance reform, and I will not vote in favor of the proposal that has been introduced by Leader Reid as written." 155 CONG.

REC. S11933 (daily ed. Nov. 21, 2009). Senator Landrieu (D-LA) also lamented: "I remain concerned that the current version of the public option included in this bill could shift significant risks to taxpayers over time unnecessarily." 155 CONG. REC. S11923–24 (daily ed. Nov. 21, 2009). After a month of opposition to the public option, Senator Nelson (D-FL) asked: "How do we bring it together so we can get the high threshold of 60 votes in the Senate?" 155 CONG. REC. S13078 (daily ed. Dec. 12, 2009). And thus the Senate leadership dropped the public option, and the "legislative bargain" was struck. *See* David M. Herszenhorn & David D. Kirkpatrick, *Lieberman Gets Ex-party to Shift on Health Plan*, N.Y. TIMES, Dec. 15, 2009, at A1 (citing Senator Lieberman's opposition to, and subsequent drop of, the public option as the impetus for passage in the Senate). Absent the option, the Act's passage was foregone so long as reform was the result.

The Act was a bargain among legislators, and it encompassed a variety of reforms including the individual mandate. The political realities, however, limited the bargain's participants to one party, and that party would have passed reform one way or another. The breadth of reform depended on what could muster sixty votes in the Senate. The only contingency was the public option. Without that, any reform would have passed—anything that would have expanded coverage, reformed industry practices, and garnered sixty votes. Although significant, the individual mandate was not a "condition[ ], consideration[ ], or compensation[ ]" for the bargain. *Warren*, 68 Mass. (2 Gray) at 99. So if the question arises whether Congress would have

preferred "no Act" to "an Act severed," the legislative history provides the answer, "an Act severed."

II. The Court should preserve section 1556 of the ACA because Congress would have preferred these provisions to survive from the Act's otherwise invalid parts.

A. The Court has the ability and authority to sever valid provisions from the Act to protect Congress's intent and goals.

The Court's usual method of assessing severability is to apply the well-established, two-prong approach to determine if an invalid provision can be severed from an act, but this top-down method is not the Court's only option. The Court has the authority to look at statutes from the bottom-up and the duty to preserve as much of a law as it can. In keeping with judicial restraint, the Court has held that a single, constitutionally valid provision may be preserved and severed from an otherwise unconstitutional act. *See Denver Area*, 518 U.S at 767. The ACA is unlike any other the Court has examined. It is an unparalleled attempt to reconfigure health care. Most of the provisions are unrelated to the individual mandate, and do not affect personal insurance in any way. *See Florida*, 648 F.3d at 1322. The disparate and unconnected nature of the majority of the provisions of the Act should encourage the Court to use its authority to "sever" individual provisions to preserve them from invalidation.

In the case of *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, the

Court held, in a plurality decision, that a constitutional provision of the Cable Television Consumer Protection and Competition Act was severable from unconstitutional provisions. 518 U.S at 767. The act in *Denver Area* contained three provisions "that [sought] to regulate the broadcasting of 'patently offensive' sex-related material on cable television." *Id.* The first provision permitted the responsible cable operator to "decide whether or not to broadcast such programs on *leased* access channels." *Id.* at 733. The second provision "require[d] leased channel operators to segregate and to block that programming," and the final provision permitted the responsible cable operator to decide whether or not to broadcast such programs on "public, educational, and governmental channels." *Id*.

The Court found that the first provision, § 10(a), was constitutionally valid, and that the second and third provisions, §§ 10(b) and 10(c), were unconstitutional. *See id.* at 753, 760, 766. The Court then addressed severability. Specifically, the Court "ask[ed] whether § 10(a) is severable from the two other provisions." *Id.* at 767. As it always does in these cases, the Court looked to legislative intent, asking "[w]ould Congress still 'have passed' § 10(a) 'had it known' that the remaining 'provision[s were] invalid'?" *Id.* (quoting *Brockett*, 472 U.S. at 506). The act in question had no severability clause, but the Court found "the [a]ct's 'severability' intention in its structure and purpose." *Denver Area*, 518 U.S. at 767. The Court stated that as § 10(c) had "little, if any, effect" on the effectiveness of § 10(a), "its

absence . . . could not make a significant difference." *Id.*

Section 10(b), which required cable providers to segregate and block offensive programming, did affect § 10(a). *Id.* The Court found that this alone did not make § 10(a) "unseverable [sic]." *Id.* As long as Congress's goal was furthered, the Court stated that it could "find no reason why, in light of Congress' basic objective (the protection of children), Congress would have preferred no provisions at all to the permissive provision standing by itself." *Id.* at 767–68. Because § 10(a), even on its own, furthered the goal that Congress set out to achieve, it could be severed from the other two provisions that were found to be unconstitutional. *See id.*

The Court used its power to sever and followed "the normal rule that partial, rather than facial, invalidation is the required course," *Brockett*, 472 U.S. at 504, to sever a single provision from a larger scheme and two invalid provisions. *See Denver Area*, 518 U.S. at 767–68. In this way, the Court upheld the established principle that the "court should refrain from invalidating more of the statute than is necessary," and that it is "the duty of this court . . . to maintain the act so far as it is valid." *Alaska Airlines, Inc.*, 480 U.S. at 684 (quoting *El Paso & Northeastern R. Co. v. Gutierrez,* 215 U.S. 87, 96 (1909)). This is consistent with the well-established, two-prong test discussed above. *See supra* Parts I.B–C; *see also Alaska Airlines, Inc.*, 480 U.S. at 684.

In deciding that a provision is severable from other provisions, the Court's powers are limited. *See, e.g.*, *Booker*, 543 U.S. at 258–59. The Court has stated that it "will sustain the statute only if it can be validly limited . . . and will strike it down if it cannot be so limited." *Id.* at 281 (Stevens, J., dissenting). If severing "would require the Court to write words into the statute" in order to make sense of an act, it is "not possible to sever some of the [a]ct's . . . provisions from others that might remain fully operative." *Randall*, 348 U.S. at 262. The Court has clarified further, stating "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Id.* at 685. This standard is further elaborated in *New York v. United States*, in which the Court stated "[c]ommon sense suggests 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." 505 U.S. at 186. If it cannot be shown that severance would go against the intent of Congress, the Court should preserve individual, valid provisions by severing them.

B. Section 1556 of the Act functions independently as law, and has no connection to the individual mandate or health care generally.

The amendments to the Black Lung Benefits Act ("BLBA") affect neither the individual mandate nor health care, but instead affect benefits available

to coal miners who suffer from pneumoconiosis. *See* 30 U.S.C.A. §§ 921(c)(4), 932(*l*), as amended by ACA § 1556. Given that Congress has enacted this provision that is unrelated to the individual mandate, there is no reason to assume that it would not have enacted § 1556 without the individual mandate. If the individual mandate is found unconstitutional, the Court should sever §1556.

Section 1556 of the Act makes two major changes in the BLBA. The first reinstates a rebuttable presumption that existed prior to the 1981 Amendments to the BLBA. § 1556(a). The reinstated rebuttable presumption provides that miners who can establish that they were employed for fifteen years or more in an underground coal mine and suffer from a "totally disabling respiratory or pulmonary impairment" shall be entitled to a rebuttable presumption that coal mining substantially contributed to that disability. § 921(c)(4). Also, in cases in which a miner's surviving spouse can establish that the miner had fifteen years of underground employment and a totally disabling respiratory or pulmonary impairment at the time of death, there shall be a rebuttable presumption that coal mining significantly contributed to the miner's death. *Id.* The second major change reinstates a continuation of survivor benefits by striking "except with respect to a claim filed under this part on or after the effective date of the BLBA of 1981" from 30 U.S.C.A. § 932(*l*). § 1556(b). The continuation of benefits provides that eligible survivors of a miner who was receiving benefits at the time of his death are not required "to file a new claim for benefits, or refile or

otherwise revalidate the claim of such miner." § 932(*l*). This second provision allows surviving spouses to continue to receive benefits after their spouse has died without re-litigating their claim.

It is notable that in neither of these changes is insurance mentioned or necessary. These changes ease the burden on disabled coal miners and their surviving spouses as they pursue benefits under the BLBA. Both changes reinstate law that existed long before the individual mandate. Nineteen clients of the Clinic are currently receiving black lung benefits due to these amendments. These people will stop receiving the benefits they rely on if the Act is struck down entirely.

C. Congress would have preferred to preserve section 1556 rather than invalidate the entire Act.

As with the Cable Television Consumer Protection and Competition Act described above, Congress's intention of severability can be inferred from the ACA's "structure and purpose." *Denver Area*, 518 U.S at 733. The Eleventh Circuit noted that "the lion's share of the Act has nothing to do with private insurance, much less the mandate that individuals buy insurance." *Florida*, 648 F.3d at 1322. From this, it is clear that Congress intended to accomplish more with the ACA than simply mandating insurance or "creating effective health insurance markets." *Id.* at 1323. Textually, the amendments to the BLBA are independent. Section 1556 does not rely on or refer to any other section of the ACA. Severing the amendments to the BLBA from an unconstitutional provision would not require

the Court to write words into the statute, as these provisions stand alone in the Act. *See Randall*, 548 U.S. at 262 (finding that a provision could not be severed if its removal required the Court to add to the statute to make it constitutional). Congress intended to provide miners with aid in receiving black lung benefits, and to ensure that eligible survivors of miners would not have to re-litigate their case to continue receiving benefits, whether or not they had personal insurance. *See* ACA § 1556; 30 U.S.C.A. §§ 921(c)(4), 932(*l*).

The argument may be made that Congress would not have passed the amendments to the BLBA without the individual mandate as part of the omnibus bill. That argument must fail. The sheer volume of provisions independent of personal insurance renders this argument ridiculous. The idea that Congress would rather throw away the entire law because of a single unconstitutional provision rather than allow independent provisions to survive not only strains logic, but is contrary to the Court's precedent. *See New York*, 505 U.S. at 186. Congress decided to join a large number of independent reforms together in an unparalleled, single law. As noted, the amendments found in § 1556 do not affect health care. To claim that Congress would prefer "no Act" to "an Act severed" would be to invalidate the entire omnibus of reforms, provisions, changes, and restorations simply because a single provision was unconstitutional. This extreme action would be acting counter to the goals and the intent Congress displayed in enacting this massive law, and would go against the principle of judicial restraint, as it is "the duty of this court . . . to maintain the act so far as it is valid." *Alaska*

Airlines, Inc., 480 U.S. at 684 (quoting *El Paso & Northeastern R. Co.*, 215 U.S. at 96).

In the case of the amendments to the BLBA, Congress is not making unprecedented changes, but removing limiting language. *See* § 1556; 30 U.S.C.A. §§ 921(c)(4), 932(*l*). A claim made before 1981 entitled the miner to both the presumption and the automatic entitlement for his survivors that are discussed above. 30 U.S.C.A. §§ 921(c)(4), 932(*l*). The amendments found in the ACA merely extend these entitlements to miners and their survivors who bring claims "after January 1, 2005, that are pending on or after" March 23, 2010. § 1556(c). The claim that Congress would have preferred to strike these provisions rather than to have them without the individual mandate cannot stand. The provisions have already existed long before the mandate, or any other provision of the Act.

The legislative history of § 1556 is limited, but Senator Byrd's comments about the BLBA amendments are enlightening. Senator Byrd states that "[i]t is clear that the section will apply to all claims that will be filed henceforth," and clarifies that the section is meant to "benefit all of the claimants who have recently filed a claim." *See* 156 CONG. REC. S2084 (daily ed. March 25, 2010) (statement of Sen. Byrd). The history available indicates that the amendments to the BLBA are intended to take effect immediately. Nineteen clients of the Clinic already rely on these changes. The individual mandate has not yet taken effect, showing further that Congress's intent in passing the individual mandate was unrelated to its motivation in passing § 1556. For this reason, the

claim that Congress would not have enacted the amendments to the BLBA without the individual mandate holds no water. Congress has allowed miners these rights prior to the ACA's enactment, and extends these rights not only to "all pending claims" but also to "all claims that will be filed henceforth." *See* 156 CONG. REC. S2083-4 (daily ed. March 25, 2010) (statement of Sen. Byrd).

The Court has the power to sever valid provisions of the ACA. *See Denver Area*, 518 U.S at 767–68. If a portion of an act is found to be unconstitutional, it is the duty of the Court to protect and save as much of a statute as can be salvaged. *See, e.g.*, *Alaska Airlines, Inc.*, 480 U.S. at 684–86. Unless it is clear that Congress would have preferred total to partial invalidation, partial invalidation is the rule. *See Brockett*, 472 U.S. at 504. In order to uphold these principles and honor the intent and desire of Congress, the Court should sever and preserve § 1556 should the individual mandate be found to be unconstitutional and not severable.

CONCLUSION

If this Court deems the individual mandate unconstitutional, Congress would have preferred "an Act severed" to "no Act" at all. Thus, the Eleventh Circuit's judgment on severability should be affirmed. Alternatively, if the individual mandate is not severable, this Court should sever § 1556 from the otherwise invalid ACA. Both remedies comport with precedent and follow the Court's doctrines of separation of powers and judicial restraint.

Respectfully submitted,

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