Nos. 11-393 & 11-400

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, ET AL.,

Petitioners,

v.

KATHLEEN SEBELIUS, ET AL.,

Respondents.

STATE OF FLORIDA, ET AL.,

Petitioners,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

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

BRIEF OF THE MISSOURI ATTORNEY GENERAL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND SEVERABILITY

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INTEREST OF AMICUS CURIAE

The Patient Protection and Affordable Care Act ("ACA") was signed into law on March 23, 2010. Among its numerous provisions, the ACA mandates that an applicable individual shall maintain "minimum essential [healthcare] coverage" or they must pay a penalty. 26 U.S.C. § 5000A. On August 3, 2010, the people of the state of Missouri overwhelmingly passed, by referendum, "Proposition C." Mo. Rev. Stat. § 1.330. Proposition C was passed in response to the ACA, and prohibits compelling "any person, employer, or health care provider to participate in any health care system." *Id.* § 1.330.1.

The ACA and Missouri's Proposition C are in conflict. Thus, the state of Missouri has an interest in the application of the ACA and in this Court's determination of the validity of its provisions under the United States Constitution. Because of the Supremacy Clause, the validity and impact of Missouri's Proposition C depends on the constitutionality of the ACA provisions with which Proposition C conflicts, as well as the severability of any conflicting provisions that may be held unconstitutional.

ARGUMENT

Should this court find the individual mandate or the new Medicaid mandate unconstitutional,[1] that finding would not require the entirety of the ACA be struck down. From providing coverage for well child visits and preventative services to establishing reasonable break times for nursing mothers, the ACA today provides benefits to Americans that are not dependent on a mandate that remains two years away.

Severance is a fundamental doctrine of judicial restraint. It derives from the notion that "when confronting a constitutional flaw in a statute, we try to limit the solution to the problem." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328 (2006). Otherwise, courts would frustrate "the intent of the elected representatives of the people" by striking an entire statute when only a portion is unconstitutional. *Id.* at 329. Indeed, "the presumption is in favor of severability." *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). And the question in this case is whether "the balance of the legislation is incapable of functioning independently" or whether the remaining "statute will function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-85 (1987) (emphasis in original). Both are satisfied here.

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[1]/ The expanded Medicaid provisions in the ACA are also unconstitutional because they impose billions of dollars in new costs for states, and leave Missouri no option but to accept the burdens.

I. Provisions of the ACA are Capable of Functioning Independently of the Individual Mandate, and Should be Severed.

Legislation is capable of being severed if "'what is left is fully operative as a law.'" *Alaska Airlines, Inc.*, 480 U.S. at 684 (quoting *Buckley v. Valeo,* 424 U.S. 1, 108 (1976)). Petitioners and their *amici* artificially construct a concept of the ACA as a piece of legislation that is so "inextricably intertwined" that "none" of the provisions "can survive without the Act's core components" – *i.e.* the individual mandate. Br. of State Petitioners on Severability, at 35. That is not the case.

Yes, the individual mandate was important to Congress in passing the ACA, and certain pieces of the ACA will not operate as Congress intended without it, particularly insurance industry reforms.[2/] *See* 42 U.S.C. §§ 300gg *et seq*. (guaranteed-issue and community-rating reforms). But if the test to strike down an entire statute were whether some part will not operate the same without the unconstitutional provision, then there would be no doctrine of severability. Thus, only the invalid provision and those provisions that do not operate the same without the invalid provision should be struck down.

The ACA, however, contains over 450 provisions that address a wide variety of topics, including such provisions as student loan reforms and funding to reduce infant and maternal mortality. Some of the

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[2/] This would not be the first time the Supreme Court has struck down an important provision of a statute under the Commerce Clause and left the remainder of the statute intact. Indeed, in *United States v. Morrison*, the Court struck down only one provision – the civil remedies provision – leaving the rest of the Violence Against Women Act in force. 529 U.S. 598 (2000).

provisions are already effective and are successfully operating independently of the individual mandate. The following are a few examples of provisions that appear to operate independently of the individual mandate:

Description	Statutory Section
Provides funding for maternal, infant, and early childhood visitation in order to reduce infant and maternal mortality.	ACA § 2951
Creates a Prevention and Public Health Fund.	ACA § 4002
Provides funding for school-based health centers.	ACA § 4101
Establishes nutrition labeling of standard menu items at chain restaurants.	ACA § 4205
Establishes a reasonable break time for nursing mothers and a place, other than a bathroom, which may be used.	ACA § 4207

The opponents of severability spend little time discussing or addressing the provisions of the ACA that would function (or are functioning) independently. Instead, they are willing to cast all provisions into a giant wheel as essential spokes relating either directly to the individual mandate or indirectly – as broad cost-balancing measures – to the individual mandate. There are many provisions in the ACA, such as

reasonable break time for nursing mothers, that should be severed and enforced because the provisions are independent of the individual mandate.

II. Severability is Supported by the Intent of Congress, as Expressed by the Statute.

Like the independent functioning of many provisions in the ACA, the intent of Congress, as expressed by the statute, also favors severability. The question of statutory interpretation and legislative intent "begins with the plain language of the statute." *Jimenez v. Quarterman,* 555 U.S. 113, 118 (2009). Furthermore, "[w]hen 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such construction as will carry into execution the will of the Legislature.'" *Carchman v. Nash*, 473 U.S. 716, 743 (1985) (quoting *Kokoszka v. Belford,* 417 U.S. 642, 650 (1974)).

Here, the statute is silent as to severability. Nevertheless, "Congress' silence is just that – silence – and does not raise a presumption against severability." *Alaska Airlines, Inc.*, 480 U.S. at 686. As such, this Court must turn to other statutory evidence to determine whether the remaining "statute will function in a *manner* consistent with the intent of Congress." *Id.* at 684-85 (emphasis in original). The most compelling evidence of such congressional intent is the very structure of the statute, and the manner in which the provisions become effective.

The ACA, with its over 450 provisions and 2,700 pages, establishes various programs and requirements

that have become (and will become) effective at different times. A number of provisions went into effect immediately upon the passage of the ACA. *See, e.g.*, http://healthreform.kff.org/Timeline.aspx (noting in a timeline of implementation that 26 provisions went into effect in 2010). In 2010, for example, provisions in the ACA went into effect for the Prevention and Public Health Fund. The Department of Health and Human Services then began funding a variety of programs to help increase immunizations and to prevent tobacco use, obesity, heart disease, stroke, and cancer. The same was true in 2011, and will be true in 2012 and 2013 with the implementation of many more provisions. It is not until 2014 – after numerous provisions have been implemented and billions of dollars allocated and spent – that the provisions being challenged in this court are even slated to become effective.

Had Congress intended that the individual mandate be so central to the operation of every provision of the ACA, and that the entire law would fall if the individual mandate was held unconstitutional, then it is unlikely that so many seemingly independent provisions would have become effective years *before* the central provision became effective. And even if the justification could be made that numerous provisions were required to precede the individual mandate, surely there would have been some forethought for the unwinding of already effective provisions. This is particularly true if, as we are informed through the legislative history analysis, Congress knew full well the constitutional tightrope being walked with the individual mandate. Yet, there is no effort in the ACA to unwind or undo the already effective provisions, or the billions of dollars, that would precede the individual mandate. Accordingly,

Congress intended that regardless of the individual mandate many provisions of the ACA would still "function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc.* at 684-85 (emphasis in original).

With the exercise of judicial restraint as the fundamental doctrine of severability, and the evidence of Congressional intent from the statute itself, this Court should restrict its ruling to the individual mandate and dependent provisions. Beyond such a limited decision, this Court should allow any further, and perhaps necessary, alterations of the ACA to be rendered by Congress as part of that branch's legislative and political prerogative.

CONCLUSION

For the foregoing reasons, this Court should affirm and hold that the individual mandate and dependent provisions are severable.

Respectfully submitted,

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