IN THE
Supreme Court of the United States

FLORIDA, ET AL.,
Petitioners,
v.
DEPARTMENT OF HEALTH AND HUMAN SERVS., ET AL.,
Respondents.

NAT'L FEDERATION OF INDEPENDENT BUSINESS, ET AL.,
Petitioners,
v.
KATHLEEN SEBELIUS, SECRETARY OF HHS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INDIVIDUAL PHYSICIANS and CITIZENS' COUNCIL FOR HEALTH FREEDOM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does severance of the individual mandate of Section 1501 from the remainder of the Patient Protection and Affordable Care Act amount to a judicial line-item veto that violates the Bicameral and Presentment Clauses?

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Electric Bond & Share Co. v. S.E.C., 303 U.S.
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Office of the Legislative Counsel, United States House of Representatives, 111th Cong.. 2d Sess., *Compilation of Patient Protection and Affordable Care Act [As Amended Through May 1, 2010]*.....33

Office of Legislative Counsel, United States House of Representatives, *House Legislative Drafting Manual*, Sec. 328 (Nov. 1995)..... 19, 20-21

Office of Legislative Counsel, United States Senate, *Legislative Drafting Manual*, Sec. 131 (Feb. 1997) 19, 21

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Tom Campbell, *Severability of Statutes*, 62 Hastings L. J. 1495 (July 2011).....6, 31

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Ernst & Young, LLP, *Summary of the Patient Protection and Affordable Care Act, incorporating The Health Care and Education Reconciliation Act (May 2010)* 33

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae ("*Amici*") are individual physicians, a national association of physicians, and a national

[1] This brief is filed with the written consent of all parties. Those consents are filed with the Clerk of this Court. Pursuant to Sup. Ct. Rule 37.6, counsel for *Amici Curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici*, members of *Amici*, or *Amici*'s counsel make a monetary contribution to the preparation or submission of this brief.

association of patients and physicians. *Amici* file this brief to assist the Court in defining and resolving the severability issue, one of four issues for which this Court has directed the parties and their *amici curiae* to brief. Order dated, December 8, 2011 ("Briefing Order").[2]

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, 933 (2000) (citing an AAPS *amicus* brief). Because AAPS has also commenced an action alleging that the Patient Protection and Affordable Care Act is unconstitutional, the disposition of these Petitions 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 (D.D.C.).

Amicus Citizens' Council for Health Freedom ("CCHF") is organized as a Minnesota non-profit corporation. The CCHF exists to support patient and doctor freedom, medical innovation and the right of citizens to a confidential patient-doctor relationship.

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[2] The Court has also directed briefing regarding the following issues: (1) the constitutionality of the individual mandate; (2) the applicability of the Anti-Injunction Act; and (3) the constitutionality of the Medicaid expansion provisions. Briefing Order. At this point, *Amici* may submit briefs as *amici curiae* regarding all three issues. However, *Amicus* AAPS has made a motion to intervene regarding the Anti-Injunction Act issue in connection with petition No. 11-398. If this motion is granted, the AAPS will not file a brief as *amicus curiae* regarding that issue.

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 Guenter L. Spanknebel, M.D., privately practiced gastroenterology in Massachusetts. He is a Past-President of the Massachusetts Medical Society and is currently chair of its History Committee. He has 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 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 monitored 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 (2010) ("HCERA" or "Reconciliation Act").

For the reasons set forth below, *Amici* argue that after the Eleventh Circuit found the individual mandate of Section 1501 of ACA unconstitutional, it incorrectly severed the individual mandate of Section 1501 from the remainder of ACA.[3]

ACA undermines, in fundamental and dangerous ways, the practice of medicine, and harms patients. *Amici* argue that severance of the individual mandate of Section 1501 without invalidating all of ACA will improperly burden the practice of medicine as well as the dockets of this Court, the Courts of Appeals and the District Courts, for many years to come.

Amici respectfully suggest that the Court reconsider its approach to severability. Thus, *Amici* submit this brief to provide the Court with greater clarity on that issue.

PRELIMINARY STATEMENT

Three separate petitions were filed by the parties in this case. *Florida v. United States Department of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011). The petitioning parties include: (1) three departments of the federal government[4] and their

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[3] *Amici* believe that the Eleventh Circuit correctly found that the individual mandate of Section 1501 is unconstitutional and expect to file a brief on that issue in support of Respondents in connection with Petition No. 11-398.

[4] United States Departments of the Treasury, Labor, and Health and Human Services.

corresponding Secretaries[5] ("Federal Petitioners") in Case No. 11-398; (2) a majority of the States[6] ("State Petitioners") in Case No. 11-400; and (3) three private parties ("Private Petitioners)[7] in Case No. 11-393. All three petitions were granted *certiorari*. At least three other petitions challenging ACA are pending (Nos. 11-117, 11-420 and 11-438).

The Eleventh Circuit erred by starting its analysis with a presumption of severability. 648 F.3d at 1320-21. Where, as in ACA, Congress is silent regarding severability, only a presumption of non-severability is permitted by the Constitution in light of the Bicameral and Presentment Clauses and the Separation of Powers doctrine.

When a court declares that a provision within a federal statute is unconstitutional, it must then decide whether or not that provision may be severed[8] from the statute to salvage the remainder of the statute. Often, this decision depends on whether Congress has placed a severability or non-severability clause within the statute or was silent regarding severability. In the former case, there is some guidance for the court. In the latter case, the court's

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[5] Timothy F. Geithner, Hilda L. Solis, and Kathleen Sebelius, respectively.

[6] Florida, South Carolina, Nebraska, Texas, Utah, Louisiana, Alabama, Michigan, Colorado, Pennsylvania, Washington, Idaho, South Dakota, Indiana, North Dakota, Mississippi, Arizona, Nevada, Georgia, Alaska, Ohio, Kansas, Wyoming, Wisconsin, Maine, and Iowa.

[7] National Federation of Independent Business, Kaj Ahlburg, and Mary Brown.

[8] *Amici* have used the following words (or a variation thereof) interchangeably within this brief: sever, excise, prune, delete, and truncate.

initial presumption could be determinative of the outcome. Indeed, over the last two centuries, the Court's position has fluctuated. Sometimes the Court has presumed that an invalid provision is severable. Sometimes it has presumed that it is non-severable.

Amici respectfully ask the Court to focus on a single aspect of the severability doctrine that has received virtually no academic or judicial attention, *i.e.*, the striking similarity between the generally accepted power of the courts to sever an unconstitutional provision from the remainder of a federal statute and the unconstitutionality of presidential authority to exercise a line-item veto. *See Clinton v. City of New York*, 524 U.S. 411(1998).[9]

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[9] *See also* Tom Campbell, *Severability of Statutes*, 62 Hastings L. J. 1495, 1507-08, 1525 (July 2011) ("*Campbell*") (concluding that courts should apply a conclusive presumption of non-severability as required by *Chadha* and *Clinton*); Lars Noah, *The Executive Line Item Veto and the Judicial Power to Sever: What's the Difference?*, 56 Wash. & Lee L. Rev. 236, 241 (1999) ("Although commentators have criticized the Supreme Court's approach to deciding the severability of particular provisions, apparently no one has suggested that the judiciary's assertion of that power violates Article I's 'finely wrought' procedures for legislating"). Other commentators have recognized the legislative nature of severance. *See, e.g.*, David Gans, *Severability as Judicial Lawmaking*, 76 Geo. Wash. L. Rev. 639, 644-45 (1999) ("*Gans*") ("Courts cannot simply focus on legislative intent. They must also consider whether severance in any particular case amounts to impermissible judicial lawmaking."). Professor Laurence Tribe observed:

> When a severability clause is regarded as an instruction to judges that they ought to act *as if* Congress had enacted a veto-free law (or, indeed, any other law severed from a portion subsequently held to be unconstitutional), the clause seems nothing more than an invitation for courts to ***disregard the absence of any actual enactment of the severed law in accord with Article I's strictures. The con-***

By considering the Bicameral and Presentment Clauses, the Court's approach to severability will be clarified.[10] The severability doctrine has received numerous, often opposing criticisms. For example, one commentator has observed:

> [Severability doctrine] has drawn criticism on almost every conceivable basis. Commentators have condemned [it] as too malleable and as too rigid; as encouraging judicial overreaching and as encouraging judicial abdication. They have criticized the doctrine's reliance on legislative intent and its disregard of legislative intent; its excessive attention to political concerns and its inattention to political concerns.

Kevin Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. Rev. 738, 750 (2010) (internal citation omitted).

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stitutional safeguards of bicamerality and presentment are thereby abandoned, and a new law is created by judicial fiat. … It seems especially odd for these concerns to be overlooked in *Chadha* – the very decision that held the legislative veto device void precisely because of its failure to meet the bicamerality and presentment requirements.

Laurence Tribe, *The Legislative Veto Decision: A Law by Any Other Name*, 21 Harv. J. Legis. 1, 22-23 (1984) (emphasis added, footnote omitted). In their petition-stage briefs as *Amici Curiae* in this case and in *Commonwealth of Virginia ex rel. Cuccinelli v. Sebelius*, Docket 10-1014, *Amici* urged the Court to apply the Bicameral and Presentment Clauses when considering severability.

[10] A robust and clarified severability doctrine will benefit all three branches of the federal government: the courts (when reviewing a statute), Congress (when drafting legislation) and the President (when approving or vetoing legislation).

SUMMARY OF ARGUMENT

The Court should declare that ACA is unconstitutional in its entirety because severance, in the absence of a severability clause, wreaks havoc on the Constitution's system of checks and balances and ignores the Separation of Powers doctrine. Such severance provides Congress with less than "ALL" legislative power, imposes a new "reconsideration" mechanism outside of the Presentment Clause, and is beyond the enumerated powers of Article III courts. Current severability doctrine allows Congress to wantonly avoid accountability. It lets courts prune away any unconstitutional provision, instead of requiring Congress to meet its requirement to comply with the Constitution *ex ante*. When Congress enacts omnibus legislation, such as ACA, severability analysis is impractical, if not impossible, in light of all the possible relationships among the provisions of the challenged statute.

ARGUMENT

I. THE COURT SHOULD REVISE ITS SEVERABILITY ANALYSIS BECAUSE SEVERANCE OPERATES AS A JUDICIAL LINE-ITEM VETO IN VIOLATION OF THE BICAMERAL AND PRESENTMENT CLAUSES

A. The Bicameral and Presentment Clauses Set Forth a Single Finely Wrought and Exhaustively Considered Procedure to Enact Federal Legislation

It is well established that the United States Constitution provides "a single, finely wrought and exhaustively considered, procedure" for enacting legislation. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983); *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998). Strict adherence to that procedure is required and is set forth in the Bicameral Clause, U.S. CONST. art. I, sec. 1, and the Presentment Clause, U.S. CONST. art. I, sec. 7, cl. 2.

The Bicameral Clause provides "**All legislative Powers** herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, sec. 1 (emphasis added).

The Presentment Clause provides:

> Every **Bill** which shall have passed the House of Representatives and the Senate, shall, before **it** becomes a Law, be presented to the President of the United States: If he approve he shall sign **it**, but if not he shall return **it**,

> with his Objections to that House in which **it** shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider **it**. If after such reconsideration two thirds of that House shall agree to pass the **Bill**, it shall be sent, together with the Objections, to the other House, by which **it** shall likewise be reconsidered, and if approved by two thirds of that House, **it** shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the **Bill** shall be entered on the Journal of each House respectively. If any **Bill** shall not be returned by the President within ten Days (Sunday excepted) after **it** shall have been presented to him, the Same shall be a Law, in like manner as if he had signed **it**, unless Congress by their adjournment prevent **its** return, in which Case **it** shall not be a Law.

U.S. CONST. art. I, sec. 7, cl. 2 (emphasis added).

The Constitution's first clause gives "ALL LEGISLATIVE POWER" to Congress. U.S. CONST. art. I, sec. 1 (emphasis added). This should have made it improper for the judiciary to exercise any legislative power, including the power to sever an unconstitutional provision from the remainder of a statute lacking a severability clause. Courts may not merely hit the delete button to excise an unconstitutional provision. By doing so, a court replaces the text of a statute that has been subjected to the Constitution's rigorous bicameral and presentment requirements with a truncated version of the text that was never passed by Congress nor

presented to the President.[11] Judicial excision of legislated text, no matter how small or insignificant, is the exercise of at least a scintilla of legislative power. Congressional control of the content of legislation is absolute. This is clear from the Constitution's use of the word "ALL" within the first clause.[12] Because the definition of the word "ALL" is not in dispute, we adopt its plain meaning.[13] "All" means completely or wholly, "without admi[ss]ion of any thing el[s]e." Samuel Johnson, 1 *A Dictionary of the English Language* 133 (6th ed., 1785).[14] There is no gray area to decide or fuzzy logic to apply. The use of the word "all" provides a firm rule or "bright line" for the Court to follow. *See generally Kyllo v. United States*, 533 U.S. 27, 40 (2001).

Completely reposing legislative power in Congress is also consistent with the content of at least five other clauses in the Constitution which ensure that all legislation is produced by an independent and vibrant two-chamber national legislature. These clauses are: (1) the Rules Clause, U.S. CONST. art. I, sec. 5 ("Each House may determine the Rules of its Proceedings…"); (2) the Origination Clause, U.S. CONST. art. I, sec. 7, cl. 1 ("All Bills for raising

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[11] That is, with the unconstitutional provision deleted from the original version of the text.

[12] Indeed, the word "all" is the very first word in Article I.

[13] *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992) ("When the words of a statute are unambiguous … 'judicial inquiry is complete'"). This point should apply to Constitutional interpretation as well because the word "all" at the beginning of the Bicameral Clause is completely unambiguous.

[14] http://www.archive.org/stream/dictionaryofengl01johnuoft#page/n131/mode/2up (viewed 1/4/12).

revenue shall originate in the House of Representatives …); (3) the Presentment Clause, U.S. CONST. art. I, sec. 7, cl. 2 (discussed above); (4) the Resolution Clause, U.S. CONST. art. I, sec. 7, cl. 3 ("Every Order, Resolution, or Vote, to which the Concurrence of the Senate and House of Representatives may be necessary …"); and (5) the Recommendation Clause, U.S. CONST. art. II, sec. 3 (the President may only recommend laws to Congress that he or she judges are "necessary and expedient." The President has no power to introduce legislation. He or she must find at least one member of each chamber to introduce the legislation). In short, the Constitution requires the Court not to look beyond the plain meaning of the word "all".

Unless a new amendment is grafted onto the Constitution, pursuant to Article V, courts lack power to reconstruct or reconstitute the text of any bill that has been enacted and become a public law ("Public Law").[15] Unless Congress includes a severability clause within the bill that it and the President ultimately enact, a court lacks power to change the law once it makes the determination that a provision within that Public Law is unconstitutional. The Public Law must be declared unconstitutional in its entirety. The binary option, "to sever" or "not to sever" exists only if Congress and the President have included a severability clause within the Public Law that has been enacted.

If this Court either: (1) affirms the finding in the decision below that the individual mandate in Section

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[15] In this brief, *Amici* use the term "Public Law" as the appropriate analytic unit. It refers to a specific bill as enacted (*i.e.*, before the deletion of the unconstitutional provision).

1501 is unconstitutional; or (2) reverses the finding that the Medicaid expansion provisions are constitutional, then this Court will have no choice but to declare that ACA is unconstitutional in its entirety because Congress did not include a severability provision within Public Law 111-148, *i.e.*, ACA.[16]

Analytically, the Court may not insert - by implication - a severability clause into ACA. Three reasons come to mind. First, the 111th Congress did, in fact, consider a severability clause in its health care legislation, but chose not to include any severability provision in the enacted version of ACA, Pub. L. 111-148.[17] Second, implying a severability clause in ACA imparts a lawmaking (*i.e.*, legislative) power to the judiciary in violation of the Bicameral Clause.[18] Third, it is beyond the Court's Article III powers to implicitly add a provision to a statute. The Court lacks subject matter jurisdiction to apply any

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[16] *Amici* believe that numerous other provisions within ACA, including the Medicaid expansion provisions, are unconstitutional. Any of those provisions could be the predicate for declaring ACA to be unconstitutional in its entirety. Like both the individual mandate and the Medicaid expansion provisions, many of ACA's other provisions violate the Presentment Clause because they were simultaneously enacted and amended.

[17] *See* America's Affordable Health Choices Act of 2009: Report of the Committee on Education and Labor on H.R. 3200, H. Rept. 111-299, p. 17 (Section 155 provides: "If any provision of this Act, or any application of such provision to any person or circumstance, is held unconstitutional, the remainder of the provisions of this Act and the application of the provision to any other person or circumstance shall not be affected.").

[18] Judicial, Legislative and Executive powers are enumerated in Articles III, I, and II, respectively.

statutory provision that was never enacted according to the Bicameral and Presentment Clauses.

Application of the Bicameral and Presentment Clauses to congressional vetoes and presidential line-item vetoes were central to this Court's decisions in *Immigration and Naturalization Service v. Chadha* and *Clinton v. City of New York*, respectively. Pursuant to Article VI, the Bicameral and Presentment Clauses must be applied to any judicial attempt to delete an unconstitutional provision from a Public Law lacking a severability clause. Despite the fact that it has, at times, condoned such deletions, this Court must now declare such judicial actions to be unconstitutional.

Perhaps the most interesting aspect of this case, if not the most ironic, is that the judicial remedy – the striking of an unconstitutional provision from the remainder of the statute in question in both *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803), and *Chadha* – is itself inconsistent with the Constitution, *i.e.*, the Bicameral and Presentment Clauses.[19]

The Constitution separated legislative, executive and judicial powers in order to prevent tyranny. Severability in the absence of a severability clause, by ignoring the Bicameral and Presentment Clauses, transfers some power from Congress[20] and the President (regarding the power of the President to

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[19] The *Marbury* Court concluded that "the particular phraseology of the constitution of the United States confirms and strengthens the principle … that ***courts, as well as other departments, are bound by that instrument***." 5 U.S. at 180 (emphasis added).

[20] The power to control the content of legislation as well as the power to "reconsider" any legislation vetoed by the President.

approve or veto legislation passed by both Houses)[21] to the judiciary.

B. Judicial Line-Item Vetoes Are as Unconstitutional as Presidential Line-Item Vetoes and Congressional Vetoes

There is no reason to believe that the Constitution allows the judiciary to retain a judicial line-item veto, because presidential line-item vetoes are unconstitutional and congressional vetoes are unconstitutional. *See Clinton*, 524 U.S. at 447-49; *see also Chadha*, 462 U.S. at 959. Although this Court has previously severed defective provisions from federal statutes, *see, e.g., Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 697 (1987) ("*Alaska Airlines*"), that remedy should be unavailable to courts without a congressionally enacted severability clause considering *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. *See Clinton*, 524 U.S. at 448. The judiciary, like the President, has no power to rewrite a statute.[22] 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*

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[21] Furthermore, when a court severs the text of a Public Law, the President never has the opportunity to approve the new text of the Public Law nor to direct Congress to "reconsider" the new text if he or she objects to the new text.

[22] Nor may Congress transfer its power to the judiciary.

of New York (Docket No. 97-1374) ("*Byrd-Moynihan-Levin Brief*"). The Constitution's Bicameral Clause gives "ALL" legislative power to Congress. Because the power to sever is the power to determine the content of legislation, it may not be exercised by the courts in the absence of congressional inclusion of a severability clause.

Furthermore, any judicial action to revise a statute is legislative in purpose and effect because "it alter[s] the legal rights, duties and relations of persons ... outside the Legislative Branch." *Chadha*, 462 U.S. at 952.

It is clear from the Presentment Clause and as held in *Clinton* that partial vetoes are not permitted. This *in toto* requirement was understood by Presidents Washington[23] and Taft[24] as well as the late Senator Moynihan, a noted constitutional scholar.[25] The *in toto* requirement should apply to the deconstruction of a statute by the courts in the same

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[23] *Accord* Letter from George Washington to Edmund Pendleton (Sept. 23, 1793), *reprinted in* 33 *The Writings of George Washington* 94, 96 (John C. Fitzpatrick, ed. 1940) ("From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto"). President Washington also served as President of the 1787 Convention that promulgated the Constitution.

[24] William H. Taft, *The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations* 11 (1916) (The President "has no power to veto part of the bill and allow the rest to become a law"). William H. Taft was the only person to serve both as President and Chief Justice of this Court.

[25] *See* 141 Cong. Rec. S4443-4449 (104th Cong. 1st Sess. 1995). The repeated use of the terms "the Bill", "it", "its" and "reconsider" in the Presentment Clause are consistent with the proposition that a bill that was passed by both Houses of Congress and presented to the President is ***indivisible***.

way that it applies to the deconstruction of a statute by the President.

C. If This Court Applies the Bicameral and Presentment Clauses to Severability, It Can Avoid the Inconsistency that Has Plagued Its Prior Cases

1. The Current Severability Test is Set Forth in *Alaska Airlines v. Brock*

The traditional test for severability is well-established:

> 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, Inc. 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. United States, 505 U.S. 144, 186 (1992). As a matter of logic and judicial consistency, congressional silence should not raise a presumption favoring severability. Therefore, *Amici* question the presumption of severability used by the Eleventh Circuit. The Eleventh Circuit stated:

> In analyzing [the severability of the individual mandate of Section 1501 from ACA,] we start with the settled premise that severability is fundamentally rooted in a respect for separation of powers and notions of judicial restraint. *See Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329-30 [(2006)]. Courts must "strive to salvage" acts of Congress by severing any constitutionally infirm provisions "while leaving the remainder intact." *Id.* at 329 .... "[T]he presumption is in favor of severability." *Regan v. Time, Inc.*, 468 U.S. 641, 653 [(1984)].

648 F.3d at 1320-21.[26]

2. Classification and Summary of Severability Cases

Amici suggest that, for analytic purposes, the Court utilize the following categories of cases in its review of prior cases: Category 1 - Express Severability Clauses; Category 2 – Express Non-Severability Clauses; Category 3 – Presuming Severability if Congress is Silent; and Category 4 – Presuming Non-Severability if Congress is Silent.

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[26] The Eleventh Circuit stated: "In the overwhelming majority of cases, the Supreme Court has opted to sever the constitutionally defective provision from the remainder of the statute." *Florida v. United States HHS*, 648 F.3d 1235, 1321 (11th Cir. 2011) (citations omitted). The Eleventh Circuit supports its analysis with references to the House and Senate drafting manuals. 648 F.3d at 1322 ("First, both the Senate and House legislative drafting manuals state that, in light of Supreme Court precedent in favor of severability, severability clauses are unnecessary unless they specifically state that all or some portions of a statute should *not* be severed.") (internal citations omitted, emphasis in original).

Often during the Twentieth Century, the Court has had to deal with many statutes that contained a severability clause. *See, e.g.*, *Chadha*, 462 U.S. at 931-932 ("[I]nvalid portions of a statute are to be severed, unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not. ... Here, however, ... Congress itself has provided the answer to the question of severability ...") (internal quotations and citations omitted).

In *Electric Bond & Share Co. v. S.E.C.*, this Court declared:

> This provision reverses the presumption of inseparability – that the Legislature intended the act to be effective as an entirety or not at all .... Congress has thus said that the statute is not an integrated whole, which as such must be sustained or held invalid .... Invalid parts are to be excised and the remainder enforced. When we are seeking to ascertain the Congressional purpose, we must give heed to this explicit declaration.

303 U.S. 419, 434 (1938). *See also Williams v. Standard Oil Co.*, 278 U.S. 235, 241 (1928) ("In the absence of such a legislative declaration, the presumption is that the Legislature intends an act to be effective as an entirety.").

Although *Amici* have not found a Supreme Court case with an express non-severability clause, the court below did address the possibility of such a clause. In fact, the Eleventh Circuit referred to the House and Senate Drafting Manuals which suggested that Congress could include a Non-Severability Clause if Congress wishes the Court to overcome the

presumption of severability. 648 F.3d at 1322-23. *Amici* strongly challenge the premise that there is a presumption of severability to be used by the courts.

From the beginning of judicial review of statutes by the federal judiciary until today, a number of courts have, where Congress is silent, merely presumed that an unconstitutional provision is severable from the remainder of the statute. *See, e.g.*, *Marbury v. Madison*, 5 U.S. at 173-80 (According to *Gans*, 76 Geo. Wash. L. Rev. at 639 n.1, "[t]he [severability] doctrine is implicit in *Marbury v. Madison*, … which invalidated one particular section of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, leaving the remainder in place."); *Bank of Hamilton v. Lessee of Dudley*, 27 U.S. 492, 526 (1829) ("If any part of the act be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the United States …."); *Champlin Refining Co. v. Corp. Commission of Oklahoma*, 286 U.S. 210, 234 (1932) ("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."); *Regan v. Time*, 468 U.S. at 653; and *Alaska Airlines*, 480 U.S. at 684.

This view has been adopted by the counsels for both the House and Senate, who apparently never considered the Bicameral and Presentment Clauses. House Counsel observed that:

> The Supreme Court has made it quite clear that invalid portions of statutes are to be severed unless it is evident that the Legislature would not have enacted those provisions which are within its

> powers, independently of that which is not. … Consequently, a severability clause is unnecessary unless it provides in detail which related provisions are to fall, and which are not to fall, if a specified key provision is held invalid.

Office of Legislative Counsel, United States House of Representatives, *House Legislative Drafting Manual*, Sec. 328 (Nov. 1995) (internal citations and quotation marks omitted"). *See also* Office of Legislative Counsel, United States Senate, *Legislative Drafting Manual*, Sec. 131 (Feb. 1997) ("The Supreme Court has made it clear that an invalid portion of a statute is to be severed unless it is evident that the Legislature would not have enacted those provisions which are within its powers, independently of that which is not. … Consequently, a severability clause is unnecessary.") (internal citations and quotation marks omitted).

Other cases have presumed non-severability when Congress is silent. In *Carter v. Carter Coal*, for example, this Court explained:

> In the absence of such a provision, the presumption is that the Legislature intends an act to be effective as an entirety – that is to say, the rule is against the mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it.

298 U.S. 238, 312 (1936).

3. The Court Should Adopt a "Bright Line" Test Regarding Severability in the Absence of a Congressionally Enacted Severability Clause

The Court should now put aside its past severability practice when it finds a statute that contains an unconstitutional provision and that statute is silent with respect to severability. Only by: (1) employing a conclusive presumption of non-severability; and (2) voiding the entire statute containing the unconstitutional provision will the requirements of the Constitution's Bicameral and Presentment Clauses be satisfied. The Constitution definitively stated that "All Legislative Power" is vested in Congress. Nothing could be clearer.

II. A JUDICIAL LINE-ITEM VETO ENDANGERS THE DISPERSION OF POWERS WHICH UNDERLIES AND IS INCORPORATED INTO THE CONSTITUTION

Amici challenge the notion that severance is an act of judicial restraint. Rather, *Amici* ask the Court to consider that severance of the individual mandate of Section 1501 from ACA would be an act of judicial activism at its zenith, not its nadir, because such severance amounts to a judicial line-item veto in that it allows the judiciary to determine the content of a law after it has been enacted. Therefore, severance is a doctrine of judicial activism that allows, and possibly even encourages, constitutional sloppiness by Congress and the President.

The Constitution diffuses power both horizontally and vertically. First, power is divided between the federal government and the states. Then, federal

power is further divided into three separate branches: the Legislative, Executive, and Judicial Branches. The legislative power is further sub-divided into two separate chambers: Senate and House of Representatives. The separation of powers between and among the branches lies at "the heart of our Constitution." *Buckley v. Valeo,* 424 U.S. 1, 119 (1976).

To foster this separation, the Constitution provides a single process by which the separate branches combine their diffused powers to create federal law. As this Court held in *Chadha* and *Clinton*, that process is set out in detail in the Bicameral and Presentment Clauses. When a court exercises a judicial line-item veto and severs a defective provision, it impermissibly tampers with that process and realigns the Constitution's diffusion of powers.

Our representative republic demands that Congress be accountable to the electorate. Severability interferes with that accountability and thereby reduces our liberty. Congress must be prevented from escaping and deflecting its constitutionally assigned duty to make our nation's hard policy choices through legislation. When a court reconstructs a statute, the post-severance statute cannot be said to have been enacted by democratically elected officials.

The bicameral system to enact federal legislation that was crafted by the Framers may be viewed as requiring four concurrences. First, the House of Representatives must agree within itself to the text of

a bill.[27] Second, the Senate must also agree within itself to the text of a bill.[28] Third, the text of the House-passed bill must exactly match the text of the Senate-passed bill.[29] Fourth, once the House and Senate agree to the same text of a bill, that bill is presented to the President for his agreement or veto.

But when a court excises an invalid provision from a statute lacking a severability clause, the final product (*i.e.*, the new statute) is not obtained through a concurrence of the "people" and the "States", as was contemplated by the Framers.

In creating a new law that was not subject to bicameral passage, severability eviscerates the genius of the Constitution's lawmaking system. A brief by three prominent U.S. Senators in the line-item veto case explained this as follows:

> Clashes of interest are an inevitable part of representative democracy in a continental nation whose "so many separate descriptions of citizens" embrace, as Madison observed [...] , a "great variety of interests, parties and sects." The Framers anticipated and respected clashes of interest, while providing for accommodation through a process of discussion and compromise.
>
> Applying a new "science of politics," The Federalist No. 9, p. 51 (Hamilton), the Framers

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[27] By a majority vote.

[28] By a majority vote.

[29] In explaining the Great Compromise, Madison said: "No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then of a majority of the States." The Federalist, No. 62 (Madison) (Clinton Rossiter, ed., at 378). In other words, the House of Representatives represents the people and the Senate represents the States.

> not only accepted human nature, *id*. No. 51, p. 349 (Madison) but enlisted it to help bring about an enduring republic. There would be conflicts. "Ambition must be made to counteract ambition," Madison wrote. Thus, **the Constitution is organized around devices that offset "by opposite and rival interests, the defect of better motives**." *Id*. Throughout our history Members have supported measures to achieve progress in other regions "for the common benefit." But the Framers also expected members would often be "partisans of their respective States." The Federalist, No. 46, p. 318 (Madison).

Byrd-Moynihan-Levin Brief at 15-16 (footnote deleted, emphasis added).

During the Constitutional Convention, at a point when the convention was sharply divided and its future in jeopardy, Benjamin Franklin spoke eloquently of the need to compromise. Franklin made his point by drawing an analogy between carpentry and legislating. He said:

> When a broad table is to be made, and the edges (of planks do not fit) the artist takes a little from both, and makes a good joint. In like manner here both sides must part with some of their demands, in order that they may join in some accommodating proposition.

Id. at 16 n.10 (quoting 1 Farrand 488)).

The Framers had the common sense to realize that the ability to reach a compromise could turn on the vote of a single member of either House. To prevent a deadlock in the Senate, the Framers provided that the Vice President would cast a vote when the members cast an equal number of votes in

support of and in opposition to a bill. U.S. CONST. art. I, sec. 3, cl. 4. It is highly unlikely, that when a bare majority of Senators vote to support a complex and lengthy bill, that the same provisions were important to all of them. If the bill lacked the provision that was important to a particular Senator or Representative, he or she may not have voted for the bill. The vote would have been "nay" instead of "yea" and the bill would have failed. When a court severs an invalid provision, it creates a truncated version of the bill that might never have passed the Congress. *See Byrd-Moynihan-Levin Brief* at 17.

When a court excises an invalid provision from a statute, it eliminates the Presentment Clause's legislative filters that were designed to retard or prevent the enactment of unwise or unconstitutional legislation. Severance transforms the pre-severance text of a statute from one that complies with the Bicameral and Presentment Clauses into text which was never exposed to those clauses. Under the Presentment Clause each Chamber of Congress, *i.e.*, the Senate and the House of Representatives, must pass exactly the same bill before it can become a law. In other words, each chamber has an absolute veto with respect to prospective legislation. In contrast, the Presentment Clause provides the President with only a qualified veto - one that may be overridden only by the agreement of two thirds of the members of both Houses. Thus, the President's qualified veto power may be viewed as a "semi-permeable membrane." In contrast, each chamber's absolute veto power over legislation may be analogized to an impermeable membrane that can never be breached.

When an invalid provision is judicially severed from a statute lacking a severability clause, it interferes with the legislative role of Congress. It may be viewed either: (1) as a cession or abdication of congressional power; or (2) as an aggrandizement of power by the courts. In any case, the result is the same: it is not permitted. The Court should not forget that the dangers of a legislature ceding its power to others are real. During a five month period,[30] Senator Byrd lectured his colleagues that ceding the Senate's power to control the content of a statute is analogous to actions taken by the Roman Senate which ultimately led to the decline and fall of the Roman Empire. 139 Cong. Rec. S 5475-79, 5724-27, 5975-78, 6395-98, 6982-85, 7157-60, 7539-42, 8157-60, 8582-85, 9097-9100, 9786-89, 10971-75, 11953-56, 13561-65 (103d Cong. 1st Sess. 1993). Permitting courts to exercise a judicial line-item veto (*i.e.*, the power to sever an unconstitutional provision from a statute lacking a severability clause) is precisely such a cession of congressional power.

Furthermore, when an invalid provision is excised from a statute, it interferes with the President's role in legislating. First, the President never approves the truncated version (*i.e.*, post-severance) of the statute. Second, the President is denied his or her veto power over the truncated version of the text (*i.e.*, the power to direct reconsideration of the post-severance statute including objections specified by the President).

Besides violating the explicit terms of the Presentment Clause, severability, without a

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[30] In connection with the debate over the presidential line-item veto.

congressionally enacted severability clause, damages the legislative process in other ways. Michael Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 Harv. J. Legis. 227, 277-278 (2004). As the court knows:

> Most legislation … is the culmination of myriad deals made among competing interests. The complexities and calculations of the logrolling process, and the limits it imposes on the strength of statutes, thus mandate heightened attention to the specifics of the legislative deal.

Id. at 267. When the court severs an invalid provision from a statute lacking a severability clause, it ignores this calculus. Judge Easterbrook explained:

> "[Because] legislation grows out of compromises among special interests, … a court cannot add enforcement to get more of what Congress wanted. ***What Congress wanted was the compromise, not the objectives of the contending interests***. The statute has no purpose. It is designed to do what it does in fact. ***The stopping points are as important as the other provisions***.

Id. (quoting Frank Easterbrook, *Foreword: The Court and the Economic System*, 98 Harv. L. Rev. 4, 46 (1984), first emphasis added). When Congress includes a severability clause, as it often does, these considerations do not come into play. These considerations should come into play here because ACA lacks such a clause.

Another flaw in the existing approach to severability is that it instills the wrong set of incentives for Congress. The practice of judicial severance of an invalid provision from a statute:

> overprotects the legislature's freedom to innovate at the cost of reducing its incentives to attend to constitutional norms *ex ante* (*i.e.*, in drafting legislation). If courts are willing to save a statute by severing … even when that entails substantial rewriting, the legislature has much less of a reason or incentive to respect constitutional norms at the outset. ***Courts, not legislators, are tailoring statutes to conform to constitutional norms. Over time the legislature may come to depend on the courts to fix statutes rather than doing the hard work necessary to enact a properly tailored statute in the first instance***. Politically, legislators may prefer this arrangement, for it frees them to pass the statute they want, knowing the courts will save as much of their handiwork as they can. But this arrangement breeds an unhealthy dependency on courts and results in a loss of accountability. When courts substantially rewrite statutes to save them, the resulting work is as much that of the judiciary as of the legislature. That makes it hard to hold the legislature accountable for the statute that the judiciary puts in place.

Gans, 76 Geo. Wash. L. Rev. at 644 (emphasis added).

Ironically, enforcing a conclusive presumption of non-severability will encourage Congress to write constitutional laws and include severability clauses where appropriate. Indeed,

> [t]he surest way to insure that Congress addresses severability is to discipline it into doing so: If the courts, for lack of a severability clause, wholly invalidate a statute … and announce that they

> will continue to do so in the future, Congress will learn its lesson: It will tell the courts what to do. This, after all, is the moral of *Warren* and its progeny. Dissatisfied with the courts' invalidation of partially unconstitutional statutes ..., legislatures began including severability clauses in constitutionally questionable legislation. Now they will *always* do so.

Shumsky, *supra* at 276 (emphasis in original) (*Warren* refers to the Massachusetts case of *Warren v. Mayor and Aldermen of Charlestown*, 68 Mass. 84 (1854)).

Like the President, in the exercise of his or her veto power, a court should examine the legislation *in toto*. And, if the court determines that a provision within the "bill" is not constitutional, then it must declare that the entire "bill" is not constitutional. By striking down a "bill" in its entirety, instead of reconstructing or reformulating the "bill", the court protects the separation of powers contemplated by the Framers and incorporated into the Constitution. Such an action preserves the Court's proper role. The Court is an adjudicatory body, not a legislative body. *See* Note, *Cleaning Up For Congress: Why Courts Should Reject the Presumption of Severability in the Face of Intentionally Unconstitutional Legislation*, 76 Geo. Wash. L. Rev. 698, 712 (2008).

The Court is not empowered to rewrite a statute. It must reject the entire piece of legislation (*i.e.*, the enacted Public Law). Its text may not be changed without reconsideration and renegotiation by Congress. Only with bicameral passage and presentment to the President may the legislation be rewritten.

III. ACA IS UNCONSTITUTIONAL IN ITS ENTIRETY BECAUSE THE INDIVIDUAL MANDATE IS UNCONSTITUTIONAL

The District Court concluded that the individual mandate of Section 1501 is not severable from the remainder of ACA, and declared ACA invalid in its entirety. *Florida v. United States HHS*, 780 F. Supp. 2d 1256, 1299-1305, 1307 (N.D. Fla. 2011). In contrast, the Eleventh Circuit concluded that the individual mandate of Section 1501 is severable. 648 F.3d at 1320-28. This Court should review the severability issue *de novo* and reconsider its test for severability.

A. Application of the *Alaska Airlines v. Brock* Standard Is Impractical, If Not Impossible, Because of ACA's Length and Complexity

Application of the existing severability standard is impractical, if not impossible, in this case. The Court would have to consider Section 1501's relationships with each of ACA's other provisions as well as various combinations of ACA's other provisions.[31] To illustrate this point, consider that there are 511 possible relationships among the nine Justices of this Court.[32] Assuming *arguendo* ACA contains 450

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[31] *Campbell*, 62 Hastings L. J. at 1507-08 and 1525 (concluding that courts should apply a conclusive presumption of inseverability as required by *Chadha* and *Clinton*).

[32] Calculated by adding together the number of 1, 2, 3, 4, 5, 6, 7, 8, and 9 Justice combinations. That sum equals $(2^9 - 1)$.

separate provisions (as recognized by the District Court, 780 F.Supp.2d at 1304), a court might have to consider as many as (2^{449} – 1) separate relationships among ACA's remaining provisions to conduct a thorough severability analysis.[33] Courts lack the time, manpower and computer resources to conduct such an analysis.

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;[34] and (3) it encourages omnibus legislation – which members of Congress may not have sufficient time to read and understand prior to casting their votes.[35]

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[33] This number can be expressed with approximately 135 digits – 35 digits longer than the number googol, which is one followed by one hundred zeros.

[34] 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 the House or Senate. 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 draft of ACA, but was excluded from ACA as enacted.

[35] The Presentment Clause directs "reconsideration" of vetoed bills - implicitly requiring members of Congress to actually "consider" a bill. The lack of "consideration" is apparent since it took

B. Separately, the Court Should Hold that ACA Is Entirely Unconstitutional If It Holds That the Medicaid Expansion Provisions Are Unconstitutional

Assuming *arguendo* that the Court finds the Medicaid expansion provisions are unconstitutional, ACA must be declared unconstitutional in its entirety because, as argued above, courts are prohibited from exercising a judicial line-item veto by the Bicameral and Presentment Clauses and the Separation of Powers doctrine.

Regardless of the deference accorded to Congress, a court may not sever a defective provision from a statute in the absence of a severability clause because such severance is a judicial line-item veto. As explained above, this practice substantially alters the dispersion of powers specified by the Constitution. It is time to return "all legislative power" to Congress as required by the Constitution's first clause. U.S. CONST. art. I, sec. 1, cl. 1.

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almost two months after ACA and HCERA were enacted for the Office of Legislative Counsel of the House of Representatives to produce its ACA Compilation Report and for Ernst & Young, one of the Big 4 accounting/consulting firms, to issue its summary of the statutes. *See* Office of the Legislative Counsel, United States House of Representatives, 111th Cong.. 2d Sess., *Compilation of Patient Protection and Affordable Care Act [As Amended Through May 1, 2010]* at 833 *et seq. available at* http://docs.house.gov/energycommerce/ppacacon.pdf (viewed 10/23/11). *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 159 pages long).

CONCLUSION

For the foregoing reasons, ACA should be declared unconstitutional in its entirety.

Respectfully submitted,

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