Nos. 19-840 & 19-1019

IN THE

Supreme Court of the United States

STATE OF CALIFORNIA, *ET AL.*,

Petitioners,

v.

STATE OF TEXAS, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS AS *AMICUS CURIAE* IN SUPPORT OF THE STATE OF TEXAS, *ET AL.*

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QUESTIONS PRESENTED

Congress passed the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010), with the stated goal of attaining near universal health insurance coverage. In pursuit of that objective, Congress found it was "essential" to require healthy Americans to ensure that they have what Congress considered minimum essential coverage. In 2012, this Court held that "the Federal Government does not have the power to order people to buy health insurance." *Nat'l Fed'n of Indep. Bus. v. Sebelius ("NFIB")*, 567 U.S. 519, 575 (2012). The Court upheld the minimum-essential-requirement, however, because it was "fairly possible" to construe the mandate as a tax. *Id*. at 574.

In 2017, Congress eliminated that alternative construction by zeroing out any penalty. At issue here is whether ACA is constitutional despite no longer being a revenue-producing tax, and whether unconstitutional provisions may be judicially severed to preserve other provisions of ACA.

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae Association of American Physicians & Surgeons ("AAPS"), a non-profit corporation founded in 1943, is a national association of physicians in nearly all types of practices and states. AAPS is dedicated to the practice of private, ethical medicine, including preservation of the sanctity of the patient-physician relationship. AAPS has filed numerous *amicus* briefs in the last quarter-century, and the U.S. Supreme Court has made use of *amicus* briefs

[1] This brief is filed with the written consent of all parties. Pursuant to SUP. CT. RULE 37.6, counsel for *amicus 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 *amicus* AAPS, members of *amicus*, or *amicus*'s counsel make a monetary contribution to the preparation or submission of this brief.

submitted by AAPS in high-profile cases. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 933 (2000); *id.* at 959, 963 (Kennedy, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting).

Amicus files this brief to address issues relating to the constitutionality of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) ("ACA"), *amended by* the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010) ("Reconciliation Act"), *amended by* the Tax Cuts and Jobs Act Pub. L. 115-97, 131 Stat. 2054 (2017) (the "TCJA"), which arose in *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), reprinted in the Joint Appendix ("JA") at 374-489 and Petitioners' Appendix ("Pet. App.") at 1a-113a. *Amicus* has direct and vital interests in the issues before this Court.

HISTORICAL NOTE

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

> The internal effects of a mutable policy are still more calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice if the laws be so **voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated,** or undergo such incessant

> changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?

Id. (emphasis added). Congress ignored Madison's warning and passed HR 3590, a massive bill that became ACA upon the President's signature. 124 Stat. at 1024 (March 23, 2010). Only seven days later, the President signed HR 4872 which became the Reconciliation Act. 124 Stat. at 1083 (March 30, 2010) (modifying numerous provisions in the ACA).

SUMMARY OF ARGUMENT

There can be no break from the Constitution: not by Congress; not by the President; and not by the Judiciary. The Constitution is the paramount law of the land. *Marbury v. Madison*, 5 U.S. (1 Cr.) 137, 177-78 (1803); U.S. CONST. art VI. The powers delegated by the People to each branch are defined and limited by the Constitution. *See, e.g.*, *NFIB*, 567 U.S. at 538 ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.") (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cr.) at 176)).

The three branches may not rearrange their powers *inter sese* and may not ignore the substantive and procedural constraints imposed upon them. Rather, the power to effectuate any rearrangement of power is reserved to the People via the ratification of an Article V Amendment. *Clinton v. City of New York*, 524 U.S. 417, 449 (1998); and *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995).

The Court may declare that ACA is unconstitutional in its entirety without addressing the thorny severability issue.[2] Because the 111th Congress violated the Bicameral and Presentment Clauses, HR 3590 did not become law upon the President's signature. U.S. CONST. art. I, sec. 1 ("Bicameral Clause"); U.S. CONST. art. I, sec. 7, cl. 2 ("Presentment Clause"). Those clauses require that, to become law, a bill must be passed by the House and Senate and signed by the President *in toto*. Unfortunately, under Title X of HR 3590 (which purportedly amends numerous provisions within HR 3590) only a subset of the bill's provisions survived enactment and became law. ACA is also constitutionally defective for additional reasons.

In ACA, severability would be inappropriate because it contains approximately 450 separate provisions. *Florida v. United States Department of Health and Human Services,* 780 F. Supp. 2d 1256, 1304 (N.D. Fla. 2011). When Congress enacts omnibus legislation, such as ACA, it is impractical, if not impossible, to analyze all the possible relationships among the provisions of the challenged statute. The Court would have to consider the Individual Mandate's relationships with each of ACA's other provisions as well as various combinations of ACA's other provisions.[3] In

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[2] Justice Scalia believed that it was important for this Court to get the reasoning right, not just to get the right results. Paul D. Clement, *Book Review: Scalia Being Scalia*, 41 Harv. J. of L. & Pub. Pol'y 640, 642 (2017) ("Legal opinions … are important, after all, for the *reasons* they give, not just the *results* they announce.") (internal citations omitted, emphasis in original).

[3] Tom Campbell, *Severability of Statutes,* 62 Hastings L. J. 1495, 1525 (2011) ("*Campbell*") (Concluding that courts should apply a

mathematical terms, the total number of possible relationships among the statute's provisions and combination of provisions equals $2^N - 1$, where N is the number of separate provisions in the statue. *See Campbell,* 62 Hastings L. J. at 1507-08.

Because ACA contains 450 separate provisions, 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.[4] Courts lack the time, manpower and computer resources to conduct such an analysis. To put this point in proper perspective, consider how the nine Justices could align themselves to write their opinions in any given case. There would be 511 such alignments among the nine Justices.[5]

ARGUMENT

I. BECAUSE ACA WAS NOT ENACTED IN ACCORD WITH THE *IN TOTO* REQUIREMENT OF THE PRESENTMENT CLAUSE, ACA IS VOID *AB INITIO*.

Failure to comply with the Constitution's strict lawmaking requirements renders any law void *ab*

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conclusive presumption of inseverability. "The Court should revert to that practice and make the presumption conclusive. Any other approach involves courts in doing what was explicitly forbidden in *INS v. Chadha* and *Clinton v. City of New York:* creating a statutory outcome not approved by both houses … and signed by the President …..").

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

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

initio. The non-compliant law must be declared unconstitutional, regardless of its merits and regardless of whether the law was passed by a single vote in each chamber or by the unanimous vote of both chambers. HR 3590, a hodge-podge of sometimes contradictory provisions which became ACA, was passed in violation of the Presentment Clause and is thereby void.

More than two centuries ago, this Court made the point "that a law repugnant to the Constitution is void." *Marbury v. Madison*, 5 U.S. at 177, 180. Furthermore,

> [w]hen the Congress, through its proper officials, certifies that it has gone through the forms of lawmaking in violation of an express constitutional mandate, is the result a law at all? Of course it is not; the question answers itself …. Any and all violations of constitutional requirements vitiate a statute.

Hubbard v. Lowe, 226 F. 135, 140 (1915) (internal citations omitted).

The failure by Congress to comply with the Presentment Clause means that ACA does not legitimately exist. "There can be no estoppel in the way of ascertaining the existence of a law." *South Ottawa v. Perkins*, 94 U.S. 260, 267 (1877).[6] Furthermore, "a court may consider an issue 'antecedent to … and ultimately dispositive of' the dispute before it, ***even an issue the parties fail to identify and brief***." *United States National Bank of*

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[6] It has been a longstanding principle of statutory construction that when a court is asked to construe a law, it has authority to determine if that law exists. *USNB*, 508 U.S. at 446-447.

Oregon v. Independent Insurance Agents of America, Inc., 508 U.S. 439, 446-447 (1993) (emphasis added, internal citations omitted) ("*USNB*").

> "[W]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law," … even where the proper construction is that a law does not govern because it is not in force.

USNB, 508 U.S. at 446 (quoting *Kamen v. Kemper Financial Services, Inc.,* 500 U.S. 90, 99 (1991)). Furthermore, the failure of litigants to argue the legal issues correctly does not render an appellate court powerless to address those issues properly:

> Appellate review does not consist of supine submission to erroneous legal concepts even though none of the parties declaimed the applicable law below. Our duty is to enunciate the law on the record facts. Neither the parties nor the trial judge, by agreement or passivity, can force us to abdicate our appellate responsibility.

Forshey v. Principi, 284 F.3d 1335, 1357 n.20 (Fed. Cir., *en banc*), *cert. denied* 537 U.S. 823 (2002) (internal citation omitted). Indeed, appellate review of the proper law prevents misapplication of the law, eliminates injustice, and avoids construction of hypothetical laws.

A. The Bicameral and Presentment Clauses Set Forth the Exclusive Procedure for Enacting Federal Legislation.

It is well-established that the United States Constitution provides "a single, finely wrought and exhaustively considered, procedure" to enact a federal statute. *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983); *Clinton,* 524 U.S. at 439-40. Strict adherence to that procedure is required and is set forth in the Bicameral and Presentment Clauses.

At its core, the Presentment Clause requires that both houses pass, in exactly the same final form, every bill that enacts, "adds, amends, or repeals any provision of any federal statute. Each bill so passed must be presented to the President, whose choices are limited to ***approving it in whole, returning it in whole, or taking no action***." Brief of Appellees Snake River Potato Growers, Inc. and Mike Cranney at 2 in *Clinton v. City of New York* (Docket No. 97-1374) (emphasis added). "[R]epeal of statutes, no less than enactment, must conform with Art. I." *Clinton*, 524 U.S. at 438 (quoting *Chadha*, 462 U.S. at 954).

The Court has held that the legislative process requires congruity between the two chambers and with the President. *Clinton*, 524 U.S. at 448. Therefore, the House, Senate and President must all agree to precisely the same text and the President may only approve or veto a bill in its entirety,[7] *i.e. in toto*. This Court has explained:

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[7] That is, not a single word or punctuation may vary.

> The Balanced Budget Act of 1997 is a 500-page document that became "Public Law 105-33" after three procedural steps were taken: (1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President. The Constitution explicitly requires that each of those three steps be taken before a bill may "become a law." Art. I, §7.

Clinton, 524 U.S. at 448.

The reasoning in *Clinton* is crystal clear. The President, House, and Senate must all agree to the entire bill. *Id.* When a bill, such as HR 3590, is internally inconsistent, *i.e.* self-contradictory, it is impossible for the House, Senate and President to agree to the entire bill because many of the bill's provisions neutralize each other.

The Presentment Clause prevents Congress from simultaneously enacting a provision and an amendment to that provision within the same bill because that simultaneity violates the "single, finely wrought and exhaustively considered, procedure," as quoted above.

B. The *In Toto* Component of the Presentment Clause Requires the Enactment of Every Provision in a Presented Bill, Not a Subset of the Bill's Provisions.

The Presentment Clause does not allow partial vetoes. *See Clinton*, 524 U.S. at 447-49. This *in toto* requirement was understood by our first president,

George Washington, who said: "[f]rom the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto." 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). More than a century later, President Taft echoed those remarks. 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 ").[8]

The late Senator Moynihan also took the same position. *See* 141 Cong. Rec. S4443-4449 (104th Cong. 1st Sess. 1995) (daily ed. March 23, 1995) (Introducing a report of the Committee on Federal Legislation of the Association of the Bar of the City of New York entitled "Revisiting the Line Item Veto," 50 The Record 321 (1995) (the "*ABCNY Report*")). The *ABCNY Report* noted that the repeated use of the terms "the Bill," "it," "its" and "reconsider" in the Presentment Clause is consistent with the proposition that a bill that was passed by both Houses of Congress and presented to the President is ***indivisible***. *Id.* at 326-27.

Whenever Congress passes a bill with dueling provisions, constitutional paradoxes arise. How can the second chamber to pass a bill which contains both a base provision and an amended version of that provision agree to both variants of that provision? How can the House and Senate present both the base provision and the amended version of that provision to the President? How can the President agree

[8] It is worth noting that President William H. Taft also served as Chief Justice of this Court.

simultaneously to both the base provision and its amended variant? These are problems of Congress's own making and easily would have been averted if each chamber had taken the time to hit the "Delete Button" on its word processor and thereby strike the base provision and leave only the amended version.

In addition to defying the Presentment Clause, ACA defies logic by Congress including a base provision and an amendment to that base provision within the same bill. Purely, as a matter of logic, two mutually exclusive statements cannot both be true because at least one of them must be false. *See The Oxford Companion to Philosophy* 661 (2d ed., Ted Honderich, ed., 2005) ("The conjunction of a proposition and its negation is a contradiction and is necessarily false …") (citations omitted).[9]

The simultaneous enactment of the Individual Mandate in Sections 1501 and 10106 is impossible under the Presentment Clause because that simultaneity may be viewed as the conjunction of a proposition and the negation of that proposition. In other words, those provisions neutralize each other.

C. Because ACA's Operative Provisions Are a Subset of HR 3590's Provisions, the *In Toto* Component of the Presentment Clause Was Violated.

HR 3590 contained base provisions that were neutralized by corresponding provisions in Title X of HR 3590. In addition, Title X's provisions were

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[9] *See* Felix S. Cohen, *Field Theory and Judicial Logic*, 59 The Yale L. J. 238, 238 (1950) ("[A]s a matter of simple logic, two inconsistent statements cannot both be true. At least *one* must be false. And it is always possible that *both* are false.").

neutralized by the corresponding base provisions of HR 3590.

While the *in toto* requirement of the Presentment Clause requires that both the base provision and the corresponding provision in Title X be enacted, the courts which have examined the constitutionality of the Individual Mandate, including this Court and the courts hearing this case below, have examined only Title X's version of the Individual Mandate.

For example, §10106(c) alters the "religious conscience exemption" (the "RCX"), contained in 26 U.S.C. §5000A(d)(2)(A), as added by Subsection 1501(b), and thereby alters the definition of Applicable Individual as specified in 26 U.S.C. §5000A(d)(1), as added by §1501(b). Compare 124 Stat. at 246 with 124 Stat. at 910. Under the Presentment Clause, the President may only approve or reject a bill *in toto*. Because Sections 1501 and 10106 contain mutually exclusive definitions of RCX (also making the definitions of Applicable Individual incompatible), it is impossible for the President to have approved HR 3590 *in toto.*[10] Specifically, the President's approval of the RCX definition in Section 1501 neutralized the definition presented to him in Section 10106 and *vice versa*.

Similarly, Sections 1501 and 10106 contain different cross-neutralizing versions of the term "applicable dollar amount." Subsection 26 U.S.C. §5000A(c)(3) (the "Applicable Dollar Amount", as

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[10] The incompatible definitions of RCX (and thus the incompatible definitions of Applicable Individual) contained in Sections 1501 and 10106 of HR 3590 also prevented the House and the Senate from being able to agree to the same definition of these terms.

added by Subsection 1501(b), is allegedly revised by Subsection 10106(b)(3). Compare 124 Stat. at 245 with 124 Stat. at 910.

While simultaneously enacting and revising various subsections within 26 U.S.C. §5000A may have led to needless complexity, incongruity, and ambiguity for our citizenry and judiciary, the gravamen of the constitutional defect is that both the original and the revised versions of Section 5000A were presented simultaneously to the President within the same bill. For Section 1501 to be amendable by Section 10106, Section 10106 would have to have been enacted after Section 1501, not simultaneously with it.

This constitutional defect, the simultaneous enactment of incompatible provisions, pervades ACA. Pursuant to Title X of HR 3590, now ACA, Congress attempted to simultaneously enact and amend scores of the bill's provisions. Indeed, Title X, which purportedly amends the first nine Titles of HR 3590, now ACA, is itself a 142-page tome. 124 Stat. at 883-1024.

II. Because ACA's Text Confirms That the Individual Mandate Is Indispensable to ACA, It Is Not Severable from ACA.

A. As an Essential Part of ACA, the Individual Mandate Is Inseverable.

Based on explicit text in the ACA, *Amicus* agrees with the Cross-Petitioners and the District Court that if the Individual Mandate is unconstitutional, then the entirety of the ACA is unconstitutional as well.

The Court need only look at §18091(2)(H)[11] to recognize that the Individual Mandate is not severable from ACA. In discussing the Individual Mandate requirement, that subsection provides: "[t]he requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market." 42 U.S.C. §18091(2)(H). Were this the only evidence that the Individual Mandate is essential to ACA, this would be sufficient to make the Mandate inseverable.

In fact there is considerably more evidence that the Individual Mandate is interdependent with other provisions in ACA and is inseverable, as explained below:

> All told, Congress stated three separate times that the Individual Mandate is ***essential*** to the ACA … It also stated the absence of the Individual Mandate would "undercut" its "regulation of the health insurance market." Thirteen different times, Congress explained how the Individual Mandate stood as the keystone of the ACA. And six times, Congress explained it was not just the Individual Mandate, but the Individual Mandate "together with the other provisions" that allowed the ACA to function as Congress intended.

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[11] The District Court stated: "Virtually every subsection of 42 U.S.C. §18091 is teeming with Congress's intent that the Individual Mandate be inseverable – because it is *essential* – from the entire ACA - because it must work *together* with the other provisions." Pet. App. at 213a (emphasis in original).

Pet. App. at 211a-212a (emphasis in original, footnote omitted).

"There can be no clearer statement of Congress's view that the mandate is not severable from the rest of the ACA. That is what the district court concluded. So, too, should this Court."[12] Petition 19-1019 at 12. In fact, the Conditional Cross-Petitioners argue that this language supplies an inseverability clause, a clear statement by Congress that "No portion of the ACA is severable from the mandate." *Id*. at 17.

> In this instance, Congress included an inseverability clause when it passed the ACA in 2010. It states that "[t]he requirement to [buy health insurance] 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." 42 U.S.C. § 18091(2)(I).

Id. at 12.

The "Plain Meaning Rule"[13] requires holding that the Individual Mandate is not severable from the ACA.

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[12] Petition 19-1019 also highlights the degree to which the Individual Mandate is "interwoven with" the ACA's other provisions. Petition 19-1019 at 12-13.

[13] The "Plain Meaning Rule" is one of several canons of construction applied by the judiciary to determine the meaning of legislation. Courts should turn to this one cardinal canon before others. *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there … When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (internal citations omitted). Leg-

B. The Individual Mandate Should Not Be Severed from ACA Because the Severability Doctrine Needs Revision.

Even if the Individual Mandate is considered severable from the remainder of ACA under the existing severability doctrine, *Amicus* believes that result is wrong and that the severability doctrine should be revised in order to reach the right result. The severability doctrine needs revision for multiple reasons.

By way of background, current severability doctrine has been characterized as an exercise in legislative mind-reading. Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. Rev. 738, 794 (2010) ("There is therefore no need for the courts to continue the hypothetical mind-reading that modern severability requires"). It allows courts to prune away any unconstitutional provision, instead of requiring Congress to meet its requirement to comply with the Constitution *ex ante*. The District Court aptly compared severability analysis to a game of Jenga. Pet. App. at 221 ("Yet the parties focus on particular provisions. It is like watching a slow game of Jenga, each party poking at a different provision to see if the ACA fails.").

First, because Congress is composed of 535 legislators within two separate chambers, determining a singular legislative intent of Congress is purely fictional. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. Rev. at 789 ("By authorizing the Court to devise a scheme approximating what Congress

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islators are "presumed to know the meaning of words and the rules of grammar." *United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897).

would have wanted, even when the idea that Congress actually wanted anything is a fiction, existing severability doctrine leads to law for which neither the Court nor Congress is entirely answerable.").

Second, severance amounts to a judicial line-item veto which violates the Bicameral and Presentment Clauses. 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, *Clinton*, 524 U.S. at 447-49, and Congressional vetoes are unconstitutional, *Chadha*, 462 U.S. at 956-59; s*ee also Campbell*, 62 Hastings L. J. at 1500.

This Court should focus on an aspect of the severability doctrine that had 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 unconstitutional use of presidential authority to exercise a line-item veto.

Third, courts encourage legislative sloppiness through uncritical severance, as explained by the dissenting judges in *NFIB*:

> The Judiciary, if it orders uncritical severance, then assumes the legislative function; for it imposes on the Nation, by the Court's decree, its own statutory regime, consisting of policies, risks, and duties that Congress did not enact. That can be a more extreme exercise of the judicial power than striking the whole statute and allowing Congress to address the

> conditions that pertained when the statute was considered at the outset.

NFIB v. Sebelius, 567 U.S. at 692 (Joint Dissent of Scalia, Kennedy, Thomas and Alito, JJ.) ("Joint Dissent").

As observed by one academic commentator:

> 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.* … 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 ….

David H. Gans, *Severability as Judicial Lawmaking*, 76 Geo. Wash. L. Rev. 639, 644 (2008) (emphasis added, footnote omitted). Similarly,

> "[t]he surest way to ensure 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."

Michael Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 Harv. J. Legis. 227, 276 (2004)

(internal citation omitted). It adheres to separation of powers by not severing statutory provisions.

Fourth, ACA's length and complexity[14] make it impossible to use a "fine-toothed Comb" to determine whether an unconstitutional Individual Mandate is severable from the remainder of ACA. The Fifth Circuit highlighted the need for a "careful, granular approach to [severability]"[15] and directed "the district court to employ a ***finer-toothed comb*** on remand and conduct a more searching inquiry into which provisions of the ACA Congress intended to be inseverable from the individual mandate." Pet. App. at 68a (emphasis added).

Current severability doctrine, as explained by *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987) and its progeny, contains the implicit assumption that the House and the Senate, as well as the President, have actually considered and approved all possible permutations of the bill's provisions. They could not possibly have done so. *See supra* p. 5.

Fifth, severing the Individual Mandate to save ACA is not an option here because ACA is riddled with many unconstitutional provisions. For example, many of ACA's appropriations lack specificity as to the amount of the appropriation. Those appropriations are open-ended and provide a blank check for HHS in violation of the Appropriations Clause. U.S. CONST. art I, sec. 9, cl. 7. One court observed, "Congress said in certain parts of the ACA that there 'are authorized to be appropriated such

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[14] This Court has recognized that ACA runs over 900 pages and contains hundreds of provisions. *NFIB*, 567 U.S. at 538-39.

[15] Pet. App. at 59a.

sums as are necessary.'" *United States House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 180 & n.18 (D.D.C. 2016) (referencing approximately 50 such open-ended appropriations provisions, essentially blank checks, which violate the Appropriations Clause) (emphasis added).

Sixth, 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 was agreed to by the President; and (3) it encourages omnibus legislation – which members of Congress may not have sufficient time to read and understand prior to casting their votes. The Presentment Clause directs "reconsideration" of vetoed bills – implicitly requiring members of Congress to actually "consider" a bill.

Because the Presentment Clause contains the words "reconsider" and "reconsideration", both chambers have a duty to actually "consider" any bicamerally passed bill before they present it to the President. It is apparent that neither the House nor the Senate fully considered HR 3590 before its passage and presentment because neither chamber removed the original language that was purportedly being amended by Title X. The sheer length of Title X made it implausible to conclude that members of the House and Senate had fully read and understood the

bill, including its amendments, prior to passing the bill.[16]

HR 3590 was not fully "considered" by the House and the Senate prior to the passage of the bill. Indeed, the Speaker admitted as much. "But we have to pass the bill so that you can find out what is in it, away from the fog of the controversy." Nancy Pelosi, *Press Release: Pelosi Remarks at the 2010 Legislative Conference for National Association of Counties* (March 9, 2010).[17] Therefore, the Court should conclude that the House members did not and could not have ***considered*** HR 3590.

Seventh, in *NFIB* this Court conducted only a partial severability analysis. The Court did not address whether the unconstitutional Medicaid Expansion provision could be severed from the remainder of HR 3590, the bill which became ACA.

Eighth, the Court needs to employ a new approach to severability for long, complex, omnibus statutes. Robert L. Nightingale, *How To Trim a Christmas Tree: Beyond Severability and Inseverability for Omnibus Statutes,* 125 Yale L. J. 1672, 1675-80 (2016). The Joint Dissent in *NFIB* made this very point:

> When we are confronted with such a so-called "Christmas tree," a law to which many nongermane ornaments have been attached, we think the proper rule must be that when

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[16] Title X appears as 142 pages of ACA's 906 pages in the Statutes-at-Large. 124 Stat. at 883-1024.

[17] https://pelosi.house.gov/news/press-releases/pelosi-remarks-at-the-2010-legislative-conference-for-national-association-of (viewed June 27, 2020).

> the tree no longer exists the ornaments are superfluous. We have no reliable basis for knowing which pieces of the Act would have passed on their own. It is certain that many of them would not have, and it is not a proper function of this Court to guess which. To sever the statute in that manner "'would be to make a new law, not to enforce an old one. This is not part of our duty.'" *Trade-Mark Cases*, 100 U.S. at 99.

NFIB, 567 U.S. at 705 (Joint Dissent).

III. THE INDIVIDUAL MANDATE DOES NOT COMPLY WITH THE "OTHER REQUIREMENTS IN THE CONSTITUTION," NAMELY THE ORIGINATION CLAUSE.

In *NFIB*, the Court stated: "[e]ven if the taxing power enables Congress to impose a tax on not obtaining health insurance, ***any tax must still comply with other requirements in the Constitution***." *NFIB*, 567 U.S. at 570 (emphasis added). Because the Individual Mandate does not comply with the Origination Clause, this Court is not limited to the reasoning used by the courts below to declare the Individual Mandate to be unconstitutional. Although this Court has yet to rule on those "other requirements,"[18] *Amicus* suggests those "other requirements" should be examined now

[18] At least two Courts of Appeals have addressed the Mandate's compliance with the Origination Clause. *Hotze v. Burwell*, 784 F.3d 984 (5th Cir. 2015), *cert. denied*, 136 S.Ct. 1165 (2016), and *Sissel v. Department of Health and Human Services*, 760 F.3d 1 (D.C. Cir. 2014), *pet. for reh'g en banc denied*, 799 F.3d 1035 (2015), *cert. denied*, 136 S.Ct. 925 U.S. (2016).

because a violation of them would negate the existence of the Individual Mandate.

The ACA, including the Individual Mandate, did not originate in the House, as required by the Origination Clause. U.S. CONST. art. I, sec. 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other Bills."). A violation of the Origination Clause may and should be raised by the Court *sua sponte*. Although this Court has yet to examine ACA's compliance with the Origination Clause, the issue has received some academic and scholarly attention. Priscilla H.M. Zotti and Nicholas M. Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century*, 3 Brit. J. Am. Legal Studies 71 (2014) ("*Zotti-Schmitz*"); Rebecca M. Kysar, *The 'Shell Bill' Game: Avoidance and the Origination Clause*, 91 Wash. Univ. L. Rev. 659 (2014); and Timothy Sandefur, *So It's A Tax, Now What? Some of the Problems Remaining After NFIB v. Sebelius*, 17 Tex. Rev. of L. & Pol. 203 (2013) ("*Sandefur*").

Amicus disputes the proposition that the situs of ACA's origination is the House because the Senate's amendment entirely gutted and replaced the House-passed version of HR 3590. The Senate-passed bill differed markedly from the House-passed bill: (1) the Senate completely obliterated the House's language;[19] (2) the Senate removed the House's title for the bill (the "Service Members Home Ownership Act of 2009") and replaced it with its own title (the "Patient

[19] The Senate Amendment, No. 2786 ("SA 2786"), struck the entirety of the House's language after the "enacting" clause.

Protection and Affordable Care Act"); and (3) the Senate-passed bill was approximately 532.21 times the length of the House-passed bill.[20] Only the bill's number, HR 3590, was retained by the Senate. It should not have been retained because the Senate's own rules consider the bill to be Senate-initiated. *See Riddick's Senate Procedure* 90 (Alan S. Frumin, ed., 1992) ("*Riddick's Senate Procedure*") (In "a complete substitute for a bill, the original text proposed to be stricken out and the text proposed to be inserted in lieu thereof, … are each regarded for the purpose of amendment as a question, … or as original text, and not as an amendment ….").

By striking the House's title and all language within HR 3590, the Senate left itself nothing to amend. The Senate-passed version of the bill begins by completely striking the entirety of the House's language. The first page of the Senate-passed bill states, in pertinent part: "***Strike out all after the enacting clause*** and insert: [ACA]." SA 2786, 155 Cong. Rec. S11607 (emphasis added). The phrase "strike out all" is not ambiguous in any way. It means there was nothing left in the House-passed bill to amend. Thus, the House-passed bill ceased to exist.[21] Every word in the Senate-passed bill was authored by the Senate. Once the Senate struck "out all after the enacting clause," there was nothing but a vacuum to amend. Clearly, the Senate's passage of SA 2786 was

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[20] *Zotti-Schmitz,* 3 Brit. J. Am. Legal Studies at 107 (comparing the length of the Senate's version (380,000 words) to the length of the bill originally passed by the House (714 words).

[21] The phrase "strike out all" is the key to understanding that the Senate-passed bill cannot be considered an amendment because the House-passed bill no longer existed in the Senate.

an act of "origination". *See Sandefur*, 17 Tex. Rev. of L. & Pol. At 231 n. 181 ("Notably, the Senate's own rules deem a gut-and-amend substitute to be a new bill, and treat it as though it were a Senate initiated bill.") (internal citation omitted). *See also, Riddick's Senate Procedure, supra* at 90.

It can be said that any Senate-originated tax measure is an affront to the Constitution. *Amicus* agrees. "[T]he Senate was never intended to write taxes and was explicitly forbidden from doing so in the Constitution." *Zotti-Schmitz,* 3 Brit. J. Am. Legal Studies at 134.

It must never be forgotten that the Origination Clause is the fulcrum upon which the Constitution was ratified and powers were distributed among the Branches, between the federal government and the States, and between the two chambers of Congress. During a Congressional debate in 1872, then Congressman James A. Garfield recounted the history of the Origination Clause:

> I am quite sure that the House cannot over-rate the importance of the issue raised by the sending of that bill to this House. … I beg the House to remember that ***the place which this clause of the Constitution occupies in our Constitution is of the utmost importance.***
>
> Twice during the Constitutional Convention of 1787 ***the whole system hinged upon the exclusive right of the House to originate revenue bills.*** Twice the determination of that single point settled the question whether the Constitution should be made or not. …
>
> … ***[T]he whole system came near being unhinged again by throwing out this***

> ***clause.*** At last, when it was demanded that the Senate should have the exclusive right to ratify treaties, to try impeachments, and to confirm nominations, it was said, "The Senate shall never have that right, unless you restore the exclusive right to originate money bills in the House." The Clause was then restored and kept in the Constitution as it now stands.

42 Cong. Globe, 42nd Cong., 2d Sess. 2106 (1872) (Statement of Rep. James Garfield) (emphasis added). This history is as relevant today as it was in the 1870s or the 1780s.

Finally, the Origination Clause is a judicially enforceable constraint upon the House and the Senate and is not a mere "prerogative" of the House. Indeed,

> the history of the Origination Clause reveals a deliberate constitutional "check and balance" under which nobody in the federal government except the direct representatives of the people in this House of Representatives, who are elected every two years and who are most familiar with the circumstances of "We the People," … can constitutionally propose federal laws under the taxing power of Congress.

Hearing on "The Original Meaning of the Origination Clause" Before the U.S. House of Representatives Judiciary Committee, Subcommittee on the Constitution and Civil Justice, 113th Cong., 2d Sess. 15 (April 29, 2014) (Testimony of Nicholas M. Schmitz) (internal citation omitted).

CONCLUSION

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

Respectfully submitted,

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