Nos. 11-393 and 11-400

In The
Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, et al.,

Petitioners,

v.

KATHLEEN SEBELIUS, Secretary of Health and Human Services, et al.,

Respondents.

STATES OF FLORIDA, et al.,

Petitioners,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF MEMBERS OF THE UNITED STATES SENATE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS ON THE ISSUE OF SEVERABILITY

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are United States Senate Republican Leader Mitch McConnell, Senator Orrin Hatch, Senator Kelly Ayotte, Senator John Barrasso, Senator Roy Blunt, Senator John Boozman, Senator Richard Burr, Senator Saxby Chambliss, Senator Daniel Coats, Senator Tom Coburn, Senator Thad Cochran, Senator Susan Collins, Senator John Cornyn, Senator Mike Crapo, Senator Michael Enzi, Senator Chuck Grassley, Senator Dean Heller, Senator John Hoeven, Senator Kay Bailey Hutchison, Senator James Inhofe, Senator Johnny Isakson, Senator Mike Johanns, Senator Ron Johnson, Senator Jon Kyl, Senator Mike Lee, Senator Richard Lugar, Senator John McCain, Senator Lisa Murkowski, Senator Rand Paul, Senator James Risch, Senator Pat Roberts, Senator Marco Rubio, Senator Richard Shelby, Senator Olympia Snowe, Senator John Thune, and Senator Patrick Toomey.

As Senators, *amici* are interested in the severability question at stake in this litigation because it lies at the intersection of their own legislative prerogative and the judicial review of the courts. The constitutional authority to draft and enact legislation is held by Congress, and this Court has acknowledged

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici* or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

its own need to defer to Congress' will on issues of severability.

Amici have strong institutional interests in ensuring that courts respect congressional judgment regarding the importance of laws. This Court has recognized that it should not substitute for that of Congress its own estimation of the importance of provisions to the legislative scheme as a whole. Members of Congress are uniquely situated to balance the many political and policy interests at play in any piece of legislation. In this case the clear intent of Congress – demonstrated through statutory findings, statements by its proponents, and the excision of a severability clause – is that the individual mandate was at the heart of the Patient Protection and Affordable Care Act ("PPACA") and was essential to the passage of the entire law.

Amici also believe that the Eleventh Circuit misconstrued this Court's severability test, overstepping its judicial role in substituting its own view of the centrality of a statutory provision for that of Congress. The facts surrounding the passage of the PPACA demonstrate why the estimation of which statutory provisions are essential to a bill as a whole is decidedly the province of Congress. The strong presumption of severability applied by the Eleventh Circuit not only misstates this Court's precedent, but also disregards Congress' own decision to exclude a severability clause from the statute.

SUMMARY OF THE ARGUMENT

Under the carefully-crafted balance enshrined in the Constitution, the separate branches of government have unique roles. When necessary, each branch must be willing to act to protect that balance of power. Each coequal branch must respect fully the authority of the other branches to act within their constitutionally-mandated spheres. The Constitution delegates to Congress the power to regulate interstate commerce through the enumerated authority of the Commerce Clause. This Court, in turn, may be required to strike down legislation if it exceeds the bounds of that grant of legislative power. When it does so, this Court must craft a remedy, mindful that policy determinations rightfully belong to the legislature, especially when those determinations result in statutes that (a) incorporate conflicting interests, (b) reflect political restraints that prevented passage of a law without certain provisions being included, and (c) make predictive judgments as to the costs and benefits of all provisions included in a legislative solution. These judgments are legislative in nature, and this Court's jurisprudence reflects that they are to be left to Congress.

Congress enacted the PPACA in an attempt to address the societal problems caused by high health care costs. In large part through a fundamental restructuring of the health insurance market, the Act's authors sought to provide for near-universal insurance coverage while trying to minimize any increase in insurance premiums. To achieve these

dual goals – significantly increased insurance coverage without significantly increased costs – they included an individual mandate requiring individuals to purchase a minimum level of government-approved insurance even though such a requirement was constitutionally questionable. 26 U.S.C. § 5000A. If this Court holds that the mandate is indeed unconstitutional, as *amici* believe the Court should, the Court must then determine a solution that maintains the proper balance between the legislative and judicial branches.[2] To do so, the Court must follow Congress' intent and evaluate whether Congress would have enacted the statute without the individual mandate. The Court cannot stray from that intent and drastically alter the law through deletion of an essential component, leaving in place a statute which the governing majority would not have chosen.

The authors of the PPACA and its proponents believed the individual mandate was indispensable to their reform scheme. The statutory findings explicitly stated that belief and explained why the mandate was so important to achieve the purposes of the statute. Opponents of the PPACA introduced numerous amendments designed to weaken or outright

[2] While *amici* submit that the individual mandate exceeds Congress' power under the Commerce Clause, this brief does not address the arguments in support of that conclusion. Rather, this brief focuses solely on the severability analysis and on the proper remedy if the Court holds the individual mandate unconstitutional.

remove the individual mandate; all were rejected. Several proponents of the law argued in committees and on the floor that the individual mandate was essential to their view of health care reform and that the legislation would not work without the mandate. More than merely a component of the insurance reforms, the majority in Congress believed that the entire health care reform effort of the PPACA was unsustainable without it.

This Court must defer to this clear expression of Congress' intent regarding the role of the individual mandate. Congress has been given the unique task of determining legislative solutions and assessing what is required to effectuate those solutions. In reaching such policy determinations, Congress must gather evidence, balance competing interests, and work within political constraints. Above all, Congress remains accountable to the people for the ultimate bargain crafted. To maintain the Constitution's balance, this Court cannot ignore Congress' determination as to what is essential to the PPACA's scheme and leave in place a statute Congress would not – and did not – enact.

The Eleventh Circuit erred in applying this Court's severability test to the PPACA. First, the Court of Appeals failed to defer to the congressional understanding of the mandate's centrality and substituted its own predictive judgment as to the requirement's effectiveness. Rather than considering whether the PPACA could function in the *manner Congress intended* without the individual mandate,

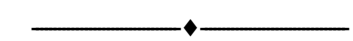
the Eleventh Circuit looked at the operational independence of some of the other provisions and relied upon its own view of the importance of the mandate. Such determinations should be left to Congress.

Second, the Court of Appeals erred in relying on a strong presumption of severability even though the PPACA does not contain a severability clause. The Eleventh Circuit was able to substitute its own view of the individual mandate's centrality partly because of an erroneous application of a presumption of severability. In particular, the Court of Appeals found that Congress' stated intent as to the indispensable nature of the individual mandate was not enough to defeat the presumption. This conclusion directly contradicts this Court's case law explaining that a strong presumption only applies if the statute contains an express severability clause.

Finally, the Eleventh Circuit erred in dismissing evidence that Congress chose to omit a severability clause from the PPACA. Congress had before it a version of health care reform that contained a severability clause and chose to go in the opposite direction. Congress drafted the PPACA without a severability clause and stressed the essential nature of the individual mandate to the health care reform effort. During the consideration of the PPACA, Congress considered amendments which contained severability clauses applicable to particular topics. At no time during the lengthy debate did anyone suggest that a severability clause should be added that would apply to the individual mandate.

Contrary to the Eleventh Circuit's suggestion, Congress had every reason to include a severability clause in the PPACA. Congress knew the individual mandate was unprecedented and potentially vulnerable to constitutional attack. Congress knew that legal challenges were inevitable and that this Court might be called upon to decide this very issue. If Congress intended for the PPACA to survive without the individual mandate, it could have protected its major legislative reform simply by including a clause which would have guided this Court and resulted in a strong presumption of severability – a clause which was already before it in a prior version of the PPACA. Congress did not do so.

Based on a review of the statutory text and numerous indicia of legislative intent, it is clear that the governing majority believed the individual mandate was essential to its reform effort. The Act's proponents believed the insurance reforms would not work as intended without the mandate and that their design for health care reform in the PPACA would crumble. Under these circumstances, this Court cannot leave a patchwork alternative to the PPACA in place without the heart of the legislation. Rather, such a determination must be left to the elected representatives of the people.



ARGUMENT

> "[The Congressional Budget Office], again, states this requirement is one of the most critical pieces of reform. Without it, we lose coverage for millions of Americans. Without it – without that reform – premiums could spike by up to 15 to 20 percent in the nongroup market. . . . That is the analysis of the nonpartisan Congressional Budget Office. So, clearly, we must resist efforts to weaken the individual responsibility policy in the health care reform bill."

—Senator Baucus, Chairman of the Finance Committee and one of the authors of the PPACA, 156 Cong. Rec. S4729 (daily ed. June 9, 2010).

I. Introduction

The Constitution gives Congress the power to legislate. The President signs legislation into law. If a citizen challenges the legislation, the Courts of the United States review it for conformance to the Constitution. If the citizenry does not approve of the laws that are passed, it votes the Congress and the President out of office. The citizenry does not vote for members of this Court, for this Court does not draft legislation and must remain independent. This is the balance created by the Founders. To maintain this balance, this Court cannot craft legislation itself; only Congress, accountable to the people, can. The people of the United States must be allowed to elect those who create the laws that govern their conduct.

The legislation at issue in this case, the Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), was fiercely debated in Congress. Its passage caused fundamental changes in the health insurance market. For the first time, Congress adopted a federal scheme for regulating health insurance in the individual market, a function traditionally left to the States. The PPACA requires a new method of setting insurance premiums (called "community rating") designed to prevent wide disparities in premiums among consumers. It also (in a stricture known as "guaranteed-issue") prohibits an insurer from refusing to issue a policy based on an applicant's preexisting health condition. Its twin goals are to achieve near universal health insurance coverage for American citizens without dramatically increasing their health insurance costs.

In order to accomplish their goals and as the primary means to making the community-rating and guaranteed-issue provisions work as intended, the authors of the PPACA included the so-called "individual mandate" – a requirement that individuals obtain insurance coverage approved by the government or pay a sizeable penalty. 26 U.S.C. § 5000A. The governing majority considered the mandate crucial to ameliorate the impact of other provisions in the PPACA, which would have caused health insurance costs to rise considerably. While essential to the legislative scheme, the individual mandate was an unprecedented exercise of Congress' Commerce Clause power. Relying on the unparalleled nature of

the mandate and the lack of any reasoned limiting principle, the Eleventh Circuit held the mandate unconstitutional. U.S. Pet. for Cert., App., 155a-156a (opinion of Eleventh Circuit, summarizing Commerce Clause holding).

If this Court affirms the Eleventh Circuit's constitutional holding, the Court must then decide the fate of the PPACA's remaining provisions. In making this severability determination, the Court will assess whether the law without the unconstitutional provision can operate as Congress intended. *See generally Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987). The individual mandate is at the heart of the PPACA, and the remainder of the statute necessarily depends on its inclusion because without the mandate, the statute's reforms cannot work as intended. Indeed, the proponents of the PPACA knew at the time Congress considered the legislation that without the mandate both the number of uninsured and the price of premiums would skyrocket. In short, without the mandate, Congress' attempted solution to the twin problems of health care coverage and costs disappears. *See* 42 U.S.C. § 18091(a)(2)(I)-(J) (explaining Congress' findings that the individual mandate was essential to broadening the health insurance risk pool and reducing costs).

In addition, the remaining provisions of the PPACA would never have been enacted in their current form without the individual mandate. Deciding to the contrary would upset the constitutional balance of power between the branches. The PPACA

is so fundamental a change in the functioning of the health care insurance market, and is so dependent on each of its interlocking provisions, that this Court cannot guess at what provisions Congress would have passed without the individual mandate in the law. What combination of provisions Congress would have been able to enact in the absence of the mandate is something that, if any accountability is to be maintained in the legislative and elective process, must be considered by Congress. Otherwise, voters cannot ever hold their Representatives or Senators accountable for the health care reform legislation as it was passed; their elected representatives did not vote for this law without the mandate and, should this Court uphold the remaining provisions without the mandate, the law, in its final form, will have been approved only by this Court.

II. Courts Must Determine Congress' Intent to Assess Whether an Unconstitutional Provision Is Severable.

When this Court determines that a portion of a law runs afoul of constitutional limits, it must determine the proper remedy. At times, severing the invalid provision may represent appropriate deference to Congress and not inject the Court into the political process. This result is correct when it is clear that the remaining provisions of the law were intended to stand or fall independently of the challenged provision.

At other times, leaving a modified statute in place can change the underlying statutory scheme in a fundamental manner and, if the entire statute is not sent back to Congress, a law that never would have passed would become binding. In such a circumstance the final drafter of the legislation is the Court. To avoid this result, the Court should not rewrite laws by striking essential passages while leaving the remaining portions in place. *Cf. Ayotte v. Planned Parenthood*, 546 U.S. 320, 329-30 (2006); *Randall v. Sorrell*, 548 U.S. 230, 262 (2006) (Breyer, J.). This is especially true where the overall statute is a fully-integrated law that works through multiple, related provisions.

The severability analysis is, at bottom, an inquiry into Congress' intent. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999); *Ayotte*, 546 U.S. at 330. As this Court has explained, an unconstitutional provision cannot be severed from the remainder of the statute if Congress "would not have enacted those provisions which are within its power, independently of that which is not." *Alaska Airlines*, 480 U.S. at 684 (quotations omitted). In other words, the court must determine whether Congress would have preferred no statute at all to what is left after the unconstitutional provision is removed. *Ayotte*, 546 U.S. at 330. This inquiry evaluates the importance of the invalid provision in "the original legislative bargain." *Alaska Airlines*, 480 U.S. at 685. To do so, the court focuses not only on the statute's text and structure but also may consider the

legislative history, views of the law's sponsors, statements of other members of Congress, proposed amendments, and votes during the legislative process. *Id*. at 691-96 (discussing these sources in determining Congress' intent for the legislation).

However, the Court is necessarily limited in its ability to interpret the types of legislative history found relevant to this determination and must be careful not to substitute its own analysis of the importance of the provision for that of Congress. With respect, *amici* submit that the legislators themselves are in the best position to determine whether a provision – functionally, structurally, or politically – is essential to a piece of legislation.

A. Congress Considered the Individual Mandate Essential to the PPACA's Reforms.

1. The PPACA's Statutory Findings Highlight the Individual Mandate's Importance to the Entire Legislative Scheme.

The PPACA's text clearly expresses Congress' understanding of the individual mandate's centrality. While the statute does not contain a provision explicitly addressing "severability" by name, the PPACA is far from silent on the issue. Congress included a number of specific findings about the importance of the individual mandate; all of these findings fall into the categories of increasing coverage or reducing

costs. In particular, the PPACA explains that its proponents believed the individual mandate will work together with the Act's other provisions to:

- add millions of new consumers to the health insurance market and thereby increase the number of insured Americans;
- achieve near-universal coverage;
- significantly reduce the economic cost caused by the uninsured;
- lower health insurance premiums;
- improve financial security for families;
- minimize adverse selection and broaden the health insurance risk pool; and
- reduce administrative costs.

42 U.S.C. § 18091(a)(2). These are not minor contributions. The PPACA also explains that its proponents believed that the mandate would accomplish these objectives by strengthening the private employer-based health insurance system; significantly reducing the number of uninsured; increasing the economies of scale; and eliminating the incentive to postpone purchasing health insurance. *Id*. Finally, the statute emphasizes that the individual mandate (which it calls "the requirement") is more than a mere component of the legislation; it is *essential* to it:

> The 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. . . . The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold . . . [and] that do not require underwriting and eliminate its associated administrative costs.

Id. at § 18091(a)(2)(H)-(J). In light of these explicit findings, it is clear that the governing majority in Congress believed its goals could not be achieved without the individual mandate.

2. The Legislative History Bolsters the PPACA's Clear Textual Explanation That the Individual Mandate Was Essential to the Health Care Reform Effort.

Legislative history can also serve as evidence of congressional intent regarding the role of an unconstitutional provision. In *Alaska Airlines*, this Court closely examined a statute's legislative history in determining Congress' intent regarding the severability of an invalid legislative-veto provision. 480 U.S. at 691-97. In particular, this Court looked at the statements of members of Congress, reports, and proposed amendments (or lack thereof) to assess the provision's importance. *Id*. The Court found that the legislative veto was mentioned only once during the entire deliberation and clearly was not a congressional

priority. Therefore, based on Congress' "scant attention," and the statute's language and structure, this Court held the provision severable. *Id*. at 697; *see also id*. at 694 n.18, 696 (finding the provision "uncontroversial" and of "relative unimportance").

A simple comparison between this case and *Alaska Airlines* speaks volumes. In addition to the explicit statutory findings discussed above, the PPACA's legislative history reveals significant consideration of the role of the mandate. Congress paid a great deal of attention to the individual mandate, and the governing majority believed it was essential to achieving its twin goals. During consideration of the Act, the Senate considered numerous amendments and points of order which would have removed or significantly weakened the mandate's impact. *See, e.g*., 155 Cong. Rec. S13830 (daily ed. Dec. 23, 2009) (statement of Sen. Ensign raising constitutional point of order); 156 Cong. Rec. S1998-99 (daily ed. Mar. 24, 2010) (consideration of S. Amdt. 3608); 156 Cong. Rec. S2076 (daily ed. Mar. 25, 2010) (consideration of S. Amdt. 3710); *cf. infra* pp. 17-20 (discussion of Sen. Baucus' opposition to other amendments that would have weakened the individual mandate). However, none of these amendments passed.

Congress' understanding of the mandate's indispensable role in the statutory scheme was also manifest in numerous comments by key supporters of the legislation and the expert testimony upon which they relied. One of the Act's chief architects was Senator Baucus, Chairman of the Senate Finance Committee.

Senator Baucus was a passionate defender of the need for an individual mandate in order to achieve the goals of the legislation. To further that end, he made a number of pleas in the Finance Committee and on the Senate floor to protect the mandate from effective elimination or diminution. For example:

September 24, 2009 (before the Finance Committee): In response to a proposed amendment that would allow individuals to opt out of the mandate, Senator Baucus argued,

> I would say it is a mortally wounding amendment because it basically says no more personal requirements, no shared responsibility for individuals. Obviously individuals will just opt themselves out, and that is going to undermine this whole system here. It clearly is going to undermine the system. The system won't work if this amendment passes. Second, as Senator Stabenow is pointing out, it makes the insurance even less affordable in the exchange, and that is not right. If we want this to work, [and] not to make things more difficult. And I just strongly urge everyone not to support the amendment.

Continuation of the Open Executive Session to Consider an Original Bill Providing for Health Care

Reform Before the S. Comm. on Finance, 111th Cong. 216 (Sept. 24, 2009).[3]

October 1, 2009 (before the Finance Committee): In response to another proposed amendment granting broad exceptions to the individual mandate, Senator Baucus stated,

> [Y]ou want to gut health reform. If we are serious about having health reform, if we are serious about having the insurance market reformed, if we are serious about making sure that the Americans have health insurance, we have to have shared responsibility. And that shared responsibility is that all Americans are in this, we all have to participate, which means there has to be a shared responsibility for individuals to buy health insurance. Essentially what you are saying, you want to take away the personal responsibility. That is basically what you are saying. And I believe that guts health care reform. This is a killer amendment. This is an amendment which guts and kills health reform. . . . The effect is to say no more coverage, not have universal coverage.

Continuation of the Open Executive Session to Consider an Original Bill Providing for Health Care

[3] Available at http://finance.senate.gov/hearings/hearing/?id=d8083e61-f98b-0204-3389-428e5a1a78e7 (follow Download the Executive Session Transcript hyperlink).

Reform Before the S. Comm. on Finance, 111th Cong. 21-22 (Oct. 1, 2009).[4]

June 9, 2010 (on the Senate floor): During consideration of a post-enactment amendment designed to limit the reach of the mandate, Senator Baucus again defended the provision:

> [The Congressional Budget Office], again, states this requirement is one of the most critical pieces of reform. Without it, we lose coverage for millions of Americans. Without it – without that reform – premiums could spike by up to 15 to 20 percent in the nongroup market. . . . That is the analysis of the nonpartisan Congressional Budget Office. So, clearly, we must resist efforts to weaken the individual responsibility policy in the health care reform bill.

156 Cong. Rec. S4729 (daily ed. June 9, 2010). Indeed, Senator Baucus noted that the "shared responsibility" that resulted from the PPACA requiring all groups to participate in the health care market, including "individuals," was "the basic premise of health care reform." *Id*. "It is," as he put it for those who share his view of health care reform, "about the only way we could make health care reform work in this country." *Id*.

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[4] Available at http://finance.senate.gov/hearings/hearing/?id=d7e5e3c3-eb4e-e366-c063-76040ad6da87 (follow Download the Executive Session Transcript hyperlink).

June 15, 2010 (on the Senate floor): During consideration of another post-enactment amendment that would have expanded exceptions to the individual mandate, Senator Baucus stated, "[The amendment] would eliminate coverage for millions of Americans. It would strike at the heart of health care reform. And the Congressional Budget Office tells us it would also increase premiums for everyone else. The [amendment], just to repeat, would increase premiums for millions of Americans who would have health insurance." 156 Cong. Rec. S4915 (daily ed. June 15, 2010).

Other proponents of the PPACA made similar statements in support of the individual mandate's centrality to the Act's goals of increased coverage and reduced cost. For example during consideration of the PPACA, Senator Jack Reed noted:

> One of the problems we have in the health care system today is healthy, young people – unless they are offered health insurance through their employer – don't typically purchase it. . . . The whole principle of insurance is spreading risk across the largest population to reduce cost. That is precisely what we are doing.

155 Cong. Rec. S13746 (daily ed. Dec. 22, 2009). He described the requirement as "fundamental." *Id*. And then-House Majority Leader Steny Hoyer said it was "a central plank of the Democratic plan." Rep. Steny

Hoyer, Address at the Center for American Progress Action Fund (Dec. 7, 2009).[5]

Senator Bingaman, a senior member of both the Finance Committee and of the Health, Education, Labor & Pensions (HELP) Committee, also stressed the importance of the individual mandate to the twin goals of increasing coverage and reducing costs. For example, during the HELP Committee markup, Senator Bingaman argued, "This requirement, I think, is critical to ensure that everyone, both the sick and the healthy buy coverage, insures appropriate risk sharing, leads to affordable coverage for everybody. I think the CBO indicated that it's a major factor. This requirement is a major factor in expanding coverage." Health Care Reform Legislation Markup Day 9, Part 3 (C-SPAN Video Library July 8, 2009, 4:18 PM EST).[6] Senator Bingaman explained that expanding coverage is "[t]he main thrust of this bill." *Id*. at 4:23 PM EST.

Later, during the Finance Committee's mark-up of the bill, he underscored that making health insurance affordable was also a critical objective for the PPACA's proponents – and that weakening the individual mandate was antithetical to that end:

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[5] Available at http://hoyer.house.gov/index.php?option=com_content&task=view&id=2338&Itemid=57.

[6] Available at http://www.c-spanvideo.org/appearance/557041913.

> [H]ow do we make health care insurance more affordable for folks? . . . And clearly this amendment [which would exempt more people from the mandate] is not one that I see as resulting in making health care coverage more affordable. . . . [T]he effect of this amendment is to reduce the number of people who will have coverage. . . . And that, of course, runs up premiums for everybody else who is insured.

Continuation of the Open Executive Session to Consider an Original Bill Providing for Health Care Reform Before the S. Comm. On Finance, 111th Cong. 145-147 (Oct. 1, 2009).[7]

Similarly, two key Chairman in the House of Representatives, Congressman Henry Waxman and Congressman George Miller, noted the centrality of the mandate to the PPACA's objectives. Representative Waxman stated that the individual mandate "may well be the critical component to make insurance work," Rep. Henry Waxman, Chairman, Committee on Energy and Commerce, Remarks at Families USA Health Action 2009 (Jan. 29, 2009),[8] and Representative Miller explained that the mandate was "the only way to make meaningful health

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[7] Available at http://finance.senate.gov/hearings/hearing/?id=d7e5e3c3-eb4e-e366-c063-76040ad6da87 (follow Download the Executive Session Transcript hyperlink).

[8] Available at http://waxman.house.gov/UploadedFiles/speech_familiesusa_1-29-2009.pdf.

insurance reforms and make coverage more affordable," Rep. George Miller, Chairman, Education and Labor Committee, Statement After Bipartisan White House Health Reform Summit (Feb. 25, 2010).[9]

Finally, Senator Franken succinctly summarized the PPACA's proponents' view of the individual mandate and its role in the entire legislative scheme:

> So that is our three-legged stool: accessibility, accountability, and affordability. We don't discriminate against people with preexisting conditions, and so we have a mandate so people don't wait until they get sick or hurt to get insurance. Because you are mandated to get health insurance, we make sure everyone can afford it. A three-legged stool. If you take any leg out, the stool collapses.

157 Cong. Rec. S737 (daily ed. Feb. 15, 2011).

This description by Senator Franken illustrates how the individual mandate was critical to the entire PPACA. The Act sought to accomplish increased coverage ("accessibility") through the insurance reforms and managed costs ("affordability") through Medicaid expansion, direct subsidies and the exchanges. However, these twin goals can only be accomplished with the counterbalance of the third "leg" – the accountability provided by the individual mandate.

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[9] Available at http://georgemiller.house.gov/2010/02/statement-after-bipartisan-whi.shtml.

The importance of the individual mandate to the dual goals of the PPACA was confirmed by expert testimony. Significantly, the Director of the Congressional Budget Office, Douglas Elmendorf, testified that the mandate made a major difference in the scope of health insurance coverage under the Act:

> A mandate is – just briefly, to address your question of the role of a mandate – that makes a big difference, in our estimation, on the number of people who end up getting coverage, who would not otherwise have it. And that's partly because the mandate has a financial penalty attached to not following it, and it's partly because people follow the rules. . . .

Health Care Reform Legislation Markup Day 9, Part 1 (C-SPAN Video Library July 8, 2009, 5:49 mark).[10]

The professional staff of the Finance Committee also underscored that it was, in fact, "very difficult, if not impossible, to achieve the same levels of coverage without having a personal responsibility requirement. . . . [T]o achieve the coverage levels that [the drafters of the PPACA attained] would essentially require something like what we've put in the mark." Continuation of the Open Executive Session to Consider an Original Bill Providing for Health Care Reform Before the S. Comm. on Finance, 111th Cong.

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[10] Available at http://www.c-spanvideo.org/program/MarkupDay9.

412-414 (Sept. 29, 2009) (statement of Yvette Fontenot).[11]

Much like the descriptive statutory findings, these comments of the Act's proponents – supported by the testimony of the CBO – and the consistent defeat of weakening amendments reveal that the majority in Congress believed the individual mandate was a critical component of the crafted legislation. They would not have included the insurance reforms without the essential counterbalance of the individual mandate, nor would they have chosen to approach health care reform as accomplished by the PPACA without the heart of the legislation, the insurance reforms. When a court is invalidating a provision that the legislators unambiguously viewed as indispensable to their overarching goal, it should not engage in the essentially legislative task of dissecting the statute rather than letting it fall as a whole.

B. This Court Should Defer to Congress' Understanding of the Centrality of the Individual Mandate Because the PPACA Was an Inherently Political Exercise.

Courts should defer to Congress' stated intent because the determination that a particular provision is essential to accomplish the overall statutory goals

[11] Available at http://finance.senate.gov/hearings/hearing/?id=d7f3a956-9ef2-b6c0-6486-3755d1b722a6 (follow Download the Executive Session Transcript hyperlink).

is a quintessential policy decision. As with other policy decisions, Congress' assessment of a statute's critical components is informed by consideration of numerous, potentially contradictory, and not-always-quantifiable interests. For this reason, courts should not easily dismiss Congress' expressed intent. As has been aptly described, "Congress' prerogative to balance opposing interests and its institutional competence to do so provide one of the principal reasons for deference to its policy determinations." *Salazar v. Buono*, 130 S. Ct. 1803, 1817 (2010) (Kennedy, J.).[12] As an elected body, Congress' resolution incorporates considerations beyond the courts' province, and Congress' members can be held accountable if the American people disapprove of the balance struck.

The legislative process, by design, entails more than a court could possibly review, and only Congress is in a position to evaluate all of the factors and craft a workable solution. These factors include, of course, studies, research, and testimony demonstrating the extent of the problem and the potential impact of proposed solutions. But Congress must also go beyond the studies and testimony and take account of political

[12] The Court should defer to Congress' policy determination regarding the effectiveness of a chosen reform method. However, it is still the Court's role to assess whether that method is within Congress' limited power to impose as dictated by the Constitution. *See, e.g., Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 911 (2010) ("When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy.").

factors in order to achieve a workable solution that is acceptable to the governing majority. "[L]egislative acts . . . are integrated bundles of compromises, deals, and principles." *Abrams v. Johnson*, 521 U.S. 74, 106-07 (1997) (Breyer, J. dissenting) (quotations omitted).

The legislative process which resulted in the PPACA only serves to highlight the importance of the Court's deference to Congress' policy determination regarding the centrality of the individual mandate. First, the Act's proponents balanced a myriad of concerns in deciding upon the PPACA's particular approach to health care reform. For example, Congress studied the experience of states that had enacted similar insurance reforms without an individual mandate. That experience showed that similar reform without the mandate actually raised the cost of insurance, increased the number of uninsured, and in at least one case, destabilized the insurance market. Uwe E. Reinhardt, Prepared Statement for Making Health Care Work for American Families; Ensuring Affordable Coverage: Hearing Before the Subcomm. on Health of the H. Comm. on Energy & Commerce, 111th Cong. 11 (Mar. 17, 2009).[13] Congress also noted the experience of Massachusetts, which included an individual mandate as the keystone of its own reforms. *See* 42 U.S.C. § 18091(a)(2)(D); Learning from the States: Individual State Experiences with the

[13] Available at http://democrats.energycommerce.house.gov/Press_111/20090317/testimony_reinhardt.pdf.

Healthcare Reform Coverage Initiatives in the Context of National Reform (Roundtable Discussion): Hearing Before the S. Comm. on Health, Education, Labor and Pensions, 111th Cong. 8 (2009) (statement of John Kingsdale, Exec. Dir., Commonwealth Health Insurance Connector).[14]

In addition, Congress considered the views of numerous groups likely to be significantly impacted by the reforms. In 2009 alone, no fewer than five congressional committees held dozens of hearings on issues related to health care reform.[15] One of these hearings before the Senate HELP Committee included a health care reform roundtable with representatives from, *inter alia*, the business community, insurance companies, physicians, states, and labor. *See* Healthcare Reform Roundtable (Part I): Hearing Before the S. Comm. on Health, Education, Labor and Pensions, 111th Cong. 6-8 (2009) (statement of Sen.

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[14] Available at http://www.gpo.gov/fdsys/pkg/CHRG-111shrg49460/pdf/CHRG-111shrg49460.pdf.

[15] *See* Hearings, U.S. Senate Comm. on Finance, http://finance.senate.gov/hearings/index.cfm?PageNum_rs=5; Hearings, U.S. Senate Comm. on Health, Education, Labor & Pensions, http://help.senate.gov/hearings/index.cfm?year=2009; Hearings, U.S. House Comm. on Energy & Commerce (Democrats), http://democrats.energycommerce.house.gov/index.php?q=hearings&page=22; Hearings & Bills, U.S. House Comm. on Education & the Workforce (Democrats), http://democrats.edworkforce.house.gov/legislation/hearing?type=hearing&tid=22&tid_1=All&page=5; Calendar Home, U.S. House Comm. on Ways and Means, http://waysandmeans.house.gov/Calendar/Default.aspx?CatagoryID=&Year=2009&EventTypeID=.

Dodd describing backgrounds of witnesses).[16] A number of these participants commented on the importance of an individual mandate, *id*. at pp. 23 (statement of Ronald A. Williams, CEO, Aetna, Inc.), 37 (statement of Samantha Rosman, M.D., Board of Trustees, American Medical Association), 69 (statement of Janet Stokes Trautwein, CEO, National Association of Health Underwriters), and Senator Bingaman noted the diverse panel's "near uniform" understanding of the need for such a requirement within the proposed reforms, *id*. at pp. 91-92.

In crafting the PPACA's "integrated bundle[ ] of compromises, deals, and principles," *Abrams*, 521 U.S. at 106-07, Congress also necessarily worked within the political constraints of the time. The statute was hotly debated, and the governing majority had to carefully balance interests to find an approach that would be acceptable to a sufficiently broad support base. Proponents of the bill had to fight for every vote in the Senate to avoid measures which would have defeated the effort.

To that end, the PPACA, as it passed the Senate, included a number of provisions offering highly-specialized and substantial benefits to the states of key, holdout senators. For example, Nebraska received an exemption from the state share of Medicaid expansion worth $100 million, Patient Protection and

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[16] Available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:50510.pdf.

Affordable Care Act, Pub. L. No. 111-148, § 10201(c)(4) (2010), and, along with Michigan, an exemption from a substantial excise tax for non-profit insurers in those states, *id*. § 10905. Similarly, Louisiana received an increase of $100-$300 million in federal aid to Medicaid recipients in the state. *Id*. § 2006. Vermont and Massachusetts were also given additional Medicaid funding, *id*. § 10201(c)(4), and the Act included Medicare Advantage protections that heavily benefited Florida, *id*. § 3201.

Thus, the Act's proponents considered contradictory interests, worked within political constraints which dictated the need for certain provisions, and made predictive judgments as to the impact of the statute's various requirements. All of these considerations resulted in a hard-fought legislative bargain that fundamentally restructures a significant segment of the United States' economy. As with all legislative bargains, the Court defers to the policy determinations inherent in the PPACA's bargain because a reviewing court cannot begin to divine how these varied interests and constraints worked together to form the legislative balance. The Act's proponents clearly believed the individual mandate was critical to their objectives, and they did not want the legislation without that essential piece because of the harm its absence would cause. This policy judgment was traditional legislative work, and the courts must defer to Congress' assessment.

III. The Eleventh Circuit Misconstrued This Court's Severability Test.

A. The Eleventh Circuit Failed to Defer to Congress' Expressed Intent Regarding the Role of the Individual Mandate.

Given the level of deference due and Congress' peculiar institutional competence, courts should be wary of substituting their own view of a statutory provision's centrality for that of Congress. The Eleventh Circuit ignored this important restraint on its remedial power and did just that.

In misapplying this Court's severability test, the Eleventh Circuit erroneously concluded that the individual mandate was severable from all other provisions of the PPACA. U.S. Pet. for Cert., App. 172a-186a. The Eleventh Circuit first concluded that most of the Act's provisions clearly operated independently of the individual mandate and, therefore, were still valid. 174a-176a. The Court of Appeals then assessed whether two of the key insurance reforms, community rating and guaranteed-issue policies, could also survive. 177a-186a. The Court noted Congress' findings as to the essential nature of the mandate but concluded that Congress was wrong. *Id*. According to the Eleventh Circuit's assessment, the PPACA's other provisions accomplish many of the same objectives as the individual mandate, 181a, and the mandate has a "limited field of operation," 182a.

Under the guise of respect for Congress, the Eleventh Circuit left in place a statute that Congress

did not want and never would have enacted. 172a. Indeed, the Court of Appeals' severability determination ignores fundamental principles of this Court's test and fails to defer to Congress' intent in two critical respects. First, the Eleventh Circuit erroneously conducted only a superficial analysis as to whether some of the PPACA's provisions were operationally independent. 174a-176a. In *Alaska Airlines*, this Court recognized that even if the remaining provisions can function independently that does not answer the severability question. 480 U.S. at 684-85. Rather, the Court acknowledged that simple operational independence alone may "indicate little about the intent of Congress." *Id*. at 685. Congress may have made different policy choices if it had known the provision was invalid. Therefore, courts have to look beyond whether the remaining provisions can function as a law and determine whether the statute, as modified, would function in the *manner* intended by Congress. *Id*.

The Eleventh Circuit ignored this distinction and only considered the "stand-alone nature . . . of the Act's provisions" and "their manifest lack of connection to the individual mandate." 176a. In so doing, the Court of Appeals ignored clear evidence that Congress would not have enacted health care reform in the vehicle of the PPACA without the mandate. *See* Section II.A, *supra*. The Act's authors chose to restructure the health insurance industry in an attempt to obtain near-universal coverage and lower health care costs. The governing majority understood

that reforming the health insurance industry in this manner necessarily entails an individual mandate. The statute does not achieve their intended goals of expanded coverage and reduced costs without the insurance reforms and the accompanying individual mandate. *Id*. Without the "leg" of the individual mandate, the "three-legged stool" that is the PPACA falls. 157 Cong. Rec. S737 (daily ed. Feb. 15, 2011) (statement of Sen. Franken).

The Eleventh Circuit also failed to give appropriate deference to Congress' policy assessment in evaluating the relationship between the individual mandate and the insurance reforms. Instead, the Court of Appeals erroneously substituted its own predictive judgment as to the mandate's effectiveness in preventing such undesirable consequences as an increase in the number of uninsured and higher insurance premiums. 177a-186a. In essence, the Eleventh Circuit held the individual mandate severable from the insurance reforms because the Court decided the mandate was not really all that necessary. *Id*. This conclusion is directly contrary to the language of the PPACA, to the arguments of numerous proponents of the legislation, and to the assessment of the CBO. *See* Section II.A.2, *supra*. The Eleventh Circuit failed to defer to Congress' traditional legislative authority, and its resulting severability holding cannot stand.

B. The Eleventh Circuit Erroneously Applied a Strong Presumption of Severability Even Though Congress Chose to Omit a Severability Clause.

1. Strong Evidence of Non-Severability Is Necessary Only If the Statute Contains an Express Severability Clause.

The Eleventh Circuit also erred in relying heavily on a presumption of severability to reject Congress' assessment that the individual mandate was indispensable to the PPACA's overall reform efforts. The Eleventh Circuit's application of this presumption directly contradicts this Court's severability jurisprudence. While recognizing that a strong presumption for severability may be warranted, this Court has linked the presumption to a statutory severability clause:

> [T]he *inclusion of such a clause* creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision. *In such a case*, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute.

Alaska Airlines, 480 U.S. at 686 (citations omitted) (emphasis added). This principle is consistent with the deference due Congress' determinations regarding the role of statutory provisions. If Congress states

that a provision can be severed from a statute without injuring the whole, the court should respect that policy decision.

However, when Congress does not express a desire for severability by including a clause in the statute, the Court does not simply assume such an intent, particularly when there is evidence to the contrary. Rather, the Court considers the statute's text and legislative history to *discern* Congress' intent. This Court's *Alaska Airlines* analysis illustrates the point. After explaining the presumption, the Court noted that the parties disputed whether such a clause applied to the statute at issue in the case. 480 U.S. at 686-87. This Court concluded that it did not need to resolve the issue because Congress' intent was clear *without the aid of a presumption*. *Id*. at 687. The Court proceeded to analyze the expressions of Congress' intent in the statute and legislative history without any special weighing in favor of severability. *Id*. at 687-97.

The Eleventh Circuit's analysis below directly conflicts with *Alaska Airlines* by requiring strong evidence of Congress' preference for non-severability even though the PPACA does not contain a severability clause. Under the Court of Appeals' approach, the court's inquiry is the same with or without the statutory clause. That simply is not the law. Indeed, the Eleventh Circuit went a step further and used the "presumption," in the face of clear contrary evidence, to overcome Congress' stated determination that the mandate was essential to its intended regulation of

the health insurance market. 184a. Specifically, the Eleventh Circuit found that Congress' express findings "do not tip the scale away from the presumption of severability." *Id*. In so doing, the Eleventh Circuit essentially turned the severability analysis on its head.

2. The Eleventh Circuit Erred In Dismissing the Fact That Congress Chose to Omit a Severability Clause.

The Eleventh Circuit also too readily dismissed the circumstances surrounding the absence of a severability clause in the PPACA. Before the Senate considered the PPACA, Congress had before it a health care reform bill which contained an express severability clause. H.R. 3962, 111th Cong. § 255 (as passed by House, Nov. 7, 2009). However, in drafting the PPACA proposal, Congress moved in the opposite direction. Rather than including a clear indication that individual provisions were dispensable, Congress left out the severability clause and introduced language explaining that the individual mandate was essential to the PPACA's intended reforms. *See* 42 U.S.C. § 18091. This was not mere silence; it was a choice.

The Eleventh Circuit ignored this evidence of congressional intent because it believed a severability clause was superfluous. U.S. Pet. for Cert., App. 175a-176a. On the contrary, the authors of the PPACA had every reason to include a severability clause if that

was what they intended. The Act's proponents well-understood that the individual mandate was an unprecedented exercise of the Commerce Clause power; Congress' own lawyers noted that its constitutionality was questionable. U.S. Pet. for Cert., App. 319a, 326a-327a (opinion of Vinson, J. on summary judgment) (citing legal opinion of Congressional Research Service). Moreover, they knew that legal battles challenging the provision were already in the works and that the courts would thus be called upon to determine whether the mandate was valid, and if not, whether the rest of the PPACA should survive. *Id*. at 355a. Far from being unnecessary, a severability clause would have provided clear guidance to the courts as to Congress' intent if the mandate failed and would have created a strong presumption in favor of severability.

Furthermore, Congress considered other specialized amendments containing severability clauses during the long debate of the PPACA but never indicated that such a clause should be applied to the individual mandate. During the Senate's consideration of the initial bill, the Senate voted on 31 amendments, motions, and points of order covering a wide range of subjects, and Senators submitted dozens of additional amendments.[17] Four amendments contained a severability clause related to a particularized topic.

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[17] *See* Amendments for H.R. 3590, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.3590: (follow "Amendments" hyperlink).

See 155 Cong. Rec. S12073, 12086-87 (daily ed. Dec. 1, 2009) (S. Amdt. 2793); 155 Cong. Rec. S12335-36 (daily ed. Dec. 3, 2009) (S. Amdt. 2862); 155 Cong. Rec. S12924-25 (daily ed. Dec. 10, 2009) (S. Amdt. 3131); 155 Cong. Rec. S12947, 12961 (daily ed. Dec. 10, 2009) (S. Amdt. 3156). The Senate voted on 41 amendments and motions during consideration of the House amendment package;[18] one contained a specialized severability clause. 156 Cong. Rec. S2070-71 (daily ed. Mar. 25, 2010) (S. Amdt. 3700).

Contrary to the Eleventh Circuit's suggestion, U.S. Pet. for Cert., App., 175a-176a, Congress is clearly not averse to severability clauses when that is its intent. However, at no time during the lengthy consideration of the PPACA did a member of Congress suggest that the PPACA should be amended to include a severability clause applicable to the individual mandate.

Quite simply, it is difficult to believe that the Act's proponents intended the individual mandate to be severable but chose to leave the future of their dramatic legislation to the Court's discretion by excluding a severability clause. Such a proposition is all the more untenable given the fact that Congress had severability clauses before it during consideration of the Act and given the statute's description of

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[18] *See* Amendments for H.R. 4872, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.4872: (follow "Amendments" hyperlink).

the individual mandate as "essential" to accomplishing its goals.

CONCLUSION

This is not a circumstance in which severing a provision respects the power and role of the politically-responsive legislature. Quite the opposite. As a political body, the governing majority in Congress believed the individual mandate was essential to the success of the PPACA. They knew that the individual mandate would not be popular with a great many people, and that the mandate was of questionable constitutionality. However, the Act's proponents also knew that their approach to health care reform simply would not work without it. Their objective through the PPACA was to increase the number of Americans with insurance coverage without considerably increasing costs. Neither objective can be achieved through the PPACA without an individual mandate.

Like the reforms themselves, Congress' assessment of what is necessary to achieve them is a policy decision uniquely within its competence. If Congress exceeds its limited power in crafting the heart of the reforms, this Court cannot create an alternative solution. *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329-30 (2006). Having determined that these reforms will not work without the mandate, Congress must then go back to the drawing board. For, unlike the

Court, Congress must answer to the people for the legislative bargain crafted. "In a democracy, it is the electorate that holds the legislators accountable for the wisdom of their choices." *I.N.S. v. Chadha*, 462 U.S. 919, 997 (1983) (White, J., dissenting). To protect this fundamental check on governmental power, this Court must respect Congress' policy determination regarding the critical role of the individual mandate. The PPACA cannot stand without it.

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