

Nos. 11-1057, 11-1058

In the
United States Court of Appeals
for the **Fourth Circuit**

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II,
in his official capacity as Attorney General of Virginia,
Plaintiff-Appellee/Cross-Appellant,

v.

KATHLEEN SEBELIUS, Secretary of the Department of
Health and Human Services, in her official capacity,
Defendant-Appellant/Cross-Appellee,

**On Appeal from the United States District Court
for the Eastern District of Virginia at Richmond**

BRIEF OF *AMICUS CURIAE*
JUSTICE AND FREEDOM FUND IN SUPPORT OF
APPELLEE/CROSS-APPELLANT AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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INTEREST OF AMICI

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the District Court, striking the individual mandate, should be affirmed—but modified to strike the entire Act.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. In this case, JFF is interested in striking down the Patient Protection and Affordable Health Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (“the Act”) in its entirety, in order to preserve the individual liberties guaranteed by the Bill of Rights and restrict the authority of Congress to the powers enumerated in the U.S. Constitution.

JFF’s founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation*, released in 2010.

The parties have consented to the filing of this brief.

FED. R. APP. P. 29(C)(5) STATEMENT

No party's counsel has authored this brief in whole or in part, and no party or party's counsel has contributed money that was intended to fund the preparation or submission of this brief. No person, other than *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amicus curiae Justice and Freedom Fund concurs with the District Court that the Commerce Clause does not grant Congress authority to compel every American to purchase health insurance. The Necessary and Proper Clause cannot salvage the Act, because Congress itself created the financial "necessity" for the individual mandate—its centerpiece. The mandate is "necessary" but manifestly improper—it exceeds congressional powers under the Commerce Clause and jeopardizes the fundamental freedoms that Americans cherish.

But rather than sever the individual mandate, the Court should have stricken the entire Act. Although such action may initially appear to be a greater intrusion into legislative territory, it actually preserves the separation of powers by not entangling the court in the extensive rewriting necessary to ferret out the sections that can and cannot be sustained after the mandate is excised.

ARGUMENT

I. THIS COURT SHOULD STRIKE DOWN THE ENTIRE ACT IN ORDER TO PROTECT THE DOCTRINE OF SEPARATION OF POWERS AS MANDATED BY THE CONSTITUTION.

Severability dates back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where the Supreme Court shaved one unconstitutional section from the Judiciary Act of 1789 and left the rest of the Act intact. C. Vered Jona, *Note: Cleaning Up for Congress: Why Courts Should Reject the Presumption of Severability in the Face of Intentionally Unconstitutional Legislation*, 76 Geo. Wash. L. Rev. 698, 701 (April 2008) (“*Cleaning Up*”); David H. Gans, *Severability as Judicial Lawmaking*, 76 Geo. Wash. L. Rev. 639, 661-62 (2008) (“*Judicial Lawmaking*”). Over the next few decades, the Court explained that severance is appropriate unless it would disrupt legislative intent. *Bank of Hamilton v. Lessee of Dudley*, 27 U.S. (2 Pet.) 492, 526 (1829) (“If any part of the act be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the [C]onstitution....”); *Allen v. Louisiana*, 103 U.S. 80, 84 (1880) (“The point to be determined...is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature.”) Moreover, the Court began to warn against aggressive judicial revisions that effectively make new laws rather than enforcing

old ones. *United States v. Reese*, 92 U.S. 214, 221 (1875); *Hill v. Wallace*, 259 U.S. 44, 70-71 (1922).

The “time-honored rule” now is “to sever with circumspection, severing any ‘problematic portions while leaving the remainder intact.’” *Commonwealth of Va. v. Sebelius*, 728 F. Supp. 2d 768, 790 (E.D. Va. 2010), quoting *Ayotte v. Planned Parenthood of New England*, 546 U.S. 320, 329 (2006) (“*Ayotte*”); see also *Florida v. United States Dep’t. of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 U.S. Dist. LEXIS 8822, *117 (N.D. Fla. Jan. 31, 2011) (“*Florida v. HHS*”); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010) (“*Free Enterprise Fund*”); *United States v. Booker*, 543 U.S. 220, 227-229 (2005); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (“*Alaska Airlines*”); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985); *Champlin Refining Co. v. Corp. Comm’n of Okla.*, 286 U.S. 210, 234 (1932) (“*Champlin*”); *El Paso & Northeastern R. Co. v. Gutierrez*, 215 U.S. 87, 96 (1909). Severability must be considered against the backdrop of separation-of-powers principles. Legislative intent is part of the equation, but courts must cautiously consider how much rewriting is necessary to save the statute. *Judicial Lawmaking*, 76 *Geo. Wash. L. Rev.* at 688.

The general principle favoring severability “is not a rigid and inflexible rule”—particularly in a novel case like this one. *Florida v. HHS*, 2011 U.S. Dist. Lexis 8822, *118. The Act is invalid because it radically exceeds the powers of Congress and assaults the individual liberty that Americans treasure. But striking down *only* the individual mandate leaves the Act in shambles. Instead, this Court should eschew judicial rewriting and send Congress back to the drawing board with a clean slate.

A. This Court Cannot Conform The Act To The Constitution Without Performing Radical Surgery—A Quintessentially Legislative Function.

Severance is a remedial doctrine that shapes the contours of judicial relief after a court has found a statute unconstitutional in part. It requires courts to “restrain [themselves] from rewriting [a] law to conform it to constitutional requirements even as [they] strive to salvage it.” *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *130, quoting *Ayotte*, 546 U.S. at 329-30, *Virginia v. American Booksellers Ass’n, Inc.*, 484 U.S. 383, 397 (1988). Conventional wisdom suggests that striking down the entire Act would be “more of an intrusion than severing [its] invalid parts.” *Judicial Lawmaking*, 76 Geo. Wash. L. Rev. at 672. But like a Presidential veto, total invalidation “functions like a remand” to Congress (*id.* at 673) and protects the separation of powers by “preserv[ing] [the] court’s role as an adjudicatory rather than a legislature body.” *Cleaning Up*, 76 Geo. Wash. L. Rev.

at 712. Reconfiguring this massive, 2700-page Act would be “a far more serious invasion of the legislative domain” than any court should undertake. *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *131-132, quoting *Ayotte*, 546 U.S. at 329-330. Such a feat would be “tantamount to rewriting a statute in an attempt to salvage it” (*id.* at 132), “enmeshing the judiciary in policy choices...better left to the legislative branch.” *Judicial Lawmaking*, 76 *Geo. Wash. L. Rev.* at 643.

The subject legislation is not a series of short statutes arranged together for convenience and thus easily severed or fine-tuned, but rather a “carefully-balanced and clockwork-like statutory arrangement comprised of pieces that all work toward one primary legislative goal.” *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *118-119. The invalid mandate is the glue that holds the Act together. “There are simply too many moving parts in the Act and too many provisions dependent (directly and indirectly) on the individual mandate” to be able to carve it out without doing violence to the entire scheme. *Id.* The mandate is a legislative lynchpin “inextricably bound” to the remaining provisions. Sometimes the connection is obvious—the limited religious exemptions, employer mandates, and coverage that must be included in a minimum benefits package. Other provisions may or may not hinge on the individual mandate. As Judge Vinson noted, e.g., it is impossible to know whether the Form 1099 reporting requirement [Act § 9006]—a revenue generating provision—would “stand independently of the insurance

reforms.” *Id.* at *133-134. The Act “must stand or fall as a single unit.” *Id.* at *135-136.

Just months ago, the Supreme Court declined to “blue-pencil” legislation, noting some possibilities but leaving it to Congress to “pursue any of these options going forward.” *Free Enterprise Fund*, 130 S. Ct. at 3162. The Court recognizes that it cannot “write words into [a] statute” or “leave gaping holes” or “foresee which of many different possible ways the legislature might respond to the constitutional objections” of a law it strikes down. *Randall v. Sorrell*, 548 U.S. 230, 262 (2006). In a pair of cases in the mid-1990’s, “the Court declined to sever, reasoning that the legislature was the proper body to fix the respective statute’s defects given the lack of a clear line in the statute to use for severance and the complexity of policy issues raised.” *Judicial Lawmaking*, 76 *Geo. Wash. L. Rev.* at 647 n. 38, citing *Reno v. ACLU*, 521 U.S. 844 (1997) and *United States v. National Treasury Emps. Union*, 513 U.S. 454 (1995). In *National Treasury Employees Union*, the Court refused to craft a new “nexus requirement” when considering an honoraria ban applied to federal employees, finding that would involve “a far more serious invasion of the legislative domain” than the simple fix applied in *United States v. Grace*, 461 U.S. 171 (1983). *Id.* at 479 n. 26. In *Grace*, severance was an appropriate quick-fix that did not necessitate intrusive judicial rewriting or distort the statutory scheme. The Court struck down a ban on

expression in the Supreme Court building and grounds, but only as applied to public sidewalks around the Court. *United States v. Grace*, 461 U.S. at 180-183. This was more efficient than requiring Congress to pass new legislation—and it did not sacrifice the legislature’s policy judgment. *Judicial Lawmaking*, 76 Geo. Wash. L. Rev. at 668.

A workable system of government is bound to create some overlap in the branches of government rather than a strict, inflexible separation. *Judicial Lawmaking*, 76 Geo. Wash. L. Rev. at 653; Paul M. Bator, *Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L.J. 233, 265 (1990). But courts must avoid encroaching on legislative territory. “Severance should rarely, if ever, be employed if radical surgery is necessary to save a statute.” *Judicial Lawmaking*, 76 Geo. Wash. L. Rev. at 689. Here, removal of the individual mandate would impermissibly entangle the Court in legislative alterations beyond the judicial domain.

B. The Presumption Of Severability Should Be Abandoned Because Congress Had Knowledge Of The Act’s Constitutional Flaws.

Legislators take an oath to “support [the] Constitution.” U.S. Const. art. VI.

But in spite of this duty:

Congress occasionally passes legislation that even supporters acknowledge poses serious constitutional concerns and presidents sometimes support legislation they believe to be constitutionally dubious, all because they sense that the courts are available as the ultimate arbiter of constitutional disputes.

Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 Harv. J. on Legis. 227, 277 (2004) (citing Joel Mowbray, *The Bush Way of Compromise*, Wash. Times, Apr. 12, 2002, at A23). Legislators are obligated to evaluate the constitutionality of proposed legislation. Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 Stan. L. Rev. 585, 586-587 (1975); *Cleaning Up*, 76 Geo. Wash. L. Rev. at 713.

This case is a striking example of legislators flouting their constitutional oath. Instead of examining the constitutional implications, this “2,700 page bill was rushed to the floor for a Christmas Eve vote.” *Commonwealth of Va. v. Sebelius*, 728 F. Supp. 2d at 789. Before the last-minute rush to legislate, several states passed laws declaring the mandate unconstitutional and exempting their own state residents from it. Congress’ own attorneys “advised that the challenges might well have legal merit as it was ‘unclear’ if the individual mandate had ‘solid constitutional foundation.’” *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *124; see Jennifer Staman & Cynthia Brougher, Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, July 24, 2009, at 3, 6 (“whether Congress can use its Commerce Clause authority to require a person to buy a good or a service” raises a “novel issue” and “most challenging question”);¹ see also *Commonwealth of Va. v. Sebelius*, 728 F. Supp.

¹ Available at http://assets.opencrs.com/rpts/R40725_20090724.pdf.

2d 768. A severability clause included in an early version of the Act was ultimately excluded. *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *123-124. Thus there is strong evidence that Congress deliberately demanded inclusion of the controversial mandate—aware of its questionable constitutionality.

Severability is presumptively appropriate when a law is partly unconstitutional. This allows legislators to pass laws without being held to a standard of perfection, knowing that “courts will not throw out the baby with the bath water.” *Cleaning Up*, 76 Geo. Wash. L. Rev. at 654. But sometimes inseverability is the norm: the Establishment Clause (an improper purpose permeates all of a statute’s applications), the Free Speech Clause (chilling effects test), and Equal Protection (underinclusivity). *Id.* at 705 n. 42.

It makes sense to extend the presumption of inseverability to cases where Congress has purposely included a constitutionally defective statute in a legislative scheme. *Cleaning Up*, 76 Geo. Wash. L. Rev. at 700. A presumption of inseverability would discourage judicial redrafting. It would also “increase legislators’ accountability for the constitutional ramifications of their actions” and encourage them to draft constitutional laws. *Id.*

This Court should “send the [Act] back to [Congress] to redraft and renegotiate a constitutionally sound law.” *Cleaning Up*, 76 Geo. Wash. L. Rev. at 712. Congress—having abdicated its obligation to follow the Constitution—

should not be able to rely on the courts to repair its defective handiwork. *Id.* at 713-714, citing Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 *Stan. L. Rev.* 235, 293 (1994).

II. THIS COURT SHOULD STRIKE DOWN THE ENTIRE ACT BECAUSE SEVERANCE WOULD THWART THE OBJECTIVES OF CONGRESS IN ENACTING IT.

When a court strikes down a statute as a remedial measure, it “frustrates the intent of the elected representatives of the people.” *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *130, quoting *Ayotte*, 546 U.S. at 329-330. Courts use severance to avoid circumventing the legislature’s intent. *Id.* But in this case, severance would frustrate that intent. The District Court correctly found the individual mandate unconstitutional, but left a shredded legislative scheme in place by failing to strike the entire Act.

Critical questions about legislative intent must be addressed:

- Would Congress have passed the Act without the individual mandate?
- Would Congress prefer a truncated Act—or no statute at all?
- If the mandate is severed:
 - Can the remaining provisions function independently and remain fully operative as law?
 - Would the remaining provisions still serve congressional intent, or would the purpose of the Act be defeated?

See Free Enterprise Fund, 130 S. Ct. at 3161-3162; *United States v. Booker*, 543 U.S. at 246; *New York v. United States*, 505 U.S. 144, 186 (1992); *Ayotte*, 546 U.S. at 330; *Alaska Airlines*, 480 U.S. at 684; *Buckley v. Valeo*, 424 U.S. 1, 108-109 (1976); *Champlin*, 286 U.S. at 234; *Allen v. Louisiana*, 103 U.S. at 83-84.

A. It Is Virtually Certain That Congress Would Not Have Passed The Act Without The Individual Mandate.

Language within the Act itself exposes congressional intent: “The [individual mandate] is essential to creating effective health insurance markets....” Act § 1501(a)(2)(I).

Severance would be appropriate if the legislature’s goals would still be served. *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *122; *New York v. United States*, 505 U.S. at 187. A relatively unimportant, uncontroversial provision is normally severable. *Alaska Airlines*, 480 U.S. at 694 n. 18, 696 (duty-to-hire provisions severed from unconstitutional administrative regulations). But where the legislature clearly would *not* have enacted the leftover portions without a lynchpin provision, severance is improper.

In spite of overwhelming evidence, the District Court found this “element of the analysis...difficult to apply...given the haste with which the final version of the 2,700 page bill was rushed to the floor for a Christmas Eve vote.” The Court concluded that:

It would be virtually impossible within the present record to determine whether Congress would have passed this bill, encompassing a wide variety of topics related and unrelated to health care, without Section 1501.

[W]ithout the benefit of extensive expert testimony and significant supplementation of the record, this Court cannot determine what, if any, portion of the bill would not be able to survive independently.

Commonwealth of Va. v. Sebelius, 728 F. Supp. 2d at 789.

The District Court's conclusion is strange in light of an avalanche of authority—including of its own analysis. Recent decisions confirm the centrality of the individual mandate. *Id.* at *776 (The mandate is a “necessary measure to ensure the success of its larger reforms of the interstate health insurance market...without full market participation, the financial foundation supporting the health care system will fail, in effect causing the entire health care regime to ‘implode.’”); *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882, 886 (E.D. Mich. 2010) (mandate is “[i]ntegral to the legislative effort” and an “essential part of this larger regulation of economic activity”); *Florida v. United States Dep't. of Health and Human Servs.*, 716 F. Supp. 2d 1120, 1129 (N.D. Fla. 2010) (“[The mandate] is necessary...to meet ‘a core objective of the Act’”); *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *115-116 (“...individual mandate is absolutely ‘necessary’ and ‘essential’ for the Act to operate as it was intended by Congress”); *id.* at *122 (“indisputably essential to what Congress was ultimately seeking to accomplish”); *id.* at *125 (“[T]he defendants have conceded that the Act's health

insurance reforms cannot survive without the individual mandate....”); *Liberty Univ., Inc. v. Geithner*, No. 6:10cv15, 2010 U.S. Dist. LEXIS 125922, *48, *82 (W.D. Va. Nov. 30, 2010) (mandate is essential to the Act); *Goudy-Bachman v. United States Dep’t of Health & Human Servs.*, No. 1:10-CV-763, 2011 U.S. Dist. LEXIS 6309, *5 (M.D. Pa. Jan. 24, 2011) (mandate is a “backbone provision”).

However misguided the reasoning or constitutional analysis, congressional intent is clear: The mandate is mandatory—the Act unravels without it.

B. Even If The Remaining Provisions Could Function Independently—A Truncated Act Would Not Serve Congressional Purposes.

It is a closer question as to whether the remaining provisions could function independently:

In a statute that is approximately 2,700 pages long and has several hundred sections—certain of which have only a remote and tangential connection to health care—it stands to reason that some (perhaps even most) of the remaining provisions can stand alone and function independently of the individual mandate.

Florida v. HHS, 2011 U.S. Dist. LEXIS 8822, *119-120. But the more critical inquiry is “whether these provisions will comprise a statute that will function ‘in a manner consistent with the intent of Congress.’” *Id.* at *120-121, quoting *Alaska Airlines*, 480 U.S. at 685. A court must proceed cautiously, not “us[ing] its remedial powers to circumvent the intent of the legislature.” *Ayotte*, 546 U.S. at

330, citing *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part).

Sometimes a legislative scheme can survive judicial surgery and continue to serve the legislature's purposes. *Free Enterprise Fund*, 130 S. Ct. at 3161 (Sarbanes-Oxley Act remained fully operative without tenure restrictions); *Reno v. ACLU*, 521 U.S. at 882-883 (the overbroad Communications Decency Act of 1996 could be salvaged by striking the words "or indecent"); *Alaska Airlines*, 480 U.S. at 684 (legislative veto easily severed from substantive provisions); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. at 506-507 (court could sever portion of overbroad state law mandating penalties for individuals dealing in obscenity and prostitution); *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (20-year limitation on religious use restrictions violated the Establishment Clause but was not essential to the statutory program). In *New York v. United States*, the Court severed a punitive "take title" provision without doing violence to the rest of the legislative scheme, which included independent incentives for States to dispose of radioactive waste. *New York v. United States*, 505 U.S. at 186-187.

This case is different. The Florida District Court correctly held that:

[A]ny statute that might conceivably be left over...would plainly not serve Congress' main purpose and primary objective in passing the Act [health care reform].... The Act, like a defectively designed watch, needs to be redesigned and reconstructed by the watchmaker.

Florida v. HHS, 2011 U.S. Dist. LEXIS 8822, *134-135. The Florida Court declined to undertake the massive task of sorting through the Act’s myriad provisions in order to salvage it. Instead, the Court suggested that Congress “do a comprehensive examination of the Act and make a legislative determination as to which of its hundreds of provisions and sections will work as intended without the individual mandate, and which will not.” *Id.* at *135.

C. The Absence Of A Severability Clause Weighs Against Preserving The Remaining Provisions.

A severability clause—if the Act contained one—would signal an intention to make the Act divisible. *Champlin*, 286 U.S. at 235. But such a clause is not an “inexorable command.” *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924). It merely creates a “rebuttable presumption that ‘eliminating invalid parts, the legislature would have been satisfied with what remained.’” *Welsh v. United States*, 398 U.S. 333, 364 (1970) (Harlan, J., concurring), quoting from *Champlin*, 286 U.S. at 235.

Severance, even on the legislature’s cue, poses constitutional risks because it “enmeshes courts in what is quintessentially legislative policy work, and does so in a way that makes legislative correction unlikely after the fact.” *Judicial Lawmaking*, 76 Geo. Wash. L. Rev. at 687. Legislators may easily ignore constitutional norms in crafting laws, and courts may unwittingly create vague legal regimes in their efforts to salvage a partially unconstitutional scheme. *Id.* The line between the judicial and legislative branches may be dangerously thin.

On the other hand, the absence of a severability clause “does not raise a presumption against severability.” *Alaska Airlines*, 480 U.S. at 686; *New York v. United States*, 505 U.S. at 186. The omission does not necessarily “dictate the demise of the entire [Act].” *Tilton v. Richardson*, 403 U.S. at 684. The *Tilton* Court reasoned that:

In view of the broad and important goals that Congress intended this legislation to serve, there is no basis for assuming that the Act would have failed of passage without this provision; nor will its excision impair either the operation or administration of the Act in any significant respect.

Id. at 684.

The Act does not contain a severability clause. Although there is no presumption, the omission constitutes evidence that severability was not a priority on the minds of legislators and logically presents a stronger case against severability than would exist if the clause had been included. *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *122. And there *is* even more persuasive evidence against severability: A severability clause was included in an earlier draft of the Act but ultimately removed. *Id.* at *123-124. The individual mandate was controversial during the drafting of the Act, and challenges were on the horizon. *Id.* at *124. The Florida District Court action was filed just minutes after the President signed the Act. *Id.* at *6.

Even if the Act did contain a severability clause, that would not settle the issue. The Supreme Court first limited the enforcement of a severability clause nearly a century ago, finding the valid provisions of the Future Trading Act were “so interwoven with those [unconstitutional] regulations that they [could] not be separated.” *Hill v. Wallace*, 259 U.S. at 70; *Cleaning Up*, 76 Geo. Wash. L. Rev. at 702. The Act under consideration here is similar—hundreds of detailed interrelated provisions.

Neither the presence nor the absence of a severability clause conclusively dictates the outcome. But the complexity of the Act, the multitude of interwoven provisions, and the intentional removal of a severability clause all reinforce the wisdom of remanding the entire scheme to Congress. In fact, if a severability clause were invoked it “to salvage parts of a comprehensive, integrated statutory scheme, which parts, standing alone, are unworkable and in many aspects unfair, [that would] exalt a formula at the expense of the broad objectives of Congress.” *Buckley v. Valeo*, 424 U.S. at 255 (Burger, C.J., dissenting). In the absence of such a clause, it is all the more appropriate to steer clear of dissecting this mammoth piece of legislation.

III. NEITHER THE NECESSARY AND PROPER CLAUSE NOR THE COMMERCE CLAUSE CAN SALVAGE THE PERVERSE “NECESSITY” CONGRESS ITSELF CREATED.

As Appellees thoroughly explain in their Opening and Response Brief, the text and history of the Commerce Clause do not support the individual mandate and penalty—a breathtaking expansion of congressional authority. An individual’s decision *not* to purchase insurance is *inactivity*—not *activity* that substantially affects interstate commerce. And since it lacks the power to enact the individual mandate in the first place, Congress cannot use the Necessary and Proper Clause to jump-start the Act.

Congress created the financial “necessity” it now employs to justify the mandate:

[R]ather than being used to implement or facilitate enforcement of the Act’s insurance industry reforms, *the individual mandate is actually being used as the means to avoid the adverse consequences of the Act itself*. Such an application of the Necessary and Proper Clause would have the perverse effect of enabling Congress to pass ill-conceived, or economically disruptive statutes, secure in the knowledge that *the more dysfunctional the results of the statute are, the more essential or “necessary” the statutory fix would be*.

Florida v. HHS, 2011 U.S. Dist. LEXIS 8822, *110-111 (emphasis added).

The Government seeks solace in the Necessary and Proper Clause. *Commonwealth of Va. v. Sebelius*, 728 F. Supp. 2d at 776, 778. But that Clause cannot save the law. The individual mandate is integral to the statutory scheme—thus “*necessary*”—but it is constitutionally *improper*. The Government

presupposes that the Commerce Clause empowers it to regulate and reform the health *insurance business*. Therefore, the Government reasons, it can also compel *individuals* to purchase policies from the insurance companies subject to the new regulations, in order to make the law financially viable and prevent economic catastrophe. This reasoning is flawed. The Government's warped application of the Necessary and Proper Clause converts it to the "hideous monster with devouring jaws" that Hamilton assured us it was not, rather than the "perfectly harmless" part of the Constitution he assured us it was. *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *115, citing *The Federal No. 33*, at 204-205.

A. The Necessary and Proper Clause Is Not A Separate Grant Of Authority That Congress Can Use To Penalize Americans Who Decline To Purchase Health Insurance.

The Necessary and Proper Clause is not a stand-alone provision but rather "a *caveat* that Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of § 8 'and all other Powers vested by this Constitution.'" *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960). Decades of precedent support this principle. *United States v. Comstock*, 130 S. Ct. 1949, 1956-1957 (2010); *Alden v. Maine*, 527 U.S. 706, 739 (1999); *Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421-422 (1819); *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

But if the end is illegitimate, “the fit between means and end is irrelevant...no matter how ‘necessary’ or ‘proper’ an Act of Congress may be to its objective, Congress lacks authority to legislate if the objective is anything other than ‘carrying into Execution’ one or more of the Federal Government’s enumerated powers.” *United States v. Comstock*, 130 S. Ct. at 1972 (Thomas, J., dissenting). These *enumerated* powers are carefully articulated—not left to congressional imagination:

The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court.

Carter v. Carter Coal Co., 298 U.S. at 291. The federal government can only claim the powers “expressly given, or given by necessary implication.” *Martin v. Hunter’s Lessee*, 14 U.S. at 326.

The District Court correctly observed that “no specifically articulated constitutional authority exists to mandate the purchase of health insurance.” *Commonwealth of Va. v. Sebelius*, 728 F. Supp. 2d at 780. Congress thus lacks authority to penalize the failure to buy insurance—unlike the power it has to regulate the failure to file a tax return, which flows from the legitimate power to tax.

B. The *Individual* Mandate Is Not Rationally Related To The Implementation Of Congressional Power To Regulate The Health Insurance *Industry*.

In defining the relevant inquiry, the court must “look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.” *United States v. Comstock*, 130 S. Ct. at 1956. But

[i]f a person’s decision not to purchase health insurance at a particular point in time does not constitute the type of economic activity subject to regulation under the Commerce Clause, then logically an attempt to enforce such provision under the Necessary and Proper Clause is equally offensive to the Constitution.

Commonwealth of Va. v. Sebelius, 728 F. Supp. 2d at 779. As Justice Kennedy cautioned, “[t]he terms ‘rationally related’ and ‘rational basis’ must be employed with care.” *United States v. Comstock*, 130 S. Ct. at 1966 (Kennedy, J., concurring). “Rational basis” is a test commonly employed in the context of the Due Process Clause. In the Commerce Clause context (*Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Lopez*, 514 U.S. 549, 588-589 (1995)), there should be a “tangible link to commerce, not a mere conceivable rational relation...a demonstrated link in fact.” *United States v. Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring).

The District Court correctly zoomed in on the *individual* decision about whether to purchase health insurance and considered whether *that* activity—or

inactivity—can be regulated under the Commerce Clause. Congressional power to regulate the *insurance industry* cannot be stretched to encompass the power to compel *individuals* to do business with that industry. Even if more customers are “necessary” to prevent the financial collapse of the industry under the new regulations, it is not constitutionally proper to forcibly enroll them. This case thus contrasts with *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), upholding an injunction requiring that employers deal only with their employees’ chosen representatives. Unlike the health care Act: “The [National Labor Relations] Act [did] not compel agreements between employers and employees. It [did] not compel any agreement whatever.” *Id.*, at 44-45. And unlike the *NLRB* employers and employees, who remained free to negotiate individual contracts and conduct business, *all* Americans (with rare exception) will soon be compelled to contract with a health insurance company for a government-defined product. As Justice Alito recently explained:

The Necessary and Proper Clause does not give Congress *carte blanche*. Although the term “necessary” does not mean “absolutely necessary” or indispensable, the term requires an “appropriate” link between a power conferred by the Constitution and the law enacted by Congress. See *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

United States v. Comstock, 130 S. Ct. at 1970 (Alito, J., concurring).

Here, the link between *individual* compulsion and *industry* regulation is too attenuated.

C. The Individual Mandate Is Hardly A “Modest” Addition To Any Existing Exercise Of Federal Power. Many Portions Of The Constitution Would Be Superfluous If Congress Could Sweep Any Regulation Under The Commerce Clause Umbrella.

In *Comstock*, the Supreme Court upheld a “modest addition” to a set of federal prison-related mental-health statutes that had existed for many decades. *United States v. Comstock*, 130 S. Ct. at 1958. The Court cautioned, however, that “even a longstanding history of related federal action does not demonstrate a statute’s constitutionality.” *Id.* at 1958.

The health insurance mandate is not anchored to any existing exercise of federal power—and it clashes with the basic freedoms that characterize America. Never before has the federal government required every *individual* to purchase a particular product or service as a “necessary” adjunct to its regulation of an *industry* that furnishes that product or service. The power to regulate an industry does not clothe Congress with authority to command every American to do business with that industry. The Commerce Clause does not stretch that far. If it did, “many of Congress’ other enumerated powers under Art. I, § 8, [would be] wholly superfluous”—including bankruptcy laws (cl. 4), coining money (cl. 5), fixing weights and measures (cl. 5), punishing counterfeiters (cl. 6), post offices and roads (cl. 7), patents and copyrights (cl. 8). *United States v. Lopez*, 514 U.S. at 588-589 (Thomas, J., concurring). These other powers overlap and substantially affect interstate commerce, yet they are expressly enumerated in the Constitution.

That enumeration cautions restraint in the extension of Commerce Clause power—which cannot swallow all of the other federal powers and sweep within its scope any law Congress wants to pass.

D. The *Individual* Mandate Is Not An Appropriate Means To Reform The *Insurance Industry*. The Link Is Too Attenuated.

Congress may regulate the insurance industry under existing precedent. *See, e.g., United States v. South-Eastern Underwriters Assoc.*, 322 U.S. 533 (1944). Congress could impose reporting requirements on insurance carriers to monitor their compliance with legitimate regulations. “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.” *McCulloch v. Maryland*, 17 U.S. at 421. It is only reasonable that Congress “be entrusted with ample means” to execute the powers granted to it. *Id.* at 408.

Congress has considerable flexibility and discretion to enact laws that are “convenient or useful” or “conducive” to its exercise of legitimate authority. *Commonwealth of Va. v. Sebelius*, 728 F. Supp. 2d at 778, quoting *United States v. Comstock*, 130 S. Ct. at 1956 (quoting *McCulloch v. Maryland*, 17 U.S. at 408). If, for example, Congress appropriates funds under its Spending Clause authority, Art. I, § 8, cl. 1, “it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power

are in fact spent for the general welfare, and not frittered away....” *Sabri v. United States*, 541 U.S. 600, 605 (2004).

But the link between means and end must not be so attenuated as to require a court to “pile inference upon inference.” *United States v. Lopez*, 514 U.S. at 567; *United States v. Comstock*, 130 S. Ct. at 1963. When the court evaluates the causal chain:

The inferences must be controlled by some limitations lest, as Thomas Jefferson warned, congressional powers become completely unbounded by linking one power to another *ad infinitum* in a veritable game of “this is the house that Jack built.” Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), 31 *The Papers of Thomas Jefferson* 547 (B. Oberg ed. 2004); see also *United States v. Patton*, 451 F.3d 615, 628 (10th Cir. 2006).

Id. at 1966 (Kennedy, J., concurring). Moreover, the analysis should consider not only “the number of links in the congressional-power chain” but also “the strength of the chain.” *Id.* In *Comstock*, the majority found the statute at issue to be a “reasonably adapted and narrowly tailored means” to pursue a legitimate government interest. *Id.* at 1965.

To sustain the individual mandate would require this Court to “pile inference upon inference”—an approach the Supreme Court has rejected. As the Florida District Court recently explained:

[T]he mere status of being without health insurance, in and of itself, has absolutely no impact whatsoever on interstate commerce (not “slight,” “trivial,” or “indirect,” but no impact whatsoever).

Florida v. HHS, 2011 U.S. Dist. LEXIS 8822, *92. The Government can only make the connection to interstate commerce by piling up inferences and speculating about future contingencies in the lives of those who do not purchase insurance. *Id.* at *93.

E. The Individual Mandate May Be “Necessary” But It Is *Improper* Because It Erodes Individual Liberties At The Core of American Freedom.

The Act has profound implications for “our notions of liberty,” which “are inextricably entwined with our idea of physical freedom and self-determination.” *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 287 (1990) (O’Connor, J., concurring). *It requires Americans to enter a contract to pay for a service—medical treatment—they are constitutionally privileged to refuse.* This is no more constitutional than compelling Americans to donate funds to a church they are not required to attend or otherwise support. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947).

However “necessary” the mandate may appear to the Act, it must “consist with the letter and spirit of the Constitution” (*McCulloch v. Maryland*, 17 U.S. at 421) and not violate or infringe another independent constitutional provision. *Commonwealth of Va. v. Sebelius*, 728 F. Supp. 2d at 778; *United States v. Comstock*, 130 S. Ct. at 1956-1957; *Buckley v. Valeo*, 424 U.S. at 132; *United States v. Darby*, 312 U.S. 100, 115 (1941).

The individual mandate collides with the right of every competent adult to refuse medical treatment. This principle is the “logical corollary of the doctrine of informed consent.” *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. at 270. *See also Washington v. Harper*, 494 U.S. 210, 221-222 (1990) (prisoner has significant liberty interest in avoiding unwanted psychotropic drugs); *Vitek v. Jones*, 445 U.S. 480, 494 (1980) (transfer to mental hospital coupled with mandatory behavior modification treatment implicated liberty interests); *Parham v. J. R.*, 442 U.S. 584, 600 (1979) (“[A] child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment.”).

Under the Government’s expansive view of its authority, “if the decision to forego insurance qualifies as activity, then presumably the decision to not use that insurance once it has been obtained is also activity.” *Florida v. HHS*, 2011 U.S. Dist. LEXIS 8822, *102-103. Extending the rationale used to justify the Act, Congress could easily manufacture the power to regulate Americans’ *economic* decisions “not to go to the doctor for regular check-ups and screenings to improve health and longevity, which, in turn, is intended and expected to increase economic productivity.” *Id.* at *103. This possibility is not “irrelevant [or] fanciful” but is part of a serious discussion among legal scholars debating the constitutionality of the Act. *Id.* at *87-88.

The Fourteenth Amendment “forbids the government to infringe...fundamental liberty interests at all...unless the infringement is narrowly tailored to serve a compelling state interest.” *Reno v. Flores*, 507 U.S. 292, 302 (1993). There are limited exceptions where the state may override the right to refuse medical treatment. *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905) (mandatory smallpox vaccine necessary to contain epidemic). But “[t]he regulation of constitutionally protected decisions...must be predicated on legitimate state concerns other than disagreement with the choice the individual has made....” *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990).

American notions of liberty encompass freedom of choice even in “mandatory markets” like food, housing, transportation, and health care. Everyone must eat but may choose what to eat—some are vegetarians, some nutrition conscious, others wary of food allergies. Everyone needs lodging but may choose where to live, whether to rent or buy, and whether to live alone or with others. *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (“The Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”) Everyone needs transportation, but may choose whether to travel by car, motorcycle, bus, train, airplane, bicycle, or even horse and buggy. Americans are free to lease or own a vehicle and select the brand, size, and color. In the same way, Americans are free

to choose whether or not they will undergo medical treatment, and if so, how they will pay for the services.

CONCLUSION

This Court should affirm the District Court decision but modify it to strike down the entire Act rather than severing the individual mandate.

Respectfully submitted,

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