Case No. 19-10011
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MISSISSIPPI, by and through Governor Phil Bryant; STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF NORTH DAKOTA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TENNESSEE; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF ARKANSAS; NEILL HURLEY; JOHN NANTZ,
Plaintiffs - Appellees
v.
UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; ALEX AZAR, II, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF INTERNAL REVENUE; CHARLES P. RETTIG, in his Official Capacity as Commissioner of Internal Revenue,
Defendants - Appellants
STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF KENTUCKY; STATE OF MASSACHUSETTS; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF VIRGINIA; STATE OF WASHINGTON; STATE OF MINNESOTA,
Intervenor Defendants - Appellants

On Appeal from the U.S. District Court, Northern District of Texas, Fort Worth
Case No. 4:18-cv-00167-O, Judge Reed C. O'Connor Presiding

BRIEF OF *AMICI CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS AND CITIZENS' COUNCIL FOR HEALTH FREEDOM IN SUPPORT OF PLAINTIFFS-APPELLEES TEXAS *ET AL.*, AND IN SUPPORT OF AFFIRMANCE

Andrew L. Schlafly, Esq.
939 Old Chester Rd.
Far Hills, NJ 07931
(908) 719-8608
aschlafly@aol.com
Counsel for *Amici Curiae*

CERTIFICATE OF INTERESTED PERSONS

Case No. 19-10011

STATE OF TEXAS; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MISSISSIPPI, by and through Governor Phil Bryant; STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF NORTH DAKOTA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TENNESSEE; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF ARKANSAS; NEILL HURLEY; JOHN NANTZ,

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Intervenor Defendants – Appellants

Amici Curiae Association of American Physicians & Surgeons and Citizens' Council for Health Freedom are non-profit corporations which have no parent corporations, and no publicly held corporation owns 10% or more of either's stock.

Pursuant to the fourth sentence of Circuit Rule 28.2.1, the undersigned counsel of record certifies that the parties' list of persons and entities having an interest in the outcome of this case is complete, to the best of the undersigned counsel's knowledge, with the following additions:

Association of American Physicians & Surgeons, *Amicus Curiae*

Citizens' Council for Health Freedom, *Amicus Curiae*

Andrew L. Schlafly, counsel for *Amici Curiae*.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

/s/ Andrew L. Schlafly
Andrew L. Schlafly
Counsel for Amici Curiae Association of American Physicians & Surgeons and Citizens' Council for Health Freedom

Dated: May 8, 2019

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IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Amicus curiae Association of American Physicians & Surgeons ("AAPS") is a non-profit corporation founded in 1943. AAPS defends the practice of private, ethical medicine, including preservation of the sanctity of the patient-physician relationship. The U.S. Supreme Court has made use of *amicus* briefs submitted by AAPS in high-profile cases. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 933 (2000); *id*. at 959, 963 (Kennedy, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting). The Third Circuit also cited an *amicus* brief by AAPS in the first paragraph of one of its decisions. *See Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006). The Illinois Supreme Court addressed an *amicus* brief submitted by AAPS. *See Valfer v. Evanston Nw. Healthcare*, 2016 IL 119220, ¶ 33, 402 Ill. Dec. 398, 408, 52 N.E.3d 319, 329 (2016) (discussing an *amicus* brief which was filed by AAPS).

AAPS itself has participated in several challenges to ObamaCare, including filing an *amicus* brief before this Court in support of a lawsuit based on how The Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010)

[1] All parties have consented to the filing of this brief by *Amici*. Pursuant to FED. R. APP. P. 29(a)(4)(E), undersigned counsel certifies that: no counsel for a party authored this brief in any respect; and no party, party's counsel, person or entity – other than *Amici*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

("ACA") violated the Origination Clause. *Hotze v. Burwell*, 784 F.3d 984 (5th Cir. 2015).

AAPS has members who practice medicine within the jurisdiction of this Court, and who are affected by continued enforcement of ACA. The decision in this case will likely affect how AAPS members continue to practice medicine, and thus *Amicus* AAPS has direct and vital interests in the issues presented here.

Amicus Citizens' Council for Health Freedom ("CCHF") is organized as a Minnesota non-profit corporation. CCHF exists to protect health care choices, individualized patient care, and medical and genetic privacy rights nationwide. The precedent to be set by this Court in this case impacts both patient and physician freedom, and the rights of citizens to a genuinely confidential patient-physician relationship. *Amicus* CCHF thereby has direct and vital interests in the issues presented in this appeal.

AAPS and CCHF (collectively, the "*Amici*") submitted an *amicus* brief to the U.S. Supreme Court in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) ("*NFIB*"). In *NFIB*, *Amici* addressed one of the major issues in this case, the severability of an unconstitutional Individual Mandate from the remainder of ACA (arguing that severance would amount to an unconstitutional judicial line item veto). In *NFIB*, *Amicus AAPS* separately briefed another major issue in this case, the constitutionality of the Individual Mandate

(arguing that the power to regulate commerce under the Commerce Clause requires the existence of a "party" and a "counterparty"). Both AAPS and CCHF have a continuing interest in establishing the unconstitutionality of ACA.

SUMMARY OF ARGUMENT

It is time to mercifully disconnect the legal life support for ACA. Its contrived justification – the taxation power of the United States – can no longer sustain it. The decision below was entirely correct in ending ACA. Lacking a severability clause, ACA should not be rewritten by the judiciary in a misguided effort to try to save it.

While Appellants argue at length against standing by the individuals and States which brought this action, Appellants themselves lack standing required to bring this appeal. Neither the State Intervenors nor the United States House of Representatives (the "House") may properly stand in the shoes of the United States to pursue this appeal. The United States informed this Court that it is not challenging the decision below. That should result in dismissal of this appeal.

"The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). "The decision to seek review is not to be placed in the hands of concerned bystanders, persons who would seize it as a vehicle for the vindication of value interests." *Id*. at 64-65

(internal quotation marks and citation omitted). In this case, the House and State Intervenors are bystanders. The Plaintiffs-Appellees did not seek (nor would they) any relief from the House and the House did not make any claim against the Plaintiffs-Appellees. Similarly, the Plaintiffs-Appellees did not seek (nor would they) any relief from the State Intervenors and the State Intervenors did not make any claim against the Plaintiffs-Appellees. This appeal should be dismissed.

If this appeal is heard and decided on its merits, then *Amici* respectfully argue that there is an additional ground – the Tenth Amendment – for invalidating the Individual Mandate as unconstitutional. This Court may affirm on any grounds, and the traditionally exclusive authority of States over medical care fits hand-in-glove with the purpose of the Tenth Amendment in safeguarding state autonomy. A ruling by the Supreme Court in favor of the Tenth Amendment, after it upheld the constitutionality of ACA by a 5-4 vote, casts doubt on the continued doctrinal vitality of the 2012 ruling in *NFIB*.

Appellants, who hail from the left side of the political spectrum, allude to catastrophic results that will supposedly occur if this Court were to affirm the invalidation of ACA. But missing from Appellants' arguments is any recognition of the enormous benefits of the free market, free enterprise, deregulation, and competition, which would ensue if ACA ended. *Amici* explain that ACA has

destroyed competition and the free market to the detriment of patients, and to the enrichment of the largest health insurers.

The lack of severability of the unconstitutional Individual Mandate from the remainder of ACA, for being "essential to" and "intertwined with" it, is fully covered by Appellees' briefs. *See* Brief for State Appellees, at 10, 36-50; and Brief of Appellees Neill Hurley and John Nantz, at 47-50; and Brief for the Federal Defendants, at 36-49. *Amici* expand on these arguments and submit an additional ground for finding the Individual Mandate to be inseverable. The Court should incorporate the Bicameral and Presentment Clauses into its severability analysis because severance, of an unconstitutional Individual Mandate from the remainder of ACA, amounts to a judicial line item veto in light of how there is no severance clause within ACA itself.

For the foregoing reasons as expounded below, this appeal should be dismissed or the decision below should be fully affirmed.

ARGUMENT

I. This Appeal Should Be Dismissed for Appellants' Lack of Standing.

Federal courts – including appellate courts – have a continuing duty to assess and determine subject matter jurisdiction at all points during litigation. "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at ***all stages of review***, not merely at the time the complaint is filed.'"

Arizonans for Official English, 520 U.S. at 67 (quoting *Preiser* v. *Newkirk,* 422 U.S. 395, 401 (1975), which quoted *Steffel* v. *Thompson,* 415 U.S. 452, 459, n. 10 (1974), internal quotation marks omitted and emphasis added)). *See also Wittman v. Personhuballah*, 136 S. Ct. 1732, 195 L. Ed. 2d 37, 42 (2016) ("The need to satisfy these … requirements [of federal subject matter jurisdiction] persists throughout the life of the lawsuit.") (internal citation omitted).

Defendant United States informed this Court that it no longer opposes plaintiffs' claims in this lawsuit. *See* Letter from Joseph H. Hunt, Brett A. Shumate, and Martin T. Otaro, U.S. Department of Justice, to Lyle W. Cayce, Clerk, U.S. Court of Appeals for the Fifth Circuit, dated March 23, 2019 ("The Department of Justice has determined that the district court's judgment should be affirmed. Because the United States is not urging that any portion of the district court's judgment be reversed, the government intends to file a brief on the appellees' schedule."). So where is the "case" or "controversy" as required by Article III on appeal? Even if the parties themselves do not raise this Article III issue, it is incumbent on the Court to assess its own federal subject matter jurisdiction, and dismiss the appeal if such jurisdiction is lacking as it is here.

An intervenor cannot plug a gaping jurisdictional deficiency unless it independently satisfies Article III standing. As the Supreme Court explained in *Wittman*:

> [A]n "intervenor cannot step into the shoes of the original party" (here, the Commonwealth) "unless the intervenor independently 'fulfills the requirements of Article III.'" [*Arizonans for Official English*, 520 U.S.] at 65, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (quoting *Diamond* v. *Charles*, 476 U.S. 54, 68, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986)).

Wittman, 136 S. Ct. 1732, 195 L. Ed. 2d at 42.

Here, there are two groups of intervenors who pursue this appeal despite how the original defendant, the United States, has decided not to. The jurisdictional defect is clearest with respect to Appellant House of Representatives (the "House"), which should be looking to the political process rather than the judiciary to advance its goals. The House could be negotiating with the President on the issues at stake here, rather than litigating them. The House is vested with exclusive authority to originate bills that raise revenue, under the Origination Clause, which gives it enormous political leverage to work with the President. U.S. CONST. Art. I, § 7, cl. 1. The House plainly lacks standing to appeal here.

The Supreme Court rejected legislative standing in *Raines v Byrd,* 521 U.S. 811 (1997), which precludes standing for the House. In *Raines*, the Supreme Court denied standing to Senator Byrd, three other Senators and two members of the House because they "alleged no injuries to themselves as individuals … [and] the institutional injury they allege is wholly abstract and widely dispersed …." 521 U.S. at 829. This case is no different. Because the House suffers no injury, it

should be relegated to the status of a mere *amicus curiae* rather than the status of an Intervenor-Appellant.

The State Intervenors likewise lack standing on appeal. The Executive Branch has the exclusive authority under the Constitution to enforce federal law. Perhaps the State Intervenors could sue the United States to compel such enforcement, but the State Intervenors cannot pretend to be the United States in order to enforce federal law. Just as some States could not enforce federal laws against marijuana against other States who legalize it, some States cannot enforce ACA against other States which challenge it. States do not have standing in federal court to step into the shoes of the United States.

The alleged "interest" or "injury" to the State Intervenors was that they would lose over half a trillion dollars of anticipated federal funds. State Defendants' Opening Brief at 37-38. Such injury was and is entirely speculative as it depends upon ***future*** appropriations, enacted through and subject to future federal legislation. Such future legislation may only be enacted by the ***future*** concurrences between ***future*** Houses, ***future*** Senates and ***future*** Presidents. Consequently, the State Intervenors should have been relegated below to the status of mere *amici curiae* rather than the status of Intervenors-Defendants. Once properly understood to be nothing more than *amici curiae*, the State Intervenors

lacked the requisite standing to file a Notice of Appeal and this appeal should be dismissed, leaving the decision below intact.

A State can have standing to challenge a federal law, but it does not follow that a State has standing to defend federal law. The State Intervenors are not consumers of medical care, in contrast with the Individual Plaintiffs-Appellees, Neill Hurley and John Nantz, and thus the State Intervenors further lack standing on that basis.

Federal courts are limited by Article III to the adjudication of actual cases or controversies. *Wittman*, 578 U.S. at ___, 195 L. Ed. 2d at 41-42. Standing to sue or defend is an element of the "case" or "controversy" requirement:

> To qualify as a party with standing to litigate, a person must show … an invasion of a legally protected interest that is concrete and particularized and actual or imminent. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). An interest shared generally with the public at large in the proper application of the Constitution and laws will not do. See *Defenders of Wildlife*, 504 U.S., at 573-576. ***Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess "a direct stake in the outcome."*** *Diamond*, 476 U.S., at 62 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) (internal quotation marks omitted)).

Arizonans for Official English, 520 U.S. at 64 (several internal citations and quotation marks omitted, emphasis added).

One group of States pitted philosophically against another group of States on appeal over the constitutionality of a federal law amounts to an Article III

absurdity, not a legitimate "case" or "controversy". Once the United States conceded the Plaintiffs' position, that should mean that the Plaintiffs win and that the federal appellate subject matter jurisdiction evaporates. The State Intervenors have no more standing to replace the United States as a defendant in litigation over the constitutionality of a federal law than an average American voter would, which is nil.

The State Plaintiffs-Appellees and the Individual Plaintiffs-Appellees, Neill Hurley and John Nantz, have standing as they thoroughly demonstrate on appeal. (States Pls. Br. 20-28; Individual Pls. Br. 13-27) Yet the House and the State Intervenors, who are pursuing this appeal, make no such showing about their own standing and fail to establish the jurisdiction of this Court to hear their appeal. This Court has an obligation to raise the issue of standing *sua sponte* even if no party argues it, and this Court should thereby dismiss this appeal for want of jurisdiction.

The requirements for Article III standing – which the Supreme Court has ruled must "persist[] throughout the life of the lawsuit" – are not met here. *Arizonans for Official English*, 520 U.S. at 67. This appeal should therefore be dismissed.

II. The Court Can Affirm on any Grounds, and Should Affirm in the Alternative Based on the Tenth Amendment.

This Court may affirm a lower court decision on any grounds. *See, e.g.*, *Dow Europe, S.A. v. United States*, 823 F.3d 282, 288 n.15 (5th Cir. 2016). "[I]t is an elementary proposition, and the supporting cases too numerous to cite, that this court may affirm ... on any grounds supported by the record." *Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 506 (5th Cir. 2009) (citation omitted). *See also United States ex. rel. Doe v. Dow Chem. Co.*, 343 F.3d 325, 330 (5th Cir. 2003) ("[T]his Court may affirm on any grounds supported by the record below[.]").

The Tenth Amendment is the elephant in the room standing against the constitutionality of ACA, and the Tenth Amendment should be the starting point for analysis of it. After the first phase of ACA litigation, after the decision in *NFIB*, the Supreme Court breathed life into this essential protection of state authority against federal encroachment. *See Bond v. United States*, 572 U.S. 844 (2014).

In *Bond*, Chief Justice Roberts wrote for the High Court in reasserting state autonomy under the Tenth Amendment, two years after *NFIB* was decided. "As James Madison explained, the constitutional process in our 'compound republic' keeps power 'divided between two distinct governments.'" *Bond*, 572 U.S. at 866

(quoting *The Federalist No. 51*, p. 323 (C. Rossiter ed. 1961)). Based on the Tenth Amendment, the Chief Justice rejected "a dramatic departure from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States." *Bond*, 572 U.S. at 866.

Nowhere is the Tenth Amendment more important than in protecting the patient-physician relationship against extensive federal encroachment. ACA deprives patients of their liberty to buy, and insurers of their liberty to offer, coverage that does not conform to the dictates of ACA architects and enforcers. ACA usurps the authority of States to regulate insurance and infringes on individuals' rights to arrange methods of payment for care. ACA also prevents patients from building their own patient-centered networks to receive medical care. The federal insurance mandates, like the Individual Mandate found below to be unconstitutional, essentially force people to buy products they do not want. While the penalty under ACA is no longer a tax, ACA is still imposing mandates that infringe upon state and individual autonomy over medical care.

"[R]eversal is inappropriate if the ruling of the district court can be affirmed on any grounds, regardless of whether those grounds were used by the district court." *Bickford v. Int'l Speedway Corp.*, 654 F.2d 1028, 1031 (5th Cir. 1981) (citing *Riley v. Commissioner*, 311 U.S. 55, 59 (1940)). States have traditionally been the exclusive authority over health insurance, and ACA transgresses the

Tenth Amendment by interfering with this domain of the States and the People, particularly after repeal of the federal tax associated with the Individual Mandate. An affirmance here should cite the Tenth Amendment as an additional basis.

III. The Sky Will Not Fall with an Invalidation of ACA.

Appellants paint an apocalyptic future if the invalidation of ACA is affirmed. Appellant House of Representatives, for example, insists that "the consequences will be devastating," "[m]illions of Americans will be denied affordable health care," "[i]nsurance costs will skyrocket … [a]nd the Nation's healthcare system will be thrown into chaos." (House Br. 4-5)

Not to be outdone, the State Intervenors argue that an invalidation of ACA would "seriously undermine[] public health," cause "32 million more people without healthcare coverage by 2026," destroy "2.6 million jobs," and even cause, in Pennsylvania alone, "3,425 premature deaths each year." (States Interv. Br. 37-38). As if prophecy of these Armageddon scenarios were not enough, the State Intervenors add that invalidation of ACA could even have the effect of "stressing financial markets." (*Id.* at 38) Missing from this doomsday scenario is any hard data or real evidence, of course, because it constitutes nothing more than an ideological preference for government planning over free market solutions.

The prediction by the State Intervenors concerning the financial markets is particularly ironic. In fact, significant beneficiaries of ACA have been investors in

health insurance stocks, such as the Nation's largest health insurer, UnitedHealth Group (stock symbol "UNH"). Easily accessible online market data show that the value of the stock UNH was only $32.67 per share on March 31, 2010, around the time of the enactment of ACA. On Dec. 31, 2018, shortly after the district court rendered its decision, the stock UNH was trading at a whopping $249.12. This was a nearly 8-fold increase in the stock value of the Nation's largest health insurer, far in excess of the less than 2.5-fold increase in the Dow Jones Industrial Average of which the stock UNH is a part.

But the invalidation of ACA at this point may have little effect on UNH and other health insurance stocks, because most of those companies abandoned the unprofitable ACA health insurance exchanges long ago. UnitedHealth Group blamed the ACA health insurance exchanges for a not-quite-as-lucrative quarter in 2015:

> UnitedHealth Group (UNH) surprised investors on Thursday with some bad news. Earnings would be reduced by $425 million because the Obamacare health insurance exchange product was performing poorly. In fact, it was so poor that UNH is considering pulling out of the exchanges altogether.
>
> UNH stock fell about 5% on the news.
>
> The problem UNH is grappling with is what critics of Obamacare have warned about since the beginning. Because individuals cannot be excluded for pre-existing conditions, those with chronic illnesses were able to obtain insurance. Claim payments on those chronic illnesses are obviously exceeding premium payments.

Lawrence Meyers, *After the UNH Blowup, Should You Short Health Insurance Stocks?* (Nov. 24, 2015).[2]

Yet ACA handcuffed patients by depriving them of the immense benefits of free market competition, which is what drives down for consumers the costs of technology, travel, and nearly every other good and service of the economy. ACA conferred the equivalent of a monopoly on big health insurers by making it impossible for viable alternatives to compete with them. UnitedHealth Group, Aetna, and other massive insurers then skimmed the gravy off the system and exploited the lack of competition caused by ACA. Health insurance premiums have doubled nationwide under ACA, even tripling in several States,[3] and shot up an average of 25% in 2017 alone.[4]

ACA has deprived patients nationwide of a competitive market for affordable high-deductible health insurance due to the expensive ACA mandates and regulations, leaving patients with no alternative to the skyrocketing premiums demanded by the big health insurers. A healthy dose of the free market, which would result from striking down ACA, is just what the legal doctor should order.

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[2] https://investorplace.com/2015/11/unh-stock-unitedhealth-group-health-insurance-companies/ (viewed May 4, 2019).

[3] https://www.hhs.gov/about/news/2017/05/23/hhs-report-average-health-insurance-premiums-doubled-2013.html (viewed May 5, 2019).

[4] https://www.cbsnews.com/news/why-obamacare-premiums-are-rising-and-what-you-can-do/ (viewed May 4, 2019).

This may "stress" the bloated health insurance stock values a bit, but only because patients will then be able to purchase, from the free market, health insurance products they actually want and need.

Under the current ACA regime, its mandates and regulations have left so little free market competition for patients that the Department of Justice felt compelled to take an extraordinary and successful action to block a planned merger between Aetna and Humana, which were two of the largest health insurers. *United States v. Aetna Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017). Meanwhile, as patients suffered enormously under the government planning imposed by ACA, executive compensation at the biggest health insurers grew astronomically. *See, e.g.*, Matthew Sturdevant, "Aetna CEO's Pay More than Tripled Last Year; Most of $36M Package from Stocks Vested," *Hartford Courant* A8 (Apr. 9, 2013) (when ACA went into effect, Aetna's CEO's pay increased to $36 million in one year).

The only "devastating" effect that an invalidation of ACA will have is to unleash free market forces for the benefit of patients, at the expense of some health insurance monopolies. Patients are already abandoning the ACA-mandated insurance in droves. "The number of U.S. people with unsubsidized individual major medical insurance fell to 6.2 million in 2018, ***down 31 percent*** from 9

million in 2016."[5] ACA imposes so many mandates that health insurance has become prohibitively expensive for average Americans, and affordable high-deductible insurance will become more available once the albatross of ACA is lifted.

IV. The Unconstitutional Individual Mandate in ACA Is Not Severable from the Remainder of ACA.

The foundation of ACA is the Individual Mandate, and once it is uprooted the remainder of ACA cannot be salvaged. As explained by the Joint Dissenters in *NFIB*:

> An automatic or too cursory severance of statutory provisions risks "rewrit[ing] a statute and giv[ing] it an effect altogether different from that sought by the measure viewed as a whole." *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U.S. 330, 362, 55 S. Ct. 758, 79 L. Ed. 1468 (1935). The Judiciary, if it orders uncritical severance, then assumes the legislative function; for it imposes on the Nation, by the Court's decree, its own new statutory regime, consisting of policies, risks, and duties that Congress did not enact. That can be a more extreme exercise of the judicial power than striking the whole statute and allowing Congress to address the conditions that pertained when the statute was considered at the outset.

NFIB, 567 U.S. at 692 (joint dissent by Scalia, Kennedy, Thomas, and Alito, JJ.).

Amici support the decision below and the position of Appellees that the Individual Mandate is inseverable from ACA because it is "essential to" and "intertwined with" the remainder of it. *See* Brief for State Appellees, at 10, 36-50;

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[5] https://www.benefitspro.com/2019/04/24/individual-health-shrinkage-drives-up-uninsured-rate-cbo-data-412-81353/?slreturn=20190405144017 (emphasis added, viewed May 5, 2019).

Brief of Appellees Neill Hurley and John Nantz, at 47-50; and Brief for the Federal Defendants, at 36-49; *id.* at 41 ("Congress has never amended or repealed its findings that the individual mandate is '***essential*** to creating effective health insurance markets.' 42 U.S.C. §18091(2)(I)") (emphasis added); *id*. at 43 (elaborating on the *NFIB* Joint Dissenters' explanation that "without [the Individual Mandate, guaranteed issue and community rating provisions], ACA's interlocking web of provisions cannot function as Congress intended"). The evidence that the Individual Mandate is essential to ACA is overwhelming. In addition to the statutory text, the Court may look to ACA's legislative history, to the arguments of the Solicitor General in the *NFIB* case, and to the opinion of the Joint Dissenters in the *NFIB* case.

Amici argue further that even if the Individual Mandate were somehow not intrinsic to ACA, then it should still not be severed from ACA.

A. Severance Would Operate as an Improper Judicial Line Item Veto in Violation of the Presentment Clause.

The Constitution separated legislative, executive and judicial powers in order to prevent tyranny. Severability in the absence of a severability clause, by ignoring the Presentment Clause, U.S. CONST. Art. I, § 7, cl. 2, transfers power to

the judiciary from Congress[6] and the President (concerning the power of the President to approve or veto legislation passed by both houses).[7]

Although Congress considered including a severability clause in ACA, it ultimately chose not to. By virtue of the Supremacy Cause in Article VI of the Constitution, the Bicameral and Presentment Clauses also must be applied to any judicial attempt to delete an unconstitutional provision from a public law lacking a severability clause. See *INS v. Chadha*, 462 U.S. 919 (1983), and *Clinton v. City of New York,* 524 U.S. 417 (1998), both of which invalidated federal statutes based on the Presentment Clause.

Presidential line item vetoes are unconstitutional and Congressional vetoes are unconstitutional. *See Clinton*, 524 U.S. at 447-49; *see also Chadha*, 462 U.S. at 959 (1983). Although the Supreme Court has previously severed defective provisions from federal statutes, *see e.g.*, *Alaska Airlines v. Brock*, 480 U.S. 678, 697 (1987), that remedy should be unavailable to courts without a congressionally enacted severability clause in light of *Clinton* and *Chadha*. The Bicameral and Presentment Clauses require the House and Senate to pass precisely the same text – not a single word or punctuation may vary between the bills passed by each

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

[7] Furthermore, when a court severs the text of a public law, the President never has the opportunity to approve the new text of the public law or to direct Congress to "reconsider" the new text if he or she objects to the new text.

chamber. *See Clinton,* 524 U.S. at 448. The judiciary, like the President, has no power to rewrite a statute. Furthermore, the idea that the judiciary be joined with the executive in a "council of revision" was considered and expressly rejected by the Drafters of the Constitution. Brief of Senators Robert C. Byrd, Daniel Patrick Moynihan, and Carl Levin as *Amici Curiae* in Support of Appellees 9-10 in *Clinton v. City of New York*, 1998 U.S. S. Ct. Briefs LEXIS 490 (Apr. 8, 1998, Sup. Ct. Dkt. No. 97-1374) ("*Byrd-Moynihan-Levin Brief*"). The Constitution's Bicameral Clause gives "ALL" legislative power to Congress. Because the power to sever is the power to determine the content of legislation, it may not be exercised by the courts in the absence of express congressional inclusion of a severability clause.

Any judicial action to revise a statute is legislative in purpose and effect because "it alter[s] the legal rights, duties and relations of persons … outside the Legislative Branch." *Chadha*, 462 U.S. at 952. It is clear from the Presentment Clause, and as held in *Clinton,* that partial vetoes are not permitted. This *in toto* requirement was understood by Presidents Washington[8] and Taft[9] as well as the

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

[9] William H. Taft, *The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations* 11 (1916) (The President "has no power to veto part of the bill and

late Senator Moynihan, a noted constitutional scholar.[10] President Washington, of course, presided over the Constitutional Convention. The *in toto* requirement that he and others acknowledged should apply to the deconstruction of a statute by the courts in the same way that it applies to the deconstruction of a statute by the President.

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

To foster this separation, the Constitution provides a single process by which the separate branches combine their diffused powers to create federal law. As the Supreme Court held in *Chadha* and *Clinton*, that process is set out in detail in the Bicameral and Presentment Clauses. When a court exercises a judicial line item

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allow the rest to become a law"). William H. Taft was the only person to serve both as President and Chief Justice of the United States.

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

veto and severs a defective provision, it impermissibly tampers with that process and realigns the Constitution's diffusion of powers.

Our representative democracy demands that Congress be accountable to the electorate. Severability interferes with that accountability and thereby reduces our liberty. When a court reconstructs a statute, the post-severance statute cannot be said to have been enacted by democratically elected officials.

The bicameral system to enact federal legislation that was crafted by the Framers may be viewed as requiring four legislative concurrences. First, the House of Representatives must agree by a majority vote to the text of a bill. Second, the Senate must also agree by a majority vote to the text of a bill. Third, the text of the House-passed bill must exactly match the text of the Senate-passed bill.[11] Fourth, once the House and Senate agree to the same text of a bill, that bill is presented to the President for agreement or veto.

In severing a provision and attempting to salvage what remains of ACA, the bicameral process is subverted. A brief by three prominent U.S. Senators in the line-item veto case explained this process as follows:

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[11] In explaining the Great Compromise, Madison said: "No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then of a majority of the States." *The Federalist No. 62*, at 378 (Madison) (C. Rossiter, ed.). The Framers intended for the House of Representatives to represent the people and the Senate to represent the States.

> Clashes of interest are an inevitable part of representative democracy in a continental nation whose "so many separate descriptions of citizens" embrace, as Madison observed […], a "great variety of interests, parties and sects." The Framers anticipated and respected clashes of interest, while providing for accommodation through "a process of discussion and compromise" ….
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> Applying a new "science of politics," The Federalist No. 9, p. 51 (Hamilton), the Framers not only accepted "human nature," *id.* No. 51, p. 349 (Madison), but enlisted it to help bring about an enduring republic. There would be conflicts. "Ambition must be made to counteract ambition," Madison wrote. Thus, ***the Constitution is organized around devices that offset "by opposite and rival interests, the defect of better motives***." *Id.* Throughout our history Members have supported measures to achieve progress in other regions "for the common benefit." But the Framers also expected Members would often be "partizans of their respective States." The Federalist, No. 46, p. 318 (Madison).

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

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

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

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

But when an unconstitutional provision is judicially severed from a statute *lacking* a severability clause, it interferes with the legislative role of Congress in an

unhealthy way. Senator Byrd explained during a debate over the line item veto that ceding the Senate's power to control the content of a statute is analogous to actions taken by the Roman Senate which ultimately led to the decline and fall of the Roman Empire. 139 Cong. Rec. S 5475-79, 5724-27, 5975-78, 6395-98, 6982-85, 7157-60, 7539-42, 8157-60, 8582-85, 9097-9100, 9786-89, 10971-75, 11953-56, 13561-65 (103rd Cong. 1st Sess. 1993). Permitting a court to exercise a judicial line item veto (*i.e.*, the power to sever an unconstitutional provision from a statute lacking a severability clause) is another such cession of power.

In addition, the severance of a provision from a statute interferes with the President's role in the legislative process. The President never approves the truncated version (*i.e.*, post-severance) of the statute, and the President is denied his or her veto power over the truncated version of the text.

Judicial severance of a provision interferes with the legislative process in additional ways. *See* Michael Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 Harv. J. on Legis. 228, 277-278 (2004). "Most legislation … is the culmination of myriad deals made among competing interests. The complexities and calculations of the logrolling process, and the limits it imposes on the strength of statutes, thus mandate heightened attention to the specifics of the legislative deal." *Id.* at 267. When a court severs an invalid provision from a statute lacking a severability clause, it ignores that calculus. As Judge Easterbrook explained:

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

Id. at 267 (quoting Frank Easterbrook, *Foreword: The Court and the Economic System*, 98 Harv. L. Rev. 4, 46 (1984), emphasis added).

"Another troubling aspect of the severability doctrine is that it produces the wrong set of incentives for Congress and, thereby reduces the accountability of Congress for its laws." David Gans, *Severability as Judicial Lawmaking*, 76 Geo. Wash. L. Rev. 639, 644 (April 2008). The judicial severance of an invalid provision from a statute:

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

Id. (emphasis added).

Congress would be more careful about severability clauses if courts were stricter about requiring them before salvaging a statute:

> The surest way to insure that Congress addresses severability is to discipline it into doing so: ***If the courts, for lack of a severability clause, wholly invalidate a statute … and announce that they will continue to do so in the future, Congress will learn its lesson: It will tell the courts what to do.*** This, after all, is the moral of *Warren* and its progeny. Dissatisfied with the courts' invalidation of partially unconstitutional statutes …, legislatures began including severability clauses in constitutionally questionable legislation. Now they will *always* do so.

Shumsky, *supra* at 276 (referencing *Warren v. Mayor and Aldermen of Charlestown*, 68 Mass. 84 (1854), emphasis added).

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

The Court is not empowered to rewrite a statute, and ACA should not be amended here without reconsideration and renegotiation by Congress. Only with bicameral passage and presentment to the President should ACA be rewritten.

CONCLUSION

There was no error of law or abuse of discretion in the district court's decision to invalidate ACA, and this appeal should be dismissed for lack of jurisdiction or the ruling below should be affirmed.

Respectfully submitted,

/s/ Andrew L. Schlafly

Andrew L. Schlafly
Attorney at Law
939 Old Chester Rd.
Far Hills, NJ 07931
Phone: (908) 719-8608
Fax: (908) 934-9207
Email: aschlafly@aol.com

Dated: May 8, 2019

Counsel for Amici Curiae Association of American Physicians & Surgeons and Citizens' Council for Health Freedom

CERTIFICATE OF SERVICE

I hereby certify that, on May 8, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ Andrew L. Schlafly
Andrew L. Schlafly
Counsel for Amici Curiae Association of American Physicians & Surgeons and Citizens' Council for Health Freedom

CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using 14-point, proportionately spaced, serif typeface, in Microsoft Word.

2. This brief complies with FED. R. APP. P. 29(a)(5) and 32(a)(7)(B) because it contains a total of 6,408 words, excluding material not counted under Rule 32(f).

Dated: May 8, 2019

s/ Andrew L. Schlafly
Andrew L. Schlafly
Counsel for Amici Curiae Association of American Physicians & Surgeons and Citizens' Council for Health Freedom