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Nos. 11-11021 & 11-11067

**IN THE UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT**

STATE OF FLORIDA, et al.,

Plaintiffs-Appellees,

V.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN
SERVICES, et al.,

Defendants-Appellants / Cross-Appellees.

On Appeal From the United States District Court For the Northern
District of Florida

**BRIEF *AMICUS CURIAE* OF PHYSICIAN HOSPITALS OF AMERICA
IN SUPPORT OF PLAINTIFFS/APPELLEES/CROSS-APPELLANTS**

Victor L. Moldovan
Counsel of Record
MCGUIREWOODS LLP
1170 Peachtree Street N.E.
Suite 2100
Atlanta, GA 30309
(404) 443-5708

Dated: May 11, 2011

Scott C. Oostdyk
Robert L. Hodges
H. Carter Redd
Lisa M. Sharp
Matthew D. Fender
MCGUIREWOODS LLP
One James Center
901 E. Cary St.
Richmond, VA 23219
(804) 775-1000

Rule 26.1 Certification

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, *amicus* Physician Hospitals of America makes the following disclosure: *Amicus* is a nonprofit association representing physician-owned hospitals. It is not publicly owned, has no parent corporation, subsidiary, or affiliate, and has not issued shares or debt securities to the public. As a result, no publicly held company owns 10 percent or more of the stock of PHA.

Counsel certifies that he believes that the Amended Certificates of Interested Persons and Corporate Disclosure Statement filed by Appellants and Appellees would be complete with the addition of the following:

Physician Hospitals of America, *amicus curiae*

Victor Moldovan, counsel to *amicus curiae*

Scott C. Oostdyk, counsel to *amicus curiae*

Robert L. Hodges, counsel to *amicus curiae*

H. Carter Redd, counsel to *amicus curiae*

Lisa M. Sharp, counsel to *amicus curiae*

Matthew D. Fender, counsel to *amicus curiae*

/s/ Victor L. Moldovan
Victor L. Moldovan

Table of Contents

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS 1

ARGUMENT 3

 I. The District Court’s Ruling on Severance Was Correct..... 3

 A. Congress Did Not Intend Section 1501 To Be Severed From PPACA’s Remaining Provisions 3

 B. Striking More Than Just § 1501 But Not the Whole Statute Is Neither Legally Permissible Nor Even Feasible.....5

 II. Declaring PPACA Unconstitutional as a Whole Is the Only Legally Defensible Decision..... 6

 III. The Government’s Approach to Severance is Unprecedented and Would Create an Unworkable Patchwork of Uncertain Non-severed Provisions by District and Circuit..... 11

CONCLUSION..... 13

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Alaska Airlines v. Brock</i> , 480 U.S. 678, 684-85 (1987)	4, 5, 6, 9
<i>Ayotte v. Planned Parenthood</i> , 546 U.S. 320 (2006)	10
<i>Clinton v. City of New York</i> , 524 U.S. 417 (1998).....	7
<i>Florida v. U. S. Dept. of Health and Human Svcs.</i> , No. 3:10-cv-91, 2011 U.S. Dist. LEXIS 8822 (N.D. Fl. Jan. 31, 2011)	6,8
<i>Florida Right to Life, Inc. v. Lamar</i> , 273 F.3d 1318 (11th Cir. 2006)	7
<i>Free Enter. Fund v. Public Company Accounting Oversight Bd.</i> , 130 S.Ct. 3138 (2010).....	4, 10, 11
<i>Harris v. Garner</i> , 216 F.3d 970 (11th Cir. 2000)	7
<i>Printz v. United States</i> , 521 U.S. 898 (1997).....	10
<i>Regan v. Time, Inc.</i> , 468 U.S. 641 (1984).....	12
<i>Russello v. United States</i> , 464 U.S. 16 (1983).....	9
<i>Virginia v. Sebelius</i> , 728 F. Supp. 2d. 768 (E.D. Va. 2010)	6
STATUTES	
Patient Protection and Affordable Care Act of 2010 (“PPACA”), Pub L. No. 11-148, 124 Stat. 119 (2010).....	1,4,6

Interest of the Amicus

Physician Hospitals of America (“PHA”) is a 26 U.S.C. § 501(c)(6) organization formed to educate members of the physician-owned hospital community about regulatory and legislative issues and to encourage PHA members to advocate for the rights of physician-owned hospitals. PHA has approximately 166 member hospitals in 34 different states, comprising both existing facilities and physician-owned hospitals in various stages of development. PHA-member hospitals are typically enrolled as providers under Medicare and Medicaid programs, with up to 70% of their case mix stemming from Medicare and Medicaid patients. The physician owners of PHA-member hospitals are also providers under Medicare and Medicaid.

PHA is committed to the sanctity of private property as guaranteed by the Constitution, especially the rights of physicians to own and operate hospitals and to provide patients with expert, cost-effective, and efficient health care. PHA contends that § 6001 of the Patient Protection and Affordable Care Act of 2010 (“PPACA”), Pub L. No. 11-148, 124 Stat. 119 (2010), retroactively prohibits planned, approved, and commenced facility expansion at approximately 58 Medicare-certified hospitals solely because they are owned by physicians, and further prevents the development of an additional 84 physician-owned hospitals that would be otherwise eligible for

Medicare certification. *See Physician Hospitals of America, et al. v. Sebelius*, Case No. 6:10-cv-00277-MHS, filed June 3, 2010, in the U.S. District Court for the Eastern District of Texas, Tyler Division.

PHA has an interest in protecting its members directly, and the public indirectly, from any unconstitutional healthcare legislation, and thus it has an interest in supporting the Appellees in this action. PHA's membership is further harmed each day this litigation continues. PHA's members are American citizens who wish to invest their personal capital to expand their businesses, create jobs, and serve the public. They are prevented from doing so by the specter of an *ultra vires* act of Congress.

Pursuant to Federal Rule of Appellate Procedure 29(a), *amicus curiae* certifies that counsel for the Department of Justice on behalf of the Department of Health and Social Services for Appellants, counsel for the States-Appellees, and counsel for the Private Plaintiffs-Appellees, have consented to the filing of this brief. This brief *amicus curiae* was written entirely by PHA's counsel, and no person apart from those identified in Federal Rule of Appellate Procedure 29(c)(5)(C) made a monetary contribution intended to fund the preparation or submission of this brief.

Argument

PHA agrees with the district court and the States that § 1501 of PPACA exceeds Congress' authority to regulate interstate commerce. Granting the unconstitutionality of that section of the Act for the sake of argument, PHA focuses here on the district court's ruling on severability. For the reasons set forth below, PHA urges this Court to affirm the district court's declaration that PPACA is unconstitutional in its entirety.

I. The District Court's Ruling on Severance Was Correct.

Having concluded that the individual mandate was invalid, the district court had three logically possible choices: sever § 1501 from the whole and strike it alone, strike more than just § 1501 by parsing through the statute to determine severance on a provision-by-provision basis, or refuse to sever § 1501 and strike the statute in its entirety. The court made the only constitutionally defensible choice consistent with Congressional intent in declaring PPACA unconstitutional in its entirety.

A. Congress Did Not Intend Section 1501 To Be Severed From PPACA's Remaining Provisions.

No party before this Court is arguing that the district court should have severed only § 1501 from PPACA. Applicable case law and the text of the Act itself demonstrate why it would be wholly improper to sever only § 1501. First, Supreme Court precedent requires that, for severance to be

defensible, the remaining provisions of the law must remain “fully operative as a law” absent the invalid provision. *Free Enter. Fund v. Public Company Accounting Oversight Bd.*, 130 S.Ct. 3138, 3161 (2010). In making this determination, courts consider whether the remaining statutory provisions “will function in a manner consistent with the intent of Congress.” *Alaska Airlines v. Brock*, 480 U.S. 678, 684-85 (1987).

Here, no one contends that a PPACA without an individual insurance mandate would “function in a manner consistent with the intent of Congress” because it is accepted that a “health insurance market could never survive or even form if people could buy their insurance on the way to the hospital,” and Congress knew this when creating PPACA. *See* Appellant’s Br. at 36 (citing 47 Million and Counting, 110th Cong. 52 (Hall)).

Second, § 1501 expressly identifies the centrality of the Individual Mandate to PPACA’s other provisions, stating:

[I]f there were no requirement [to purchase health insurance], many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, ***together with the other provisions of this Act***, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. ***The requirement is essential*** to creating effective health insurance markets

Pub. L. 111-148 § 1501 (a)(2)(G), 124 Stat. 119, 243 (2010) (emphasis added). In light of Congress’s own statement that the Individual Mandate is

an essential piece of an intentionally bundled-together group of provisions, there is no basis to conclude that Congress intended the residual of PPACA to survive if only § 1501 were stricken as unconstitutional. Thus, a decision to sever only § 1501 from PPACA would conflict with Supreme Court authority on severance as well as evidence of Congress's intent in enacting PPACA as a complete package.

B. Striking More Than Just § 1501 but Not the Whole Statute Is Neither Legally Permissible Nor Even Feasible.

It is conceivable that other severance cases involved statutes that accommodated an easy “save this, strike that” approach to severance: PPACA is simply not in that category. Section 1501 itself is a linchpin provision of an Act that involved a delicate and opaque balancing of interests among members of Congress, who passed the statute by the slimmest of majorities. It would be, therefore, an improvident project for any court to guess at which provisions were not part of an unrecorded *quid pro quo* that enabled the statute as a whole to pass through Congress. Moreover, the proper inquiry is not whether any residual provision *could* stand on its own, but rather whether the residual “will function *in a manner* consistent with the intent of Congress.” *Alaska Airlines*, 480 U.S. at 684-85. Because Congress has not made a practice of creating a record that might inform a court about what various constellations of potentially residual

provisions would function in a manner consistent with its intent, any court's warrant to cobble together some-but-not-other of PPACA's provisions would necessarily rely on the most speculative evidence. Further, as argued above, that approach would contradict the Act's plain statement that § 1501 was enacted to function "together with the other provisions of this Act." Pub. L. 111-148 § 1501 (a)(2)(G), 124 Stat. 119, 243 (2010).

As both Appellants and two district courts that have considered this question have recognized, parsing through PPACA's residual provisions with the aim of determining which subset "will function in a manner consistent with [Congress's] intent" would require the courts to do nothing less than unscramble the legislative omelet. *See Florida v. U. S. Dept. of Health and Human Svcs.*, No. 3:10-cv-91, 2011 U.S. Dist. LEXIS 8822 at *132 (N.D. Fl. Jan. 31, 2011) ("Severing the individual mandate from the Act along with the other insurance reform provisions -- and in the process reconfiguring an exceedingly lengthy and comprehensive legislative scheme -- cannot be done."); *Virginia v. Sebelius*, 728 F. Supp. 2d. 768, 790 (E.D. Va. 2010) ("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."). Furthermore, this Court has several times declined the invitation to

usurp the legislature's role and rewrite a statute in order to save it. *See, e.g., Fla. Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1326 (11th Cir. 2001) (“We will not, however, rewrite the clear terms of a statute in order to reject a facial challenge.”); *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000) (“[T]he role of the judicial branch is to apply statutory language, not to rewrite it.”).

As this Court has recognized, rewriting a statute in order to salvage it usurps the legislative function. *See Harris*, 216 F.3d at 976. Not only would a “parsing” approach to severance revise statutory law without conforming to Constitutional requirements of bicameralism and presentment, but it would also encourage Congress to rely on the judicial branch to wield the equivalent of a line-item veto in the guise of “severance.” As the Supreme Court has acknowledged, our Constitutional procedures for enacting statutes “were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only be exercised in accord with a single, finely wrought and exhaustively considered, procedure.” *Clinton v. City of New York*, 524 U.S. 417, 439-440 (1998). The procedure the government proposes for the scope of severance here has none of those qualities.

II. Declaring PPACA Unconstitutional as a Whole Is the Only Legally Defensible Decision.

Any suggestion that Congress believed itself to be on solid constitutional footing when enacting the individual mandate of § 1501 could not be said with a straight face. Not only did Congress build in a judicial review period by making § 1501 effective in 2014, but its legal researchers also unambiguously foretold that the mandate faced an uncertain future in the courts. *See Florida*, 2011 U.S. Dist. LEXIS at *71 (noting that “Congress’ attorneys in the Congressional Research Service (‘CRS’) and Congressional Budget Office (‘CBO’) advised long before the Act was passed into law, that the notion of Congress having the power under the Commerce Clause to directly impose an individual mandate to purchase health care insurance is ‘novel’ and ‘unprecedented.’”)(further citation omitted).

With and despite this apparent knowledge, Congress elected not to guide the federal courts’ decision as to severance by including a severability provision. It is difficult to view those facts in combination and not conclude that Congress opted either to risk the viability of the Act as a whole, or to prompt a judicial determination of what provisions it intended to link to the individual mandate. If the former is true, then the government must live with the consequence of that decision and accept that PPACA must fail as a

whole. If the latter is true, this Court should decline the invitation to make hard choices that Congress declined to make for itself using only guesswork as to Congressional intent with respect to a mish-mosh statute.

In the usual case where Congress includes a severability clause or provision, the courts apply a presumption of severability. *Alaska Airlines*, 480 U.S. at 686. PPACA, however, lacks a severability provision, so there is no such presumption. *Id.* Moreover, not only did Congress fail to include a severability provision, but the statute's legislative history indicates that this failure was intentional because an earlier version of the Act included a severability clause. *See* H.R. 3962, section 255. "Where Congress includes [express] language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the [omitted provision] was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983). Thus, where normally Congress's failure to include a severability clause is perceived as mere Congressional "silence" on the subject, *see Alaska Airlines*, 480 U.S. at 686, here the Court may consider the Congressional decision *to exclude* a severability clause as evidence of Congressional intent that PPACA should stand or fall as a whole on the constitutionality of its core provisions.

Accordingly, because the record does not show that the remaining provisions of PPACA were intended to be “fully operative as a law” absent the Individual Mandate, and it is not “evident” that Congress would have enacted PPACA’s remaining provisions independent of its unconstitutional package of wide-ranging health-care industry reforms, the only proper approach here is to strike the statute in its entirety. *See Free Enter. Fund*, 130 S. Ct. at 3161.

III. The Government’s Approach to Severance is Unprecedented and Would Create an Unworkable Patchwork of Uncertain Non-severed Provisions by District and Circuit.

For the first time in this case, the government argues that a two-stage process should guide the scope of PPACA’s severance. In stage one, the district court would determine which PPACA provisions “burden parties to the litigation,” because the government contends that only those provisions even qualify for severance consideration. Appellant’s Br. at 59-60. None of the Supreme Court’s seminal cases on severance—*Alaska Airlines*, *Free Enterprise Fund*, or *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006)—contemplate this approach. This idea is manufactured from dicta in *Printz v. United States*, 521 U.S. 898 (1997), a case that cursorily considered the scope of severance with respect to a state statute.

The government further asserts that this preliminary determination of what provisions would qualify for severance consideration could exclude even provisions *integrally related* to an unconstitutional provision. Appellant's Br. at 59 ("Moreover, even when particular provisions are integrally related, a court may not address provisions that do not burden parties to the litigation."). That extreme argument is made not only without any authority but also in contravention of existing authority. Specifically, in *Free Enterprise Fund*, the Supreme Court instructed that courts should be guided in their severance determinations by evidence from the Legislature that certain provisions would not have been enacted independent of the unconstitutional provision. 130 S.Ct. at 3161. This can only mean that any provision "integrally related" to an unconstitutional provision should be subject to severance, because such provisions "would not have been enacted independent of the unconstitutional provision." *Id.* Thus, the government's suggested approach ignores binding authority.

In the second stage of the government's hoped-for process, district courts would engage in "a close analysis of Congressional intent" to determine whether the however-many remaining provisions that do burden the parties and are otherwise "unobjectionable" were intended by Congress

to “stand alone and function independently.”* Appellant’s Br. at 57.

Notably, the government declines to identify to this Court exactly which provisions of PPACA even arguably meet those criteria.

If the government’s approach were adopted, federal courts would be making at least two determinations to define the proper scope of severance: first as to provisions that burden the parties, second as to Congressional intent regarding the independent functionality of the residual. That approach to severance would practically guarantee the creation of very different PPACA rump statutes by district and circuit. Until the Supreme Court would settle the severance question with finality, the country would have to suffer an unmanageable and uncertain hodge-podge of differing—and costly—provisions. The government does not make this result clear, but it is foreseeable, and gives this Court ample reason to reject that approach.

Conclusion

The court below properly entered judgment declaring PPACA unconstitutional and void in its entirety. In so doing, the court avoided the pitfalls of producing hybrid legislation which does violence to the separation

* There is no authority cited to illuminate what constitutes an “unobjectionable” provision as used in *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). If this Court were to order remand and an evaluation of severance on a provision-by-provision basis, due process would entitle PHA and other affected persons to a hearing on their objections to constitutionally infirm provision of PPACA before the court determines that any individual section is “unobjectionable” and therefore not subject to severance.

of powers and fails to accomplish stated congressional purposes. For these reasons, your amicus urges the Court to affirm the judgment of the district court, nullify PPACA in its entirety, and prohibit its enforcement.

Respectfully Submitted,

/s/ Victor L. Moldovan

Victor L. Moldovan
MCGUIREWOODS LLP
1170 Peachtree Street N.E.
Suite 2100
Atlanta, GA 30309
(404) 443-5708

Scott C. Oostdyk
Robert L. Hodges
H. Carter Redd
Lisa M. Sharp
Matthew D. Fender
MCGUIREWOODS LLP
One James Center
901 E. Cary St.
Richmond, VA 23219
(804) 775-1000

*Counsel for Physician
Hospitals of America*

Certificate of Compliance with Rule 32(a)

I hereby certify that according to the word-count feature provided in Microsoft Word 2003, excluding only the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), that the foregoing brief contains 2,707 words. The text of the brief is composed in Times New Roman 14 point font.

/s/ Victor L. Moldovan
Victor L. Moldovan

Certificate of Service

I hereby certify that on May 11, 2011, I filed the foregoing brief with the Court by causing an original and six copies to be delivered to the Clerk by hand delivery. I further certify that, by consent of the parties, I have caused the brief to be served by electronic mail and by U.S. first-class mail upon the following counsel:

Eric B. Beckenhauer, Esq.
U.S. Department of Justice
20 Massachusetts Ave. NW
Washington, DC 20530
eric.beckenhauer@usdoj.gov

Scott Douglas Makar, Esq.
Office of the Attorney General of Florida
The Capitol PL-01
Tallahassee, FL 32399
scott.makar@myfloridalegal.com

Gregory Katsas, Esq.
Jones Day
51 Louisiana Ave. NW
Washington, DC 20001-2105
ggkatsas@jonesday.com

Further, an identical electronic copy of the brief shall be uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity. Such notice constitutes service to all registered attorneys participating in the case.

/s/ Victor L. Moldovan
Victor L. Moldovan