Record 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

APPELLEE'S REPLY BRIEF REGARDING CROSS APPEAL

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REPLY BRIEF

The Commonwealth of Virginia, by and through its Attorney General, Kenneth T. Cuccinelli, II, hereby files its Reply Brief regarding the issues raised in its Cross-Appeal.

ARGUMENT

I. SUMMARY OF THE ARGUMENT

Having found the mandate and the penalty unconstitutional, the district court erred in deciding to "sever only Section 1501 and directly-dependent provisions which make specific reference to Section 1501." (J.A. at 1114). Taken literally, this ruling of the district court leaves standing the remainder of PPACA, including provisions that the Secretary has conceded are directly-dependent on the mandate and penalty. (J.A. at 901-02). This is a consequence of the district court's choice of words because no other provision of PPACA makes an explicit reference to Section 1501.[1]

[1] While no other provision of PPACA makes specific reference to Section 1501, as the Chamber of Commerce points out in its amicus brief, "thirteen statutory provisions include one or more references to 26 U.S.C. § 5000A, the provision codifying the mandate. *See* PPACA §§ 1001, 1251, 1302, 1311, 1312, 1331, 1332, 1401, 1411, 1512, 1514, 9001 & 9014." (Doc. 128-1, p.14, n.3). However, a literal reading of the

Although the general rule is that courts will seek to sever unconstitutional provisions from a statute, the rule is not absolute. As recently as last term, the Supreme Court reiterated the long-standing rule that an unconstitutional portion of a statute may not be severed from the remainder of the statute if "it is evident that the Legislature would not have enacted those provisions . . . independently of that which is invalid." *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3161 (2010) (internal quotation and citation omitted). *See also Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (same). Because it is clear that Congress would not have passed PPACA at all without the mandate and penalty, the district court's decision was erroneous.

While determining which provisions of an enactment Congress would not have passed without the constitutionally offensive provision may present challenges, the Supreme Court has identified at least two methods of analysis to support such findings. The first is a functional test that allows the striking of otherwise valid provisions of a statute if they cannot function **as intended** without the unconstitutional

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district court's ruling would allow these provisions to survive the invalidation of the mandate and penalty.

provision. As the Supreme Court stated in *Alaska Airlines*, "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently . . . ." 480 U.S. at 684. The second is more open-ended, with a court being directed to strike any provisions that were part of the legislative deal that was dependent upon inclusion of the unconstitutional provision. Even provisions that are unquestionably legitimate exercises of congressional power must be stricken if the "statute created in [their] absence is legislation that Congress would not have enacted." *Id.* at 685. The Court went on to state that, in determining severance questions, it is "appropriate to evaluate the importance of the [unconstitutional provision] in the original legislative bargain . . . ." *Id.* Because some of the provisions of PPACA fail a functional analysis and all of the provisions fail a legislative bargain analysis, the district court erred in severing the mandate and penalty from the remainder of the statute.

Although the Secretary in her response brief pays lip service to the proposition that otherwise valid provisions may not be severed from the unconstitutional mandate and penalty if "'it is evident that the

Legislature would not have enacted those provisions independently . . .'" of the mandate and penalty, (Doc. 161 at 55 (internal citations omitted)), her argument, in practice, ignores that principle. Faced with the fact that no credible argument can be made that Congress **would** have passed the whole of PPACA without the mandate and penalty, she essentially argues that, because Congress **could** have passed other provisions independently that can function independently, the district court correctly severed the mandate and penalty. This argument fails because it ignores the precedent cited above, ignores the tortured legislative path that led to the passage of PPACA, and ignores the fatal concession the Secretary made below.

In argument below, the Secretary conceded that, if the mandate and penalty were found to be unconstitutional, other "provisions of the Act plainly cannot survive." (J.A. at 901). Specifically, she acknowledged that the "insurance industry reforms" contained in PPACA "cannot be severed from the" mandate and penalty, and therefore, had to be stricken if the mandate and penalty were found to be unconstitutional. (*Id*. at 902). The Secretary has not retreated from that concession on appeal, arguing instead that the concession

"provide[s] no basis for invalidation of any **other** provision . . . ." (Doc. 161 at 58) (emphasis added).

However, for the first time on appeal, the Secretary seeks to avoid the consequences of her concession by arguing that the Commonwealth lacks standing to claim the benefits of the concession, citing *Printz v. United States*, 521 U.S. 898 (1997). (Doc. 161 at 58-59). That argument fails for two reasons.

The Secretary's argument fails first because nothing in *Printz* remotely suggests that prudential standing considerations would be employed to save unseverable provisions which are concededly unseverable. Second, the Secretary is simply incorrect in her assertion that the insurance industry changes do not affect the Commonwealth. They affect the Commonwealth as regulator, health care provider, and as a purchaser of health insurance for its employees.

Ultimately, on the merits of the severance question, the parties agree that the district court erred. But that is the floor and not the ceiling. All of PPACA should fall under the legislative bargain test of *Alaska Airlines*. Even if some degree of severability is found, the touchstone for distinguishing between the severable and the

unseverable is to be found in this principle: provisions that are intertwined with the unconstitutional provision cannot be severed. Otherwise, a reviewing court would be improperly rewriting a statute. (*See* Amicus Br. of Family Research Council, Doc. 126-1 at 25-29).

Clearly, as the Secretary has conceded, the mandate and penalty are intertwined with PPACA's provisions related to guaranteed-issue and community-rating. But the mandate and penalty are equally intertwined, at a minimum, with PPACA's risk adjustment provision, its bar of annual limits for benefits, and its medical loss ratio provision. Indeed, because the Secretary has conceded that all of these provisions work together with the Medicare and Medicaid provisions to broadly change how health care is financed, (Doc. 21 at 21-23), they are all intertwined to the point that severance is not permissible.

Though the Secretary now maintains that the Commonwealth is not the proper party to benefit from her concession, she has consistently conceded that certain provisions must fall if the mandate and penalty are found to be unconstitutional. (J.A. at 901-02; Doc. 161 at 58). Thus, there is no dispute between the parties that the district court's severance analysis was flawed.

Based on the Secretary's concession, it is clear that the district court should have refused to sever the mandate and penalty from what the Secretary terms the insurance industry reforms. Applying the logic of the Secretary's concession and her own description of the scheme of PPACA to other portions of the statute, it becomes apparent that the mandate and penalty may not be severed from the Medicare and Medicaid provisions of PPACA either. Finally, applying the precedents referenced above to the relatively rare circumstances of PPACA, it becomes necessary for PPACA to fail completely once the mandate falls.

Accordingly, this Court should reverse the judgment of the district court on severance and declare the entirety of PPACA unconstitutional. Alternatively, this Court should, based on the concession of the Secretary and the logic of her arguments, strike those provisions of PPACA that relate to health care financing, including the private insurance industry reforms, changes to Medicare and changes to Medicaid. At a bare minimum, as the Secretary has conceded, what she calls the private insurance reforms should fall with the mandate and penalty.

II. BASED ON THE SECRETARY'S CONCESSION BELOW, THE DISTRICT COURT ERRED IN SEVERING THE MANDATE AND PENALTY FROM ALL PROVISIONS OF PPACA RELATED TO METHODS OF PAYING FOR HEALTH CARE SERVICES.

A. There is no dispute between the parties that, as a matter of law, what the Secretary has referred to as the insurance industry reforms must fall with the mandate and penalty.

In both the district court and in this Court, the Secretary has recognized that certain provisions contained in PPACA, which she has termed "insurance industry reforms," rise or fall with the mandate and penalty. (J.A. at 901-02; Doc. 161 at 58). She makes this concession because no serious argument can be made that what the Secretary terms the insurance industry reforms can function as Congress intended without the mandate and penalty, and therefore, under the functional test of *Alaska Airlines*, the mandate and penalty cannot be severed from these provisions. 480 U.S. at 684. ("Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently . . . .").

The threshold question thus becomes how much of PPACA falls within the Secretary's concession. She has characterized the insurance

industry reforms as only encompassing "the Act's guaranteed-issue and community-rating provisions . . . ," (Doc. 161 at 58), without reference to specific sections of PPACA. However, as the Chamber of Commerce demonstrates in its amicus brief, there are far more insurance industry changes that are intertwined with the mandate and penalty than just the guaranteed-issue and community-rating provisions. (Amicus Br. of the Chamber of Commerce, Doc. 128-1 at 17-32). At a minimum, PPACA's risk adjustment provision (§ 1343 of PPACA), PPACA's bar on annual limits for benefits (§ 1001 of PPACA), and PPACA's medical loss ratio provision (also contained in § 1001 of PPACA) are all "insurance industry reforms" that are dependent on the individual mandate and penalty, and therefore rise or fall with the mandate and penalty. Finally, there are many other insurance industry provisions in PPACA that both fall within the logic of the Secretary's concession and are intertwined with the mandate and penalty. (*See* Doc. 128-1 at 32, n.7).

That the mandate and penalty cannot be severed from any of the insurance industry provisions is borne out by the very words that Congress chose in enacting the mandate and penalty. Specifically,

Congress made clear on the face of PPACA that the statutory scheme cannot work as Congress intended without the mandate and penalty.

For example, in §§ 1501(a)(2)(H) and 10106(a) of PPACA, Congress explicitly stated that the mandate "is an **essential** part of this larger regulation of economic activity, and the absence of the [mandate and penalty] would undercut Federal regulation of the health insurance market." (emphasis added). Congress continued, noting in §§ 1501(a)(2)(I) and 10106(a) of PPACA that the mandate and penalty,

> **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 [mandate and penalty are] **essential** to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

(emphasis added). Furthermore, in §§ 1501(a)(2)(J) and § 10106(a) of PPACA, Congress again stated that the mandate and penalty were necessary for PPACA to work as Congress intended, noting that the mandate and penalty,

> **together with the other provisions of this Act**, will significantly reduce administrative costs and lower health insurance premiums. The [mandate and penalty are] **essential** to creating effective health insurance markets

> that do not require underwriting and eliminate its associated administrative costs.

(emphasis added). Thus, in the enactment itself, Congress found that the mandate and penalty are intertwined with the other provisions of PPACA and that the mandate and penalty are essential to the functioning of PPACA as intended by Congress. Given that Congress made such explicit findings, it can be said to a certainty that PPACA, without the unconstitutional mandate and penalty, will not "function in a manner consistent with the intent of Congress . . . . ," and therefore, the mandate and penalty may not be severed from the remainder of PPACA under the functional test of *Alaska Airlines*.

B. The Secretary's new argument, that the Commonwealth is not a proper party to argue that the insurance industry provisions may not be severed, is legally and factually incorrect.

Faced with the weight of her own concession and the clear statement of Congress that the mandate and penalty are "essential" to PPACA's reforms, the Secretary raises a new argument on appeal. Still conceding that what she terms insurance industry reforms rise or fall with the mandate and penalty in the abstract, she argues for the first

time that the Commonwealth is not a proper party to benefit from her concession.

She cites *Printz*, 521 U.S. 898, in support, arguing that this Court should decline to address the severance of the insurance industry reforms because she alleges that Virginia is not affected by them. (Doc. 161 at 58-59). However, this argument fails because the situation in *Printz* is distinguishable and because the Secretary's new argument is based on an assertion that is false.

The *Printz* scenario is distinguishable from this case in two basic ways. First, when the Department of Justice was defending the various provisions at issue in *Printz*, it does not appear to have conceded that the provisions in question "plainly cannot survive. . ." without the unconstitutional provisions or that those provisions "cannot be severed from the" unconstitutional provisions. (J.A. at 901-02). Thus, unlike *Printz*, the Secretary is left to argue that, while she agrees that the insurance industry provisions cannot survive without the individual mandate and penalty, this Court should ignore that fact until another

party comes along. Nothing in *Printz* suggests such a result.[2] Unlike the circumstances in *Printz,* Congress has explicitly declared that the insurance industry provisions are inextricably linked to the unconstitutional provisions, and therefore, must be stricken. Furthermore, the Secretary's premise that the Commonwealth is not affected by the insurance industry provisions is incorrect.

The Commonwealth is affected by these regulations in at least three significant ways. First, as regulator, the Commonwealth must implement the insurance changes that are concededly unseverable. The reordering necessary to accomplish this imposes substantial costs and inconvenience on the Commonwealth. (J.A. at 142-45).

Second, as an employer, the Commonwealth is a significant purchaser of health insurance. It offers its employees health insurance

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[2] In its Supreme Court brief in *Printz*, the United States contested the standing of the plaintiffs to challenge provisions of the Brady Handgun Violence Prevention Act "which have no impact on them." Brief for the United States, *Printz v. United States*, 1996 W.L. 595005 *43 (U.S., filed Oct. 1996). The United States agreed however, that the Court properly could consider "the continuing validity of statutory provisions that were upheld against constitutional challenge but were related to other parts of the statute that were successfully challenged." *Id.* at *44. The United States also agreed that the plaintiffs had standing to challenge a notice requirement "because it directly affects them." *Id.* at *44 n.30.

as a benefit of employment.[3] PPACA requires the Commonwealth to overhaul the way it purchases and provides health insurance to its own employees. PPACA requires state plans to comply with new requirements relating to pre-existing conditions (§ 1201 (inserting § 2704 into the Public Health Service Act ("PHSA")), exclusions for excessive waiting periods (§ 1201 (PHSA § 2708)), lifetime and annual policy limits (§ 1001 (PHSA § 2711)); prohibition on rescission of coverage (§ 1001 (PHSA §2712)), dependent coverage (§ 1001 (PHSA § 2714)); and reporting requirements (§ 1001 (PHSA § 2718)). States must by 2014 enroll automatically any other employees working 30 or more hours a week into these expanded State insurance plans or pay applicable taxes and penalties. PPACA §§ 1511, 1513. The Act penalizes States for each State employee who opts for other federally-subsidized coverage. *Id.* Section 9001 also taxes States when they provide "high cost" benefits that exceed a federal threshold. Thus, any regulations in PPACA that affect the cost, availability and content of the health insurance policies that the Commonwealth purchases or is permitted to purchase necessarily affect the Commonwealth.

[3] *See* http://www.dhrm.virginia.gov/hbenefits/cova/covacare.html.

Finally, the Commonwealth is a provider of health care services through its state-owned hospitals, public health clinics and other facilities. For example, the Commonwealth operates two major teaching hospitals, the University of Virginia Medical Center and the Virginia Commonwealth University Medical Center, formerly the Medical College of Virginia Hospital.[4] Through its Department of Behavioral Health and Developmental Services, the Commonwealth operates an additional 16 treatment facilities.[5] The Commonwealth also provides public health care services through its public health clinics that are operated through the various local health districts established by the Virginia Department of Health.[6] All of these facilities, which are owned or operated by the Commonwealth, accept some combination of Medicare, Medicaid and/or private insurance. Thus, any and all of the insurance industry changes that potentially affect reimbursements or claim processing affect the Commonwealth.

Because of its roles as regulator, employer, and health care provider, the Commonwealth is affected by the insurance industry

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[4] http://www.healthsystem.virginia.edu/toplevel/home/ and http://www.vcuhealth.org/

[5] http://www.dbhds.virginia.gov/SVC-StateFacilities.htm

[6] http://www.vdh.state.va.us/lhd/

regulations, and the foundation for the Secretary's *Printz* argument crumbles.

The fact that the Secretary's *Printz* argument fails is a good thing from a public policy prospective. As the Secretary concedes, leaving the insurance industry changes in place without the mandate and penalty would result in a grave injury to the American economy.

At the July 1, 2010 hearing on her motion to dismiss, the Secretary argued that, without the mandate and penalty, PPACA would destroy the American health insurance market, stating

> And what the testimony was, was if you do the preexisting condition exclusion and no differential health care status, **without a minimum coverage type provision, it will inexorably drive the market into extinction.** And what somebody said more succinctly was, the market will implode. And that's what Congress had before it.
>
> **So then what Congress did** [in enacting the mandate and penalty] **was as necessary as could be to making those other reforms work. . . . [H]ere it really was necessary.**

(J.A. at 227) (emphasis added). The Secretary continued this theme throughout that hearing, making this same point over and over again:

> [The mandate and penalty] really is necessary. What the Court would be saying [by finding the mandate and penalty unconstitutional] is effectively the Congress could not, could not pass those insurance reforms [found elsewhere in

> PPACA] . . . . [The mandate and penalty are] actually necessary. . . . It's not like [the mandate and penalty] would be a great thing to have. **It's actually essential.** The market will implode [without the mandate and penalty].

(*Id.* at 229-30) (emphasis added).

In response to a question from the district court that attempted to draw a distinction between the mandate and penalty and the other portions of PPACA, the Secretary rejected the proposition that such a distinction was even possible, stating

> **One can't exist without the other**, Your Honor. That is what the testimony is. And **that's what Congress found. That is, if you have one without the other, the market implodes. The two go hand in hand.**

(*Id.* at 230) (emphasis added).

Even in her rebuttal argument at the motion to dismiss hearing, the Secretary continued to steadfastly maintain that PPACA could not work as Congress intended without the mandate and penalty, stating

> It's not just rationally related, reasonably related, it's necessary. What Congress found, and what the testimony before Congress was, the market would go into extinction or it would implode. **It actually was essential to make the reforms work.**

(*Id.* at 293) (emphasis added).

In addition to her arguments at the July 1, 2010 hearing, the Secretary has consistently and repeatedly argued that the mandate and the penalty were essential to PPACA's broader legislative scheme in her written filings. In Paragraph 14 of her Answer, the Secretary avers that the mandate and penalty are "essential to ensure the success" of PPACA's regulatory scheme. (*Id.* at 333). In her Memorandum in Support of Her Motion to Dismiss, the Secretary described the individual mandate and associated penalty being challenged here as "**a linchpin of Congress's reform plan**." (J.A. at 51) (emphasis added). Elsewhere in her Memorandum, she said that "**Congress determined that, without the minimum coverage provision, the reforms in the Act . . . would not work**." (*Id.* at 52) (emphasis added). (*See also Id.* at 56, 78-83, 154, 161, and 166-67).

Based on the all of the foregoing, it is clear that the district court erred in severing the mandate and penalty from the insurance industry changes in PPACA. To hold otherwise is to ignore the Secretary's concession, the relevant precedent, and Congress' express findings that the mandate and penalty were "essential" to PPACA's other provisions.

C. Both the Secretary's concession below and her own description of how PPACA was intended to operate dictate that any other provisions regarding methods of payment for health care services must fall with the mandate and penalty.

Although the Secretary's concession is nominally limited to "insurance industry reforms," its logic would extend to the PPACA's provisions that make changes to Medicare and Medicaid as well.[7] While the Secretary argues that "[t]he Commonwealth . . . provides no support for its contention that the Act's 'changes to Medicare and Medicaid' should be declared invalid . . . ," (Doc. 161 at 59), it is the Secretary and Congress who have provided that support.

The Secretary has repeatedly argued that PPACA seeks to "regulate the diverse methods by which consumers pay for health care services . . ." (Doc. 21 at 28) and "regulates the means of payment for services in the interstate health care market . . . ." (*Id.* at 44-45). According to the Secretary, it seeks to accomplish this not only by making changes to private insurance (presumably the "insurance

[7] There is no question that the Commonwealth is affected by the changes to Medicare and Medicaid. As a participant in the Medicaid program, the Commonwealth is affected by those changes by definition. Further, as a health care provider, the Commonwealth is affected by any changes to Medicare and Medicaid that could affect reimbursement rates or procedures.

industry reforms" she has conceded are dependant on the mandate and penalty), but also by making changes to government programs, such as the Medicare and Medicaid programs that the Secretary characterizes as "insurance." (Doc. 21 at 22) ("The federal government provides health insurance for older and disabled Americans under Medicare . . ."; "Federal and state governments provide health insurance for low income Americans through Medicaid . . . ."). As demonstrated in the merits brief, the mandate and penalty do not themselves regulate methods of payment. But the associated changes in private insurance, Medicaid, and Medicare are related to the purpose stated by the Secretary and are all intertwined with the mandate and penalty.

In addition to the Secretary's statements, Congress made clear that all of these changes were intended to work together. It was Congress that, on multiple occasions within PPACA itself, stated that the mandate and penalty "together with the other provisions of this Act" were "essential" to maintaining viable insurance markets. PPACA §§ 1501(a)(2)(H), 1501(a)(2)(I), 1501(a)(2)(J), and § 10106. Furthermore, it is the Secretary who stated that Medicare and Medicaid are a key part of the comprehensive insurance market. (Doc. 21 at 22) ("The federal

government provides health insurance for older and disabled Americans under Medicare . . .”; “Federal and state governments provide health insurance for low income Americans through Medicaid . . . .”).

The logical conclusion of the Secretary’s position, when coupled with the express statements of Congress in PPACA, is that PPACA contains a comprehensive attempt to “regulate the diverse methods by which consumers pay for health care services . . . .” (Doc. 21 at 28). These regulations are intended to work in concert with the mandate and penalty and are intertwined with the mandate and penalty. Thus, when the mandate and penalty fail, the regulation will not “function in a *manner* consistent with the intent of Congress . . . . ,” *Alaska Airlines*, 480 U.S. at 685, and therefore, the Medicare and Medicaid provisions fail as well.

III. PPACA SHOULD BE STRICKEN IN ITS ENTIRETY BECAUSE IT IS INCONCEIVABLE THAT CONGRESS WOULD HAVE PASSED IT WITHOUT THE MANDATE AND PENALTY.

While the foregoing demonstrates that the mandate and penalty are not severable from the insurance industry changes and the Medicare and Medicaid changes under the functional test of *Alaska Airlines*, it is apparent that, under the legislative bargain test of *Alaska*

Airlines, the mandate and penalty are not severable from PPACA as a whole, and therefore, the entire Act falls with the mandate and penalty.

As the Supreme Court declared in *Alaska Airlines*, even provisions that are unquestionably legitimate exercises of congressional power must be stricken if the "statute created in (their) absence is legislation that Congress would not have enacted." *Id.* The Court went on to state that, in determining severance questions, it is "appropriate to evaluate the importance of the [unconstitutional provision] in the original legislative bargain . . . ." *Id.* at 685. Thus, the question for the Court is whether the inclusion of the mandate and penalty were important enough to the legislative bargain that produced PPACA that Congress would not have enacted it without the mandate and penalty.

In this case, Congress stated on the face of PPACA that it viewed the mandate and penalty as essential to the Act as a whole. PPACA §§ 1501(a)(2)(H), 1501(a)(2)(I), 1501(a)(2)(J), and 10106. Given that Congress made clear on the face of PPACA that the statutory scheme cannot work as Congress intended without the mandate and penalty, certainly the mandate and penalty must be regarded as central to the legislative bargain that produced PPACA.

As noted above, the Secretary has also repeatedly stressed the centrality of the mandate and penalty to PPACA as a whole. (J.A. at 51, 52, 56, 78-83, 154, 161, 166-67, 227, 229, 230, 293, and 333). Importantly, it is the Secretary that has characterized the mandate and penalty as PPACA's "linchpin." Furthermore, as she stated in one of her filings in Florida, the insurance changes and the people they would allegedly protect were "a core objective of the Act . . . ." as a whole. *Florida v. Sebelius* (N.D. Fla.), Case No.: 3:10-cv-91RV/EMT, *available on* PACER at Doc. 74 at 29. Clearly, anything that is a "core objective of" PPACA and/or is the "linchpin" needed to hold the enterprise together are essential to the "legislative bargain" that produced PPACA.

While the importance of the mandate and penalty are sufficient to demonstrate that PPACA would not have passed without them, a review of the specific history of PPACA prior to enactment confirms this point. Once that history is reviewed, it is impossible to credibly maintain that PPACA would have passed absent the unconstitutional mandate and penalty.

The tortured legislative process that was utilized to enact PPACA resulted in its passing the House by the margin of 219 to 212, a fact the

Secretary concedes.[8] (J.A. at 875). The legislative history reveals that no change could be made in the House – the margin necessary to invoke cloture in the Senate having been lost because of an intervening special election for the United States Senate in Massachusetts. Hence, it is as well known as such a thing can ever be known, that any change, let alone removing parts of the enactment that Congress has described as "essential," would have caused PPACA to fail.

The Secretary's response to this is two-fold. First, she argues that the Commonwealth improperly invites the Court to consider the legislative history of PPACA, including both its narrow passage in both the House and the inability of the House to amend the bill due to an inability to invoke cloture in the Senate. (Doc. 161 at 57). Next, she argues that many of the provisions of PPACA **could** have been enacted as stand-alone measures. (*Id.* at 53-56, 59-60). However, both of these arguments fail.

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[8] The Secretary has previously misapprehended the significance of the narrow margin for passage. It is true that a valid bill that passes by a one-vote margin is still validly passed. However, when trying to determine what portions of a law can be severed from an unconstitutional section, the margin is significant in determining whether the remainder of the law would have passed without the constitutionally offensive provision.

Regarding the Secretary's assertion that there is no authority for the Court to consider the legislative history, the whole thrust of the Supreme Court's severance cases suggests such things should be considered because this Court must determine whether Congress would have enacted the remainder of PPACA absent the mandate and penalty. *Free Enterprise Fund*, 130 S. Ct. at 3161; *Alaska Airlines*, 480 U.S. at 684. The fact that the margin in the House was small and the fact that the bill was not changed by the House in any way because of an inability to gain cloture in the Senate are certainly relevant to the question of whether Congress would have enacted PPACA without the mandate and penalty, which, under any definition, would have been a major change to the statute.

The Secretary's other argument, that Congress **could** have independently enacted some of the other provisions of PPACA in a way that would allow them to be fully operative as law independently of PPACA as whole simply ignores the key element of the legislative bargain analysis. The question is not whether a hypothetical Congress **could** have enacted the provisions independently of PPACA as a whole,

it is whether Congress **would** have done so in PPACA if the mandate and penalty had been removed.

The Secretary's interpretation of the severance cases essentially reduces the severability analysis to whether or not Congress had the power to adopt a provision and whether that provision can conceivably function without the unconstitutional provisions. (Doc. 161 at 55). However, this ignores the fact that the legislative bargain test is not just simply a question of whether Congress had the power to pass other provisions of an enactment. Rather, the test is concerned with the question of whether the unconstitutional provisions were so important "in the original legislative bargain . . ." as to require all provisions of the enactment to be treated as an indivisible whole. *Alaska Airlines*, 480 U.S. at 685.

In this case, the centrality of the mandate and penalty to PPACA as a whole, the fact that Congress described the mandate and penalty as essential to PPACA, the tortured legislative path taken by PPACA on the way to its passage by razor thin margins, all militate in favor of a conclusion that Congress would not have enacted PPACA without the mandate and penalty. Coupled with the absence of a severability clause

(which will be discussed more fully below), it is clear that district court erred in severing the mandate and penalty from the remainder of PPACA, and that this Court should declare all of PPACA invalid.

IV. WHILE NOT DISPOSITIVE, THE LACK OF A SEVERABILITY CLAUSE IN THE FINAL VERSION OF PPACA FURTHER SUGGESTS THAT THE MANDATE AND PENALTY SHOULD NOT BE SEVERED FROM THE REMAINDER OF THE ACT.

Virginia has never maintained that the absence of a severability clause is dispositive of the severance question in this case. (J.A. at 929). Rather, Virginia has consistently maintained that the lack of a severability clause deprives PPACA of a presumption of severability to which it would be entitled if it contained such a clause. *Id.* *See also* *Alaska Airlines*, 480 U.S. at 686 (Statutes containing severability clauses are entitled to a "presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision."). While not dispositive, the absence of a severability clause under the specific circumstances surrounding PPACA strongly suggests that Congress did not intend for the mandate and penalty to be severable from the remainder of PPACA.

The Secretary argues that "'"[i]n the absence of a severability clause, . . . Congress' silence is just that— silence — and does not raise a presumption against severability.'" *New York v. United States*, 505 U.S. at 186 (quoting *Alaska Airlines*, 480 U.S. at 686)." (Doc. 161 at 57). However, this assumes that Congress was silent on the question of severability and that there is not "evidence that Congress intended otherwise . . . ." *Alaska Airlines,* 480 U.S. at 686. In this case, there is strong evidence that Congress did not intend for the mandate and penalty to severable from the remainder of PPACA, and thus, Congress was not simply silent on the question of severability.

First, the absence of a severability clause in PPACA was a considered choice of Congress because such a clause existed in an earlier version of the legislation, but Congress elected to remove it. (*See* Amicus Br. of Physician Hospitals of America, Doc. 154-1 at 8 (PPACA's "legislative history also raises the presumption that this failure was intentional because an earlier version of the Act included a severability clause. *See* H.R. 3962, section 255.")). The fact that Congress intentionally removed a severability clause demonstrates that it did not intend for portions of PPACA to be severable. As Judge Vinson of the

United States District Court for the Northern District of Florida noted in finding that the mandate and penalty were not severable from the remainder of PPACA,

> The lack of a severability clause in this case is significant because one had been included in an earlier version of the Act, but it was removed in the bill that subsequently became law. "Where Congress includes [particular] 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, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983). In other words, the severability clause was intentionally left out of the Act. . . . In light of the foregoing, Congress' failure to include a severability clause in the Act (or, more accurately, its decision to not include one that had been included earlier) can be viewed as strong evidence that Congress recognized the Act could not operate as intended without the individual mandate.

Florida v. HHS, 2011 U.S. Dist. LEXIS 8822, at *123-25.

In addition to Congress making the conscious decision to remove the severability clause from an earlier version of the health care legislation, the case for non-severability of the mandate and penalty is further strengthened by what Congress did say in PPACA. Specifically, as noted above, Congress deemed the mandate and penalty "essential" to making PPACA work as intended. PPACA §§ 1501(a)(2)(H), 1501(a)(2)(I), 1501(a)(2)(J), and 10106. Further, Congress repeatedly

noted that the mandate and penalty were intended to work "together with the other provisions of this Act . . . ." PPACA §§ 1501(a)(2)(I), 1501(a)(2)(J), and 10106. As the Family Research Council notes in its amicus brief, these statements that the mandate and penalty, working together with the other provisions of the Act, are essential to PPACA's functioning means that PPACA is not "silent on the issue [of the severability of the mandate and penalty], instead containing a congressional finding that the Individual Mandate is essential to the proper functioning of the statute. This Court may regard this finding as creating a presumption of nonseverability with regard to Section 1501." (Doc. 126-1 at 11).

Taken together, the fact that Congress explicitly found that the mandate and penalty are essential to PPACA's operation and were intended to work with the other provisions of the Act, and the fact that Congress intentionally removed a severability clause that existed in a prior version of health care legislation evince Congressional intent to have the whole of PPACA rise and fall with the mandate and penalty.

V. CONCLUSION

Based on the foregoing, this Court should reverse the judgment of the district court related to severance and declare that PPACA must fall in its entirety given the unconstitutionality of the mandate and penalty. Alternatively, this Court should, based on the concession of the Secretary and the logic of her arguments, strike those provisions of PPACA that relate to health care financing, including the private insurance industry provisions and changes to Medicare and changes to Medicaid. At a bare minimum, as the Secretary concedes, what she calls the private insurance reforms should fall with the mandate and penalty.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief has been prepared using fourteen point, proportionally spaced, serif typeface: Microsoft Word 2007, Century Schoolbook, 14 point.

2. Exclusive of the table of contents, table of authorities and the certificate of service, this brief contains 6,157 words.

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CERTIFICATE OF SERVICE

This is to certify that on April 15, 2011, I electronically filed the foregoing APPELLEE'S REPLY BRIEF REGARDING CROSS APPEAL with the Clerk of Court using the CM/ECF System, which will send a notification of such filing to registered CM/ECF users, including counsel for amici. I further certify that on April 15, 2011, eight paper copies were hand-delivered to the Clerk's Office and two copies were mailed by first-class, postage prepaid, U.S. Mail upon the attorneys listed as follows:

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