No. 19-840

In The Supreme Court of the United States

CALIFORNIA, ET AL.,

Petitioners,

V.

TEXAS, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF *AMICUS CURIAE*
THE WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW BLACK LUNG CLINIC
IN SUPPORT OF PETITIONERS

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STATEMENT OF AMICUS INTEREST[1]

The Black Lung Clinic ("Clinic") is a legal clinic at the Washington and Lee University School of Law in Lexington, Virginia. The Clinic represents former coal miners and survivors who are pursuing federal black lung benefits. The Clinic's clients are represented by a member of the law school faculty licensed to practice law who works closely with students in the Clinic. Students evaluate claims; develop evidence; conduct discovery, depositions, and hearings; and write motions, arguments, and appellate briefs. In attempting to collect benefits, miners and survivors face formidable teams of lawyers, paralegals, and doctors that the coal companies assemble to challenge these claims. The Clinic currently represents seventeen former coal miners and their spouses, with dozens of closed claims. Nearly seventy of these current and former clients are receiving benefits as a direct result of the changes to the Black Lung Benefits Act (BLBA) made in the Affordable Care Act.

Section 1556 of the Patient Protection and Affordable Care Act (PPACA) makes two major changes to the Black Lung Benefits Act. These

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[1] Pursuant to Supreme Court Rule 37, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of *amicus* briefs and have filed letters reflecting their blanket consent with the Clerk.

changes remove limiting language to make it simpler for disabled miners and their families to establish that they are entitled to federal benefits. First, § 1556(a) reinstates the fifteen-year rebuttable presumption, which presumptively entitles former coal miners to benefits if they have worked over fifteen years underground and have a totally disabling pulmonary disease. The second, § 1556(b), reinstates a continuation of benefits for surviving spouses whose coal-mining spouse was receiving benefits at the time of their death. The clients of the Clinic already have benefitted from these amendments: nearly sixty former clients who are currently receiving black lung benefits could face modification proceedings and the loss of benefits if § 1556 is not severed; clients with pending claims could face a change in their ability to prove their claims mid-process, and the ability of future miners to prove their entitlement to benefits will be injured. The Clinic has a profound interest in the possibility of the invalidation of the amendments. If the amendments are totally struck down it would adversely affect our clients; not only the ones currently enjoying benefits under the amendments, but all coal miners or surviving spouses who will bring cases in the future.

ARGUMENT

I. SEVERABILITY MUST BE PRESUMED GIVEN THAT § 1556 IS CONSTITUTIONALLY VALID, CAN FUNCTION INDEPENDENTLY, AND IS CONSISTENT WITH CONGRESS' OBJECTIVES IN ENACTING THE AFFORDABLE CARE ACT.

The framework for severability is well established, asking what "Congress would have intended in light of the Court's constitutional holding . . . ." *See Champlin Refining Co. v. Corp. Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932); *United States v. Booker,* 543 U.S. 220, 246 (2005) (citing *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 767 (1996) ("Would Congress still have passed" the valid sections "had it known" about the constitutional invalidity of the other portions of the statute?) (internal quotations omitted). In answering this question, the Court must "refrain from invalidating more of the statute than is necessary." *See Booker*, 543 U.S. at 258 (citing *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984)). The Court "*must* retain those portions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute." *See id*. at 258-59 (citations omitted) (emphasis added). The last prong is concerned with legislative intent and whether Congress would have preferred an Act severed to no Act at all. *See Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006). This counterfactual question of legislative intent must be

asked in the present rather than the past; the relevant question is "not whether the legislature would [have] prefer[red] (A+B) to B" but "whether the legislature would prefer not to have B if it could not have A as well." *See Leavitt v. Jane L.,* 518 U.S. 137, 143 (1996). And in the absence of evidence that Congress would prefer no Act at all, the Court must defer to the legislature. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010) ("[N]othing in the statute's text or historical context makes it 'evident' that Congress . . . would have preferred no Board at all to a Board whose members are removable at will.").

The test therefore embodies a presumption in favor of preserving as much of the law as possible, requiring proof of legislative intent contrary to severability. The Court has also historically noted the existence of this presumption. Since *Marbury v. Madison*, courts have presumed severability, recognizing that the Court does not have the power to strike a law that is not constitutionally invalid. *See Marbury v. Madison*, 5 U.S. 137 (1803) (rendering unenforceable § 13 of the Judiciary Act of 1789 but leaving other sections in effect, since an Act of the legislature must be repugnant to the Constitution to be voided by the Court). It is out of this tradition that this doctrine continues to embody a presumption in favor of judicial restraint, favoring severability when possible. *See Ayotte*, 546 U.S. at 328-29; *see also Booker*, 543 U.S. at 321 (Thomas, J., dissenting in part) (discussing the presumption of severability); *Regan v. Time, Inc.,* 468 U.S. 641, 653 (1984) ("[T]he presumption is in favor of severability."). The Supreme Court in *Ayotte v.*

Planned Parenthood of North New England addressed this separation of powers concern explicitly, stating that: 1) nullifying the legislature's work beyond what is necessary "frustrates the intent of the elected representatives of the people," 2) the Court must restrain itself from rewriting law "even as [it] strive[s] to salvage it," and 3) the "touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.'" *See Ayotte,* 546 U.S. at 328-30.

As a result, a reviewing court must "try to limit the solution to the problem. . . . sever[ing] problematic portions while leaving the remainder intact." *See id*. at 328-29; *Free Enter. Fund,* 561 U.S. at 508 (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) ("[The] normal rule is that partial, rather than facial, invalidation is the required course.").

a) Precedent shows a consistent application of these principles, finding severing to be the appropriate remedy.

The Court's application of this doctrine in *United States v. Booker* is instructive. *See United States v. Booker*, 543 U.S. 220 (2005) (severing only two statutory provisions which 1) made the Sentencing Guidelines mandatory, or 2) depended on the Guidelines' mandatory nature).

First, the Court identified that the constitutional conflict was limited to the Sentencing Guidelines' mandatory nature. *See id.* at 259-60. It then recognized that the remainder of the Act,

without the "mandatory" provisions, could function independently. *See id.* Accordingly, the Court struck only the provisions related to the mandatory effect of the Guidelines, making the Guidelines advisory. *See id.* at 246 ("The . . . approach, which we now adopt, would . . . make the Guidelines system advisory while maintaining a strong connection . . . to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve."). The Court cautioned that because of the complexity of the statute, its "interrelated provisions, and a constitutional requirement that creates fundamental change – we cannot . . . determine likely congressional intent mechanically." *See id.* at 248. In making this determination, the Court found that the remaining provisions (now advisory in nature) were still consistent with Congress' basic sentencing intent – "to move the sentencing system in the direction of increased uniformity." *See id.* at 253.

It is true that at the time the Act was passed, Congress clearly intended a mandatory set of Guidelines, not intending to pass them in an advisory form. *See id.* at 293 (Stevens, J., dissenting) ("Congress explicitly rejected as a model for reform the various proposals for advisory guidelines that had been introduced in past Congresses."). This is not the correct point of analysis; such an approach would have the effect of systematically invalidating any analysis regarding severability. *See Leavitt,* 518 U.S. at 143-44 (1996) (stating that a determination that "a legislature bent on banning almost all abortions would prefer . . . to ban no abortions at all rather than merely some" was "at the very least, questionable when considered in isolation."). Each

provision of the Guidelines already took on the force of law, and the perspective must shift; Congress' intent then becomes a counterfactual question asking what Congress would intend *now*, after learning that mandatory provisions were struck. *See id.* at 143. It was with this perspective in *Booker* that the Court acted with restraint, refusing to invalidate Congress' work in total when the remaining provisions would add various new protections furthering its objectives.

This focus on Congress' holistic purpose in enacting the law, and the ability of the remaining provisions to further this purpose, has historically driven the Court's analysis. Under this methodology, the Court has found that unconstitutional legislative veto provisions did not interfere with the purpose of the remaining provisions under the Immigration and Nationality Act allowing for the suspension of deportation proceedings in extreme circumstances. *See INS v. Chadha*, 462 U.S. 919, 934-35 (1983). A legislative veto provision also did not interfere with favorable provisions for the airline industry which were intended to de-regulate this market. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 696 (1987). In both cases, the Court noted Congress' lack of discussion of the legislative veto with respect to the remaining provisions, inferring the unconstitutional provision's relative unimportance in these mechanisms. *See Chadha*, 462 U.S. at 934 ("[T]here is insufficient evidence that Congress would have continued to subject itself to the onerous burdens of private bills had it known that § 244(c)(2) would be held unconstitutional."); *see also Alaska Airlines*, 480

U.S. at 697 ("In the almost total absence of any contrary refrain, we cannot conclude that Congress would have failed to enact the Airline Deregulation Act . . . if the legislative veto had not been included."). Likewise, the Court has also found that the Sarbanes-Oxley Act remained "fully operative" in its purpose even if the Public Company Accounting Oversight Board's unconstitutional, dual layered removal restrictions, fell. *See Free Enter. Fund*, 561 U.S. at 509. The Court also refused to invalidate Congress' policy of shifting responsibility for regulating the disposal of radioactive waste to the States. *See New York v. United States*, 505 U.S. 144, 151-52 (1992). In *New York v. United States*, the Court identified "three types of incentives [the legislature had added] to encourage the States to comply with their statutory obligation to provide for the disposal of waste generated within their borders." *Id.* at 152. When one of these incentives (the take title provision) was struck, the Court reasoned that "[c]ommon sense suggests that where Congress has enacted a statutory scheme for an obvious purpose, and where Congress has included a series of provisions operating as incentives to achieve that purpose, the invalidation of one of the incentives should not ordinarily cause Congress' overall intent to be frustrated." *See id.*

Finally, this precedent is consistent with the Supreme Court's decision to sever certain Medicaid expansion provisions of the Affordable Care Act given their capacity to continue to function in a way that is "consistent with Congress' basic objectives in enacting the statute." *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 588 (2012) (citing *Booker*,

543 U.S. at 259). Specifically, the remaining provisions continued to further the purpose of the Affordable Care Act because "nothing in our opinion precludes Congress from offering [additional] funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use." *See id.* at 585. Where withdrawing existing funds for Medicaid was unconstitutional, new funding could still be offered as an incentive encouraging States to participate in the federal government's healthcare initiatives. *See id.* at 585. It was *not* evident that Congress would have wanted to strike down the rest of the PPACA, "had it known that the States would have a genuine choice whether to participate in the new Medicaid expansion." *See id.* at 587. In fact, there was no evidence that "Congress would have wanted the whole Act to fall, simply because some [states] may choose not to participate." *See id.* In the absence of evidence that Congress would have objected to these remaining provisions, the Court acted with proper restraint by severing only the plainly defective provisions.

b) Justice Scalia's dissent in *Nat'l Fed'n of Indep. Bus. v. Sebelius* does not follow this precedent.

In his dissent, Justice Scalia recasts the doctrinal test as following: 1) whether "the provisions will work as Congress intended" and 2) whether "Congress would have enacted them standing alone and without the unconstitutional portion." *See Sebelius*, 567 U.S. at 692-93 (Scalia, J. dissenting). However, his understanding of the second test is flawed. Justice Scalia states that

"many provisions . . . are ancillary to its central provisions . . . [or] entirely unrelated – hitched on because it was a quick way to get them passed despite opposition, or because their proponents could exact their enactment as the quid pro quo for their needed support." *Id.* at 705. Although Justice Scalia concedes that many of the minor provisions can function independently and as intended without the unconstitutional provision, he attacks the second prong. *See id.* ("Some provisions, such as requiring chain restaurants to display nutritional content, appear likely to operate as Congress intended . . . ."). He argues that "[o]ften, a minor provision will be the price paid for support of a major provision. So, if the major provision were unconstitutional, Congress would not have passed the minor one." *See id.* at 704.

This is not the proper question under traditional severability doctrine. First, this doctrine of judicial restraint is based on the fact that each provision *did* pass into law. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2148 (2016) (asking how the Court would know "what . . . the Members of Congress who voted *for* the bill, would have wanted? Is this even the right question to be asking?"). The reason for the Court's separation of powers concerns stems from this acknowledgment. Justice Scalia construes the purpose of the Affordable Care Act so narrowly that he must create two unequal classes of laws: major and minor bargain provisions. *See Sebelius*, 567 U.S. at 699 (Scalia, J. dissenting) (arguing that the purpose of the PPACA was to provide universal coverage, with all other provisions limited to balancing costs and benefits in this

program). This is improper. Additionally, Justice Scalia fails to follow precedent showing that the analysis of Congressional intent is *not* to be conducted as if from the time of an Act's passage but should be a hypothetical analysis of what Congress' intent would be if faced with the present situation. *See* discussion *supra* Part I. These failings, in addition to the strong presumption in favor of severability and lack of contrary evidence of legislative intent, are conclusive. *See id.*

These problems flow through to Justice Scalia's analogy inquiring whether superfluous "ornamental" provisions also fall when the Court cuts down the tree they adorn. *See Sebelius*, 567 U.S. at 705 (Scalia, J. dissenting). In actuality, each "ornament" or minor provision of the Affordable Care Act is its own separate tree, lawfully passed by Congress, as one small organism in the forest of laws enacted under the PPACA. Justice Scalia asks the wrong question. The proper question is whether the minor provisions are left standing to support the PPACA's purpose even if one of its trees – the individual mandate – falls.

c) The few cases in which the Court, before and after *Sebelius*, refused to sever maintain a focus on the "domino effect" of the unconstitutional provision.

Severing is not appropriate when the law must be substantially overwritten or restructured, where the provision struck is so central to the remaining provisions that the legislature would not have intended them to function on their own. The presumption of severability also appears weaker

when the remaining, closely intertwined provisions establish prohibitions on state and individual rights rather than Congress' addition of regulatory incentives or rights. In *Randall v. Sorrell*, for example, the Court struck down a Vermont campaign finance statute's limitations on campaign expenditure and contribution on First Amendment grounds. 548 U.S. 230, 262 (2006). In its explanation that the remaining provisions implementing this prohibition were inseverable, the Court noted that severing would "require us to write words into the statute (inflation indexing), or to leave gaping loopholes (no limits on party contributions), or to foresee which of many different possible ways the legislature might respond to the constitutional objections we have found." *See id.* In other words, the principles of severability (purpose of legislation, independent function of remaining provisions) in this case were so frustrated by the constitutional holding that the remainder of the Act could not be preserved without putting words into the mouth of the legislature.

A similar problem occurred in *Murphy v. NCAA*. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1484 (2018). The Court found that provisions of Professional and Amateur Sports Protection Act (PASPA) prohibiting state licensing and authorization of sports gambling violated the anti-commandeering rule. *See id.* at 1478. However, the Court refused to sever these provisions from PASPA's separate prohibitions of state-run lotteries or its prohibitions on private actors sponsoring, operating, or promoting sports gambling. *See id.* at 1482-84. The Court first found that "legalizing sports

gambling in privately owned casinos while prohibiting state-run sports lotteries would have seemed exactly backwards" to the larger legislative scheme Congress intended. *See id.* at 1483. Similarly, prohibitions on advertising would not be appropriate because of the absurd result that severing would have; forbidding "the advertising of an activity that is legal under both federal and state law . . . is something that Congress has rarely done." *See id.* at 1484.

Further, the Court discussed PASPA's prohibitions against private actors sponsoring, operating, or promoting sports gambling, stating that they "were obviously meant to work together with the provisions in § 3702(1) that impose similar restrictions on governmental entities . . . we do not think [Congress] would have wanted the former to stand alone." *See id.* at 1483. Specifically, § 3702(2) and § 3702(1) were intended as a joint legal mechanism to sue States for authorizing private parties in sports gambling schemes *in addition* to private parties when they were authorized by States to engage in this conduct. *See id.* at 1483-84. Where "Congress lacks the authority to prohibit a State from legalizing sports gambling, the prohibition of private conduct . . . ceases to implement any coherent federal policy." *Id.* at 1483. In *Randall* and *Murphy*, when prohibitions on campaign contributions and prohibitions on private casinos fell, the roots of those trees were too closely intertwined with its surrounding trees.

II. APPLICATION OF THIS PRECEDENT SHOWS THAT § 1556 OF THE PPACA MUST BE PRESERVED.

First, none of the defects in *Randall* or *Murphy* are present in this case. If the individual mandate were excised, § 1556 would stand after the dust clears. The individual mandate is not closely intertwined with § 1556 of the PPACA. Section 1556 makes two major changes to the Black Lung Benefits Act. First, § 1556(a) reinstates the fifteen-year rebuttable presumption that existed prior to the 1981 amendments to the BLBA. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556, 124 Stat. 260 (2010). Second, § 1556(b) reinstates a continuation of survivor benefits without requiring beneficiaries "to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner." *See id.* The last provision, § 1556(c), explains that these amendments apply to any claim filed after January 1, 2005. *See id.* With the exception of the last, these reinstated provisions existed before the individual mandate and would continue to function without it. Nothing in § 1556 would have to be substantially rewritten; it is capable of functioning as intended.

Second, § 1556 is consistent with Congress' intent and objectives in enacting the statute. The broad purpose of the Affordable Care Act is reflected in the original Senate and House of Representative bills which ultimately were reconciled into the Affordable Care Act. The preceding Senate HELP Committee bill stated that the purpose of the bill was to "make quality, affordable health care available to all Americans, reduce costs, improve

health care quality, enhance disease prevention, and strengthen the health care workforce." S. 1679, 111th Cong. (2009). Similarly, the House of Representatives described the purpose of its bill to "provide affordable, quality health care for all Americans and reduce the growth in health care spending, and for other purposes." H.R. 3962, 111th Cong. (2009). However, the clearest evidence of this broad purpose can be found in the text of the Affordable Care Act itself. The PPACA includes ten titles ranging in subject matter from "Quality, Affordable Health Care For All Americans," to "Transparency and Program Integrity" and "Health Care Workforce," and "Improving the Quality and Efficiency of Health Care." *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 260 (2010). Within these titles, Congress furthers its broad purposes by creating policy in a myriad of ways such as: encouraging development of new patient care models to increase quality of healthcare, *see id.* §§ 3021-27, modernizing disease prevention and public health, *see id.* §§ 4001-04, providing new options for States to provide long-term services, *see id.* §§ 2401-06, and enhancing health care education and training. *See id.* §§ 5301-405.

The Black Lung Act amendments further the broad purposes of the Affordable Care Act. The Federal Coal Mine Health and Safety Act of 1969, *see* Pub. L. No. 91-173, § 2(a), 83 Stat. 743 (1969) [hereinafter Mine Health and Safety Act], as further amended by the Black Lung Benefits Act, *see* Pub. L. No. 92-303, 86 Stat. 794 (1972), recognized that States had failed to provide adequate benefits to a

significant number of miners and their surviving dependents. *See* Mine Health and Safety Act § 2(a). The text of the law states its broad purpose – to protect the "health and safety of [the coal mining industry's] most precious resource – the miner." *See id*. The Country at this time faced an "urgent need to provide more effective means . . . to prevent death and serious physical harm, and . . . to prevent occupational disease originating in such mines." *See id*. § 2(c). These problems were "a serious impediment to the future growth of the coal mining industry[,]" would "burden . . . commerce[,]" and "cause grief and suffering to the miners and to their families." *See id*. § 2(b)-(d), (f). Congress' policy was a decision to place responsibility and liability on mine operators "to prevent the existence of such conditions and practices" in accordance with mandatory federal requirements. *See id*. § 2(e), (g).

The § 1556 provisions amend Title IV within the Mine Health and Safety Act requiring miner operators to provide:

> benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis. *Id*. § 401.

This title serves the overall purpose of the Mine Health and Safety Act by creating a strong

incentive for employers to protect the workforce by preventing injury and disease. *See id.* §2. By restoring presumptions and administrative rules which favor the miner or survivor, the Affordable Care Act increased these existing regulatory pressures, and did so for similar purposes. This pressure shifts risk from individuals and onto employers, who are better positioned to avoid burdening the healthcare system with the costs of caring for sick miners, who may eventually succumb to black lung disease and leave a surviving dependent behind. In short, the § 1556 amendments are one example of a regulatory incentive added to further the Affordable Care Act's purposes. *See New York v. United States*, 505 U.S. at 186 (stating that where "Congress has included a series of provisions operating as incentives to achieve that purpose, the invalidation of one of the incentives should not ordinarily cause Congress' overall intent to be frustrated.").

The complete absence of legislative intent to the contrary solidifies this conclusion. In the only legislative history on record on this provision, Senator Byrd introduced § 1556 by remarking that:

> While this bill as passed may not satisfy the individual concerns of each and every constituent or member of Congress, it does begin to satisfy the growing needs of millions of Americans who find themselves without access to the medical services and attention they need. Access to proper health care for every American citizen should not only be held as a necessity, it should be

> considered the commensurate right of any and every citizen of the mightiest and most advanced Nation the world has ever known. 156 Cong. Rec. S2083 (daily ed. Mar. 25, 2010) (statement of Sen. Byrd).

He then describes the amendments, concluding that he looks "forward to working to ensure that claimants get a fair shake as they try to gain access to these benefits that have been so hard won." *See id.* at 2084. There is no record of opposition to Senator Byrd's remarks or the amendment's passage on any grounds. As a result, the Court must retain § 1556 because it is without constitutional defect, capable of functioning independently from the individual mandate, and is consistent with Congress' objectives in enacting the statute.

III. EVEN ACCEPTING THE DISSENTING VIEW IN *Sebelius*, THE PRESENT CASE DOES NOT PRESENT A CHALLENGE UNDER THAT TEST.

Even if the framework for analyzing severability suggested by Justice Scalia in *Sebelius* is accepted by the Court, the Court should still find § 1556 severable. Under Justice Scalia's framework, the Court would ask (1) whether the remaining provision[s] operate in a manner consistent with the intent of Congress, and (2) whether Congress would have enacted the remaining provision[s] without the unconstitutional portion. *See Sebelius,* 567 U.S. at 692-93 (Scalia, J., dissenting). Justice Scalia's dissent focuses on the second prong, and asks

whether Congress only passed the various "omnibus" provisions of the Affordable Care Act as a concession for provisions such as the individual mandate. *See id.*

Although a significant reform, § 1556 was not "the price paid for support of a major provision" such as the individual mandate. *See id.* at 704. The lack of legislative history, or opposition to § 1556, first demonstrates this. Second, Justice Scalia's concern that there is no "reliable basis for knowing" whether a provision like § 1556 would have been passed on its own can be disproved in this case. *See id.* at 705.

Section 1556 is different from several prior unsuccessful attempts to amend similar parts of the BLBA. *See* Black Lung Benefits Survivors Equity Act, H.R. 228, 106th Cong. (Jan. 6, 1999) (reinstating automatic survivor's benefits at 30 U.S.C. § 932(1)); S. 2685, 107th Cong. (June 26, 2002) (reinstating 30 U.S.C. § 932(1) and § 921(c)(4)); H.R. 4236, 107th Cong. (April 16, 2002) (same); H.R. 1988, 108th Cong. (May 6, 2003) (same); H.R. 300, 109th Cong. (Jan. 26, 2005) (same); H.R. 1123, 110th Cong. (Feb. 16, 2007) (same); H.R. 1010, 111th Cong. (Feb. 12, 2009) (same). However, § 1556 differs from these past amendments by including subsection (c). None of these earlier proposed bills contained anything resembling § 1556(c), the retroactive application of these amendments to claims filed after January 1, 2005 and pending on or after March 23, 2010. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556(c), 124 Stat. 260 (2010). This "[c]ongressional doubt concerning judicial retroactivity doctrine . . . provide[s] a plausible explanation" for Congress's failure to enact

the previous versions. *See Landgraf v. USI Film Products*, 511 U.S. 244, 261 (1994). It would thus be improper to suggest that Congress would not have passed § 1556 due to the failure of past bills which did not address retroactivity.

Additionally, when the PPACA was passed, the main obstacle to reaching a legislative bargain was the public option. *See* Robert Pear & David M. Herszenhorn, Senate Says Health Plan Will Cover Another 31 Million, N.Y. TIMES, Nov. 18, 2009, at A1. Once Senator Reid introduced the Senate's initial health-care reform bill, which included a public option, he faced resistance immediately from fellow Democrats. *See* H.R. 3590, 111th Cong. § 1323 (Nov. 19, 2009) (unenacted version with public option). After a month of opposition to the public option, Senator Nelson (D-FL) asked: "How do we bring it together so we can get the high threshold of 60 votes in the Senate?" *See* 155 Cong. Rec. S13078 (daily ed. Dec. 12, 2009). And thus, the Senate leadership dropped the public option, and the "legislative bargain" was struck. *See* David M. Herszenhorn & David D. Kirkpatrick, Lieberman Gets Ex-party to Shift on Health Plan, N.Y. TIMES, Dec. 15, 2009, at A1 (citing Senator Lieberman's opposition to, and subsequent drop of, the public option as the impetus for passage in the Senate). Instead of a public option, Congress implemented a system modeling Massachusetts' combination of "insurance market regulations, a[n] [individual] coverage mandate, and tax credits" to support popular requirements such as guaranteed issue and community rating provisions without causing an economic "death spiral." *See King v. Burwell*, 135 S.

Ct. 2480, 2485-86 (2015). After agreeing that the structure of the Affordable Care Act would improve upon the existing model of healthcare rather than a pure public option, new regulatory incentives supporting and using the insurance model as a way to implement broad healthcare reform goals could begin. This is the likely reason why Senator Reid exclaimed, "I don't know if there is a senator that doesn't have something in this bill that was important to them . . . ." *See Sebelius*, 567 U.S. at 704 (Scalia, J. dissenting).

This, in addition to the absence of evidence that § 1556 was contested or contingent upon the passage of another provision, is decisive on the issue of severability. Any other result would undermine the principle that the votes cast by Congress' members are the ultimate proof of Congress' intent. Careful excision is necessary in order to preserve the will of the legislative branch and the welfare of the people it represents. The consequences of failing to adhere to this rule are especially severe when the Court's ruling will revoke benefits that citizens have received from Congress.

IV. IF THE BYRD AMENDMENTS ARE INSEVERABLE, THE COURT SHOULD NOT APPLY ITS DECISION RETROACTIVELY BECAUSE DOING SO WOULD CAUSE INJUSTICE AND HARDSHIP TO INDIVIDUALS WHO HAVE RELIED ON THE BYRD AMENDMENTS IN THEIR CASES.

Even if the Byrd amendments are not found to be severable from the PPACA, the Court should only

apply its decision prospectively. A retroactive application would severely harm individuals who have relied on the Byrd amendments, and would impose substantial inequitable results in individual cases. Constitutional remedies are generally limited to the minimal remedy necessary to cure the constitutional defect. *See Free Enter. Fund*, 561 U.S. at 508-09 (2010).

A decision here that applies retroactively could open the door to modification of past decisions in black lung cases. According to the Department of Labor's regulation governing black lung claims, a modification is granted when a litigant "demonstrates a change in condition [or] a mistake in a determination of fact." 20 C.F.R. § 725.310. These proceedings may be initiated by an employer "any time prior to one year after the date of the last payment of compensation." 33 U.S.C. § 922. Thus, it is possible that employers will assert that changes in the Act brought about by the invalidation of the Byrd amendments are changes in conditions permitting a modification. *See Peabody Coal Co. v. Adler*, 40 Fed. Appx. 54, 58-59 (6th Cir. 2002). Also, employers may seek to relitigate cases under a mistake of fact theory where the miner or spouse received benefits based on the presumptions contained in the Byrd amendments. If a court were to accept these arguments, all claims that are currently in pay status could be in jeopardy of facing a modification claim. This would not only flood the Department of Labor's already-overburdened system with re-opened claims, but it would work a substantial injustice on miners and surviving spouses. Miners and surviving spouses could find

themselves having to once again spend years litigating claims they have already won. Further, if they lost, employers or the Department of Labor could pursue miners and surviving spouses for the pay they had already received. This would work a substantial injustice upon the very people the Black Lung Benefits Act is intended to protect.

The Court has historically rejected retroactive application of its decisions when doing so would impair important government programs. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (finding that retroactive application in a case of first impression was not necessary to the holding and "would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts."). In the context of the black lung benefits program, a retroactive application of the law would severely impair the program. Retroactive application would increase the burden on already-overburdened Department of Labor dockets. This harm to the program would substantially delay and interrupt access to benefits for thousands of former coal miners and their widows whose claims and livelihood rely on black lung decisions. Rather, the Court should consider a prospective application of its holding as it has done in the past. Whether a decision should apply prospectively in civil cases has traditionally been governed by the nonretroactivity test articulated in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971). According to that test, the Court may apply a decision non-retroactively when the issue is of first impression and where the holding

might be unfair or cause harm to individual parties if applied retroactively. *See id.* at 106-07. Additionally, this Court has held that "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969).

The Court should apply this approach in the current situation, if it finds that severability is not an appropriate remedy. Further, the Court should specify that its holding does not apply retroactively. This is both to avoid worsening the backlog of cases within the Department of Labor, and to avoid injuries to disabled miners, surviving spouses and other dependents of deceased coal miners, many of whom depend on the payment of benefits to afford their basic necessities.

CONCLUSION

It must be presumed that § 1556 should be severed from the Affordable Care Act if the individual mandate is struck. The provision is constitutionally valid, functions independently of the individual mandate, is consistent with Congress' objectives, and is untainted by evidence that the legislature would prefer no Act at all to an Act severed. Further, even if dissenting views on the test for severability are adopted, § 1556 should be preserved. The passage of § 1556 was not a concession that Congress made for the individual mandate. The individual mandate and insurance-based implementation model was the compromise for the contested public option, not the remaining

Affordable Care Act initiatives. There is no opposition in the record to § 1556. Further, these amendments were altered from previously unsuccessful proposals by adopting a new retroactivity provision which allowed them to pass.

Given the weight of precedent and the lack of contrary legislative intent, the Court must preserve the will of Congress. The consequences of striking § 1556, as with many other provisions of the Affordable Care Act, are widespread and dramatic. The Court must tread carefully to avoid stifling the voice of the people, expressed through their legislators, and manifested in the passage of this Act.

Respectfully submitted,

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