Nos. 11-1057, 11-1058

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

BRIEF OF *AMICUS CURIAE* FAMILY RESEARCH COUNCIL IN SUPPORT OF APPELLEE/CROSS-APPELLANT AND AFFIRMANCE IN PART AND REVERSAL IN PART

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Dated April 4, 2011

Respectfully submitted,

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INTRODUCTION

Appellee Virginia argues that Section 1501 of the Patient Protection and Affordable Care Act cannot be severed under *Alaska Airlines v. Brock*, 480 U.S. 678 (1987). This *amicus* brief argues four points in support of Appellee. First, this Court can hold Section 1501 nonseverable without significant ramifications for future cases. Second, Virginia's argument is consistent with the Supreme Court's most recent restatement of severability doctrine in 2010. Third, Virginia's *Alaska Airlines* argument is further reinforced by the three principles underlying severability that the Supreme Court subsequently explored in 2006. And fourth, Virginia's application of *Alaska Airlines* is consistent with 111 years of prior Supreme Court precedent.

INTEREST OF *AMICUS CURIAE*[1]

The Family Research Council is a 501(c)3 nonprofit public-policy organization headquartered in Washington, D.C., that exists to develop and analyze governmental policies that affect families in the United

[1] Pursuant to Fed. R. App. P. 29, *amicus curiae* certifies and affirms that all parties have consented to the filing of this brief, that no party or counsel for any party authored this brief in whole or in part, and no person other than *amicus curiae* contributed any money intended to fund this brief's preparation or submission.

States. Founded in 1983, FRC advocates legislative and regulatory enactments that protect and strengthen family rights and autonomy, and assists in legal challenges of statutes and administrative actions detrimental to family interests. FRC informs and represents the interests of 39 state organizations and over 500,000 citizens on a daily basis.

Various provisions of the Patient Protection and Affordable Care Act (PPACA) are contrary to family values, family interests, and religious liberty. For example, there are specific provisions that will result in funding abortions under the precedent of at least one Circuit, either through Federal spending or through fees imposed upon employers and individuals. *See Planned Parenthood Affiliates v. Engler*, 73 F.3d 634, 636 (6th Cir. 1996) (holding that for statutes providing funding for medical services, executive or administrative orders denying the use of such funds for abortion are of no effect because only Congress can impose such limitations through statutory language).

Additional provisions in PPACA impair the ability of families to make medical decisions in consultation with their healthcare providers, by imposing mandates upon individuals limiting their healthcare

choices, mandates upon employers that reduce the options they can extend to employees, mandates upon insurers that will increase the costs of premiums and thereby make insurance less affordable, and also by encumbering the decisionmaking of physicians. Moreover, other provisions discriminate between adherents of different faiths, by allowing a religious exception to the "Individual Mandate" for followers of certain religions, but excluding adherents of others.

These interests are thus central to FRC's organizational mission, and will only be fully addressed by PPACA being held unconstitutional in its entirety.

SUMMARY OF ARGUMENT

Severability doctrine usually enables a court to excise an unconstitutional provision from a statute while preserving the remainder. In other situations, it requires invalidation of much or all of the statute.

Under the "Individual Mandate" of Section 1501 of the Patient Protection and Affordable Care Act (PPACA), most Americans must purchase federally-approved health insurance beginning in 2014.

Appellee Virginia argues both that this provision is unconstitutional, and that it cannot be severed from the remainder of PPACA.

Severability presents two alternatives regarding a statute's nature. One is that Congress intended a statute as a bundle of separate legislative embodiments, which are bundled together in a single enactment like a series of shorter, stand-alone laws. The second is that a statute embodies a carefully-balanced legislative deal, which Congress negotiated to address competing policy priorities, any modification of which could result in the bill failing. PPACA falls into the latter category.

This Court can hold the Individual Mandate nonseverable without imperiling severability in future cases before this Court. PPACA neither contains a severability clause, nor is silent on the issue, 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. While legislative intent is often difficult to ascertain, a textual analysis of PPACA evinces Congress declaring the

necessity of the Individual Mandate under any textual approach utilized by the Supreme Court.

PPACA is an exception to the general rule on severability. The most recent restatement of the doctrine, from the 2010 case *Free Enterprise Fund*, requires a court to first determine whether the remainder of the statute is fully functional. If so, then the court must determine whether the statute can function in the manner Congress intended. Appellee Virginia rightly focuses on the second prong of this analysis.

Appellee Virginia's argument is consistent with the three principles underlying severability doctrine, the last two of which are critical to the instant appeal. The Supreme Court expounded these principles in 2006 in *Ayotte v. Planned Parenthood of N. New England*. The second is that a court cannot effectively rewrite a statute to save it from invalidity. The third is that a court cannot use its remedial power to circumvent Congress's purpose for the statute. Federal Appellant's arguments, as well as concessions made on the record, show that these two principles would be violated by severing Section 1501 from PPACA under this Court's application of these principles.

Finally, Appellee Virginia's severability argument is consistent with 111 years of Supreme Court case law preceding *Alaska Airlines*, from 1876 to 1987. The Court consistently looked to congressional intent, developing a doctrine to ascertain that intent regarding whether the residue of a statute should continue without its unconstitutional provision. The Court sets forth the proper weight to be afforded a severability clause, and how a court has more free of a hand in examining a statute lacking such a clause. This case law was implicated by the Court in *Alaska Airlines*, and confirms Appellee Virginia's severability argument.

ARGUMENT

Severability doctrine is comprised of the rules by which a court can invalidate one provision of a statute while preserving the remainder intact. Under most circumstances, severability enables a court to surgically excise an unconstitutional provision from a statute without doing violence to the remainder of the Act. In other situations, it requires invalidation of much—or all—of the statute at bar.

Most Americans must purchase health insurance beginning in 2014 under Section 1501 of the Patient Protection and Affordable Care

Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119, 243 (2010). Appellee Virginia argues that this "Individual Mandate" both is unconstitutional and cannot be severed from the remainder of the Act, such that invalidating the Individual Mandate and accompanying statutory penalty require this Court to invalidate PPACA in whole or in substantial part.

I. THIS COURT CAN HOLD SECTION 1501 NONSEVERABLE FROM THE REMAINDER OF PPACA WITHOUT ADVERSE RAMIFICATIONS FOR OTHER STATUTES.

The question of severability is a judicial inquiry of two alternatives regarding the nature of a statute. One possibility is that Congress intended a given statute as a bundle of separate legislative embodiments, which for the sake of convenience, avoiding redundancy, and contextual application, are bundled together in a single legislative enactment. This makes a statute a series of short laws, every one of which is designed to stand alone, if needs be. The second possibility is that a given statute embodies a carefully-balanced legislative deal, in which Congress weighs competing policy priorities, and through negotiations and deliberation crafts a package codifying this delicate balance. Congress is thus not voting for separate and discrete

provisions. Instead, Congress is voting on a package as a whole, any modification of which could result in the bill failing to achieve passage in Congress. As both Appellee's brief and the following argument shows, PPACA falls into the latter category, not the former.

This Court can hold the Individual Mandate nonseverable without imperiling the severability of other provisions in other statutes that will come before this Court in future litigation. Although the severability argument in Parts II, III, and IV of this brief should lead this Court to hold Section 1501 nonseverable regardless of whether this Court accepts the following argument in Part I of this brief, the unusual facts of this appeal presents this Court with a severability question of extremely limited precedential value.

Almost all statutes entail a presumption of severability. As the Supreme Court case law cited in this brief demonstrates, statutes that include an express severability clause enjoy a presumption of severability. And even without such a clause, almost all other statutes are still entitled to a weaker presumption of implied severability.

However, PPACA falls into neither of these categories. In addition to the statute not containing a severability clause, Section 1501 instead contains the following congressional finding:

> [I]f there were no requirement, 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. No. 111−148 § 1501 (a)(2)(G), 124 Stat. 119, 243 (2010) (emphasis added). More than simply not declaring Congress's intent that the provisions of the statute be severable, Congress specifically declares in the statute that Section 1501 in particular is *essential* to the statute functioning in the manner Congress intended.

The conjunction of these two factors suggests that this Court should instead hold that PPACA entails a presumption of *nonseverability*. *Alaska Airlines* specified that congressional "silence is just that—silence—and does not raise a presumption against severability." 480 U.S. 678, 686 (1987). The instant case, however, is not a case in which Congress is silent. Instead of being silent regarding its

intent vis-à-vis whether the statute could function as intended without the Individual Mandate, Congress expressly declared that Section 1501 is essential to the statute accomplishing its purpose of enacting a comprehensive scheme of insurance industry reform. (*See* J.A. 902).

The most restrictive rule proposed in academic literature of a court's power to invalidate a statute *in toto* is that "all statutes should be construed as severable absent a specific nonseverability clause." John C. Nagle, *Severability*, 72 N.C. L. REV. 203, 233 (1993). Although defenders of PPACA could reasonably argue that the congressional finding in Section 1501 cited above is not a "nonseverability clause" *per se*, this congressional finding is clearly a statement of congressional intent regarding the centrality of the Individual Mandate to PPACA. As such, in a severability analysis involving *Alaska Airlines*, in which questions of severability turn on congressional intent, it is reasonable to regard a statement such as the italicized language from Section 1501 shown above as the functional equivalent of a nonseverability clause.

This express statement in Section 1501 regarding the necessity of the Individual Mandate to PPACA obviates the primary hurdle to assessing congressional intent in the instant case. "Intent is elusive for

a natural person, fictive for a collective body." Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. OF LAW & PUB. POL'Y 61, 68 (1994). But when the language upon which a court ascertains congressional intent is found in the statute itself, words that were approved by a formal vote in both houses of Congress and signed into law by the president, intent can be determined via a textualist methodology.

The term "textualism" here can be either of two schools of interpretation. The first is that the text of a statute controls, and legislative history is of no interpretive value. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992); *see also, e.g.*, *United States v. Gonzales*, 520 U.S. 1, 6 (2006). The second school agrees that the meaning of the text controls when such meaning is unambiguous, but explicitly allows consultation of legislative history insofar as that history aids in resolving ambiguities, especially when such history confirms the text's evident meaning.[2] *See, e.g.*, *Zedner v. United States*, 547 U.S. 489, 500–02 (2006).

[2] This alternative approach is designated "the newer textualism" by one writer. *See* Note, *The Newer Textualism: Justice Alito's Statutory*

This Court need not choose between these competing schools of thought. Given the clear meaning of the language in Pub. L. No. 111−148 § 1501 (a)(2)(G), quoted above, this Court has clear and unambiguous language from which to hold that, of all the provisions in PPACA, Congress intended Section 1501 to be nonseverable from the statute in whole or in part.

II. APPELLEE VIRGINIA'S SEVERABILITY ARGUMENT UNDER *ALASKA AIRLINES* COMPORTS WITH THE SUPREME COURT'S MOST RECENT RESTATEMENT OF SEVERABILITY DOCTRINE IN *FREE ENTERPRISE FUND*.

Federal Appellant Sebelius will likely oppose Appellee Virginia's severability argument by quoting, "Because the unconstitutionality of part of an Act does not necessarily defeat or affect the validity of its remaining provisions, the normal rule is that partial, rather than facial, invalidation is the required course." *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138, 3161 (2010) (internal quotation marks omitted). This argument misses the point entirely. The second clause, stating that partial invalidation is *often* required, is premised on the first clause, that this general rule exists because for

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Interpretation, 30 HARV. J. OF LAW & PUB. POL'Y 983, 986−87, 991−93 (2007).

most statutes, invalidity of one provision "*does not* necessarily . . . affect the validity of its remaining provisions." As explained in Appellee Virginia's brief, striking down the Individual Mandate would profoundly affect the validity of many of PPACA's provisions.

The Supreme Court's most recent refinement of the framework this Court must apply in considering severability was handed down just last Term. In *Free Enterprise Fund*, the Supreme Court employed a two-part inquiry: First, the remainder of the statute must continue to be "fully operative as a law" absent the invalid provisions. *Id.* at 3161 (citations omitted). If the remainder would be fully operative, the second step is to uphold the truncated statute "unless it is evident that the Legislature would not have enacted those provisions … independently of that which is invalid." *Id.* (citation omitted).

The Court's methodology in reviewing the Sarbanes-Oxley statute then at issue confirms this two-step approach. After discussing how the functioning of the public board at issue in that case would continue unaffected by invalidating the removal mechanism of its board members, the Court concluded that the "Act remains 'fully operative as a law' with these tenure restrictions excised. " *Id.* at 3161 (quotations

omitted). The Court then continued, "We therefore must sustain its remaining provisions '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.'" *Id.* (quoting *New York v. United States*, 505 U.S. 144, 186 (1992) (quoting in turn *Alaska Airlines*, 480 U.S. at 684)) (brackets in the original).

Noting that the remaining provisions of PPACA are still operative without the Individual Mandate, Appellee Virginia rightly focuses on the second prong of severability analysis, arguing that PPACA cannot function in the manner Congress intended absent Section 1501.

III. APPELLEE VIRGINIA'S SEVERABILITY ARGUMENT IS ALSO CONFIRMED BY THE THREE PRINCIPLES OF SEVERABILITY DOCTRINE ANNOUNCED BY THE SUPREME COURT IN *AYOTTE* IN 2006.

The Supreme Court has clarified and elaborated upon severability doctrine since *Alaska Airlines*, which serves to confirm Appellee Virginia's argument. The Court in 2006 expounded upon three principles that this Court must apply in conducting a severability examination in a unanimous opinion written by Justice O'Connor. The Court in *Ayotte v. Planned Parenthood of N. New England* was considering a New Hampshire statute involving parental notification

before a minor could obtain an abortion, a statute which the Court noted contained an express severability clause. 546 U.S. 320, 323–24, 331 (2006). This unanimous opinion revolved around severability, in which the Court declared these three principles that form the rationale underlying severability doctrine:

> Three interrelated principles inform our approach to remedies. First, we try not to nullify more of a legislature's work than is necessary . . . . Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting [a] law to conform it to constitutional requirements even as we try to salvage it. . . . Third, 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.

Id. at 329–30 (brackets and citations omitted). While the first principle is uncontested by the parties here, the second two are pivotal in the instant case.

The Supreme Court elaborated on the second principle in *Ayotte* thus:

> Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from "rewrit[ing] [a] law to conform it to constitutional requirements" even as we try to salvage it. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988). Our ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly we have already articulated the background

> constitutional rules at issue . . . But making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a "far more serious invasion of the legislative domain" than we ought to undertake. [*United States v. Treasury Employees*, 513 U.S. 454, 479 n.26 (1995)].

Ayotte, 546 U.S. at 329–30. Thus, the Court reasoned that surgical exercises to cleanly remove an unconstitutional provision is one thing, but having to rebalance a statutory scheme becomes a "far more serious invasion," and is impermissible.

This relates to the third principle, which the Court expounded as follows:

> Third, 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." After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all? All the while, we are wary of legislatures who would rely on our intervention, for "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside" to announce to whom the statute may be applied. "This would, to some extent, substitute the judicial for the legislative department of the government."

Ayotte, 546 U.S. at 330 (citing, *inter alia*, *Alaska Airlines*, 480 U.S. at 684; *United States v. Reese*, 92 U.S. 214, 221 (1876)) (other internal citations omitted); *accord INS v. Chadha*, 462 U.S. 919, 931–32 (1983).

These latter two principles are of central importance in the instant appeal. This Court is required to consult this case's entire record on appeal. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984). As Appellee Virginia sets forth for this Court in its brief, Federal Appellant Sebelius has conceded on the record that if Section 1501 is invalidated, other provisions of PPACA "plainly cannot survive." (J.A. 901). Even if Appellant Sebelius argues that some provisions could continue as law without the Individual Mandate, the record reflects that Appellant Sebelius admits that at minimum the insurance industry reforms in PPACA cannot be severed from Section 1501. (J.A. 902). This is because the Individual Mandate and accompanying statutory penalty for noncompliance constitute the "linchpin" of the entire statutory scheme embodied in PPACA. (J.A. 51).

This Court recognizes the importance of *Ayotte* in conducting a severability analysis. Quoting *Ayotte*, this Court recently upheld a statute because the panel held that the narrowed statute "fulfills the statute's purpose," reasoning that this fulfillment was a necessary condition for severability because this Court was "[m]indful that a court cannot use its remedial powers to circumvent the intent of the

legislature." *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 258 (4th Cir. 2010) (quoting 546 U.S. at 330) (internal quotation marks omitted).

Applying the principles unanimously affirmed by the Supreme Court in *Ayotte*, it is clear that the Individual Mandate is nonseverable in whole and in part from the statute, requiring this Court to invalidate PPACA in whole or in substantial part if this Court holds Section 1501 unconstitutional.

IV. APPELLEE VIRGINIA'S SEVERABILITY ARGUMENT FROM *ALASKA AIRLINES* IS CONSISTENT WITH 111 YEARS OF PRIOR SUPREME COURT PRECEDENT.

In grounding its severability argument on *Alaska Airlines*, Appellee Virginia notes that *Alaska Airlines* cites "a long line of cases." Appellee's Brief at 65. Indeed, Appellee Virginia's portrayal of *Alaska Airlines* comports with a consistent line of cases from the Supreme Court dating back to 1876.

In *United States v. Reese*, the Court began by holding unconstitutional two sections of a federal statute making it a crime for an election official to refuse allowing a person entitled to vote from casting their vote. 92 U.S. at 218–20. The Court then continued in this often-cited case to strike down the whole statute, holding that the Court

was "not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional . . . from that which is not." *Id.* at 221. The Court then went on to hold that a court will give effect to congressional intent when that intent can be ascertained and when the intent accords with the Constitution. *Id.*

Over the next several years the Supreme Court expanded upon the issue of severability and legislative intent. In 1877 the Court found a provision in another statute severable. "Statutes that are constitutional in part only, will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable. We think a severance is possible in this case." *Packet Co. v. Keokuk*, 95 U.S. 80, 89 (1877). Two years later, the Court expressly considered legislative intent and held a statute nonseverable. "If we should, in the case before us, undertake to make by a judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do . . . ." *Trade-Mark Cases*, 100 U.S. 82, 99 (1879).

Just two years later in *Allen v. City of Louisiana*, the Court reiterated the "elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are *wholly* independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." 103 U.S. 80, 83–84 (1881) (emphasis added). The Court then went on quote and adopt the opinion of the Supreme Judicial Court of Massachusetts from 1854, which reads:

> Such an act has all the forms of law, and has been passed and sanctioned by the duly constituted legislative department of the government; and if any part is unconstitutional, it is because it is not within the scope of legitimate legislative authority to pass it. Yet other parts of the same act may not be obnoxious to the same objection, and therefore have the full force of law, in the same manner as if these several enactments had been made by different statutes. But this must be taken with this limitation, that the parts, so held respectively constitutional and unconstitutional, must be *wholly* independent of each other. But if they are so mutually connected with and dependent on each other . . . *as to warrant a belief that the legislature intended them as a whole*, and that, if all could not carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.

Warren v. Charlestown, 68 Mass. (2 Gray) 84, 98–99 (1854) (emphases added). The Supreme Court elaborated on *Warren* by adding that the

Supreme Court held this rule to require the test of, "whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature." *Allen*, 103 U.S. at 84. The Court applied this test in varying articulations in a series of cases over subsequent decades. *See, e.g.*, *Butts v. Merchants & Miners Transp. Co.*, 230 U.S. 126, 135 (1913); *Employers' Liability Cases*, 207 U.S. 463, 501 (1908); *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 565 (1902); *Baldwin v. Franks*, 120 U.S. 678, 688 (1887).

Beginning in 1922, the Supreme Court made clear that this test of ascertaining congressional intent applies even in the face of an express severability clause. Citing *Reese*, *Trade-Mark Cases*, and *Butts*, the Court in *Hill v. Wallace* held that a particular provision in the statute at bar:

> is so interwoven with [the aforementioned] regulations that they cannot be separated. None of them can stand. [The severability clause] did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain.

259 U.S. 44, 70 (1922). The Court would later examine *Hill* in *Alaska Airlines*, incorporating it into Appellee Virginia's argument. *See* 480 U.S. at 684.

Ten years later the Court clarified that courts must consider legislative intent as a separate element from functionality. That is to say, even if a court finds the remaining provisions of a statute are capable of functioning, it must invalidate the entirety of the statute if Congress would not have passed the statute without the offending provision. In *Champlin Refining Co. v. Corporation Commission of Okla.*, the Court cited several of the cases already mentioned, and held:

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

286 U.S. 210, 234 (1932).[3] Noting that the statute at bar had a severability clause, the Court also held that if such a clause is present, it "discloses an intention to make the Act divisible and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained." *Id.* at 235.

[3] In *Alaska Airlines* the Court cited this holding and incorporated it into modern severability doctrine. 480 U.S. at 684.

This form of judicial inquiry was consistently maintained over the intervening decades. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 108 (1976); *United States v. Jackson*, 390 U.S. 570, 585 (1968). In each, the Court looked beyond the question of mere functionality to look for indicia of Congress's overall purpose for passing the statute, and considered whether that purpose could still be achieved without the invalid provision.

Then in 1983 the Court elaborated on the significance of a severability clause. In *INS v. Chadha*, the Court began its consideration of whether an unconstitutional legislative-veto provision could be severed from the statute by reaffirming:

> that the invalid portions of a statute are to be severed unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.

462 U.S. at 931–32 (quoting *Buckley*, 424 U.S. at 108 (quoting in turn *Champlin*, 286 U.S. at 234)). The Court labeled this task an "elusive inquiry," but found the statute's express severability clause contained in the statute at issue an unambiguous expression of intent that "gives rise to a presumption that Congress did not intend the validity of the Act . . . to depend on the legislative-veto clause." *Id.* at 932.

Chadha's reaffirmation of this consistent approach of critically examining congressional intent, and the importance of a severability clause as an expression of such intent, informed the Court's severability analysis in *Alaska Airlines*, decided only four short years later. And the Supreme Court's docket during those intervening four years consistently cited to these aforementioned cases and the longstanding framework they employed. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985); *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion). This then was the doctrinal foundation upon which the Court decided *Alaska Airlines*, as that case is explicated in Appellee Virginia's brief.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. District Court for the Eastern District of Virginia should be affirmed with regard to the invalidity of Section 1501, and reversed with regard to severability, and therefore this Court should invalidate the Act in its entirety.

Respectfully submitted,

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April 4, 2011

CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for *amicus curiae* affirms and declares as follows:

This brief complies with the type-volume limitation of Fed. R. App. 29(d) and Fed. R. App. P. Rule 32(a)(7) for a brief utilizing proportionally-spaced font, because the length of this brief is 4,753 words, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(a)(7)(B)(iii).

This brief also complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in proportionally-spaced typeface using Microsoft Word 2007 in 14-point Century Schoolbook font.

Executed this 4th day of April, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the Appellate CM/ECF System on April 4, 2011.

I certify that if parties to this case are registered CM/ECF users that service will be accomplished by the Appellate CM/ECF System.

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