Nos. 11-393 & 11-400

In The
Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, *et al.*,

Petitioners,

vs.

KATHLEEN SEBELIUS, *et al.*,

Respondents.

STATE OF FLORIDA, *et al.*,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

AMICI CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE, 117 MEMBERS OF THE UNITED STATES CONGRESS, AND MORE THAN 103,000 SUPPORTERS OF THE ACLJ IN SUPPORT OF PETITIONERS AND URGING REVERSAL ON THE SEVERABILITY ISSUE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

INTEREST OF THE AMICI CURIAE

Amicus curiae, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to defending constitutional liberties secured by law.[1] ACLJ attorneys have argued before this Court and other federal and state courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003). ACLJ attorneys also have participated as amicus curiae in numerous cases involving constitutional issues before this Court and lower federal courts. *E.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Van Orden v. Perry*, 545 U.S. 677 (2005).

The ACLJ has been active in litigation concerning the Patient Protection and Affordable Care Act of 2010 ("ACA" or "Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010), Pub. L. No. 111-152, 124 Stat. 1029 (2010), in particular, with regard to the "individual mandate" provision, 26 U.S.C. § 5000A, which requires millions of Americans to purchase and maintain Federal Government-approved health insurance from a private company for the remainder of their lives or be penalized annually. The ACLJ has filed amici curiae briefs in support of the following challenges to the

[1] No counsel for a party authored this brief in whole or in part. No person or entity aside from amici curiae, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed notices with this Court consenting to the filing of amicus curiae briefs.

ACA: *Virginia v. Sebelius*, No. 3:10-CV-188-HEH (E.D. Va.), and Nos. 11-1057, 11-1058 (4th Cir.); *TMLC v. Obama*, No. 10-2388 (6th Cir.); and *Florida v. United States Dep't of Health & Human Servs.*, No. 3:10-CV-91-RV-EMT (N.D. Fla.), Nos. 11-11021-HH, 11-11067-HH (11th Cir.), and No. 11-400 (U.S.).

Additionally, the ACLJ represents the plaintiffs in a challenge to the individual mandate: *Mead v. Holder*, No. 1:10-CV-00950-GK (D.D.C.), *appeal sub. nom. Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir.). The ACLJ has recently filed a petition for a writ of certiorari in *Seven-Sky v. Holder*, No. 11-679 (U.S. Nov. 30, 2011). Accordingly, the ACLJ has an interest that may be affected by the instant case.

This brief is also filed on behalf of United States Representatives Paul Broun, Robert Aderholt, Todd Akin, Rodney Alexander, Mark Amodei, Steve Austria, Michele Bachmann, Spencer Bachus, Lou Barletta, Roscoe Bartlett, Joe Barton, Rob Bishop, Diane Black, Marsha Blackburn, Charles Boustany, Kevin Brady, Mo Brooks, Larry Bucshon, Michael Burgess, Dan Burton, Francisco "Quico" Canseco, Eric Cantor, Steve Chabot, Howard Coble, Mike Coffman, Tom Cole, Mike Conaway, Chip Cravaack, Geoff Davis, Scott DesJarlais, Jeff Duncan, Blake Farenthold, Stephen Fincher, Chuck Fleischmann, John Fleming, Bill Flores, Randy Forbes, Virginia Foxx, Trent Franks, Cory Gardner, Scott Garrett, Bob Gibbs, Phil Gingrey, Louie Gohmert, Bob Goodlatte, Tom Graves, Tim Griffin, Michael Grimm, Ralph Hall, Gregg Harper, Andy Harris, Vicky Hartzler, Jeb Hensarling, Wally Herger, Tim

Huelskamp, Bill Huizenga, Randy Hultgren, Lynn Jenkins, Bill Johnson, Walter Jones, Jim Jordan, Mike Kelly, Steve King, Adam Kinzinger, John Kline, Raul Labrador, Doug Lamborn, Jeff Landry, James Lankford, Robert Latta, Billy Long, Blaine Luetkemeyer, Cynthia Lummis, Dan Lungren, Connie Mack, Donald Manzullo, Kenny Marchant, Kevin McCarthy, Michael McCaul, Tom McClintock, Thaddeus McCotter, Cathy McMorris Rodgers, Gary Miller, Jeff Miller, Randy Neugebauer, Alan Nunnelee, Pete Olson, Ron Paul, Steve Pearce, Mike Pence, Joe Pitts, Ted Poe, Mike Pompeo, Bill Posey, Tom Price, Ben Quayle, Reid Ribble, Scott Rigell, Phil Roe, Todd Rokita, Dennis Ross, Ed Royce, Steve Scalise, Jean Schmidt, Adrian Smith, Lamar Smith, Marlin Stutzman, Lee Terry, Scott Tipton, Michael Turner, Tim Walberg, Joe Walsh, Daniel Webster, Lynn Westmoreland, Joe Wilson, Rob Woodall, and Don Young, who are 117 members of the United States House of Representatives in the One Hundred Twelfth Congress. In addition, this brief is filed on behalf of more than 103,000 supporters of the ACLJ who specifically requested that they be included in this brief as an expression of support for the ACLJ's efforts to overturn the ACA.

Amici curiae are dedicated to the founding principles of a limited Federal Government and the belief that the Constitution contains meaningful boundaries that Congress may not trespass – no matter how serious the nation's healthcare problems. Amici curiae believe that the Constitution does not empower Congress to require Americans to purchase and maintain

health insurance from a private company for the rest of their lives or pay an annual penalty. Amici curiae are deeply troubled by the fundamental alteration to the nature of our federalist system of government that would be required to recognize a novel Congressional power to mandate that citizens buy a product from a private company. Amici curiae urge this Court to rule the individual mandate unconstitutional and to declare the entire ACA invalid, since the unconstitutional individual mandate cannot be severed from the ACA.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Eleventh Circuit correctly ruled that the individual mandate is unconstitutional because it exceeds Congress's powers under Article I of the United States Constitution. The Eleventh Circuit, however, erred in concluding that the individual mandate can be severed from the remainder of the ACA. The unconstitutional individual mandate is the essential component of the ACA's reforms to the health insurance and health care markets, as the Federal Government has conceded. Congress would not have passed the ACA absent the individual mandate. Without the individual mandate, the ACA's remaining provisions cannot function properly. Thus, the unconstitutional individual mandate is not severable from the ACA, and the entire Act must be invalidated. This Court should reverse the Eleventh Circuit's judgment on the severability issue.

ARGUMENT

THE UNCONSTITUTIONAL INDIVIDUAL MANDATE CANNOT BE SEVERED FROM THE REST OF THE ACA, AND THE ENTIRE ACA SHOULD BE RULED INVALID.

The Eleventh Circuit correctly held that the individual mandate is unconstitutional. The Eleventh Circuit properly concluded that the Commerce Clause does not give Congress the power to require American citizens to purchase a product from a private company for the remainder of their lives or be penalized annually, and the court also properly noted that there would be no judicially-administrable limits to Congress's power that would prevent Congress from mandating numerous other purchases from private companies if the Act's individual mandate were upheld. *Florida v. United States Dep't of Health & Human Servs.*, 648 F.3d 1235, 1311-13 (11th Cir. 2011).

Regarding severability, however, the Eleventh Circuit incorrectly reversed the district court's well-reasoned determination that the individual mandate cannot be severed from the ACA and, as such, the entire Act is invalid. *Florida v. United States Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1299-1305 (N.D. Fla. 2011). The Eleventh Circuit determined instead that *only* the unconstitutional individual mandate may be severed from the ACA. *Florida*, 648 F.3d at 1320-28. In that regard, the Eleventh Circuit erred, and its judgment on the severability issue should be reversed.

"The inquiry into whether a statute is severable is essentially an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999). "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." *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987). A court must ask "whether [after removing the invalid provision] the [remaining] statute will function in a manner consistent with the intent of Congress." *Id.* at 685 (original emphasis omitted).

Two factors demonstrate that Congress did not intend the individual mandate to be severable. First, the Affordable Health Care for America Act (H.R. 3962), which the House approved on November 7, 2009, contained an individual mandate section as well as a severability provision.[2] H.R. 3962's severability provision, however, was not included in the final version of the ACA. Congress's *conscious* rejection of a severability clause in the ACA is strong evidence that Congress did not intend for the statute's individual provisions to be severable.

Second, Congress would not intend for a provision to be severable if severing it would allow an

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[2] Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 255 (2009), *available at Bill Summary & Status*, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.3962: (click on "Text of Legislation," then the link for "Affordable Health Care for America Act (Engrossed in House [Passed House]-EH)").

inoperable or counterproductive regulatory scheme to stand. *Alaska Airlines*, 480 U.S. at 684; *accord Free Enter. Fund. v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161-62 (2010). The Federal Government has conceded that the individual mandate is essential to the ACA. As such, without the individual mandate, the Act's remaining portions cannot function "in a manner consistent with the intent of Congress." *See Alaska Airlines*, 480 U.S. at 685. For example, in *Mead v. Holder*, No. 1:10-CV-950-GK (D.D.C.), the Federal Government asserted that the individual mandate is essential to the workings of the ACA's reforms to the health insurance and health care markets. The Federal Government stated

- that the ACA's "*reforms of the interstate insurance market . . . could not function effectively without the* [*individual mandate*] *provision*." Memorandum in Support of the Defendants' Motion to Dismiss, *Mead v. Holder*, No. 1:10-CV-950-GK (D.D.C.), Doc. 15-1 at 22 (filed on Aug. 20, 2010) (available on PACER) (emphasis added);

- that the individual mandate is "*an 'essential' part of the Act's larger regulatory scheme for the interstate health care market,*" *id.* (emphasis added);

- that Congress found the individual mandate "*not only is adapted to, but is 'essential' to, achieving key reforms of the interstate health care and health insurance markets,*" *id.* at 24 (emphasis added); and

- that "*Congress determined*, also with substantial reason, *that* [*the individual mandate*] *provision was essential to its comprehensive scheme of reform*. *Congress acted well within its authority to integrate the provision into the interrelated revenue and spending provisions of the Act.*" *Id.* at 31 (emphasis added).

The Federal Government made similar concessions in other challenges to the ACA concerning the importance of the individual mandate to the overall Act. In the United States District Court for the Eastern District of Virginia, the Federal Government maintained that the individual mandate "*is essential to the comprehensive regulation Congress enacted*." Memorandum in Support of Defendants' Motion for Summary Judgment, *Virginia v. Sebelius*, No. 3:10-CV-188-HEH (E.D. Va.), Doc. 91 at 26 (filed on Sept. 3, 2010) (available on PACER) (emphasis added). And, in the instant case, the Federal Government asserted in the United States District Court for the Northern District of Florida that "*Congress found that* [*the individual mandate*] *'is an essential part of this larger regulation of economic activity,' and that its absence 'would undercut Federal regulation of the health insurance market.'*" Memorandum in Support of Defendants' Motion for Summary Judgment, *Florida v. United States Dep't of Health & Human Servs.*, No. 3:10-CV-91-RV-EMT (N.D. Fla.), Doc. 82-1 at 11, 20 (filed on Nov. 4, 2010) (available on PACER) (emphasis added) (quoting 42 U.S.C. § 18091(2)(H)).

In addition to its broader concessions noted in the previous paragraphs, the Federal Government has specifically conceded that the individual mandate is essential to two particular provisions of the ACA: the guaranteed issue provision, 42 U.S.C. § 300gg-1 (effective Jan. 1, 2014), and the prohibition on preexisting condition exclusions, 42 U.S.C. § 300gg-3 (effective Jan. 1, 2014). The United States District Court for the Middle District of Pennsylvania accepted this concession and ruled that, not only is the individual mandate unconstitutional, but the individual mandate must be severed from the ACA along with the guaranteed issue and preexisting conditions provisions. *Goudy-Bachman v. United States Dep't of Health & Human Servs.*, 2011 U.S. Dist. LEXIS 102897 at *64-73 (M.D. Pa. Sept. 13, 2011); *id.* at *68 (explaining that the Federal Government conceded that the guaranteed issue and preexisting conditions provisions are "'absolutely intertwined'" with the individual mandate and "must be severed should the individual mandate provision be severed").

In sum, as the Federal Government has conceded, the individual mandate is essential to the overall operation of the ACA. It follows that Congress could not have intended the individual mandate to be severable from the rest of the ACA; the ACA's reforms to the health care and health insurance markets could not function without the individual mandate. These observations, along with the fact that Congress deleted a severability provision from an earlier version of the health care reform legislation, lead to one conclusion: the individual mandate is not severable

from the ACA's remaining provisions. Accordingly, this Court should rule the entire ACA invalid and reverse the Eleventh Circuit's decision on this point.

CONCLUSION

The unconstitutional individual mandate is the essential element of the ACA, and the balance of the ACA cannot function independently without the individual mandate. Amici curiae, therefore, respectfully request that this Court reverse the Eleventh Circuit's judgment that the unconstitutional individual mandate can be severed from the rest of the ACA and urge this Court to rule the entire ACA invalid.

Respectfully submitted,

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