No. 11-400

In The Supreme Court of the United States

STATE OF FLORIDA, *et al.*,

Petitioners,

vs.

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

Respondents.

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

AMICI CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE, 105 MEMBERS OF THE UNITED STATES CONGRESS, AND THE SUPREME COURT COMMITTEE TO DECLARE OBAMACARE UNCONSTITUTIONAL IN SUPPORT OF PETITIONERS

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I. IDENTITY AND 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*, 129 S. Ct. 1125 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). 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); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006); *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"), in particular, with regard to the "individual mandate" provision, which requires applicable American citizens to purchase and

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[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. Amici curiae have no parent corporation and do not issue stock. Counsel of record for the parties received timely notice of the intent to file this brief, and they have filed notices with this Court consenting to the filing of amicus curiae briefs.

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 ACA: *Virginia v. Sebelius*, No. 3:10-CV-188-HEH (E.D. Va.) & Nos. 11-1057, 11-1058 (4th Cir.); *TMLC v. Obama*, No. 10-2388 (6th Cir.); and in the case from which the petition originates, *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.).

Additionally, the ACLJ represents individual 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.). Oral argument occurred in *Seven-Sky* in the United States Court of Appeals for the District of Columbia Circuit on September 23, 2011, before the Honorable Brett M. Kavanaugh, Harry T. Edwards, and Laurence H. Silberman. A decision is pending. Accordingly, the ACLJ has an interest that may be affected by the instant case because any decision by this Court would be dispositive authority in *Seven-Sky*.

This brief is also filed on behalf of amici curiae United States Representatives Paul Broun, Robert Aderholt, Todd Akin, Rodney Alexander, Steve Austria, Michele Bachmann, Spencer Bachus, Joe Barton, Rob Bishop, Diane Black, Marsha Blackburn, 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, Doug Lamborn, Jeff Landry, James Lankford, Robert Latta, Billy Long, Cynthia Lummis, 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, Tim Walberg, Joe Walsh, Daniel Webster, Lynn Westmoreland, Joe Wilson, and Don Young, who are 105 members of the United States House of Representatives in the One Hundred Twelfth Congress, and the Supreme Court Committee to Declare ObamaCare Unconstitutional, which consists of over 29,000 Americans from across the country who oppose the individual mandate.

Amici curiae are dedicated to the founding principles of a limited Federal Government and to the corollary precept that Article I of the Constitution contains boundaries that Congress may not trespass – no matter how serious the nation's healthcare problems. In particular, amici curiae believe that the Constitution does not empower Congress to require Americans to purchase and maintain Federal Government-approved 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 in order to recognize a novel Congressional power to mandate that citizens buy a product from a private company. Amici curiae urge this Court to grant plenary review in this case.

II. SUMMARY OF THE ARGUMENT

The petition presents three questions for review. Amici curiae urge this Court to grant review of those questions for the reasons stated in the petition. Of primary concern, amici curiae urge this Court to review the third question presented: "Does the Affordable Care Act's mandate that virtually every individual obtain health insurance exceed Congress's enumerated powers and, if so, to what extent (if any) can the mandate be severed from the remainder of the Act?" Pet. at i. This question should be reviewed for two reasons: First, there is a split among the circuit courts of appeal regarding the constitutionality

of the individual mandate. This Court should resolve that split on this matter of national importance. Second, even though the United States Court of Appeals for the Eleventh Circuit correctly held that the individual mandate is unconstitutional, it wrongly severed only the individual mandate from the ACA. The individual mandate, by the Federal Government's own admission, is *the* essential component of the ACA. Should this Court also rule the individual mandate unconstitutional, it should decide to what extent (if any) the individual mandate can be severed from the rest of the ACA.

III. ARGUMENT

Although amici curiae urge this Court to grant plenary review in this case, they are most interested in the review of the third question presented: "Does the Affordable Care Act's mandate that virtually every individual obtain health insurance exceed Congress's enumerated powers and, if so, to what extent (if any) can the mandate be severed from the remainder of the Act?" Pet. at i. This Court should review this third question for the following reasons:

A. THIS COURT SHOULD GRANT REVIEW AND DECIDE WHETHER THE INDIVIDUAL MANDATE EXCEEDS CONGRESS'S ENUMERATED POWERS

This case arises from a challenge to the federal law known as the Patient Protection and Affordable

Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010), Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("ACA" or "Act"). Among their various causes of action, Petitioners challenge the constitutionality of the "individual mandate" provision of the ACA, which requires most Americans to purchase and maintain Federal Government-approved health insurance from a private company for the rest of their lives or pay an annual penalty. 26 U.S.C. § 5000A (effective Jan. 1, 2014). The resolution of whether the individual mandate is constitutional is a matter of national importance.

A split now exists in the circuit courts of appeal regarding the constitutionality of the individual mandate. The United States Court of Appeals for the Sixth Circuit wrongly held the individual mandate constitutional in a 2-1 decision. *TMLC v. Obama*, 2011 U.S. App. LEXIS 13265 (6th Cir. June 29, 2011). By contrast, the United States Court of Appeals for the Eleventh Circuit correctly held that the individual mandate is unconstitutional in a 2-1 decision. 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.[2] Pet. App. at 167-72 (*Florida v. United States Dep't of Health & Human Servs.*, 648 F.3d 1235, 1311-13 (11th Cir. 2011)).

Owing to the circuit court split on this matter of national importance, amici curiae urge this Court to exercise its discretion and grant the petition to resolve this conflict. A grant of review is appropriate in this case. Sup. Ct. R. 10 (explaining that this Court may properly exercise its discretion by granting a petition for writ of certiorari to resolve a circuit court split); *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1264 (2011) (granting writ of certiorari to resolve a circuit court split); *Fox v. Vice*, 131 S. Ct. 2205, 2212-13 (2011) (same).[3]

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[2] The Sixth and Eleventh Circuits both correctly ruled that the individual mandate is not supported by Congress's taxing power. *TMLC*, 2011 U.S. App. LEXIS 13265 at *52-64, *100; Pet. App. at 173-89 (*Florida*, 648 F.3d at 1313-20).

[3] Other challenges to the ACA are pending in the circuit courts of appeal, including *Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir.). On September 23, 2011, the Honorable Brett M. Kavanaugh, Harry T. Edwards, and Laurence H. Silberman heard oral argument on the following issues: whether Congress was authorized to enact the individual mandate through its Commerce or Taxing Clause powers and whether the Anti-Injunction Act applies to the case. Also involved in *Seven-Sky* is whether the individual mandate violates the rights of certain plaintiffs pursuant to the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq*. The parties are awaiting a decision.

B. THIS COURT SHOULD GRANT REVIEW AND DECIDE TO WHAT EXTENT (IF ANY) THE INDIVIDUAL MANDATE CAN BE SEVERED FROM THE REST OF THE ACA

The Eleventh Circuit reversed the district court's well-reasoned determination that the unconstitutional individual mandate cannot be severed from the ACA and, as such, the entire Act is invalid. Pet. App. at 382-97 (*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. Pet. App. at 189-205 (*Florida*, 648 F.3d at 1320-28). In that regard, the Eleventh Circuit erred.

"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.[4] 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 could not have intended the individual mandate to be severable if severing it would allow an inoperable or counterproductive regulatory scheme to stand. *See 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-00950-GK (D.D.C.), which is now on appeal in the District of Columbia Circuit as *Seven-Sky v. Holder*,

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[4] 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)").

No. 11-5047, the Federal Government asserted in the district court that the individual mandate is essential to the workings of the ACA. 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 at 22, Doc. 15-1, *Mead v. Holder*, No. 1:10-cv-950-GK (D.D.C.) (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 district court 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 at 26, Doc. 91, *Virginia v. Sebelius*, No. 3:10-cv-188-HEH (E.D. Va.) (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 at 11, 20, Doc. 82-1, *Florida v. United States Dep't of Health & Human Servs.*, No. 3:10-cv-91-RV-EMT (N.D. Fla.) (emphasis added) (quoting ACA §§ 1501(a)(2)(H), 10106(a)).

Indeed, as Petitioners point out, the Federal Government, while this case was pending in the Eleventh Circuit, conceded, in particular, that the individual mandate is essential to at least two other 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). Pet. at 31-32. Although ignored by the Eleventh Circuit, this same concession was recently accepted by the United States District Court for the Middle District of Pennsylvania. The district court ruled on September 13,

2011, that the individual mandate is unconstitutional and 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, the Eleventh Circuit erred in severing the individual mandate from the ACA. The Federal Government has conceded that the individual mandate is essential to Congress's reforms of the health insurance and health care markets (and, at minimum, is "absolutely intertwined" with the guaranteed issue provision and the preexisting conditions provision of the ACA). Those concessions, in addition to the lack of a severability provision and the divergent severability rulings of federal courts, underscore the need for this Court to accept review of this case. This Court should resolve these and the other questions presented.

IV. CONCLUSION

Amici curiae respectfully request that this Court grant the petition.

Respectfully submitted,

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