Nos. 11-393 & 11-400

In the Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, ET AL., PETITIONERS

v.

KATHLEEN SEBELIUS, ET AL., RESPONDENTS

STATE OF FLORIDA, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE DAVID BOYLE, OR MOTION FOR LEAVE TO INTERVENE, IN SUPPORT OF COURT-APPOINTED AMICUS CURIAE ON THE ISSUE OF SEVERABILITY

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QUESTION PRESENTED

1.

Whether the remainder of the Act must be invalidated in whole or in part because it cannot be severed from the individual mandate. (Private Petitioners' version)

If the Affordable Care Act's mandate that virtually every individual obtain insurance exceeds Congress' enumerated powers, to what extent (if any) can the mandate be severed from the remainder of the Act? (State Petitioners' version)

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STATEMENT OF INTEREST OF AMICUS CURIAE

The present amicus curiae, David Boyle (hereinafter, "Amicus"),[1] an American citizen, is respectfully filing this *pro se* Brief[2] in Support of Court-Appointed Amicus Curiae [H. Bartow Farr III] on the Issue of Severability ("this Brief") in the matter of Case 11-393 ("*NFIB v. Sebelius*") and Case 11-400 ("*Florida v. HHS*"). (The reasons this Brief is being filed later than others, will be explored below.) 11-393, and in part 11-400, concern the appeal by National Federation of Independent Business ("NFIB") and four individual petitioners, and by twenty-six States, of the portion of *Florida ex rel. Attorney General v. United States Department of Health and Human Services*, 648 F.3d 1235 (11th Cir., Aug. 12, 2011), that did not overturn the Patient Protection and Affordable Care Act or "PPACA" (Pub. L. 111-148, 124 Stat. 119 (2010), *as amended by* the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010) ("Act" or "the Act")), but overturned the Act's "individual mandate" ("Mandate", a.k.a. Section 1501, or 26 U.S.C. (or 26 U.S.C.A.) § 5000A, or "minimum coverage provision") to buy health insurance, and held the Mandate severable from the rest of the Act. And the present Question Presented in 11-393 and 11-400 is whether the Mandate is severable from the Act,

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[1] As per Supreme Court Rule 37, no party or counsel for a party, nor anyone else for that matter besides Amicus himself, wrote or helped write this brief, or contributed money to fund the writing or submission of it. Blanket permission is on record with the Court for amicae/i to write briefs.

[2] The format of this Brief relies partly on someone else's apparently-allowed format for amicus briefs in these cases, *see* Br. Amicus Curiae of the Commonwealth of Va. *ex rel.* Att'y Gen. Kenneth T. Cuccinelli, II, in Supp. of Appellees on the Issue of the Unconstitutionality of the Mandate and Penalty in which Va. Governor Robert F. McDonnell and the Republican Governors Pub. Pol'y Comm. Join in 11-398, Feb. 13, 2012, *available at* http://aca-litigation.wikispaces.com/file/view/Virginia+amicus+%2811-398+MCP%29.pdf (courtesy of ACA Litigation Blog). Movant is also presently sending the Clerk's office a note re format issues.

and if so, just how much. Movant opposes Petitioners, and also Respondents ("the Government"), in that he sees the Mandate as fully severable, as opposed to completely inseverable, or only partially-severable.

Amicus, for his part, had noticed early in 2011 that other Mandate/Act lawsuits across the Nation: (a) had largely ignored or abandoned rights-based defenses (such as a Fifth Amendment defense) against the Mandate, and (b) had almost without exception demanded the end of the entire Act; and Judge Roger Vinson indeed overturned the Act (including the Mandate) on January 31, 2011, *see Florida ex rel. Bondi v. U.S. Dep't. of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla.), the district-court iteration of 11-398 (-393, -400). Movant then felt obliged to file his own suit, *Boyle v. Sebelius*[3] (CV-11-07868-GW(AJWx)), in the federal judicial Central District of California where he resides, in order to express detailed rights-based defenses against the Mandate, and to sever the Mandate from the Act so that the Act might survive. Movant felt that if that the Act did not survive, then fewer Americans would survive or thrive, as a result of inferior health care opportunities resulting from the death of the Act. Movant filed suit *pro se* on September 22.

Coincidentally, a few days later, on September 28, 2011, the Government declined to ask for, re its defeat on the Mandate issue, *en banc* review of 648 F.3d 1235: a rather surprising decision which sped up the process of Supreme Court

[3] Currently *dismissed for lack of jurisdiction without ruling on the merits*, *see* Ruling on Def. Kathleen Sebelius's Mot. to Dismiss, or in the Alternative, for a Stay of Procs. (Feb. 3, 2012); Amicus presents somewhat different arguments for standing, *see* Amicus' accompanying Motion for Leave to Intervene in 11-398, than in *Boyle v. Sebelius*. Amicus respectfully disagrees with the District Court and plans to appeal the ruling in some manner, though this present Brief and accompanying documents take precedence in Amicus' efforts right now.

review. And the Court granted certiorari in that case, as: *NFIB v. Sebelius* (11-393), about severability of the Mandate from the Act; *HHS v. Florida* (11-398), about the Mandate; and *Florida v. HHS* (11-400), including Medicaid-related and severability issues, all on November 14, 2011. Thus, Movant is filing a request to intervene and add Questions Presented to 11-398, largely about individual rights, and is also filing this Brief in 11-393 and 11-400 to advocate full severability of the Mandate, lest the Act possibly be overturned and people needlessly suffer or die.

Because neither Petitioners nor Respondents advocate full severability, Amicus was going to petition the Court, some while ago, that he be allowed to argue in the Court in favor of severability. However, the Court then appointed esteemed counsel H. Bartow Farr to act as an amicus and argue for severability. So, unlike in 11-398, Amicus is not seeking oral argument, especially since such a request might seem like a personal insult to Farr. (In 11-398, by contrast, there are various lawyers, not just one; and any consideration of Bill-of-Rights or other statutory or otherwise non-"federalism-related" individual rights might take place after March 2012, and under a different docket number than 11-398.)

One will note that Farr's brief ("Brief for Court-Appointed Amicus Curiae Supporting Complete Severability (Severability)"), is arguably the most important brief in all the cases: the Mandate (and even the Medicaid issues) could be regarded as a "tail", compared to the much larger "dog", the immense and immensely important Act with all its health-giving provisions. Farr's brief is meant to establish that the "dog" will be saved even if the "tail" (the Mandate) is chopped off. So it is

absolutely crucial that those supporting Farr's work have a chance to comment on it to the Court; and Amicus is so doing. Amicus does not understand why supporters of Farr's brief were not given extra time to read and respond to, or complement, that brief. It seems asymmetrical and puzzling to prevent other supporters of full severability from having lead time to read the main brief by Farr, lead time that was allowed (to read and ponder the main parties' briefs) to those submitting amicus briefs on other topics besides severability. As it is, Farr's brief did not get public exposure until February 22,[4] five days after its filing. The four diverse amicus briefs besides Farr's, from, variously, Asian/Hawaiian/Pacific groups, a health policy expert, black-lung advocates, and the Missouri Attorney General, are worthy, but miss addressing a number of vital points, so that it is proper for Amicus to write this Brief, lest the cause of full severability needlessly fail, and the Act fail with it, and many people likely suffer or die due to the death of the health care Act. Also, Amicus may not have been a Supreme Court Bar member on February 17 (or for a while after that), making it much harder for him to have submitted an amicus brief then (or for a while after then).

Thus, Amicus humbly moves, if necessary to move formally, that this amicus brief be accepted, and without penalty, even though after February 17. If that is somehow not quite acceptable, then Amicus instead files this document as a request

[4] Disclaimer: Amicus did not see the brief on the Internet for some while after February 17, so telephoned Farr's office on February 22 and left a polite message querying about the brief. Within roughly two hours of that message, by Amicus' count, Farr's brief surfaced on the Internet, *see* Brad Joondeph, *Court-appointed amicus brief*, ACA Litigation Blog, Feb. 22, 2012, 4:03 p.m., at http://acalitigationblog.blogspot.com/2012/02/court-appointed-amicus-brief.html. If Amicus somehow helped the public access that brief, he is glad to have helped inform the public on this vital issue.

for leave to intervene in 11-393 and 11-400, since there is no particular time limit on intervention. (Also, Amicus is wondering about his word limit—given the format—,[5] which may be less stringent for a leave-to-intervene motion.) —Without repeating the whole intervention argument from his 11-398 Motion (much less the argument for *locus standi* from that Motion), Amicus evokes Rule 24 of the Federal Rules of Civil Procedure, "Intervention" ("Rule 24"), though this Court is not bound by that Rule. Timeliness for intervention is encouraged, *see id.* §§ (a) and (b)(1), but since Farr's brief was not available until February 22, and Amicus may not have even been a Supreme Court Bar member for some time after that (not to mention that Amicus has also been busy writing the accompanying Motion to intervene in 11-398 (with attached Complaint in Intervention) and Motion for Justices Kagan and Thomas to recuse themselves), Amicus has been delayed by good-faith reasons, and it is less than four weeks after February 22, not a gigantic amount of time. (Amicus welcomes other people or amicae/i being given a chance to respond to this Brief; he is not trying to "blind-side" anyone here.)

Under Rule 24(a)(2), re "Intervention of Right", Movant has a right to intervene if his interests relating to the issue may be impaired otherwise, *see id.* And much of the rest of this Brief will focus on how Amicus' interests (and the public's) may not be completely protected even by the fine amicus briefs already submitted. In the event that somehow Amicus (or would-be Intervenor as needed) is not granted intervention by right, he seeks permissive intervention under Rule 24(b)(1)(B), since

[5] If this paper can only be submitted as an amicus brief, please feel free to contact Amicus if he needs to "take the hatchet" to some particular number of words.

he "has a claim or defense that shares with the main action a common question of law or fact", *id.*, i.e., Amicus' "defenses" of full severability involve many of the same cases and arguments, even if in a different light, as those used by various parties or amicae/i in 11-393 and -400. Amicus, if he needs to be an intervenor, is not attaching a Complaint in Intervention (under Rule 24(c), "Notice and pleading required") here—though if the Court requires one he could provide one—, especially since he is not trying to "complain" about anything (as he is with the Mandate, in 11-398), but trying to preserve something, i.e., the Act without the Mandate. (Also, that Complaint would tend to be extremely repetitive, almost word-for-word, of this Motion, and would thus be wasteful.) Finally: while Rule 24(b)(3), "Delay or Prejudice", mentions the need not to "unduly delay or prejudice the adjudication of the original parties' rights", *id.*, there are several weeks left for all parties to consider and answer this Brief, if desired, so that Amicus does not see real delay or prejudice resulting from allowing intervention (or other filing of this document).

Again, Amicus would have liked to get this Brief and other documents in earlier, and apologizes as needed. However, other parties have not gotten in things at all, e.g. the Government's failure to mention, even by the time of its Reply Brief on the Merits in 11-398 (March 2012), that *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), says, *see id.* at 535-36, 562, that coerced insurance purchase violates the Sherman Act (ch. 647, 26 Stat. 209 (1890)): an idea that hardly supports the Mandate. If not for Amicus, who would tell the Court about this (and a large amount of other relevant information besides)? (As for those who would

prefer the Court be kept blind or asleep, *see, e.g.*, Ezra Klein, *Column: A world with an individual mandate*, Wash. Post, Dec. 20, 2010, 11:00 a.m., at http://voices.washingtonpost.com/ezra-klein/2010/12/column_a_world_with_an_individ.html,

> Unless someone can drop into Anthony Kennedy's dreamspace and, "Inception"-style, [ask or] simply tell him what to think of the individual mandate, it's not worth spending much time speculating on the ultimate legal fate of the provision. . . .
>
> So repeat after me, "Justice Kennedy: You're getting very sleepy . . . "

Column: A world with an individual mandate, *supra*. Does this mind-manipulation of a Supreme Court Justice, *see id.*, sound like fair play?) So Amicus is trying to be a friend of the Court and keep it informed of important matters.

SUMMARY OF ARGUMENT

Amicus (or Intervenor) supports full severability of the Mandate from the rest of the Act, on the basis of: case law; the guaranteed-issue and no-preexisting-condition provisions, but not the Mandate, being the heart (if any) of the Act; the non-necessity of the Mandate for those provisions; the inaccuracy of both sides' assertions that the Mandate is inseverable; the unconscionability of the "bargain" made by Congress to hand Americans over, against their will, to health insurance companies; the crucial importance of not taking away vital or lifesaving health care from the vulnerable; the frenzy of the Administration and Congress to pass the Act almost by any means necessary; the need for judicial deference to Congress when reasonably possible; and the righteous balance between liberty and commonweal upheld in the Eleventh Circuit decision. Not all these factors have been mentioned,

or substantially explored, by other amicae/i, so that Amicus' commentary may be helpful in better understanding the issue of severability in these cases.

ARGUMENT

I. SOME BASIC CASE LAW ON SEVERABILITY

Amicus is not extensively going to emphasize or repeat the good points of the other amicus briefs, since that might be repetitive. However, he will mention at least a little case law on severability. —For guidance on severability, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U. S. ____, 130 S. Ct. 3138 (2010), is worth quoting at length, in pertinent part,

> "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem," severing any "problematic portions while leaving the remainder intact." *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 328–329 (2006). Because "[t]he unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions," *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U. S. 210, 234 (1932), the "normal rule" is "that partial, rather than facial, invalidation is the required course," *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 504 (1985) . . . .
>
> The Sarbanes-Oxley Act remains "'fully operative as a law'" with these tenure restrictions excised. *New York*, 505 U. S., at 186 (quoting *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684 (1987)). We therefore must sustain its remaining provisions "[u]nless it is evident that the Legislature would not have enacted those provisions . . . independently of that which is [invalid]." *Ibid.* (internal quotation marks omitted). Though this inquiry can sometimes be "elusive," *Chadha*, 462 U. S., at 932, the answer here seems clear: The remaining provisions are not "incapable of functioning independently," *Alaska Airlines*, 480 U. S., at 684, and nothing in the statute's

> text or historical context makes it "evident" that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will. *Ibid.*; see also *Ayotte*, *supra*, at 330.

Free Enter. Fund, *supra*, at 3161-62 (Roberts, C.J.). Without quoting or citing all of the *Free Enterprise Fund* material *supra*, one notes that the Act can operate fully and independently, *see Free Enter. Fund*, 130 S. Ct. at 3161-62, without the Mandate, which is largely a funding mechanism, and thus replaceable by other funding mechanisms. In fact, the Mandate might *hamper* health care, the ostensible purpose of the Act, by taking away from citizens the money they need to take advantage of other health opportunities, and giving it to health insurers instead. (And with a "captive market" under the Mandate, and thus lessened competition, the health insurance industry may become more inefficient and costly, as monopolies or similar entities tend to.) As well, nothing leads to the conclusion that Congress would have preferred no Act to an Act without the Mandate, paraphrasing Chief Justice Roberts, *see* 130 S. Ct. at 3162. Thus, the Mandate should be severed from the Act, instead of overturning the whole great mass of the Act, *see Free Enter. Fund* at 3161-62.

II. "THE HEART OF THE ACT"

But does cutting the Mandate out, cut the heart out of the Act? —The Government (or anyone else) misstates if it claims that the Mandate is the heart of the Act, or is part of that heart. If the Act in fact has a "heart", the guaranteed-issue and no-preexisting-condition provisions (*see* § 1201 of the Act, and the relevant

codifications at 42 U.S.C. § 300gg–1 and 42 U.S.C. § 300gg–3) are the best candidates to be the heart: preserving private enterprise in American health care (as opposed to "socialized medicine"), but obliging private providers to make insurance available to the whole public. The Mandate is just a *funding mechanism* for that heart, and is not itself the "heart of the Act". (*See* the Eleventh Circuit opinion: "In light of the stand-alone nature of hundreds of the Act's provisions and their manifest lack of connection to the individual mandate, the plaintiffs have not met the heavy burden needed to rebut the presumption of severability", 648 F.3d at 1323 (Dubina and Hull, JJ.); "It is also telling that none of the insurance reforms, including even guaranteed issue and coverage of preexisting conditions, contain any cross-reference to the individual mandate or make their implementation dependent on the mandate's continued existence", *id.* at 1324 (Dubina and Hull, JJ.).) Any number of devices (higher taxes ending certain tax breaks on the top 1% of taxpayers; cost controls on charges by insurers; etc.), not just the Mandate, can fund the guaranteed issue and no-preexisting-condition provisions. Some of those devices may be external to the Act as written, e.g., a future hypothetical end to particular tax breaks for the very rich; and some may be internal to the Act, already present. *See, e.g.*, "Congress included other provisions in the Act, apart from and independent of the individual mandate, that also serve to reduce the number of the uninsured by encouraging or facilitating persons (including the healthy) to purchase insurance coverage", 648 F.3d at 1325 (Dubina and Hull, JJ.).

Or, to use an automotive simile about the Act: the guaranteed-issue and no-preexisting-condition provisions are something like the engine, the heart, of a car (the Act), whereas the Mandate is just a filling station for the "gas" (money) that the "engine" needs. But there are many other "filling stations" (funding sources). Who among us would destroy his car, or junk its engine, just because one filling station is closed? *Cf.* Farr Br. at 33,

> As we have discussed, if confronted with the severability question by itself, Congress in most cases will prefer to have an imperfect solution rather than no solution at all, and that seems particularly likely here, where the result of having no solution would be the denial of coverage to many people that Congress unquestionably wanted to assist.

id., and at 25,

> Although the guaranteed issue and community rating provisions . . . . likely will operate less ideally without the minimum coverage provision, it does not follow that Congress . . . . would prefer to return to the prior health insurance system, where large numbers of people, in need of insurance but with pre-existing illnesses or conditions, were excluded from the market.

Id.

There is also the issue of "essentiality", i.e., is the Mandate "essential" to the guaranteed-issue and no-preexisting-condition provisions? As put well by Farr,

> Petitioners (now joined by the United States) also rely on the Act's express findings about the centrality of the minimum coverage provision to health care reform, *see* 42 U.S.C.A. §§ 18091(a)(1), (2)(A)-(J), but those findings are of limited value on the question of severability. That is because the findings, by their terms, are aimed at a very

> different question: whether the minimum coverage provision is so "essential" to other provisions of the Act (as well as to other laws) that it should be regarded as part of a broader regulatory scheme for purposes of Commerce Clause analysis.

Farr Br. at 6. As for another side of "essential", the Brief of *Amicus Curiae* the Washington and Lee University School of Law Black Lung Clinic in Support of Amicus Curiae Counsel on Severability ("Black Lung Brief") (undated, but filed Feb. 15, 2012) admits "[t]he removal of the mandate may upset the supply-demand structure, which otherwise would keep premiums low", but then notes,

> The severity of this effect is speculative, however, and the Government misplaces its reliance on it. *See* Resp't's Pet. 32. First, data are not available to determine the stress imposed on insurers with the removal of the mandate. . . . On a federal level . . . . multistate exchanges will increase the risk pool, thereby alleviating the impact of similar market reforms. Any analogy drawn between a state's experience and the projected impact federally is inapposite. Second[,] the Secretary of Health and Human Services [is able] to assess community ratings state-by-state, with the ability to make adjustments. Both the states and the Secretary can adapt accordingly if the mandate's removal upsets the ratings system.

Black Lung Br. at 15-16. And as for a somewhat similar concern brought up by Petitioners, the purported necessity of "deficit neutrality" in the Act, *see, e.g.*, Br. for Private Pet'rs on Severability in 11-393 & 11-400, Jan. 6, 2012 ("Private Brief") at 6, the Black Lung Brief notes, among other things, "Thus, absent the mandate, the Act still reduces the deficit by $126 billion. . . . The loss of $17 billion obtained from penalty payments, in this era of government spending, cannot render the Act contrary to Congress's purpose of reducing the deficit." Black Lung Br. at 17

(internal citation omitted). All in all: whether the Government or Respondents, whoever argues that the Act is doomed, or even partially doomed, if the Mandate fails, is not arguing accurately.

III. "WHY WOULD BOTH PETITIONERS AND RESPONDENTS ARGUE FOR LACK OF SEVERABILITY IF IT ISN'T TRUE?"

To avoid scandal, and maintain civility and a belief in others' good faith: one shall not accuse the Government of "bad faith" or intentional "strategic manipulation" when it falsely claims that guaranteed-issue and no-preexisting-condition must go if the Mandate goes. One assumes the Government really believes this, although some might argue that the "Mandate is at the heart of the Act" argument is really an attempt to "shame" or "guilt" people into not overturning the Mandate, on the (false) pretext that the Mandate is a necessity for keeping guaranteed-issue and no-preexisting-condition provisions operative. *See* Ed Morrissey, *Video: Lack of severability in ObamaCare a "colossal mistake"*, Hot Air, Feb. 2, 2011, 2:15 p.m., at http://hotair.com/archives/2011/02/02/video-lack-of-severability-in-obamacare-a-colossal-mistake/,

> *Or was it* [a colossal mistake]? Larry O'Donnell blames Democrats for rushing the ObamaCare bill to a vote and forgetting to insert the severability clause, but [law professor] Jonathan Turley isn't buying the post-Florida verdict spin from Capitol Hill. He suggests that Democrats deliberately left out the severability clause as a triple-dog dare to judges. *Take out the mandate,* the strategy goes, *and lose all of the goodies in the rest of the bill!*

Video: Lack of severability in ObamaCare a "colossal mistake", *supra*; and *Florida ex rel. McCollum v. HHS*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010): "[A] strong argument could be (and has been) made that the staffers who drafted [a government] report were merely engaging in last minute 'strategic manipulation' to secure results they were unable to achieve through the Act itself." *Id.* at 1139 (Vinson, J.). And *cf.* Philip Klein, *Obama solicitor general: If you don't like mandate, earn less money*, Wash. Examiner, June 2, 2011, 12:52 p.m., at http://washingtonexaminer.com/blogs/beltway-confidential/2011/06/obama-solicitor-general-if-you-dont-mandate-earn-less-money, "President Obama's solicitor general [Neal Katyal], defending the national health care law on Wednesday, told a federal appeals court that Americans who didn't like the individual mandate could always avoid it by choosing to earn less money." *Id.* The Government has very interesting ideas sometimes, though not always credible or decent to the People, *see id.* In any case, no one should be fooled into believing the Mandate is anything but fully severable: the Eleventh Circuit saw through that illusion of inseverability—just as it saw through the illusion that the Mandate is legal or constitutional—, and Amicus trusts the Court will also see through it as well.

This situation, in which both the Government and its opponents in the Mandate/Act cases have asserted without malice an inaccuracy, i.e., that there is no, or limited, severability of the Mandate, reminds Amicus of what he read years ago (without citation at present; Amicus apologizes) about a certain dynamic in the "Cold War". That is, some of the Soviet Union's politicians and generals made

falsely inflated claims of Soviet military strength, so that enemies would feel deterred from attacking; and some American politicians and generals also made falsely inflated claims of Soviet military strength, or accepted the Soviets' false claims despite the disprovability of those claims, so that the interests of those American politicians and generals, e.g., inflating the military establishment, could be served. (*See* 34th President, and former General of the Army, Dwight Eisenhower, in his Farewell Address (Jan. 17, 1961), *available at* http:// homeofheroes.com/presidents/speeches/eisenhower_farewell.html (courtesy of HomeOfHeroes.com):

> In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist. We must never let the weight of this combination endanger our liberties or democratic processes.

Id. Cf. also the Orion Pictures fictional film *The Package* (1989), starring Gene Hackman and directed by Andrew Davis, about an assassination plot by both American and Soviet extremist elements of their respective militaries, who want to frustrate peace efforts and continue the Cold War, *see id.*) In the present scenario, one side, which does not seem to like the Act, benefits from claiming the Mandate is inseverable, because that claim makes it easier to destroy the Act. The other side presumably does not like the idea of being found wrong by a court, or having the Act funded less than they would like, so they too claim the Mandate is inseverable, at least from the guaranteed-issue and no-preexisting-condition provisions. So, even

though the two sides oppose each other, each finds it useful to agree on at least one (wrong) thing, the inseverability of the Mandate. While each side may believe this idea in good faith, reason tells us otherwise, i.e., that the Mandate is quite severable.

Speaking frankly: many opponents of the Mandate and Act are Republicans, interestingly enough, while many defenders of the Mandate and Act are Democrats, interestingly enough. However, Amicus thinks the Court should drop the Mandate while keeping the rest of the Act, which does not make him a stereotypical "Republican" or stereotypical "Democrat" in this matter. Amicus is trying to assert what is legally and ethically right, not trying to curry favor with any political party. *Cf.* Laurence Tribe, *On Health Care, Justice Will Prevail*, N.Y. Times, Feb. 7, 2011, *available at* http://www.nytimes.com/2011/02/08/opinion/08tribe.html, the concluding words of his article, calling the legal challenges to the Mandate "a political objection in legal garb." *Id.* While Tribe's diatribe is stereotyping, stigmatizing, and largely inaccurate, there is a grain of truth to it, in that *both* sides in the Mandate/Act fray may be subconsciously performing "gamesmanship" or "rationalizing", *cf.* the words of Judge Vinson *supra* re "'strategic manipulation'", 716 F. Supp. 2d at 1139.

On that note, Amicus urges the Court to look beyond appearances to realities here. *Cf. Hodel v. Va. Surface Mining & Reclamation Ass'n,* 452 U. S. 264 (1981), "Moreover, simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. Congress'

findings . . . are reviewable by the courts," *id.* at 311 (Rehnquist, J., concurring in the judgment): a quote which nicely expresses courts' right to, or duty of, skepticism. Simply because the Government and various plaintiffs in Mandate and Act suits may have denied severability, that does not mean that severability is absent. Rather, it is very much present, so that the message of *Free Enterprise Fund*, 130 S. Ct. at 3161-62, making severability essentially the "default setting" rather than a rarity or oddity, *see id.*, should be followed here.

IV. UNCONSCIONABLE CONTRACT, BANNED BARGAIN: CUTTING OFF THE MANDATE'S ILLEGTIMATE COERCED STREAM OF INCOME TO INSURERS IS NOT A LEGITIMATE REASON AGAINST SEVERABILITY

The past few pages have reviewed general severability theory, plus psychology and politics, one may say. Now to one specific gap in commentary supporting Amicus Farr's position. —In that brief, *see id.*, the word "bargain" does not occur. However, the State Brief (Brief for State Petitioners on Severability in 11-393 & 11-400, Jan. 6, 2012) and the Private Brief speak frequently about violation of a "bargain" if the Mandate is overturned. *See, e.g.*, "A proper application of the correct severability analysis reveals that the individual mandate . . . was central to 'the original legislative bargain' that produced the ACA [the Act], [*Alaska Airlines, Inc. v.*] *Brock*, 480 U.S. [678,] 685 [(1987)]", State Br. at 35;

> Where legislation is born of compromise, severing an invalid provision threatens improperly to strip one side of the deal of its benefits in the "original legislative bargain." *Alaska Airlines*, 480 U.S. at 685. *See, e.g.*,

> *Carter* [*v. Carter Coal Co.*], 298 U.S. [238,] 316 [(1936)], (refusing to sever provisions that are "conditions, considerations, or compensations" for one another)[.]

Private Br. at 35; and "Without the mandate's subsidy, these taxes and cuts would saddle insurance companies . . . with far greater net burdens than did the original legislative bargain." *Id.* at 53.

That being said, are the various Petitioners right? Would insurers be "cheated" somehow by the death of the Mandate? Or not? Before discussing that, one will note that at least the Black Lung Brief does discuss the idea of a legislative bargain, *see id.* at 20-24. However, that part of the Black Lung Brief does not really discuss, *see id.*, the alleged deleterious effect on the insurance companies from losing the money brought by the Mandate, and thus allegedly getting the short end of the "bargain". So Amicus is bringing up that issue, lest no one supporting Farr discuss it.

In answer to the question of whether insurers would be "get the short end of the bargain" if the Mandate were overturned, a fictional illustration may come in handy. One imagines a cartoon with two boys in it ("little Bobby, speaking to little Johnny"), with the caption, "In return for all those catseye marbles, you can have my toy fire truck, my baseball cards, and I'll throw in my little sister too."

Among other problems with that "bargain", Little Sister may not have *consented* to be tradable property in return for the desired catseyes. This is analogous to the Mandate/Act situation, with all its unwilling consumers of undesired insurance. People, and their rights and decisions, do not tend to be State or corporate property, at least in a land of liberty. Big Brother, in the "marbles" scenario *supra*, and "Big

Brother" in a more general sense in our real world, must be watched ceaselessly to prevent his (their, its) propensity to dominate others, and grab what is not theirs to grab, sell what is not theirs to sell, trade what is not theirs to trade. *Cf.* George Orwell, *Animal Farm* (1945), ch. 10, in which the horse Boxer is betrayed by the leaders of Animal Farm and taken to the knacker's for the ultimate exploitation after a lifetime of being exploited, and being a faithful citizen of the farm, *see id.*

Amicus does not like the idea of being traded like an inanimate thing without choices, *see, e.g.*, Martin Buber (1878-1965), on the idea of an "I-Thou" relationship, with reciprocity and mutual respect being better than an inhuman "I-It" subject-object relationship; and many Americans may not like being "traded" either, *cf., e.g.*, the Dec. 8-11, 2011 AP-GfK poll at http://ap-gfkpoll.com/main/wp-content/uploads/2011/12/AP-GfK-Poll-December-2011-Topline_Obama.pdf, in which an overwhelming 84% of respondents said the Government should not have the power to enact a Mandate and to fine noncompliants, *see* AP-GfK Poll, *supra*, at 42.

Insures have tried hard to have the power to "trade" around Americans' rights without Americans' consent, *see, e.g.*, Jim Spencer, *Reform fight leaves insurers in a delicate position*, Minnesota Star Tribune, updated Feb. 12, 2011, 9:52 p.m., at http://www.startribune.com/business/115950604.html: "Wendell Potter, an ex-Cigna insurance executive . . . , says his former colleagues spent millions of dollars lobbying for the individual mandate to replace a public option . . . because it gave private companies a giant new revenue stream that was in some cases subsidized by taxpayers", *id.* The fact that the Government has now bowed to the will of insurers,

see id., and passed the Mandate, has the unpleasant scent of "agency capture" or "crony capitalism". *See, e.g.*, *Caperton v. A. T. Massey Coal Co.*, 556 U. S. ____, 129 S. Ct. 2252 (2009), on the importance of avoiding the reality, or appearance, of government partiality or corruption. And *see, e.g.*, this anecdote about famously trust-busting President Theodore Roosevelt, from the Public Broadcasting Service ("PBS") series *The American Experience*, webpage *The Presidents: The Film and More—Theodore Roosevelt, 26th President: Historian John Milton Cooper on Trust Busting*, at http://www.pbs.org/wgbh/amex/presidents/26_t_roosevelt/filmmore/ra_jcootrust.html, about a conflict between Roosevelt and corporate archmogul J.P. Morgan:

> [W]hen the first big anti-trust suit under Roosevelt was brought, which was against Morgan's railroad combine, Morgan said, "Send your man to see my man and tell him to fix it up." Roosevelt's answer to that was, "That can not be done. Nobody treats as a sovereign equal to — of the President. No company can presume to be — no private interest can presume to be equal to the government. The government must be superior to all of these."

Id.; and President Grover Cleveland, in his fourth State of the Union Address (Dec. 3, 1888), during his first term as President, an address *available at* http://www.usa-presidents.info/union/cleveland-4.html (courtesy of USA-Presidents.Info):

> We discover that the fortunes realized by our manufacturers are no longer solely the reward of sturdy industry and enlightened foresight, but that they result from the discriminating favor of the Government and are largely based on undue exactions from the masses of our people. . . .

> . . . Corporations, which should be carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters.
>
> Communism is a hateful thing and a menace to peace and organized government; but the communism of combined wealth and capital, the outgrowth of overweening cupidity and selfishness, which insidiously undermines the justice and integrity of free institutions, is not less dangerous than the communism of oppressed poverty and toil, which, exasperated by injustice and discontent, attacks with wild disorder the citadel of rule.

Id. On that note, *see also*

> Displeased as insurance companies may be with severability, the inquiry focuses on the intent of Congress —not the insurance companies' preferences. In light of the impetus for systemic reform, the lllth Congress favored consumers over the insurer. . . . The Court need not consider the insurance companies' demands, only Congress's purpose. And the Act fulfills that purpose even in the individual mandate's absence.

Black Lung Br. at 14 (several pages before that Brief's discussion of "bargains").

And *cf. Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Circuit Nov. 8, 2011), *pet. for cert. pending* (U.S. Nov. 30, 2011) (No. 11-679): "We cannot rewrite the Affordable Care Act to accommodate an alleged congressional intent to follow the apparent wishes of the health insurance industry." *Id.* at 46 (Kavanaugh, J., dissenting as to jurisdiction).[6]

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[6] One piece of popular culture is apposite to mention here, since it relates specifically to health insurance. The 1998 Warren Beatty/20th Century Fox film *Bulworth*—which has received curiously little mention during the last several years' controversy over the Act—is about a fictional U.S. Senator (Jay Billington Bulworth, played by Beatty, who was also the film's director) who becomes a sort of "freespeaker of the people", breaking into rapping spontaneously on the re-election campaign trail as he fights against various putative oppressors of the American people, including health insurers. Among Bulworth's rhymes in the film are, "Health care, managed care, HMOs/Ain't gonna work, no sir, not those/'Cause the thing that's the same in every one of these/Is these mother—— [expletive deleted]s there, the insurance companies!" *Id.* However, unlike Senator Bulworth (whose foul mouth incidentally recalls the similar words of Joe Biden about the Act, *infra* at 30), Amicus

Moreover, how much are insurers really going to lose if the Mandate goes, especially in the light of how much, or how little, supposed "freeloading" or "free riding" by uninsured people actually goes on? *See* Private Br. at 16-17,

> In fact, the mandate will have virtually no impact on uncompensated care. As the Eleventh Circuit explained, the data on which Congress relied for its $43 billion estimate of uncompensated care show that the vast majority of this sum is attributable to people *not* affected by the mandate. . . . Thus, the amount of uncompensated care even *potentially* attributable to individuals affected by the mandate is less than *$8 billion*, 0.33% of the $2.4 trillion healthcare market. . . .
>
> Moreover, other data show that even this $8 billion figure is substantially overstated. As a threshold matter, many uninsured individuals obtain *no* healthcare in a given year, and most others actually pay in full. The uninsured on average obtain *no* uncompensated care from non-emergency providers and actually pay *more* for those services than the insured do.

Private Br. at 16-17 (citations omitted). The exact figures, *see id.*, may be debated, but in any case, one doubts that a full "$43 billion" is assignable to people affected by the Mandate. So the insurers may not lose hugely if the Mandate is overturned.

Finally, there may be compensatory, profit-making factors for the loss of the Mandate. *See* once again, "Congress included other provisions in the Act, apart from and independent of the individual mandate, that also serve to reduce the number of the uninsured by encouraging or facilitating persons (including the healthy) to

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believes insurance companies may have a positive role to play in improving American health care, as long as they do not use the State to force Americans to buy their products. —At the end of the film, Bulworth is assassinated by an insurance company representative, shot to death like a modern-day Kennedy or King. *See id.* The film is fiction, but it is true that those who seek not to be oppressed by insurance companies, or those companies' enablers in government, have much resistance to overcome, even if not the resistance of actual bullets.

purchase insurance coverage", 648 F.3d at 1325 (Dubina and Hull, JJ.). Also, *see* Brett Norman, *Backup plans if individual mandate is struck down*, Politico, Mar. 11, 2012, 10:07 p.m., at http://www.politico.com/news/stories/0312/73855.html and http://www.politico.com/news/stories/0312/73855_Page2.html,

> If the . . . Court strikes down [the M]andate and leaves the rest of the law in place — what happens next?
>
> The backup plan could be automatic enrollment in your employer's health insurance, a lot like the way you get signed up for the 401(k) plan.
>
> . . . .
>
> Gail Wilensky, who ran Medicare and Medicaid under President George H.W. Bush, said she thinks a combination of carrot-and-stick policies could do a better job of moving free riders into the insurance market than the mandate — "a terrible piece of policy," she said.
>
> Auto-enrollment could do a better job, Wilensky said, as could another option: strict late-enrollment penalties, in which people pay higher premiums if they don't enroll in coverage as soon as they're eligible. That's an approach similar to those that have shown results in Medicare Part B and Part D.

Backup plans if individual mandate is struck down, *supra*. Finally, *see Exclusive - Kathleen Sebelius Extended Interview Pt. 2*, The Daily Show with Jon Stewart, Jan. 23, 2012, *available at* http://www.thedailyshow.com/watch/mon-january-23-2012/exclusive---kathleen-sebelius-extended-interview-pt--2, during which Secretary Sebelius, after host Jon Stewart asks her what happens if the Court overturns the Mandate but not the rest of the Act, answers,

> I think we keep, we keep going. We find ways to encourage people to become enrolled and become insured, and that's really...the Mandate is the fastest way to do it, and it just says basically everybody's got some responsibility, but there are other ways to encourage people to come in.

Exclusive - Kathleen Sebelius Extended Interview Pt. 2, at 7:13-7:28 of the video clip. While the Secretary is wrong that people have a "responsibility", *id.*, to buy health insurance (and the Mandate also wrongfully shames people for not buying insurance), she is correct that there are many ways to get people to buy insurance (and funnel money to insurance companies), *see id.*, so that overturning the Mandate will not in fact give insurers "the short end of the stick". Not to mention that every forced contract without any consent, such as a coerced contract to buy health insurance, strongly tends to be unconscionable (or under duress, or similar terms) from the beginning, as any first-year contracts class in law school should tell us. It was never legitimate to mandate people to buy insurance; and if insurance companies might happen to lose some money (not too much, as we have seen) if the Mandate is overturned, it would not be legitimate or conscionable to overturn the Act or the "heart" of the Act for that reason. —And this is especially so since people would suffer from that overturning of useful, even lifesaving, health care measures.

V. DELETERIOUS HEALTH EFFECTS OF OVERTURNING THE ACT

While it is true that "Congress's compassion does not allow it to exceed the limits of its constitutional powers", *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 572 n.3 (6th Cir., June 29, 2011), *pet. for cert. pending* (U.S. July 26, 2011) (No. 11-117) (Graham, J., concurring in part, and dissenting from the judgment), that does not mean that the "public interest" cannot be considered, *see* Farr Br. at, e.g., 4, "Th[e] traditional exercise of equitable powers requires the Court, not just to weigh the effect of possible remedies on the parties before it, but also [to] take account of the

public interest." *Id.* (internal quotation marks, and citation, omitted) So, what might be some of the concrete effects of overturning the Act, or even a large part of the Act, upon which Americans have already begun to plan and rely for health care? (*See, e.g.*, "In 2010, for example, provisions in the ACA went into effect for the Prevention and Public Health Fund. The Department of Health and Human Services then began funding a variety of programs to help increase immunizations and to prevent tobacco use, obesity, heart disease, stroke, and cancer." Br. of the Mo. Att'y Gen. as *Amicus Curiae* in Supp. of Resp'ts and Severability at 8.)

There is a great deal of suffering in this country due to health care deficiency, including that of millions of persons who may suffer without health insurance, *see, e.g.*, Phil Galewitz and Andrew Villegas, *Number of uninsured Americans hits record high: Latest Census report shows 50.7 million people don't have health insurance*, MSNBC.com, updated Sept. 16, 2010, 3:22:33 p.m., at http://www.msnbc.msn.com/id/39215770/ns/health-health_care/t/number-uninsured-americans-hits-record-high/, but for the "guaranteed issue" provision of the Act. *See* Act "SEC. 1201. AMENDMENT TO THE PUBLIC HEALTH SERVICE ACT", amending "Part A of title XXVII of the Public Health Service Act (42 U.S.C. 300gg et seq.), as amended by section 1001", § 1201 of the HCA, by adding, among other things, "SEC. 2702 [42 U.S.C. 300gg–1]. GUARANTEED AVAILABILITY OF COVERAGE", and "SEC. 2704 [42 U.S.C. 300gg–3]. PROHIBITION OF PREEXISTING CONDITION EXCLUSIONS OR OTHER DISCRIMINATION BASED ON HEALTH STATUS", § 1201 of the Act, allowing Americans to procure health insurance regardless of

preexisting health conditions, *see id.* Justice Cardozo eloquently notes in *Helvering v. Davis*, 301 U.S. 619 (1937), about unemployment, that

> Spreading from State to State, unemployment is an ill not particular, but general, which may be checked, if Congress so determines, by the resources of the Nation. . . . Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poor house, as well as from the haunting fear that such a lot awaits them when journey's end is near.

Helvering, *supra*, at 641 (Cardozo, J.). If one replaces "unemployment" with "health care" in the excerpt above, one sees the imperative of Congressional action like the Act to save Americans from illness and the often prohibitive costs of health care which could lead to the "poor house", *Helvering*, 301 U.S. at 641 (Cardozo, J.).

Also cf. "A decent provision for the poor is the true test of civilization." (Samuel Johnson (1709-1784)). Unwise or unnecessary actions by the government, including the judiciary, in needlessly destroying or mutilating the Act which has power to help so many sick Americans, could result in mass bodily suffering (or death) and impoverishment of ill or injured Americans. *See Amos* 6:12, "[Y]ou have turned justice into poison": a situation devoutly to be avoided.

Cancer, AIDS, blindness, severe impairment of mobility, Alzheimer's disease, and numerous other illnesses or disabilities, are a real-life "parade of horribles" that afflicts countless Americans. (*See, e.g.*, this obituary by Nedra Pickler, Associated Press, *Elizabeth Edwards, advocate for changes in the health care system*, The Christian Science Monitor, Dec. 7, 2010, at http://www.csmonitor.com/USA/Latest-

News-Wires/2010/1207/Elizabeth-Edwards-advocate-for-changes-in-the-health-care-system, in pertinent part: "The family had issued a statement Monday that said doctors have told Edwards that further treatment for her cancer would be unproductive." *Id.*) The terrible mute eloquence of those medical conditions, and the pains, injuries or deaths they occasion, have hallowed the battlefield of the victims' struggle far beyond what Amicus has the power to say here. Whether senior citizens "when journey's end is near", *Helvering*, *supra*, at 641 (Cardozo, J.), or little children who can be saved from illness or dying, so that their fathers and mothers can see them live to laugh and play in "infinite jest . . . most excellent fancy" (as said of Yorick during the meditation on his skull in Shakespeare's *Hamlet*, Act V, scene i), they all deserve what consideration and respect our advanced society can give.

See the fairly recent decision *Brown v. Plata*, 563 U. S. ____, 131 S. Ct. 1910 (May 23, 2011), upholding a district court decision releasing roughly 40,000 Californian prisoners from prison due to violation of their Eighth Amendment rights, and mentioning "[n]eedless suffering and death", *Brown v. Plata*, *supra*, 131 S. Ct. at 1923, "the essence of human dignity inherent in all persons", *id.* at 1928, and that "depriv[ation] . . . of . . . adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society", *id.* (Kennedy, J.); "Of all the forms of inequality, injustice in health care is the most shocking and inhumane." (Rev. Dr. Martin Luther King, Jr., speaking to the Medical Committee for Human Rights, 1966); and for a transatlantic comparison, Alexandra Topping,

Amy Winehouse funeral: parents say goodbye to their 'angel', The Guardian (London), July 26, 2011, 7:07 p.m., at http://www.guardian.co.uk/music/2011/jul/26/amy-winehouse-funeral-parents,

> I want[ ] an Amy Winehouse Foundation . . . to help those struggling with substance abuse.
>
> In this country, if you cannot afford a private rehabilitation clinic, there is a two-year waiting list for help. With the help of Keith Vaz MP [Member of Parliament], we are trying to change that.

Mitch Winehouse (father of Amy Winehouse, d. July 23, 2011) at his daughter's funeral service, *id.*

See also NBC Universal, *Man robbed bank for $1 to cover jail health care*, Colorado NBC affiliate 9News.com, June 20, 2011, 9:47 a.m., at http://www.9news.com/news/sidetracks/204061/337/Man-robbed-bank-for-1-to-cover-jail-health-care, in pertinent part,

> Desperation apparently drove a North Carolina man to commit a bank robbery last week. What made him sit down and wait for police to arrive to arrest him, is another story.
>
> "I'm sort of a logical person and that was my logic, what I came up with," James Verone said. . . .
>
> "The note said this is a bank robbery. [P]lease only give me one dollar," Verone said.
>
> . . . .
>
> "I wanted to make it known that this wasn't for monetary reasons, but for medical reasons," he said.
>
> That's right[;] James Verone says he has no medical insurance. He has a growth of some sort on his chest, two ruptured disks and a problem with his left foot. He is 59 years old and with no job and a depleted bank account. He thought jail was the best place he could go for medical care and a roof over his head. Verone is hoping for a three-year sentence.

Id. If *Brown v. Plata*, *supra*, can make health care better for prisoners, *see id.*, perhaps the court system can preserve efforts, like the Act, to make health care better for those of us outside of prison, so that fewer people commit crimes to get better health care…in prison, *see Man robbed bank for $1*, *supra.* Finally, *see* the recent story, *Ex-Cop Admits To Robbing Bank To Get Health Benefits In Federal Prison*, CBS Atlanta, Feb. 24, 2012, 12:54 p.m., at http://atlanta.cbslocal.com/2012/02/24/ex-cop-admits-to-robbing-bank-to-get-health-benefits-in-federal-prison/, "Edward Pascucci told [a district court judge] that he was facing 'severe health problems. . . . I didn't want to be homeless . . . . I should not have manipulated the justice system, but I couldn't think of any other way to get help.'" *Id.* When even veterans of law enforcement are willing to break the law to get health care, *see id.*, it seems that the health care system must somehow be repaired. And if it is being repaired, e.g., by the Act, perhaps the courts should not "fix" what is not broken, i.e., should not overturn any part of the Act, besides the Mandate.[7]

VI. THE NEAR-DESPERATION OF THE CONGRESS AND ADMINISTRATION TO PASS THE ACT WEAKENS ARGUMENTS THAT THEY WOULD TOLERATE THE DEATH OF THE ACT

In fact, the Act is widely recognized as the signature initiative of the Obama Administration, *see, e.g.*, AHFF Geoff, *Obama Approval Bounce Over: Gallup and Rasmussen Show Declines*, CentristNet, Mar. 27th, 2010, 2:16 p.m., at http://

[7] Re the Mandate, *see* once more, "Congress's compassion does not allow it to exceed the limits of its constitutional powers", 651 F.3d at 572 n.3 (Graham, J., concurring and dissenting).

centristnetblog.com/daily/obama-approval-bounce-over-gallup-and-rasmussen-show-declines/: "After the historic passage of President Barack Obama's signature initiative, Obamacare . . . ." *Id.* It might also be considered the signature initiative of the Democratic Congress in power at the time of the Act's passage, especially seeing the strong language of figures like ex-Speaker of the United States House of Representatives, Nancy Pelosi, and Joe Biden (who is President of the U.S. Senate, not just Vice President of the United States), concerning the Act. E.g., Pelosi saying, "Are you serious? Are you serious?" when asked where the constitutional authority to let Congress create the Mandate lies, *see, e.g.*, *Nancy Pelosi is asked where te* [sic] *constitution states that Congress has the power to provide universal health*, YouTube, *excerpting* a CNSNews.com audio clip, and uploaded by NimblePig on Dec. 2, 2009, at http://www.youtube.com/watch?v=q-JByUpfmjQ; Pelosi's fascinatingly Orwellian pronunciamento about the Act, "But we have to pass the bill so that you can find out what is in it", as recorded in, e.g., David Freddoso's article *Pelosi on health care: 'We have to pass the bill so you can find out what is in it...'*, Wash. Examiner, Mar. 9, 2010, 5:00 a.m., at http://washingtonexaminer.com/blogs/beltway-confidential/pelosi-health-care-039we-have-pass-bill-so-you-can-find-out-what-it039; and Biden's saying to President Obama on March 23, 2010, on the day of the signing of the PPACA bill, "This is a big ——— [expletive deleted] deal!" (as captured by microphones, *see, e.g.*, *Joe Biden to Obama: "This is a Big* [ ]*ing deal"* (brackets not in original), YouTube, uploaded by FacebookDay on Mar. 23, 2010, at http://www.youtube.com/watch?v=HHKq9tt50O8. Those eminent persons certainly

seemed very eager, almost desperate, to pass the Act "any which way or how", so Amicus offers their "off-the-cuff comments" for consideration. "Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived[.]" *United States v. Fisher*, 2 Cranch (6 U.S.) 358, 386 (1805) (Marshall, C.J.).

For some similar opinions by legislators, *see* Michael Kinzie, *Former Navy SEAL Now Focusing on Domestic Enemies*, EzineArticles.com, Oct. 27, 2010, at http://ezinearticles.com/?Former-Navy-SEAL-Now-Focusing-on-Domestic-Enemies&id=5279258: "Congressman Anthony Weiner says on the question of whether there is a constitutional mandate for a government health care system: 'Perhaps not, but who cares?'" *Id.*; Kerry Picket, *Conyers fabricates constitutional law citing 'good and welfare' clause*, Wash. Times, "Water Cooler" blog, Mar. 23, 2010, at http://www.washingtontimes.com/weblogs/watercooler/2010/mar/23/conyers-makes-constitutional-law-citing-good-and-w/, "House Judiciary Committee Chairman Rep. John Conyers, a Michigan Democrat, recently told a CNS News reporter that the 'good and welfare clause' gives Congress the authority to force individuals to buy health insurance . . . . However, there is no 'good and welfare clause' in the U.S. Constitution[.]" *Conyers fabricates constitutional law*, *supra* (Perhaps Congressman Conyers was thinking of the "Good & Plenty" pink and white licorice candy brand?); and Edwin Mora, *Sen. Lautenberg Declines To Say Where Congress Gets Constitutional Authority To Mandate Health Insurance*, CNSNews.com, Dec. 27, 2009, at http://cnsnews.com/news/article/59037, relating, "At the U.S. Capitol on

Tuesday, Dec. 22, CNSNews.com asked Senator Lautenberg, 'Specifically where in the Constitution does Congress get the authority to mandate that individuals have health insurance?' Lautenberg said, 'I am not going to answer that,' and then walked away." *Sen. Lautenberg Declines To Say*, *supra*.

So, in a bizarre way (or serendipitously, as the case may be), the outré statements made by various politicians quoted above, *cris de coeur* or "excited utterances" as it were, re the Mandate or Act may actually help preserve the viability of the Act. If those public officers were so high-spirited to pass the Act in Congress that they were willing to cut corners or go a little off regular tracks in doing so or commenting about the Act, then it is apparent that they wanted the Act to pass, and survive, no matter what. (*See* Black Lung Br., "Between a Democratic president, whose platform centered on overhaul, and Democratic supermajorities [sic?] in both Houses, health-care reform was happening irrespective of the individual mandate", *id.* at 9, and, "The idea that Congress would rather throw away the entire law because of a single unconstitutional provision rather than allow independent provisions to survive . . . strains logic", *id.* at 30.) Of course, their enthusiasm for the Act does not make an illegal provision like the Mandate any more legal than it currently is; but Amicus is not asking to make the Mandate legal. (Actually, Amicus sees the Mandate, and the government defense of it, as being driven partially by fear, and by desperation to pass the Act at any cost. However, politicians' well-meaning fear of not being able to reform health care, does not *ipso facto* justify every possible "reform", e.g., the Mandate.)

VII. CONSTITUTIONAL AND BALANCE-PRESERVING FACTORS WEIGHING IN FAVOR OF FULL SEVERABILITY

And it may be fair for the Court to offer some deference to the Administration's signature initiative, and that of the Congress that passed it. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952): "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635-36 (Jackson, J., concurring in the judgment). Not enough deference, surely, to allow through the sheer *dirigiste* horror of the Mandate, under which people are made to buy health insurance just because (among other reasons) they *may* use free public health care in the future, so they are considered to be "free riders" or "freeloaders" if they don't buy health insurance now, even if they end up *never* using free public health care.[8] This rationale is frighteningly reminiscent of the 1956 Philip K. Dick short story *The Minority Report* (later made into a 2002 Amblin Entertainment and Cruise/Wagner film directed by Steven Spielberg, *Minority Report*), in which, *see id.*, people are arrested before they commit a crime just because the State predicts they will commit that crime. (*See* "The government's position amounts to an argument that the mere fact of an individual's existence substantially affects interstate commerce, and therefore Congress may regulate

[8] *Cf.* "Let my people go!" (*Exodus* 9:1), "Shallach 'et-`ammi" in transliteration from the Hebrew (and Amicus would have put the Hebrew letters here but cannot get Century Schoolbook font to support them), the feel and import of those words lasting down to the present day. (While the Mandate is, of course, not as bad as Hebrew slavery in Egypt, the point is that in a free country like America, any type of state oppression is unacceptable.)

them [sic] at every point of their life." 648 F.3d at 1295 (Dubina and Hull, JJ.). This quote nicely brings out the Orwellian bouquet of the Mandate.)

But the precedent of freedom is at the core of our laws and customs: *see, e.g.*, the poem by a Poet Laureate, *You Ask Me, Why* (c. 1833) by Alfred, Lord Tennyson, in pertinent part: "A land of settled government,/A land of just and old renown,/ Where Freedom slowly broadens down/From precedent to precedent", *id.*; "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (Kennedy, J.). So the Mandate should be mandated for destruction, lest freedom be destroyed.[9]

But if not deference to the Mandate itself, still, some deference to the Act as a whole: that Act may, hypothetically, be unwise, overly costly, or not very effective, but as long as it is not unconstitutional or otherwise illegal, courts should not bother to strike it all down, *see, e.g.*, the ideas of James Bradley Thayer in *The*

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[9] If, on the other hand, not only the Act but also the Mandate is upheld, then there will be truth to what Ronald Reagan said on his 1961 LP recording (for the American Medical Association) *Ronald Reagan Speaks Out Against Socialized Medicine*, "We are going to spend our sunset years telling our children and our children's children, what it once was like in America when men were free." *Id.* President Reagan may have been criticizing Medicare, a now-popular program*, see id.*; but with the Mandate, we have coerced "medicine" which combines some of the worst features of capitalism and of communism, so that the Mandate is a form of tyrannical "health care" of which one suspects Reagan would be very wary. And not only Reagan, but many others, e.g., the alarmingly-named Dead Kennedys hardcore punk rock band from the Bay Area of Northern California, in the 1979 song *California Über Alles* (found on their 1980 debut album *Fresh Fruit for Rotting Vegetables* (Faulty Products/Alternative Tentacles labels)), a nightmare vision in which "health care" means that "You will jog for the master race/And always wear the happy face", *California Über Alles*, *supra*. (By the way, the name of the band is meant not to insult the Kennedy family but "to bring attention to the end of the American Dream", quoting the DKs' lead singer Jello Biafra, *see* Wikipedia at http://en.wikipedia.org/wiki/Dead_Kennedys.) If "well on the Right" Ronald Reagan and the "far to the Left" Dead Kennedys would likely agree on the evil of something, that thing must be pretty bad indeed.

Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (Oct. 25, 1893), on the wisdom of judicial deference to the legislature in most cases.

While some would have us be "free" not only of the Mandate but also of the Act entirely, regardless of what damage that does to those whom the Act could help, that "freedom" would be extreme in the present situation. Indian poet and artist Rabindranath Tagore (1861-1941) noted that "Emancipation from the bondage of the soil is no freedom for the tree", and that quote is apposite here, re the balancing of "freedoms" that the Court may wish to perform. One signal template for the consideration of different freedoms in relation to each other, is Franklin Roosevelt's "Four Freedoms" (*see* Roosevelt's eighth State of the Union Address (Jan. 6, 1941), during his second term as President, an address *available at* http://www.infoplease.com/t/hist/state-of-the-union/152.html (courtesy of infoplease.com)), some of which freedoms may interfere with each other, e.g., "freedom from fear", *id.*, may interfere with "freedom from want", *id.* That is, say, under one scenario, there might be a militant "communistic" order in which "gatherers and sharers", *see* "The Scouring of the Shire", ch. 8, Bk. VI, of J.R.R. Tolkien's *The Return of the King* (1955), would take almost everything from citizens, ostensibly for redistribution to the needy: thus, "freedom from want" would trump "freedom from fear". Or, on the other hand, there might be a near-anarchic society where there were almost no socially-helpful or general-welfare government provisions of any kind, whether Social Security, county hospitals, public schools, public libraries, etc.; but the poor—and there would

be many—would, as per a popular version of what Anatole France (1844-1924) once said, be as "free" as rich people are to sleep under a bridge without being arrested: thus, "freedom from fear" would trump "freedom from want".

By upholding the Act but striking down the Mandate, the Court will be steering neatly between Scylla and Charybdis: preserving both of the Rooseveltian freedoms mentioned above, maintaining a comprehensive and possibly-useful health care bill which can save lives (as Congress has determined), but eliminating the undue coercion of forcing Americans to buy health insurance. Both want and fear can so be kept at bay; or, put otherwise, a balance can be maintained between "positive" and "negative" liberty, in the words of British philosopher Isaiah Berlin (1909-1997). (*See also* Chief Justice Rehnquist's contention that the Supreme Court's "role is no more to exclusively uphold the claims of the individual than it is to exclusively uphold the claims of the government: It must hold the constitutional balance true between these claims", in *The Supreme Court: How it Was, How it Is* (1987), quoted at Wikiquote, http://en.wikiquote.org/wiki/William_Rehnquist.)

Moreover, it may be simpler to strike down the Mandate if the whole weight of the Act is not on it: i.e., if removal of the Mandate were taken to destroy the Act, through alleged lack of "severability", that could pose a needless burden on those who would get rid of the one offensive provision, without destroying the whole law. One need not cut off the nose to spite the face (or cut off the nose to get rid of a wart on the nose), nor need one strike off the hands of people, when one need only strike off the individual manacles the individual mandate, the Mandate, puts on people.

(*Cf.* Neil Millard, *Man rids finger of painful wart ... by shooting it off*, The Sun (London), June 15, 2011, at http://www.thesun.co.uk/sol/homepage/news/3638968/Man-rids-finger-of-painful-wart-by-shooting-it-off.html (Englishman tries to cure wart by blowing off warty finger with shotgun).)

In considering what to do, those in the legal profession might consider one of the most famous quotes from the Hippocratic Oath of the medical profession, "ἐπὶ δηλήσει δὲ καὶ ἀδικίῃ εἴρξειν" (transliterated roughly from that original Greek as "Epi deileisei de kai adikiei eirzein"), often translated in a broad way, *see id.*, as "First, do no harm", from the more literal meaning "from both injury and injustice to refrain". If one can remove the cancer from the patient rather than killing the patient entirely, the patient may be profoundly grateful. And if not just the Act, but the body politic, is taken to be the patient here, there may be profound gratitude that unwarranted judicial activism was not given rein, gratitude that adept surgery was done on the Act to remove the "cancer" of an illegal and unconstitutional provision, rather than wanton butchery that needlessly strikes down all of a massive law into which Congress put so much of its heart. *See Ariz. Christian Sch. Tuition Org.*, 563 U. S. ____, 131 S. Ct. 1436, 1449 (2011),

> Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them.

Id. at 1449 (Kennedy, J.).

So this Brief recommends, in this instance, reliance on *stare decisis*, and the upholding of the Eleventh Circuit's August 12, 2011 opinion *in toto* (except for the Mandate), albeit on broader grounds, including rights-based grounds which would happen to prevent any State from imposing a Mandate. This would be "conservative", in the sense of *stare decisis*—but ironically, also "liberal", both in the sense of "liberty", freedom to avoid the Mandate, and in the sense of "kind", i.e., not cutting out the Act from under the sick people who may need it to heal, or to live at all. Whether one calls it serendipitous, Solomonic, etc., the Court is presented with the relatively easy choice of simply upholding the Eleventh Circuit, and the worthy balance between liberty and commonweal that Circuit's opinion supported.

VIII. LAST-MINUTE RESPONSE TO BRIEFS AGAINST SEVERABILITY

A citizen has some right to bring up rights or public concerns that no one else has brought up; much like the legendary "last-minute Governor's pardon for the electric chair", late interventions can protect rights and lives. —Responding to the March 13 reply briefs advocating the gutting or death of the Act sans the Mandate: "Neither the . . . government nor Amicus [Farr] provides any convincing reason why the . . . Act should stand if the . . . mandate . . . falls", says the State Reply Brief at 1. Well, the present Amicus will give a "convincing reason": because people will suffer, or die, or both, in all likelihood, if the Court "kicks out the slats under them", and eliminates parts of the Act that are already there. (Not to mention the other parts of the Act to come into play later.) If this is seen as too sentimental or even

"sissified" to mention: *see, e.g.*, Cardozo in *Helvering*, and Kennedy in *Plata*, *supra* at 26 and 27, respectively (mentioning the importance of reducing human suffering).

"*Amicus* simply ignores the States' argument that the political realities were such that Congress could not have enacted the two insurance provisions without the mandate . . . . [T]he Act's proponents secured the critical insurance industry support . . . only by promising to include [a] mandate[.]" State Reply Br. at 22. But the States (and other enemies of severability) themselves "simply ignore" the Black Lung Brief, which shows the political reality was that the Administration and Congress would ram through healthcare reform no matter what, *see id.* at, e.g., 9, 30. Also, the State Brief makes the situation sound like "agency capture" gone wild—is the Congress now the insurers' handmaiden? Similarly said, "[T]he mandate was an economic and political *quid pro quo* for the insurance regulations. . . . This Court should not undo that bargain," Private Reply Br. at 14. But courts undo unconscionable bargains all the time; *see, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Court refuses to uphold unconscionable contract). So should this Court.

"[T]his Court has long recognized that severance is inappropriate if it would redistribute the burden[s] of the [law] in a direction which could not have been contemplated." (citation and internal quotations omitted) Private Reply Br. at 21. However, the idea of a Mandate has been controversial (and often damned) for years, so that it was not difficult to contemplate the overruling of it, and the resulting cutoff of a coerced handout to insurers. Again, any "burden" can be alleviated substantially, *see* once more Secretary Sebelius' candid confession on the

"Daily Show", *supra* at 23-24, that there are alternatives to fund insurers. So, even if a Congress heavily lobbied by insurers labeled the Mandate "essential", the Court may find that "essentiality" (or other things) suspect, or limited, *see Hodel*, 452 U. S. at 311 (stressing reviewability by courts of Congressional findings). If "Congress' goal was to make coverage more accessible and affordable", U.S. Reply Br. at 18, an Act sans Mandate may do that less perfectly, but Amicus does not imagine that sick people helped by the Act to access better health care are going to quibble about that. If the Court helps "the perfect be the enemy of the good", evil may needlessly result.

CONCLUSION

In the words of Farr, "If the Court determines that the minimum coverage provision is unconstitutional, the judgment of the Court of Appeals for the Eleventh Circuit that the provision is severable from the remainder of the Patient Protection and Affordable Care Act should be affirmed." The present Amicus concurs, and if necessary respectfully asks for leave to intervene in 11-393 and -400, or any other leave needed. Amicus humbly thanks the Court for its time and consideration.

Dated: March 16, 2012 Respectfully submitted,

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