No. 19-840

In the Supreme Court of the United States

CALIFORNIA, ET AL., PETITIONERS

v.

TEXAS, ET AL., RESPONDENTS

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

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF PETITIONERS

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] has noted the present attempt by Respondents to destroy the Patient Protection and Affordable Care Act (Pub. L. 111-148, 124 Stat. 119 (2010), *as amended by* the Health Care and Educ. Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010) and the Tax Cuts and Jobs Act of 2017, Pub. L. 115–97, 131 Stat. 2054 (2017)), a.k.a. "PPACA" or "the Act". That attempt rests on the thin grounds that, essentially, the Act's "individual mandate" (Act § 1501(b) (26 U.S.C. § 5000A)) to buy unwanted health insurance, a.k.a. "the Mandate", because it's presently *less* coercive than before—a tax penalty of *zero* now—, has near-magically become so illegal that the entire Act must be destroyed. *Cf.* the title of William Shakespeare, *Much Ado About Nothing* (c. 1598-99).

The Mandate is now largely an unenforceable pious prayer that people buy health insurance: more toothless than ruthless. Amicus does not like the Mandate, but he is not fond of seeing mass deaths of uninsured Americans either, so he writes this brief, to let the Court and Nation avoid disaster.

Amicus may receive credibility here, in that he sees good on both sides of the argument, instead of being a partisan Democrat or Republican in this

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[1] No party or its counsel wrote or helped write this brief, or gave money for it, *see* S. Ct. R. 37. Blanket permission to write briefs is filed with the Court by the U.S. House of Representatives Respondent, State Respondents, and Federal Respondents. Individual Respondents, and Petitioners, sent Amicus letters of consent to his brief.

case. He may even be the only litigant in the United States who tried to 1) get rid of the Mandate, but 2) also save the Act as a whole, at the same time. It happens he has long experience in this very Court dealing with the Mandate and Act; his maiden efforts in this Court, in fact, concerned the initial round of attacks on the Act in 2012. *See, e.g.*, Mot. of David Boyle for Leave to Intervene as Resp't or Otherwise, and to Add Questions Presented, in *HHS v. Florida* (11-398) (Mar. 16, 2012), and Br. of Amicus Curiae David Boyle, or Mot. for Leave to Intervene, in Supp. of Ct.-Appointed Amicus Curiae on the Issue of Severability, in *NFIB v. Sebelius* and *Florida v. HHS* (11-393 and 11-400) (Mar. 16, 2012).

While the motions were denied (Apr. 16, 2012)—and Amicus didn't hugely expect he'd be allowed to intervene—, Amicus was largely successful in the substantive results he asked for, in that the Act was upheld, and the Mandate was at least partially curbed (overturned *vis-à-vis* the Commerce Clause, U.S. Const. art. 1, § 8, cl. 3). *See NFIB v. Sebelius*, 567 U.S. 519 (2012), *passim*. Eight years later—how time flies—, Amicus still welcomes the end of the Mandate, but never at the cost of the whole lifesaving Act itself.

Too, it is an extraordinarily bad time even to contemplate ending the Act, since the COVID-19 plague hit America earlier this year. *Cf.* "[T]he Constitution . . . . is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (Goldberg, J.). If there is any gray area at all about the law here, it seems right for the Court to take the dangerous medical conditions of present-day

America into account, lest the Court hurt the Nation that the Court is supposed to serve.

…Perhaps the most novel—because relatively little-known—legal point this brief will make is that there have been, in the past few decades, various *precatory purchase mandates* in America, including a precatory mandate to buy health insurance, that were not overturned in the courts or otherwise. Petitioners' arguments properly notice that the zero-tax-penalty "Mandate" of today is hardly a mandate at all. However, their arguments should profit greatly from actual examples of precatory purchase mandates, so Amicus offers examples.

"Precatory": a non-mandatory mandate, a jurisprudential oxymoron? The legal equivalent of a harmless yapping chihuahua; a juridical April Fool's joke? The honorable Court will decide. But whether the Mandate stays, or not, the Act should survive—possibly helping various people who read this brief, or their loved ones, survive longer—, as shall be discussed below.

SUMMARY OF ARGUMENT

The argument proceeds in roughly two phases: first, asserting that the Mandate may not necessarily deserve to be overturned, if it is merely precatory; and second, averring that if the Mandate is overturned, it is fully severable from the Act.

If Individual Respondents feel morally obliged to buy health insurance, they can, instead, send the IRS the exact payment currently demanded by the Mandate, or perform civil disobedience and refuse to buy health insurance they clearly deem unfair or

illegal. Political means to overturn the Act may be best.

Various purchase mandates in the Nation, e.g. mandates to purchase guns, or to purchase health insurance for children, are precatory, and thus give legal precedent for keeping the Act's Mandate in existence, since it is precatory. (Even if a zero-tax Mandate is not fully legally justified, the current precatory version may not be worth striking down more than other precatory purchase mandates are.)

If the Mandate is struck down, credible sources like H. Bartow Farr and the Eleventh Circuit give reason for holding the Mandate severable. E.g., the Mandate may not be "inseverably" connected to other portions of the Act, not being absolutely "essential" to them; and there are alternate forms of health-insurance funding available besides the Mandate. So, the Mandate, while useful, is not necessary.

The Obama Administration sometimes opined—and correctly—that the Mandate *was* severable from guaranteed issue and community rating.

The current COVID-19 crisis shows that copious healthcare funds are available, including for the Act, making the Mandate less needed.

The Court in *King v. Burwell* ("*King*"), 135 S. Ct. 2480 (2015), equivocated on the necessity of the Mandate, but should now find it severable.

If Chief Justice Rehnquist once, famously, needed serious medical care, perhaps the People need access to it too.

If the Act is doomed sans the Mandate, why need the Court take the trouble to destroy the Act at all?

Finally, in an age of plague, and of the Court's Members taking care of themselves, those Members may also want to nurture the Act which can save many people from destruction.

ARGUMENT

I. THE MANDATE IS ARGUABLY MERELY PRECATORY AT THIS POINT, AND PERHAPS NOT WORTHY OF BEING STRUCK DOWN. (AND: SOME "CONSCIENCE" ISSUES OF RESPONDENTS)

A. Individual Respondents Could Possibly Have Contacted the IRS and Said They Are Paying the Zero Tax Penalty, Rather Than Filing Suit Against the Act

First off, some "conscience-related" issues: Amicus understands that named plaintiffs/ Respondents Hurley and Nantz ("Individual Respondents") dislike the Mandate and feel it is illegal. Amicus agrees with them, if on different grounds from the ones they offer. That said, just because Amicus disapproves of the Mandate, that does not mean he thinks Individual or other Respondents offer a reasonable argument for overturning the Act, or even the Mandate.

The tax penalty having been reduced to zero, the remaining "Mandate" can be considered merely precatory now. But whether it is merely precatory or not, there may be a way for Individual Respondents legally to avoid the Mandate, if they have felt they have some moral/legal obligation to obey the Mandate even though the penalty was zeroed out.

To wit, Individual Respondents could have written (or could still write) a letter to the Internal Revenue Service, included in their tax return, with words similar to these:

> Dear IRS:
>
> I refuse to buy health insurance under the terms of "Obamacare" (the Affordable Care Act). Since the offered legal alternative is to pay a tax penalty, and the current penalty is zero, I am sending zero dollars with this letter, which is a full payment of all I am required under the law to pay.
>
> Sincerely,
> [first/last names]

That letter, *supra*, is only 60 words, but may help fulfill all legal requirements to avoid having to purchase insurance under the Act, by paying the IRS, in a written communication, the full amount of the current penalty (zero) for nonpurchase of health insurance. —Problem solved, one suspects.

Alternative forms of that letter could be done: e.g., there could be a check for zero dollars and cents included with the letter. (Zero is the exact amount of the penalty, after all…) Or if a check for zero is seen as flippant or uncashable, then, say, a check for one dollar, donated to the Government for debt reduction, can be sent. That check would presumably be cashable, and the letter would note that the check also includes the zero amount of the tax penalty.

Thus, the IRS would cash a check including the full amount of the current penalty: zero.

So, Individual Respondents could easily have written that letter instead of filing suit, and maybe saved themselves and others much trouble. (Though, when the tax went to zero, perhaps all Americans *had effectively already paid their debt*, in full?)

Amicus is not being facetious by presenting that sample letter, in whatever variety, as a simple way to solve Individual Respondents' problems—if any debt still exists. He thinks that letter is at least as serious as Individual Respondents' (and some States') contention that the Mandate tax penalty is *too low now*, so that they are mysteriously *more* oppressed than before, and have standing to file suit and take yet another bite at the apple (after years of previous attempts) for a chance to destroy the Act.

B. Refusal to Buy Insurance Could Be Deemed a Martin Luther King-Style Form of Civil Disobedience—Though Without Financial Penalty

Of course, some persons may hypothetically not deem Amicus' proposed letter-to-the-IRS *supra* morally sufficient to meet their sentiments. Some of those persons may claim to feel moral offense, or other injury, if they are obliged to buy health insurance, since they feel they are morally obliged to follow the law, even if they dislike it. Their assertion may have some legitimacy, *prima facie*, but there are additional considerations or options.

For example, if people feel a certain law is immoral, they can always perform Martin Luther

King-type civil disobedience by not buying the insurance. While the Act may not have *per se* evil like racism (re MLK), it may have *de facto* evil for some observers, since, just as conscientious people may object to guns (*see infra* Sections I.C and I.D, re gun-purchase mandates), other people may conscientiously object to "Coercive Big-Government Insurance Tyranny". And Individual and State Respondents seem to find the Act not just illegal but also immoral, inefficient, and injurious to them or their families, thus unjust.

Thus, people can avoid purchasing health insurance but also follow moral principles, through civil disobedience, instead of violating their consciences. (Would Respondents claim that MLK was immoral because he performed technically-illegal civil disobedience?) And conveniently, there is no financial penalty for failing to buy health insurance, either.

If it were true that every law must be overturned because someone feels obliged, "mandated", to obey a law she doesn't like, where does it stop? Plenty of employers, say, may dislike that they are obliged to pay a minimum wage, even while they also feel morally obliged to obey the law. That putative moral disquietude should not be enough to overturn minimum-wage laws, or maybe any other law, including the Mandate, unless there is some additional reason, e.g., a law violates religious or racial-equality rights, etc.

So, Individual Respondents may have *self-redressable* moral injury. If they fulfill what that the Act and Mandate ask them to, which is to offer the IRS the full amount of the penalty, they should not

have to buy health insurance. But to protest that you are being taxed too little (*zero*), seems a little protest too much. Once more, per the Bard of Avon: "Much ado about nothing."

Respondents' problem may largely be that they dislike the Act, not that the financial penalty is now too lenient. But while Individual or State Respondents may complain that the Act causes them various difficulties, financial or otherwise, the Act may help other people or States, maybe more than Respondents are allegedly hurt. Mere dissatisfaction with the law is not sufficient reason to overturn it.

(If States allege that "injury" comes from the Mandate, even sans penalty, allegedly persuading more of the States' citizens to receive health insurance and thus burden the State fisc: then virtually *any* part of the Act could give standing to sue just because it may attract people to buy insurance. E.g.: subsidies; exchanges; gestational-diabetes-screening coverage; government efforts at informing citizens about the Act; etc. It is a slippery slope. But if the Mandate is merely persuasive, precatory, then legal standing, or at least "damages", i.e., overturning the Mandate, is questionable.)

If Respondents want to destroy the Act, the proper way is to marshal popular and political support for overturning the Act in Congress, with a cooperative President. This seems unlikely, though, given considerable American popular support for increased health-care access—especially while the coronavirus rages.

Finally, Amicus understands the legal contention that if the tax is zero, it raises no revenue, so may be considered "not a tax", so that, in turn, the Mandate cannot be legally upheld. The next section of this brief, about other precatory purchase mandates, gives reasons why the "zero tax = no Mandate" theory *supra* may be incorrect.

C. The Kennesaw, Georgia Gun-Purchase Mandate: An American Precatory Purchase Mandate Which Allows Anyone to Opt Out of It Who Wants to Opt Out, Sans Financial or Other Penalty

As previously foreshadowed, Amicus wants the Court and the public to know that there is a long history of precatory purchase mandates in this country; this empirical knowledge fleshes out Petitioners' theories that the now-precatory nature of the Mandate isolates the Mandate, and/or the whole Act, from being overturned.

For example, there is an (in)famous "gun mandate" in the municipal code of Kennesaw, Georgia, Section 34-21 (last updated 2009), "Heads of households to maintain firearms.", *available at* https://tinyurl.com/KennesawGunCode. Under this originated-in-1982 law, every head of household must have a gun and ammunition, *see id.* § (a). And there were/are actual penalties for failure to do so: up to a $200 fine, up to 60 days in jail, and/or up to 60 days doing work on the streets or public works, as Section 1-8 of the Kennesaw Code noted in 1982, *id.* The case of *Richard Butler v. City of Kennesaw, Georgia and Robert Ruble, Chief of Police of Kennesaw, Georgia* ("*Butler v. Kennesaw*" or

"*Butler*"), C-82-1143-A (N.D. Ga. 1982) (original documents downloadable, as "Kennesaw PDF", at http://tinyurl.com/ButlerV-Kennesaw), offers Section 1-8, "General penalty.", as part of "Exhibit 'B'" of the lawsuit, p. 28 of the PDF.

These days, the fine is up to $1000, *see* former Section 1-8, *supra*, now Section 1-11, *possibly last revised* 1986, *available at* the link https://tinyurl.com/KennesawPenaltyCode. Those penalties *supra* are serious penalties; in particular, the jail time is more serious than any penalty in the health care Act's Mandate, which does not allow jail time for violators, *see id.*

However, the Kennesaw law's part (b) says,

> Exempt from the effect of this section are those heads of households who suffer a physical or mental disability which would prohibit them from using such a firearm. Further exempt from the effect of this section are those heads of households who are paupers or who conscientiously oppose maintaining firearms as a result of beliefs or religious doctrine, or persons convicted of a felony.

Id. In particular, "[E]xempt . . . are those . . . who conscientiously oppose maintaining firearms as a result of beliefs[.]" *Id.* "Beliefs" is an extremely loose category, so that the law is more an "Individual Suggestion" than an "Individual Mandate".

See, e.g., Omar Jimenez, *In this American town, guns are required by law*, CNN, updated 2:22 p.m., Mar. 7, 2018, https://tinyurl.com/Kennesaw2018: "It

may be the law in Kennesaw to own a gun, but the police department says it isn't actually enforced. . . . 'It was meant to be kind of a crime deterrent,' said Lt. Craig Graydon[.] 'It was also more or less a political statement[.']" *Id.* But Kennesaw could easily have passed a mere *resolution* suggesting gun ownership; however, they passed an actual *law*.

See also, e.g., Drizzt, *Still the Law in Kennesaw*, The Firing Line, July 15, 2001, 5:51 p.m. (likely excerpting Jim Galloway, *Still the Law in Kennesaw*, Atl. J.-Const., July 15, 2001), at the link https://tinyurl.com/KennesawFiringLine, "[Under the] revised ordinance[, g]un possession was the law in Kennesaw, unless . . . you objected for any reason, religious or otherwise. 'The only people subject to the law were the ones who agreed with it,' said Richard Butler, one of those who filed suit." *Id.* (citation omitted)

In *Butler v. Kennesaw*, the July 23, 1982 Dismissal Order (Kennesaw PDF at 2), based, *see id.*, on parties' stipulation that Butler is exempt from the gun mandate ordinance, does not happen to judge the constitutionality/legality of the mandate. But in any case, the Kennesaw gun-purchase mandate has shown for decades that legally, there is a history in America of a full, *de facto* unconditional power of opt-out for a purchase mandate.

Thus, with that opt-out, the gun mandate is precatory, and the law is not illegal, so far. Amicus wishes such mandates were illegal, because he dislikes purchase-mandate laws. However, such mandates provide ample precedent for the Court to uphold the Act's own precatory Mandate.

By contrast with *Butler*, it is true there is no stipulation by the Government with Respondents that they do not have to obey the health-insurance Mandate. However, what is the practical difference between the Act's Mandate, and the Kennesaw gun mandate, if any? Both have no effective penalty. Kennesaw agreed not to jail, fine, or draft into a work gang, violators of the gun-purchase mandate. More recently, the U.S. Congress set the Mandate tax penalty at zero; and ever since *NFIB v. Sebelius* (2012), the Commerce Clause does not allow jailing violators of the health-insurance-purchase Mandate.

So, even without a stipulation, the Act's Mandate is quite precatory, and under Respondents' questionable arguments, Amicus wonders if it should be overturned.

(True, the Kennesaw gun mandate is persuasive authority, not controlling authority, for this Court. As well, Kennesaw or other State authorities have a general "police power" that may possibly legitimate a purchase mandate; while the federal government, famously, has no such "police power". Still, once again, the Nation has a history of precatory purchase mandates which have not been overturned, which is a highly apposite consideration re the health care Act's precatory Mandate.

Amicus still believes, by the way, that there is ample evidence for a facial overturning of the Mandate; he just believes that that evidence is in other theories than Respondents'.)

D. Other Precatory Gun-Purchase Mandates

And Kennesaw's is not the only precatory gun mandate. *See, e.g.*, Keith Wagstaff, *5 towns that have*

considered making gun ownership mandatory, The Week, Mar. 6, 2013, at the following link, https://tinyurl.com/FiveGunTowns (mentioning Kennesaw gun mandate, and the similar Nelson, Georgia and Virgin, Utah gun mandates); Bigfoot Gun Belts, *Mandatory Gun Ownership – It's A Thing!*, Gunbelts.com, Oct. 3, 2016, https://gunbelts.com/blog/mandatory-gun-ownership/ (mentioning Kennesaw, Nelson, and also Nucla, Colorado gun-purchase mandates).

The Nelson, Georgia mandate, "Sec. 38-6. - Heads of households to maintain firearms." (Apr. 1, 2013; revised Sept. 3, 2013), *available at* the link https://tinyurl.com/NelsonGaGunCode, drew a Brady Center to Prevent Gun Violence lawsuit, *see, e.g.*, *Brady Center v. City of Nelson*, 2:13-cv-00104-WCO (N.D. Ga. 2013), Joint Mot. for Stay to Effectuate Settlement and Proposed Order (Aug. 22, 2013), *available at* the following link, https://tinyurl.com/BradyCenterMotion, including a stipulation that the ordinance—which had already exempted those "who conscientiously oppose maintaining firearms as a result of beliefs or religious doctrine", § 38-6(b)—, would be modified to say that the ordinance was unenforceable and sans penalty, *see* Joint Mot, *supra*, *passim*. Once again, a precatory mandate, not overturned but gelded, like the PPACA's Mandate.

E. New Jersey's 2008 Precatory Mandate to Buy Health Insurance for Children

Maybe even more on point than the gun mandates *supra*, is an actual health-insurance-purchase mandate which is precatory, and has

existed for over a decade. The State of New Jersey in 2008 enacted a Mandate to buy health insurance for minors, *see* N.J. Stat. Ann. § 26:15-2, "Coverage provided for residents 18 years of age and younger; terms defined." (2008), *available at*, e.g., https://tinyurl.com/NJPrecatoryKidsMandate,

> a. Beginning one year after the date of enactment of this act, all residents of this State 18 years of age and younger shall obtain and maintain health care coverage that provides hospital and medical benefits. The coverage may be provided through an employer-sponsored or individual health benefits plan, the Medicaid program, NJ FamilyCare Program, or the NJ FamilyCare Advantage buy-in program. [etc.]

Id. (Note that that Mandate is not identical to any other New Jersey health insurance mandate, *see, e.g.*, NJ.gov, *NJ Shared Responsibility Requirement*, "New Jersey Health Insurance Market Preservation Act[:] Beginning January 1, 2019, New Jersey will require its residents to maintain health insurance. [etc.]", *last updated* Nov. 21, 2019, at the link https://tinyurl.com/NJNonPrecatoryMandate. This brief will discuss only the 2008 precatory New Jersey Mandate, which is still on the books, whether it has been affected by any other mandate, or not.)

Further detail is in, e.g., The Commonwealth Fund, *New Jersey's Children's Mandate and Coverage Expansion for Parents* (undated, but apparently from 2008), at the following link,

https://tinyurl.com/CommonwealthNJArticle,

> In July [2008], New Jersey Governor Jon Corzine signed into law comprehensive health reform that helps the state move toward universal access to health coverage. A key feature is a "Kids First" mandate: beginning July 2009, all state residents up to age 19 will be required to have health coverage.
>
> "This is a 'soft' mandate, with carrots, not sticks," says Suzanne Esterman, spokeswoman for New Jersey's Department of Human Services. There are currently no penalties for non-compliance, but there are many opportunities to obtain affordable coverage. . . . Families will be asked to indicate on their New Jersey tax returns whether their dependents have health insurance coverage. The state will send applications and conduct outreach to families identified as having uninsured children who may be eligible for Medicaid or NJ FamilyCare. Task forces are currently developing strategies to enhance outreach and enrollment activities.
>
> . . . .
>
> New Jersey's health reform also makes changes intended to make individual health insurance more affordable to young adults and to

> increase insurer participation in the small group market.

Id. The Garden State's "carrots-not-sticks" health insurance purchase mandate *supra*, sans any penalty, *see id.*, is very clearly a precatory mandate *par excellence*. Even if there are constitutional or legal questions about that Mandate, it still exists today, so that if there were any challenges to it (and Amicus knows of no lawsuits against that Mandate, for example), they were not successful.

So, if that Mandate exists, then the question arises, of why the PPACA Mandate cannot also be allowed to exist, as long as it is precatory and the tax penalty remains at zero. The New Jersey 2008 Mandate is not controlling precedent for this Court (especially since it is not a court case), but it is certainly persuasive. *Arguendo*, if the Court struck down the Act's precatory Mandate, at least for the reasons Respondents give, the Court might be flying in the face of American history (decades-old New Jersey precatory health-insurance Mandate…not to mention the gun mandates), and common sense.

F. Even If the Mandate Is No Longer Supported by a Tax Above Zero, That May Not Mean That the Mandate Must Be Overturned, If It Is Now Merely Precatory

Again, Amicus understands the idea that a zero tax may not legally undergird the Mandate. That does not logically mean, though, that the Court should take the trouble actually to eliminate Section 5000A, or any subpart of it.

True, the Mandate would look obsolete and out-of-place, if it were no longer validated by a tax above zero. However, if it were commonly understood that the Mandate were now only precatory, a historical record, that might argue for the Court not taking the trouble actually to throw out the Mandate. Indeed, the Court's opinion in this case might powerfully publicize that the "Mandate" is no longer mandatory, so that the public would have little reason to fear the Mandate any longer, in turn lessening any need to eliminate the Mandate.

That said, Amicus is somewhat neutral about whether the Court should allow a merely-precatory Mandate to stand. He wants the Mandate to end, but, once more, Respondents may not give sufficient reason for that to happen.

If the Court ends the Mandate now, though, Section 5000A should be held fully severable from the Act, as will now be discussed.

II. IN CASE THE MANDATE IS STRUCK DOWN: IT SHOULD BE HELD SEVERABLE FROM THE ACT AS A WHOLE, OR ANY SUBPARTS OF IT, SUCH AS COMMUNITY RATING AND/OR GUARANTEED ISSUE

Amicus tries to be relatively reasonable about the Act; he does not want the whole thing stricken down, but has publicly agreed (e.g., in amicus briefs) that it can be cut back where appropriate, e.g., the Mandate, or needlessly-large punishment for nuns who don't want to provide contraceptives for employees. (It is one thing, say, for religious employers to pay a *small* fine, and/or to refund employees some fair amount to compensate "lost

wages" from not receiving contraceptives as most other employees do. But to punish religious employers *excessively*, seems inappropriate.)

On that note, of being reasonable and balanced, Amicus thinks it fair, if the Court destroys the Mandate, at least to let the rest of the Act survive. In supporting "full severability" of Mandate from Act, Amicus will first focus on H. Bartow Farr III's magisterial "Brief for Court-Appointed Amicus Curiae Supporting Complete Severability (Severability)" in 11-393 and 11-400, *NFIB v. Sebelius* and *Florida v. HHS* (Feb. 17, 2012), *available at* the following link, https://tinyurl.com/FarrSeverabilityBrief. Amicus will add what he can here to what Farr said, including, "If the Court determines that the minimum coverage provision is unconstitutional, the judgment . . . that the provision is severable from the remainder of the . . . Act should be affirmed." (Farr Br. at 53); but Farr went so far in his analysis, that the Court and public would do well to review it carefully and repeatedly.

A. The Mandate Is Not Absolutely "Essential" to the Act or Any of Its Subparts; Nor Has the Act Any "Inseverability Clause"

Firstly: much, too much, has been made of the word "essential" in, "The requirement [i.e., the Mandate] is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." 42 U.S.C. § 18091(2)(I) (2010). Even the

Court may have made too much of it: "As noted, Congress found that the guaranteed issue and community rating requirements would not work without the coverage requirement. §18091(2)(I)." *King*, *supra* at 4, 135 S. Ct. 2487 (Roberts, C.J.). But "essential" does not always mean "absolutely necessary". *See, e.g.*, Wiktionary, *essential*, https://en.wiktionary.org/wiki/essential (as of Apr. 16, 2020, at 14:48 GMT): "2. Very important; of high importance." *Id.*

Using Farr's own summary:

> Petitioners (now joined by the United States) also rely on . . . . 42 U.S.C.A. §§ 18091(a)(1), (2)(A)-(J) . . . . but those findings are of limited value on the question of severability. [T]he 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. . . . [I]t would be entirely possible for Congress to . . . hold . . . that, if the minimum coverage provision were found unconstitutional, the remaining provisions of the Act should continue in force. Indeed, that . . . seems particularly likely for . . . . guaranteed issue and community rating[,] that were regarded as the principal means

> for bringing new insureds into an otherwise risk-based insurance market.

Farr Br. at 6. For further detail, *see id.* at, e.g., 24-33.

Too, during the current COVID-19 crisis, there is endless argument over what is an "essential" business or not. This underlines that "essential" is an equivocal term, that may mean "useful", or "absolutely necessary", or other things.

As for an "inseverability clause",

> [I]t is worth noting that the Act does not contain an inseverability clause, either a general one or one limited to the guaranteed issue and community rating provisions.[Footnote 6: Neither the United States nor petitioners dispute that the guaranteed issue and community rating provisions can still be "fully operative as a law," *New York* [*v. United States*], 505 U.S. [144] at 186 [1992], in the relevant sense that there is no textual dependency on the minimum coverage provision. Cf. [*United States v.*] *Booker*, 543 U.S. [220] at 245 [2005] (striking down review provision with no function other than to enforce unconstitutional provision). *See also* Note 1 *supra*. [noting that invalidating Mandate will invalidate its penalties as well]

Farr Br. at 29 & n.6. For further detail, *see id.* at, e.g., 4-5, 30-31.

B. The Mandate Is Only One Funding Mechanism Among Many for the Act, and Is Quite Replaceable

The Mandate, truly, may be far less "essential", financially, than some would say:

> Finally, petitioners and the United States rely on an empirical argument of sorts, asserting that, without the minimum coverage provision, future health insurance markets would be severely distorted by adverse selection, resulting in a potential "death spiral" that Congress would have sought to avoid. But the Congressional Budget Office has recognized that the Act contains a number of provisions that "would tend to mitigate that adverse selection." . . . . For example, the Act permits insurers to establish limited enrollment periods each year to discourage the uninsured from waiting until they are sick before purchasing insurance. . . . And, even more importantly, the Act provides generous subsidies to enable low-income people — many of whom are young and in relatively good health — to purchase insurance. . . . As a consequence, various estimates of premium increases in an insurance market with continued guaranteed issue and community rating, but without the minimum coverage provision, ... fall[] short of

> the "death spiral" that petitioners and the United States are warning about.
>
> Petitioners and the United States also point to the pre-Act experiences of several States that adopted guaranteed issue and community rating without a coverage mandate[; but, *inter alia*,] it is noteworthy that despite their experiences, a number of the States in question have elected not to do away with guaranteed issue and community rating, or to impose a mandate, indicating that removing barriers to coverage of the uninsured remains of central importance. [etc.]

Farr Br. at 6-7 (citations omitted). For further detail, *see id.* at, e.g., 33-44. Incidentally, Farr mentions, *supra*, the mysterious support of the U.S., under the pro-Act Obama Administration, for inseverability, which deserves some brief analysis.

C. *Pace* the False Claim That the Mandate Was Inseverable from Guaranteed Issue and Community Rating, Obama Administration Officials Backtracked on, or Contradicted, That Claim

Amicus has wondered why Obama's Solicitor General arguably "played chicken" with the courts by claiming that wiping out the Mandate would mean exterminating guaranteed issue/community rating. Amicus thinks that while that claim may not have been "dishonest", maybe it was "strategic

speculation", designed to "guilt" the courts and Court into letting the Mandate survive, even though Amicus believes the Mandate was never necessary.

Cf. Ed Morrissey, *Video: Lack of severability in ObamaCare a "colossal mistake"*, Hot Air, Feb. 2, 2011, 2:15 p.m., at the following link, https://tinyurl.com/HotAirTripleDare,

> *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!*

Id. But sensible analysts like Amicus Farr did not take the 2012 U.S. litigation position seriously, *see* once more Farr Br., *passim*.

In fact, even during the 2012 oral arguments, there was a flash of candor or good sense from the Administration, *see* the oral argument in 11-393, *NFIB v. Sebelius* (Mar. 28, 2012), *available at* https://tinyurl.com/11-393OralArgumentTranscript: Justice Antonin Scalia (RIP) said that since some people had gotten insurance because of the Act, in "[a]nticipation of …minimum coverage[,] that's going to bankrupt the insurance companies, if not the States, unless this minimum coverage provision comes into effect." 11-393 Tr. at 49. Deputy Solicitor

General Edwin S. Kneedler replied, "There is no reason to think [the end of the Mandate is] going to . . . . bankrupt anyone. The costs will be set to cover those -- to cover those amounts[.]" *Id.* Though Needler may have said elsewhere in the oral arguments that guaranteed issue and community review would fall sans the Mandate, that notion is contradicted by his quote just quoted, which stated the obvious truth that alternate funding sources could fund the Act even sans the Mandate.

And when Justice Elena Kagan questioned H. Bartow Farr, "So, if you assume that, that all the minimum coverage is, is a tool to make those provisions work[:] if we know that something is just a tool to make other provisions work, shouldn't that be the case in which those other provisions are severed along with the tool?", Tr. at 77, Farr supported the same idea as Kneedler's at p. 49:

> MR. FARR: No, I don't think so, because there are -- there are many other tools to make the same things work. That's I think the point.
>
> And if one -- and the case that comes to mind is New York v. The United States, where the Court struck down the "take title" provision but left other -- two other incentives essentially in place.
>
> Even without the minimum coverage provision, there will be a lot of other incentives still to bring younger people into the market and to keep them in the market. [etc.]

Id. at 77. Indeed, an axiom that "You must abandon a project if you happen to lack one tool designed for that project" would be false, since, as Farr noted *supra*, other tools may be available.

Finally, *see* the video clip, The Daily Show with Jon Stewart, *Exclusive - Kathleen Sebelius Extended Interview Pt. 2*, Jan. 23, 2012, at the following link, https://tinyurl.com/DailyShowSebelius, at 7:12-7:28, during which HHS Secretary Sebelius, after host Jon Stewart asks what happens if the Court overturns the Mandate (and maybe other mandates) but not the rest of the Act, answers him,

> 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.

Id. That is an open confession, *see id.*, from Sebelius, maybe the best-placed person in the world to know, that although the Mandate would of course be helpful to the Act: other viable funding mechanisms indeed exist; the Act is indeed severable from the Mandate; the Act would survive.

D. A Simple Way to Save the Act If the Mandate Disappears, Is to Subsidize Insurance Companies to the Amount the Mandate Would Have Provided—Much as the Government Massively Subsidizes Anti-COVID-19 Efforts

Too, the assertion that "the end of the Mandate will kill the Act, by defunding health care" rings hollow these days, for multiple reasons. First, there is the simple math that if the vanishing of the Mandate would cause a financial deficit by causing fewer people to buy health insurance, the federal government (and/or other entities, e.g., State governments) can simply compensate insurance companies in the amount of any deficit that occurs. If a yearly deficit for insurers, lacking the Mandate, equals "x", then increased subsidies to insurers that year can equal, or exceed, "x".

That solution may seem overly simplistic, but there is truth to it, Amicus suspects. The Mandate is largely to get more people to buy health insurance, preventing costs from ballooning out of control. So, the Mandate is largely a funding mechanism, thus, a fungible device that can be replaced by other funding mechanisms.

And this is especially true in the age of multi-trillion-dollar programs to combat the COVID-19 pandemic. While emergency situations like a pandemic may justify larger public expenditure even than the large public expenditure on the Act, the lesson is still that the Government is capable of copious financial aid for healthcare when people are in need. (It is possible that over the decades, the Act may save even more lives than the trillions of dollars of expenditures against COVID-19, and maybe for less money as well.) Finally, the Act may, obviously, be needed more than usual during this pandemic (or other emergency situations): if not for coronavirus treatment *per se* (if the Government is giving dedicated funding to that), then for multiple other

conditions which may be exacerbated by the current strain on the health system.

E. The Court Did *Not* Definitively Find in *King v. Burwell* That the Mandate Is Absolutely Necessary to Guaranteed Issue/Community Rating; and the Court Should Clearly Find the Mandate Non-Necessary

By the way, some may try to claim that the *King* Court found the Mandate to be utterly necessary if guaranteed issue and community rating are to be upheld. However, the Court did not definitively find that; though if it had, that finding would be incorrect.

Once again, the Court did say, "As noted, Congress found that the guaranteed issue and community rating requirements would not work without the coverage requirement. §18091(2)(I)." *King* at 2487. However, this is not necessarily true, as per what Farr opined, *see* Br. at 6, 24-33.

Moreover, contrast that previous *King* quote to, "The combination of no tax credits and an ineffective coverage requirement could well push a State's individual insurance market into a death spiral." *King* at 2493 (Roberts, C.J.). The tentative language "could well push"—as opposed to, say, "will definitely force"—admits that even the pair of 1. no healthcare subsidies, and 2. a severely weakened Mandate, only *may* cause a death spiral. Not "will", but "could". Thus, the Court did not definitively say that lack of a Mandate would doom the Act, or even doom guaranteed issue/community rating; since even 1. no healthcare subsidies *plus* 2. a dessicated Mandate

was not deemed enough to deliver a knockout punch to the Act, or maybe even any part of the Act.

So, when the Court then says a very different thing, "Congress made the guaranteed issue and community rating requirements applicable in every State in the Nation. But those requirements only work when combined with the coverage requirement and the tax credits", *King* at 2494 (Roberts, C.J.): not only is "only" a misplaced modifier here, if the Court was trying to say "requirements work only when …", but the Court contradicts what it said *supra*, one page before, *King* at 2493, with the tentative "could well push [etc.]".

Thus, people seeking a clear "mandate" from the *King* Court that the Mandate is absolutely necessary, are searching in vain: the Court equivocated, veered all over the place. So, the Court should now make a definitive statement, following simple math and common sense, and find the Mandate non-necessary and severable.

F. The Eleventh Circuit in 2011 Argued Well for Severability

Also deserving mention here is the appellate opinion the Court reviewed in 2012 before producing the *NFIB v. Sebelius* opinion, i.e., the Eleventh Circuit opinion *Florida v. HHS*, 648 F.3d 1235 (Aug. 12, 2011). Following is a pertinent excerpt:

> 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 . . . .
>
> 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 . . . .
>
> 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 1323, 1324, 1325 (Dubina and Hull, JJ.).

Amicus sees no reason to disbelieve what Judges Dubina and Hull say *supra*; and nine years after their opinion, the existence of the Act for a decade now itself, as per, e.g., *stare decisis*, argues against overturning the Act, and disappointing the expectations of tens of millions of people who might not have decent health care without the Act.

G. Chief Justice Rehnquist's Placidyl Addiction and His Need for Health Care

Speaking of "disappointing expectations": what would make any appearance of compassionless, or callous, behavior by the Court's Members, re the Act, look especially questionable is the fact that one of

their own badly needed help, comprehensive healthcare, at one point: their Brother Justice, William Rehnquist. Before he was Chief Justice, Rehnquist suffered from addiction to the sleep drug Placidyl for ten years, *see, e.g.*, Alan Cooperman, *Sedative Withdrawal Made Rehnquist Delusional in '81*, Wash. Post, Jan. 5, 2007, *available at* https://tinyurl.com/RehnquistPlacidyl. Fortunately, the Justice was able to get medical help, though his withdrawal was harrowing:

> One doctor said Rehnquist thought he heard voices outside his hospital room plotting against him and had "bizarre ideas and outrageous thoughts," including imagining "a CIA plot against him" and "seeming to see the design patterns on the hospital curtains change configuration."
>
> At one point, a doctor told the investigators, Rehnquist went "to the lobby in his pajamas in order to try to escape."

Id. Rehnquist must have been going through a kind of living hell, but Amicus is pleased that he was able to access quality healthcare and surface from the darkness of drug addiction. However, many Americans, at least before the Act, have not been able to access an equal level of healthcare to that of Rehnquist, or maybe any healthcare at all beyond the minimal. The Act is an attempt, even if flawed, to improve the average American's healthcare, since not only Supreme Court Justices need healthcare. As

the Nazarene said, "Do onto others as you would have them do unto you." (*Matthew* 7:12, *Luke* 6:31)

H. One "Ripeness" Issue: If the Lack of a Mandate Is Really Going to Put the Act into a "Death Spiral", the Court Can Simply Let That Happen Gradually over Time, Instead of Rushing to Destroy the Act

Finally, while there may not necessarily be a "ripeness" problem with the standing-to-sue of Respondents, there may be a ripeness issue with possible solutions in this case. To wit, for the Court to overturn the Act, when the disappearance of the Mandate may "naturally" overturn the Act anyway, would be putting the cart before the horse.

That is, Respondents, and many opponents of the Act and Mandate, aver that without the Mandate, health insurance will enter a death spiral. If that dystopian projection is really true, though: then what is the point of the Court's overturning the Act, when the Act is (hypothetically) "overturning" itself already through "death-spiraling"? (Or are opponents of the Act afraid that the Act might actually work, and avoid destroying itself?)

This is especially true in that during the coming years that the Act is (putatively) dying of its own weight, it may still give some degree of help—maybe even in a lifesaving dose—to those who have insurance under the Act, so that even a "sinking" Act may still save some lives. Thus, asserting that a Mandate-less Act is absolutely doomed, may be a self-defeating assertion, at least if the point of the assertion is to move the Court to annihilate the Act

before the Act self-annihilates. If the Act is really "ripe for self-destruction", why does the Court even need to act against the Act?

* * *

"Yea, though I walk through the valley of the shadow of death, I will fear no evil: for thou *art* with me; thy rod and thy staff they comfort me." This famous part of the 23rd Psalm (King James Version), *id.*, is apposite to this age of an American and worldwide viral plague. The Court may have no rod or staff—maybe a gavel or such—, but it can certainly comfort Americans by not needlessly destroying the health care Act, especially in an age of random, terrible mass death stalking the land.

Of course, *if there is no possible way*, legally, to save the Act, or any significant part of it (e.g., guaranteed issue), from complete destruction, then, "it is what it is". Amicus just has doubts that that nightmare scenario should be the case. This is especially true given all the reasoning Amicus has employed *supra*, whether: existing precatory purchase mandates; excerpts from the wisdom of Farr and the Eleventh Circuit opinion; parsing of the word "essential"; noting the replaceability, by subsidy or otherwise, of monies that the Mandate's end might deny to health insurers; observing that a truly "death-spiraling" Act can simply spiral downward *de façon solitaire* without any extra push from the Court; etc.

Amicus does not want anyone reading this brief, Member of the Court or otherwise, to have to look back in later years, like Orpheus looking back at his wife receding irretrievably to the Underworld, and wonder, *Why was the Act gratuitously destroyed?* or,

Did people needlessly suffer and die because of what happened? If the Act has flaws, annoying or overly taxing Respondents, the Act can be mended, not ended. Indeed, nonpartisan or bipartisan good-faith attempts to improve the Act, and keep improving it, respecting both liberty and the general welfare, appeal to Amicus; he hopes he is helping those efforts with this brief.

And as a final note: a Court that takes safety measures to protect its own lives from COVID-19, through telephone oral arguments (which will hopefully be as electric as live oral arguments), might look inconsistent or cruel if it then dismantles the Act which protects the People from morbidity and mortality. (Incidentally, it could also look mean or thoughtless if the Court fails to show sufficient, yet Constitutional, compassion to voters who may not want to get COVID-19 from having to commingle in a voting line.) Even if the Court returns to normal oral arguments by the time this case is heard—"normal" being a beautiful and wistful word these days—, Amicus may not be there in person, but this written prayer (and others' similar prayers) for relief of the Nation from sickness and death will ideally be remembered; not to mention the unwritten prayers of those sick and vulnerable Americans who may not ever speak to the Court by paper or voice, but still desperately need the Court to spare the Act—and many of those Americans—from death.

CONCLUSION

The Court should either: 1) hold the Mandate to be merely precatory and still legally in existence; or, 2) if the Court overturns the Mandate, also hold the

Mandate to be fully severable from the Act. As always, Amicus humbly thanks the Court for its time and consideration.

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