Nos. 11-393, 11-398, 11-400

IN THE

Supreme Court of the United States

NAT. FED'N OF INDEP. BUSINESS,
Petitioners,
v.
SEBELIUS, SEC. OF HHS, ET AL.
Respondents.

DEPT. OF HHS, ET AL.
Petitioners,
v.
FLORIDA, ET AL.
Respondents.

FLORIDA, ET AL.
Petitioners,
v.
DEPT. OF HHS ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMERICAN CIVIL RIGHTS UNION *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS ON SEVERABILITY

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INTEREST OF THE *AMICUS CURIAE* [1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former

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[1] Peter Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we seek to ensure that the Constitutional limits to federal power are fully recognized and enforced. That includes in regard to this case in particular that the scope and boundaries of the Commerce Clause be fully respected and maintained, and properly applied to analysis of the constitutionality of the Patient Protection and Affordable Care Act.

SUMMARY OF ARGUMENT

Because the ACA does not include a severability clause, if the individual mandate is found unconstitutional, then the whole Act must be struck down as unconstitutional.

The government itself has repeatedly argued in this case and in other cases across the country that the ACA cannot function without the individual mandate, because of the Act's regulatory requirements for guaranteed issue and community rating. Because of those regulatory requirements, without an individual mandate requiring everyone to purchase health insurance, the result would be a financial death spiral for the health insurance industry that is supposed to provide coverage for everyone under the Act.

If regulation required fire insurers to issue policies to people whose houses were already on fire at

standard rates, the fire insurance pool would include only all burned down houses, which would obviously be dysfunctional.

The resulting financial death spiral would cause the costs of other provisions of the ACA to soar, such as the subsidies for purchase of health insurance on the Exchanges, which would be even more costly than expected, and the costs for the Medicaid expansion, where more people would qualify given the decline of private insurance.

For these foregoing reasons, this Court should reverse the ruling of the court below on the severability issue.

ARGUMENT

I. THE INDIVIDUAL MANDATE CANNOT BE SEVERED, THEREFORE THE WHOLE ACA MUST BE FOUND UNCONSTITUTIONAL.

The ACA does not include a severance clause. Consequently, if the individual mandate is found unconstitutional, the question becomes whether the remaining parts of the ACA can still remain fully operative as law and function as Congress intended, and whether Congress would have passed the ACA without the individual mandate. *Alaska Airlines v. Brock*, 480 U.S. 678 (1987); *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010); *Williams v. Standard Oil Co*., 278 U.S. 235 (1929); *Pollock v. Farmers' Loan & Trust Co.,* 158

U.S. 601, 636 (1895); *see also R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 362 (1935) (invalid parts "so affect[ed] the dominant aim of the whole statute as to carry it down with them").

The answer in both cases is indisputably no. HHS itself has repeatedly argued in this case and in other cases across the country that the ACA cannot function without the individual mandate. That is because of the Act's regulatory requirements for guaranteed issue and community rating. The Act requires all insurers to cover all pre-existing conditions and issue health insurance to everyone that applies, no matter how sick they are when they first apply or how costly they may be to cover. *ACA, Sections 2702, 2704, 2705.* This is what is known as guaranteed issue.

The Act also prohibits insurers from varying their rates based on the medical condition or illnesses of applicants. Insurers can only vary rates within a limited range for age, geographic location, and family size. *ACA, Section 2701*. This regulatory requirement is known as modified community rating.

Under these regulatory requirements, younger and healthier people delay buying insurance, knowing they are guaranteed coverage at standard rates after they become sick. Sick people show up applying for an insurer's health coverage for the first time with very costly illnesses such as cancer and heart disease, which the insurer must then cover and pay for, out of the same standard premiums as everyone else pays. This means the insurer's covered risk pool includes more costly sick people and fewer less costly healthy

people, so the costs per person covered soar. The insurer then has to raise rates sharply for everyone just to be sure to have enough money to pay all of the policy's benefits.

Those higher rates encourage even more healthy people to drop their insurance, leaving the remaining pool even sicker and more costly on average, which requires even higher premiums, resulting in a financial death spiral for the insurers and the insurance market.

If regulation required fire insurers to issue policies to people whose houses were already on fire at standard rates, the fire insurance pool would include only all burned down houses, which would obviously be dysfunctional.

The ACA tries to counter this problem by adopting the individual and employer mandates, seeking to require everyone to be covered and contributing to the pool at all times. Without these mandates, the government itself has repeatedly argued, those who would remain uninsured would substantially affect the interstate market for health insurance, by allowing the remaining regulatory requirements to cause soaring health insurance premiums through the above process and ultimately a financial death spiral.

That financial death spiral would cause the costs of other provisions of the ACA to soar, such as the subsidies for purchase of health insurance on the Exchanges, which would be even more costly than expected, and the costs for the Medicaid expansion,

where more people would qualify given the decline of private insurance.

Indeed, the ACA itself in its very statutory language recognized the essential role of the individual mandate in the statute's overall framework, saying in Section 1501(a)(2)(I),

> "[I]f there were no [individual mandate], many individuals would wait to purchase health insurance until they needed care….The [individual 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."

As the court in *Alaska Airlines* said, "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently…." 480 U.S. at 684.

Moreover, as *Alaska Airlines* also recognized, in the absence of a statutory severance clause the entire statute must be struck down if Congress would not have enacted the statute without the unconstitutional provision. 480 U.S. at 678. The narrow margin of passage of the ACA greatly increases the probability that Congress would not have passed the ACA without the individual mandate. The loss of that provision so centrally affects the entire structure of the Act that without it the entire structure must fall. Trying to determine what could be salvaged

would embroil the Court in rewriting the statutory policy and framework to govern one-sixth of the entire U.S. economy.

The District Court below recognized the validity of exactly these arguments in striking down the entire PPACA. The court said,

> "[O]n the unique facts of this particular case, the record seems to strongly indicate that Congress would not have passed the Act in its present form if it had not included the individual mandate. This is because the individual mandate was indisputably essential to what Congress was ultimately seeking to accomplish. It was, in fact, the keystone or lynchpin of the entire health reform effort."

(Slip Op. at 67). Indeed, the court's analysis of the legislative history of the ACA concluded that the absence of a severability clause in the Act was intentional, reflecting Congress's judgment that the ACA was not functional without the individual mandate. (Slip Op. at 67-68). The court added,

> "Severing the individual mandate from the Act along with the other insurance reform provisions – and in the process reconfiguring an exceedingly lengthy and comprehensive legislative scheme – cannot be done consistent with the principles set out above. Going through the 2,700-page Act line-by-line, invalidating dozens (or hundreds) of some sections while retaining dozens (or hundreds) of others, would not only take considerable time and extensive briefing, but it would, in

> the end, be tantamount to rewriting a statute in an attempt to salvage it, which is foreclosed by *Ayotte, supra*. Courts should not even attempt to do that….The interoperative effects of a partial deletion of legislative provisions are often unforeseen and unpredictable. For me to try and 'second guess' what Congress would want to keep is almost impossible."

(Slip Op. at 72-73). The court consequently rightly concluded,

> "In the final analysis, this Act has been analogized to a finely crafted watch, and that seems to fit. It has approximately 450 separate pieces, but one essential piece (the individual mandate) is defective and must be removed. It cannot function as originally designed. There are simply too many moving parts in the Act and too many provisions dependent (directly and indirectly) on the individual mandate and other health insurance provisions—which, as noted, were the chief engines that drove the entire legislative effort—for me to try and dissect out the proper from the improper, and the able-to-stand-alone from the unable-to-stand-alone. Such a quasi-legislative undertaking would be particularly inappropriate in light of the fact that any statute that might conceivably be left over after this analysis is complete would plainly not serve Congress' main purpose and primary objective in passing the Act….The Act, like a defectively designed

> watch, needs to be redesigned and reconstructed by the watchmaker."

(Slip Op. at 73-74).

CONCLUSION

For all of the foregoing reasons, *amicus curiae* American Civil Rights Union respectfully submits that this Court should reverse the ruling of the court below on the severability issue.

Respectfully submitted,

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