Nos. 11-393 & 11-400

In the Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, ET AL.,

v.

KATHLEEN SEBELIUS, ET AL.

STATE OF FLORIDA, ET AL.,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

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

REPLY BRIEF FOR PRIVATE PETITIONERS ON SEVERABILITY

KAREN R. HARNED
NFIB SMALL BUSINESS LEGAL CENTER
1201 F St. NW, Suite 200
Washington, DC 20004

PROF. RANDY E. BARNETT
GEORGETOWN UNIV. LAW CENTER
600 New Jersey Ave. NW
Washington, DC 20001

MICHAEL A. CARVIN
Counsel of Record
GREGORY G. KATSAS
C. KEVIN MARSHALL
HASHIM M. MOOPPAN
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Private Petitioners

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In arguing that the individual mandate is severable from most or all of the ACA, the Government and *Amicus* Farr return over and over to the same themes: Surely the Act, even without the mandate, would be *better than nothing*. After all, it includes *so many* provisions, and most *could operate* on their own. Invalidating these perfectly functional elements of Congress' handiwork would thus be a grave act of *judicial overreach*. Each of these themes, however, is badly misconceived.

That a severed law would achieve some of Congress' goals does not suffice—if severance would also abandon the law's principal purpose, undermine another, distort the scheme, or violate important constraints. Half a loaf is not always better than none; sometimes Congress would choose fruit or meat instead of insufficient bread, especially if the latter's price is too high. Hence the proper inquiry asks if Congress actually would "have enacted th[e valid] provisions independently," *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010) ("*FEF*"), and thus considers "whether the statute will function in a *manner* consistent with the intent of Congress," *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987), rather than simplistically relying on the truism that courts ought not invalidate more of a statute "than necessary."

Not all statutory provisions are created equal under this inquiry. The mandate is one of thousands of ACA provisions, but that does not detract from its singular role as the foundational building block for the legislative effort: the coercive broadening of the

insurance risk pool; which in turn makes affordable sweeping new regulation of insurers; which in turn enables uniform and acceptable federal premium subsidies; which in turn necessitate the imposition of new taxes and fees; and all of which justifies the imposition of new burdens on States and employers in a scheme of "shared responsibility" for achieving affordable, near-universal coverage. Invalidating a *mere detail* of a legislative scheme may not justify scrapping the entirety, but striking a *fundamental premise*, like the mandate, evidently requires wholesale reworking.

Accordingly, it is irrelevant whether other ACA provisions could operate absent the mandate (and the insurance regulations). Even if a hypothetical Congress *could have* enacted the ACA without those provisions, the actual Congress that enacted the ACA never *would have* departed so significantly from its carefully wrought legislative bargain. All of the objective indicia—from statutory text to historical context—so confirm. The Government fails to rebut Private Petitioners' illustrations of the grave distortions of the Act's fundamental features that would be caused by severing the mandate and principal insurance regulations. For his part, *Amicus* seems to agree that significant distortions would result, but aims to minimize them by retaining even those insurance regulations, notwithstanding Congress' express finding that the mandate was "essential" to their proper functioning.

Hence, the only act of overreach would be for the judiciary to implement a version of comprehensive health-insurance reform that does not remotely resemble the law that Congress enacted—a version

under which premiums would skyrocket, coverage would drop, the Government would pay insurers for "discriminatorily" priced policies, and burdens would fall disproportionately on employers and States. Rather than show respect for Congress, such a result would fundamentally alter landmark legislation. Here, preserving the boundary between the judicial and legislative realms means allowing *Congress* to rewrite its *own* statute upon the invalidation of its operational, economic, and political centerpiece.

ARGUMENT

I. THIS COURT CAN AND SHOULD NOW RESOLVE THE SEVERABILITY OF THE INDIVIDUAL MANDATE

The Government's lead argument on severability is that this Court cannot or should not address it. Govt. Severability Br. 14-25. Its theory is that, because not every provision in the 2700-page ACA injures Petitioners, this Court cannot address the survival of those provisions, or should (in its discretion) defer the question. But the Government's novel theory is irrelevant, because it concedes that at least *some* provisions of the Act *do* injure Petitioners, and Petitioners contend that those provisions must fall because the mandate is the lynchpin of the entire Act. In any event, as even *Amicus* agrees, the Government's theory is wrong, because severability is a remedial inquiry meant to effectuate Congress' intent, not to redress a distinct injury to a plaintiff.

A. The Government mounts its justiciability challenge on the premise that many ACA provisions do not burden any parties. If a provision causes no injury, the Government argues, this Court cannot or should not decide whether it is severable. *Id.* 16-19.

But the Government also concedes that State Petitioners "have standing to challenge the Act's employer-responsibility provision" and "expansion of Medicaid eligibility." *Id.* 24. Article III thus indisputably allows this Court to consider whether at least *those* provisions must fall with the mandate. Yet Petitioners' argument for why they must is that the *entire Act* collapses if the mandate is invalidated, given the critical economic, operational, and political role of that provision. *See* Private Petrs. Severability Br. 42-61; State Petrs. Severability Br. 42-51. Therefore, to resolve the validity of the provisions as to which the Government asserts no jurisdictional objection, this Court *must* consider Petitioners' broad contention about the survival of the ACA as a whole. The Government's theory is, therefore, irrelevant.

B. In any event, as even *Amicus* agrees, Farr Severability Br. 19-24, the Government's approach to severability is wrong as a matter of theory and precedent. Severability is a "remedial question." *United States v. Booker*, 543 U.S. 220, 246 (2005). When a plaintiff has standing to challenge a statutory provision, and that challenge succeeds, courts must choose a remedy "compatible with the Legislature's intent." *Id.* There is no jurisdictional obstacle to that selection. Surely if congressional intent were undisputed—*e.g.*, if the law had a *non*-severability clause—a court could and should carry out that direct instruction. *Accord* Farr Severability Br. 21 n.4. Here, nobody disputes that Private Petitioners have standing to challenge the mandate. *See* Pet.App. 8a, 10a; Govt. Mandate Br. 16 n.5. Therefore, the remedial severability question is undoubtedly within this Court's power.

Indeed, for nearly a century this Court has resolved severability disputes without ascertaining whether the plaintiffs were independently injured by each of the law's separate provisions—even where it was apparent that they were not. Perhaps the best example is *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929), wherein this Court considered whether provisions establishing a "Division of Motors and Motor Fuels" and requiring collection of data could survive invalidation of a price-fixing provision. *Id.* at 242-43. Of course, the parties could not possibly have been injured by the mere *existence* of the agency or by its data collection, but this Court nonetheless invalidated the entire law. *Id.* at 244-45. The Government has not even tried to distinguish *Williams*. *See* Govt. Severability Br. 20 n.10.

Conversely, there is *no* case holding that, before a court can address severability, a plaintiff must show harm from each provision. *Printz v. United States*, 521 U.S. 898 (1997), held only that courts *may* "decline" to address severability if *no* party is injured by *any* of the statute's other parts. *Id.* at 935. Here, in contrast, it is undisputed that at least *some* of the Act's other provisions injure Petitioners. *Supra* at I.A.

Moreover, *Printz* at most recognized a *prudential* rule, yet every relevant prudential consideration here supports resolving severability now. This issue has divided the lower courts, and the Act's sweeping provisions have huge implications for government operations and nearly every participant in the health-insurance and healthcare fields—which is presumably why even the Government recommended that this Court grant certiorari on the question.

C. The Government finally argues that two statutes prevent this Court from considering the severability of certain ACA provisions. Govt. Severability Br. 14-15 & nn.8-9. Again, however, the Government's argument is irrelevant, because those statutes do not even arguably bar consideration of whether the *Medicaid expansion* is non-severable. *Id.* Accordingly, even if a handful of ACA provisions could not formally be invalidated in this case, that cannot prevent Petitioners from arguing that the Act's Medicaid expansion is non-severable because the entire Act must fall with the mandate.

In any event, neither statute bars this Court from invalidating the entire ACA. The Anti-Injunction Act bars suits brought "for the purpose of restraining the assessment or collection of any tax," 26 U.S.C. § 7421(a), but the "purpose" of this suit is to invalidate the mandate's legal requirement to purchase health insurance, not to restrain any taxes. *See* Private Resps. AIA Br. 9-12. Similarly, judicial review is barred for actions "to recover on any claim arising under" the Medicare laws, *see* 42 U.S.C. §§ 405(h), 1395ii, but this suit cannot possibly be so described. Unlike in *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 10 (2000), Petitioners' suit is not designed to compel payment of either past or anticipated future Medicare benefits. That a finding of inseverability may incidentally invalidate a tax or Medicare provision does not mean that this suit has the "purpose" of restraining the tax or constitutes an action "to recover on a Medicare claim."

II. THE GOVERNMENT AND *AMICUS* DISTORT THE LEGAL STANDARD FOR SEVERABILITY BY OVERSIMPLIFYING THE LEGISLATIVE PROCESS

Inseverability is mandated in two circumstances: *first*, if the remaining provisions are not "fully operative as a law"; and *second*, if, regardless, it is "evident that the Legislature would not have enacted [them] … independently." *FEF*, 130 S. Ct. at 3161. The Government and *Amicus* nominally acknowledge this two-part test. But they deprive the critical second prong of all force by effectively assuming that Congress *always* would have enacted any valid part of its handiwork so long as that part advances, to any degree, any of the law's objectives. That assumption is inconsistent with the caselaw, incongruent with the legislative process, and insensitive to the separation of powers.

A. In conducting the second step of severability analysis, the central question "is whether the statute will function in a *manner* consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685. Remarkably, the Government never quotes this test, and *Amicus* overtly attacks it as too "broad," suggesting that it cannot be "[t]aken literally." Farr Severability Br. 16. It can and it should.

Contrary to *Amicus*, the *Alaska Airlines* test's implicit "comparison between the judicially modified statute and the statute originally enacted," *id.*, is not only proper but *imperative*. Courts must evaluate whether a severed statute would depart so fundamentally from the law's intended operation to warrant the inference that Congress would have done nothing—or something else entirely—rather

than pass such a distorted version. *Alaska Airlines*, 480 U.S. at 685. That is wholly consonant with how other cases have described the inquiry. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) (asking whether "the legislature would have preferred what is left of its statute to no statute at all"); *Williams*, 278 U.S. at 242 (asking whether Congress "would not have been satisfied with what remains").

B. The *Alaska Airlines* comparison properly accounts for the many reasons why Congress might refuse to pass *independently* a statutory provision that it was willing to enact as part of a *package*. This Court has recognized such factors repeatedly, in precedents both venerable and recent. For example, if the provision does not serve Congress' "dominant aim," Congress would prefer a future comprehensive alternative rather than hybrid half-measures. *See R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 361-62 (1935); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191-92 (1999). Likewise, if provisions are "mutually dependent," with some serving "as conditions, considerations or compensations" for others, Congress would not have passed the *quid* absent the *quo*. *Carter v. Carter Coal Co.*, 298 U.S. 238, 313, 316 (1936); *see also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 561-62 (2001) (Scalia, J., dissenting). Similarly, severing a legislative compromise could shift a scheme's deliberate allocation of benefits and burdens "in a direction which could not have been contemplated" and which was not desired. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 637 (1895); *see also Alaska Airlines*, 480 U.S. at 685 (directing consideration of "original legislative bargain").

Accordingly, *Amicus* is fundamentally wrong to assert that severance necessarily "does the least amount of damage" to congressional intent. Farr Severability Br. 11. And the Government is equally wrong to suggest that severance is warranted so long as the remaining provisions would advance any statutory objective. *See* Govt. Severability Br. 26-27. As explained, even where the remaining provisions somewhat advance one purpose of a comprehensive and multi-faceted legislative package, their retention could well conflict with Congress' overall plan.

C. For all these reasons, the separation-of-powers implications of severability should not be overlooked. While severability, used cautiously, can effectuate Congress' intent, applying it in a manner that disrupts the statute's dominant purpose or basic bargains constitutes "legislative work beyond the power and function of the court," *Hill v. Wallace*, 259 U.S. 44, 70 (1922). *Amicus* scoffs at the notion that invalidating an entire statute could be more respectful of Congress than invalidation in part, Farr Severability Br. 15, but it is only *partial* invalidation that risks "substitut[ing], for the law intended by the legislature, one they may never have been willing by itself to enact," *Pollock*, 158 U.S. at 636.

III. CONTRARY TO *AMICUS*, CONGRESS WANTED THE GUARANTEED-ISSUE AND COMMUNITY-RATING RULES TO WORK WITH THE MANDATE OR NOT AT ALL

The Government agrees that, because the Act's guaranteed-issue and community-rating regulations would, without the mandate, "*restrict* the availability of health insurance and make it *less* affordable—the opposite of Congress's goals in enacting the [ACA],"

those provisions are inseverable from the mandate. Govt. Severability Br. 45. Indeed, Congress made express its position that the mandate was "essential" to the proper functioning of these regulations, 42 U.S.C.A. § 18091(a)(2)(I), mooting any speculation about legislative intent on this point.

Amicus admits that these insurance regulations were intended "to work together with the [mandate], and likely will operate less ideally without" it, but he nonetheless urges they be severed. Farr Severability Br. 25, 31. This Court should not do so.

A. *Amicus* dismisses as "conjecture" Congress' claim that, without the mandate, guaranteed-issue and community-rating would increase premiums, enable strategic behavior, and potentially cause a "death spiral" for the industry. *Id.* 34. Citing studies that challenge those upon which Congress relied, and experts who disagree with those who testified to Congress, *Amicus* insists that the negative effects of the insurance regulations, even untempered by the mandate, will not be as bad as Congress warned. *Id.* 35-44. His argument is doubly wrong.

1. "Conjecture" about the effects of a law matters—when it is *Congress* doing the conjecturing. Severability doctrine asks whether Congress "would … have been satisfied with what remains" after the unlawful provision is invalidated, *Williams*, 278 U.S. at 242; that inquiry necessarily requires evaluation of what Congress "conjectured" when it chose to structure the statute as it did. *Amicus* thus repeats the Eleventh Circuit's error in second-guessing empirical evidence on which Congress relied.

Here, Congress made its position known, rendering an express finding that the mandate was

"essential," both to prevent strategic gaming of the guaranteed-issue and community-rating rules and to "lower health insurance premiums" by "broaden[ing] the health insurance risk pool." 42 U.S.C.A. § 18091(a)(2)(I). Whatever the merits of the studies *Amicus* now cites, *Congress* for these reasons deemed the mandate critical to the preservation of "effective health insurance markets." *Id.*

Amicus responds that Congress' finding was "not address[ing]" severability. Farr Severability Br. 31. Perhaps not, but whether Congress saw an invalid provision as "essential" to the operation of a valid provision is *exactly* the question that severability doctrine tries to answer. *E.g.*, *Alaska Airlines*, 480 U.S. at 691 (asking "whether Congress regarded the [invalid] clause as essential to" valid provision). *Amicus* insists that Congress would have preferred "an imperfect solution rather than no solution," Farr Severability Br. 33, but since Congress viewed the mandate as an "essential" prerequisite to its chosen solution, guaranteed-issue and community-rating by themselves were not a "solution" *at all*. That is not to say that Congress would have abandoned its efforts to solve the problem of preexisting conditions. But it certainly would have rejected guaranteed-issue and community-rating, standing alone, as an acceptable approach.[1]

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[1] *Amicus* claims that Congress also declared the mandate "essential" to statutes like ERISA. Farr Severability Br. 32-33. Actually, the findings cite ERISA *only* to illustrate the Government's "significant role in regulating health insurance"; they describe the mandate as "essential" to "regulation of the health insurance market"—in the manner explained by the very next finding, relating to the interplay between the mandate and insurance regulations. *See* 42 U.S.C.A. § 18091(a)(2)(H),(I).

2. In any event, *Amicus*' evidence does not demonstrate any disagreement with Congress on the relevant point—that the insurance regulations, without the mandate, would dramatically increase premiums, contrary to congressional intent.

Private Petitioners cited a pre-Act CBO study that found that the Act's insurance regulations alone would increase premiums in the individual market by roughly 30%. *See* Private Petrs. Severability Br. 11. *Amicus* cites three other studies: One predicts increases of 27%. Another estimates the increase at 10%-20%. The third finds that premiums would rise by 12.6%, but that appears to reflect premiums as reduced by federal subsidies; putting subsidies aside (as they merely help *some* people *pay* for premiums, but do not reduce them), the increase is 26.2%-34.9%. Farr Severability Br. 40-41 & n.9. These numbers hardly differ from those used by Petitioners and Congress, and they *confirm* the common-sense conclusion that, without the mandate's subsidy, compelling insurers to sell limitless coverage to the relatively unhealthy at average prices will cause a dramatic increase in premiums—frustrating Congress' goal of affordable care.[2]

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[2] The Government says that the 30% increase would be partially offset by two countervailing reductions, Govt. Severability Br. 40 n.19; but, as CBO explained, those reductions are primarily due to the mandate and resulting influx into the risk pool of new, below-average-cost enrollees, *see* CBO, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act*, at 6, 13 (Nov. 30, 2009). That, of course, is exactly the point: Without the mandate, the enormous cost of forcing insurers to provide limitless healthcare to the sick would *not* be offset.

Amicus speculates that these premium increases would not cause a "death spiral," Farr Severability Br. 39-40, but Congress' goal was not simply to avoid a death spiral. It was to promote "Affordable Care." And, as noted, there is no dispute that insurance costs would increase considerably if the mandate's subsidy were not available to counteract the inflationary effects of the insurance regulations. Indeed, premiums would rise by approximately $1200 per year in that scenario, Private Petrs. Severability Br. 14 n.15—*more than* the alleged $1000 increase that Congress attributed to "cost-shifting" that would be prevented by the mandate, 42 U.S.C.A. § 18091(a)(2)(F). Congress obviously would not have enacted a "solution" that *raises* insurance premiums *more* than the uncompensated-care "problem" it was purporting to solve.

B. *Amicus* also emphasizes the importance of the insurance regulations in "protect[ing]" patients from "abusive" insurance practices. *See* Farr Severability Br. 25-28. But "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Id.* at 526. That is all the more true when, as here, Congress had not one but *two* (inconsistent) primary goals—increasing access to coverage ("Patient Protection") *while also reducing costs* ("Affordable Care")—and single-mindedly furthering one goal would directly undermine the other.

It may be true that a "rational Congress" could so value insuring the unhealthy that it would be willing to accept the resulting increased premiums; some States apparently have done so. Farr Severability Br. 35, 43-44. But the question is whether *this* Congress *would have* made that choice. On that question, the legislative findings (Congress declared the mandate "essential"), congressional record (Senators repeatedly justified the provisions as a package), and historical context (the industry demanded the mandate for its support) all direct that the answer is no; the mandate was an economic and political *quid pro quo* for the insurance regulations. *See* Private Petrs. Severability Br. 3-5, 12-19, 36-40. This Court should not undo that bargain.

IV. CONTRARY TO THE GOVERNMENT, THE ACT CANNOT SURVIVE, AND NEVER WOULD HAVE BEEN ENACTED, WITHOUT ITS UNCONSTITUTIONAL HEART

The Government's position is: thus far but no further. While agreeing that guaranteed-issue and community-rating, without the mandate, "would drive up costs and reduce coverage" and so cannot be severed, Govt. Severability Br. 26, the Government contends that invalidation can stop there. It cannot. The Government's line-drawing is arbitrary, as *other* insurance regulations similarly "would drive up costs and reduce coverage" absent the mandate. More importantly, it is inconceivable that Congress would have enacted anything resembling the current ACA without its most critical, most touted provisions—the principal mechanisms for achieving its predominant goals, without which major components of the law would be operationally and politically distorted.

A. The Government Ignores The Operational And Economic Similarities Among The Act's Various Insurance Regulations

1. As Congress understood and the Government explains, if insurers were compelled to issue coverage to all-comers at average prices, "[p]remiums would therefore go up, further impeding entry into the market." Govt. Severability Br. 46. Those regulations (if imposed alone) would thus "restric[t] the availability of affordable health insurance—the opposite of what Congress intended." *Id.* Only by pairing them with the mandate's nearly $40 billion annual subsidy to insurance companies, Private Petrs. Severability Br. 14, was Congress able to "protect" vulnerable customers from "abuse" while still avoiding dramatic premium increases.

Yet the Government refuses to acknowledge that the very same logic equally links the mandate to the Act's *other* regulations of insurance products, which are packaged together in Sections 1001 and 1201 of Title I of the Act. If insurance companies are forced to cover particular services, or forbidden to impose limits on coverage, or restricted in their use of cost-sharing mechanisms like deductibles, costs will similarly increase, and "[p]remiums would therefore go up, further impeding entry into the market." Govt. Severability Br. 46. The result: "restricting the availability of affordable health insurance—the opposite of what Congress intended." *Id.* Again, as Congress expressly found, the mandate's subsidy counteracts much of this effect by "lower[ing] health insurance premiums" to almost the same extent that the insurance regulations increase them. *See* Private Petrs. Severability Br. 13-14. But, without

it, *none* of these regulations would work as intended. *See generally* Economists Severability Br. 9-11 (detailing costs of various insurance regulations and offsetting impact of mandate). Particularly since there is no bright-line rule distinguishing *two* of the costly insurance regulations from the rest, choosing among them constitutes an arbitrary and improper alteration of the Act, akin to improperly "blue pencil[ing]" it, *FEF*, 130 S. Ct. at 3162.

2. The Government ignores this logic entirely, instead knocking down a straw-man—that the insurance regulations would "unfairly burden the insurance industry"—by observing that the industry (in its *amicus* brief) does not ask for these provisions to be invalidated. Govt. Severability Br. 38. Of course, the point is not that Congress wanted to protect *insurers* from *unfair burdens*, but that Congress wanted to protect the *public* from the *unaffordable premiums* that would result. As for why the industry seeks invalidation only of guaranteed-issue and community-rating, those two regulations force insurers to sell to undesirable customers at undesirable prices, while the other insurance regulations merely compel them to sell more expensive products. The latter "burden" can more fully be passed on to customers. But the resulting premium increases—which would be considerable, given that these regulations are estimated to drive up insurers' costs by *billions* of dollars annually, *see* Economists Severability Br. 9-11—explain why Congress would not have enacted these regulations on their own, without the economic *quid pro quo* of the mandate to temper their impact.

3. The Government also observes that certain States impose similar regulations, even without an individual mandate. Govt. Severability Br. 39. That is the same argument that *Amicus* advances against the *Government's* position on guaranteed-issue and community-rating. Farr Severability Br. 43-44. The response is also the same: The inquiry is whether *this Congress*, seeking to reduce costs and expand coverage, *would have* enacted these regulations alone, not whether some legislature somewhere, with different weights assigned to the competing interests, *could have* done so. *Supra* at III.B.

4. The Government suggests that Congress could not have intended the insurance regulations to work exclusively with the mandate, because a few of them take effect *before* it. Govt. Severability Br. 38. That proves nothing: A *quid pro quo* is not any less so if a present *quid* is given for a future *quo*. ACA provisions take effect at various times for many reasons, including budgetary gimmickry. *See* Robert Pear, *Senate Health Care Bill Faces Crucial First Vote*, N.Y. TIMES, Nov. 20, 2009, at A24 ("[T]o help hold down the cost of the bill, Mr. Reid decided to delay the effective date for many provisions …."). Even if these effective dates *were* meaningful clues to Congress' intent, they still would not support the Government's singling out of guaranteed-issue and community-rating for inseverability: Many *other* insurance regulations—*e.g.*, the prohibition on annual dollar limits, requirements to cover certain services, and limits on cost-sharing—also take effect *only* in 2014, along with the mandate.[3]

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[3] *See* Kaiser Family Found., *Implementation Timeline*, http://healthreform.kff.org/Timeline.aspx.

B. The Government Ignores The Fundamental Significance To The Act Of Its Individual Mandate And Insurance Regulations

More broadly, the Government ignores the principal reason why the *entire Act* must ultimately fall: The provisions that the Government concedes must be stricken are, indisputably, the heart of the statute, the primary means of satisfying its major goals. A legislative centerpiece cannot cavalierly be severed, as if it were a dispensable detail.

To repeat, this Court's cases emphasize the need to weigh "the nature" of the stricken provision, and its role "in the original legislative bargain." *Alaska Airlines*, 480 U.S. at 685. A provision can readily be severed if the statute's "prime object" could be "fully accomplished" without it, *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 395-96 (1894); but the opposite is true if the provision played an "integral" role in the law's "predominant purpose," *Mille Lacs*, 526 U.S. at 191-92, or implicated its "dominant aim," *Alton*, 295 U.S. at 361-62. When a bill's *hallmark* is stripped therefrom, it is hardly reasonable to presume that Congress nevertheless would have pressed ahead to enact the remainder.

The Government cannot and does not dispute that the mandate, together with the guaranteed-issue and community-rating regulations, are the heart of the ACA. They play an "integral"—indeed, indispensable—role in reducing both the cost of premiums and the number of uninsured, which were the Act's "predominant purpose[s]." *Mille Lacs*, 526 U.S. at 191-92. It thus cannot be said that the Act's "prime object[s]" would be *remotely* satisfied, much less "fully accomplished," without these provisions.

Reagan, 154 U.S. at 395-96. They were the political focal points and operational building blocks for the entire ACA; relative to them, its other parts were "mere appendants," *Williams*, 278 U.S. at 243-44.

Instead of responding, the Government points to the Act's "myriad" provisions that would remain operative without the mandate. Govt. Severability Br. 28. Its focus is exclusively on *quantity*, but what really matters is the *nature* of these provisions. Many of them are allegedly "unrelated" to the Act's main purposes. *Id.* 30. If so, then *those* provisions, if invalid, could likely be severed from the rest of the Act. But the mandate and "core reforms" of the insurance regulations, Govt. Mandate Br. 24, which are critical to the Act's primary goals, cannot be.

C. The Government Ignores The Distortions That Would Be Caused By Eliminating The Mandate And Insurance Regulations

The foundational significance of the mandate and insurance regulations is corroborated by the operational spill-over effects from their invalidation. Indeed, even *Amicus* concedes that those effects "could not easily be limited" to the stricken provisions. Farr Severability Br. 46. Whereas the Government repeatedly emphasizes the undisputed point that most of the Act's components could continue on their own to operate in *some* fashion, e.*g.*, Govt. Severability Br. 12, 13, 26, 29, it barely even attempts to respond to Private Petitioners' showing that those components will cease to "function in a *manner* consistent with the intent of Congress," *Alaska Airlines*, 480 U.S. at 685.

1. Private Petitioners have explained that, without the individual mandate, guaranteed-issue,

and community-rating, the Act's scheme of federal premium subsidies would *pay* for the very insurance practices that Congress sought to *proscribe*. Private Petrs. Severability Br. 49-50. The Act's subsidies are calculated based on the lesser of (i) premiums paid or (ii) the community-rated premium for the second-cheapest "silver" plan in the applicable "rating area." *Id.* The Government's attempt to explain how it could calculate the latter figure—notwithstanding invalidation of the entire community-rating regime—defies comprehension. Govt. Severability Br. 36 n.15. The rest of its response is devoted to showing that the *total cost* of subsidies would not increase absent the mandate and insurance regulations, *id.* 36, but that misses the point. Without the insurance regulations, calculating subsidies based on *individual* premiums would, absurdly, *pay* insurers, with federal funds, to continue pricing practices that Congress condemned as discriminatory.

2. Notably, *Amicus* agrees with Private Petitioners that eliminating the mandate, guaranteed-issue, and community-rating would "interfere with operation of the new insurance exchanges." Farr Severability Br. 45. Indeed, the "critical feature" of those exchanges was the "greater standardization of health insurance policies" created by the effective end to individual underwriting. *Id.* Without that standardization, Congress' goals in creating the exchanges "would be significantly frustrated." *Id.* 46. Moreover, the federal subsidies are the incentive to participate in the exchanges, and without those subsidies, there will be no mechanism to sustain the exchanges. The Government's only response is that an insurance exchange could still add some value, offering State-created exchanges as

examples. Govt. Severability Br. 37. Maybe so, but such weak exchanges would not accomplish what *this* Congress was trying to achieve.

3. As *Amicus* again agrees and the Government does not dispute, *see* Farr Severability Br. 50, if the exchanges or subsidies are stricken, the employer-responsibility provision—triggered only when an employee obtains a subsidy on an exchange—can no longer "functio[n] independently." *Alaska Airlines*, 480 U.S. at 684. And, regardless, the Government has no answer to the fact that the Act's "shared responsibility for employers" would, absent the individual mandate, not be "shared responsibility" at all. Yet this 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." *Pollock*, 158 U.S. at 636-37.

4. On Medicaid, the Government offers no explanation of its own earlier concession that the burdens on the States of expanding that program were intended to be "offset" by other "cost-saving provisions" for the States—such as guaranteed-issue, community-rating, and (supposedly) the mandate, RE 1023-24—all, assumedly, no longer extant. Congress never intended the States to bear the costs of the Medicaid expansion *absent* those countervailing "cost-saving provisions."

5. Likewise, the Government does not address the Act's set of new taxes, fees, and spending cuts. Yet briefs by numerous *amici* confirm that many of these provisions were included as part of economic *quid pro quo* arrangements, in reliance upon revenue and savings that Congress anticipated would accrue

to healthcare providers as a result of the individual mandate. *See, e.g.*, Am. Hosp. Ass'n Severability Br. 8-22 (identifying three specific provisions that Congress included on the premise that the mandate would "offse[t] the loss" of hospital revenues and "allo[w] them to continue serving patients while still making ends meet").

Nor does the Government grapple with the fact that many of these provisions were reluctantly included in the Act as "Revenue Offset Provisions" to satisfy the political constraint of deficit-neutrality. Without the liability of the premium subsidies, Congress surely would not have imposed these politically unpopular measures, such as the nearly $500 billion in Medicare cuts, *see* State Petrs. Severability Br. 15. Because this Court cannot rebalance the books by "blue pencil[ing]" the Act, *FEF*, 130 S. Ct. at 3162, these "defraying" provisions must also be stricken, *Williams*, 278 U.S. at 244.

6. Finally, while showing little interest in the operational difficulties that would be caused by the mandate's invalidation, the Government complains that inseverability would create the "prospect" of "extraordinary disruption" because "many provisions of the Act" are already "in operation." Govt. Severability Br. 29. But the relevant question is whether Congress *originally* "would … have enacted those provisions independently," *FEF*, 130 S. Ct. at 3161, not whether invalidating them *now* may be disruptive. Severability analysis obviously does not vary depending on the extent to which the vagaries of the pace of judicial review have caused a statute to be implemented or relied upon.

D. The Government Ignores The Evidence That The Act Was A Unique Package Deal

On top of the many operational distortions that eliminating the mandate would cause, evidence from the legislative process confirms that Congress intended the ACA to stand or fall as a unit.

1. The textual evidence is the notable elimination of a standard severability clause. *See Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245, 1267 (9th Cir. 1988) (treating such removal as probative evidence that statutory provisions meant to "operate together or not at all"). The Government does not dispute that the bill initially passed by the House *included* such a clause, and that the subsequent Senate bill omitted it. Govt. Severability Br. 43.

The Government claims that the eschewal of a severability clause does not matter, because "there already *are* severability provisions" in the Tax Code, the Social Security Act, and ERISA, all of which were amended in certain respects by the ACA. *Id.* But the existence of those clauses proves Petitioners' point. Congress made clear that invalidation of any part of the ACA will not topple pre-existing parts of the Tax Code, Social Security Act, or ERISA—but the same cannot be said for the ACA itself, because Congress, by contrast, did *not* include a severability clause in *that* law. And the contrast belies the Government's reliance on drafting manuals claiming that severability clauses are "unnecessary." For an unnecessary appendage, they are indeed ubiquitous (including in other comprehensive legislation enacted by the very same Congress, *see* Private Petrs. Severability Br. 59).

2. The contextual evidence includes not only the close margins by which the Act passed, but also the unique circumstances that limited the Senate's ability to amend the Act and prevented the House from even considering amendments to the Senate bill. *See id.* 57-61. While the Government urges that "the politics of the Act's passage" be ignored, Govt. Severability Br. 41, this Court has long framed the inquiry as whether Congress would have enacted the valid provisions even if, "while the bill was pending … a motion to strike out the [invalid] provisions … prevailed." *Carter*, 298 U.S. at 313; *accord Alaska Airlines*, 480 U.S. at 685 (considering "legislative bargain"). Given the complex, delicate compromise that produced the Act, the conclusion is inescapable that a successful motion to strike the mandate—and, *a fortiori*, the mandate, insurance regulations, and other elements discussed above—would have decisively ended any possibility that Congress would have enacted the ACA's remaining fragments.

CONCLUSION

This Court should hold that the ACA is entirely non-severable from the individual mandate.

Respectfully submitted,

KAREN R. HARNED
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F St. NW, Suite 200
Washington, DC 20004

PROF. RANDY E. BARNETT
GEORGETOWN UNIV.
LAW CENTER
600 New Jersey Ave. NW
Washington, DC 20001

MICHAEL A. CARVIN
Counsel of Record
GREGORY G. KATSAS
C. KEVIN MARSHALL
HASHIM M. MOOPPAN
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Private Petitioners

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