No. 11-393

In The Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, et al.,

Petitioners,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Respondents.

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

BRIEF OF AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Amicus Curiae Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, strict construction of the Constitution and individual rights.[1] Specializing in Constitutional history and litigation, Landmark presents herein a unique perspective concerning the legal issues and national implications of the Eleventh Circuit's improper decision to sever the individual mandate from the larger Patient Protection and Affordable Care Act ("ACA"). In particular, Landmark explains how the Eleventh Circuit's decision will lead to inconsistent application of the ACA's mandates. Moreover, Landmark demonstrates how the Eleventh Circuit misapplied the Court's standard for determining whether the individual mandate could properly be severed from the larger ACA.

SUMMARY OF ARGUMENT

The fundamental and overriding question is whether this Court will give its imprimatur to the

[1] The parties were notified at least 10 days prior to the due date of this brief of the intention to file. The parties have filed blanket consents to the filing of Amicus Curiae briefs.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, or its members, or its counsel made a monetary contribution to its preparation or submission.

heavy-handed demands of temporary politicians who seek to fundamentally and permanently change the relationship between the citizen and government in a manner that no past Congress or Executive have undertaken and which the Constitution clearly does not allow? Or will it uphold the Framers' construct of a federal government with enumerated and limited grants of power. Whichever course is to be set, now is the time and this is the case for this Court's determination.

In order to uphold the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (hereinafter referred to as "the Act" or "the ACA"), and, in particular, its individual mandate, this Court must set aside more than 220 years of Commerce Clause application and Supreme Court precedents, rewrite the Necessary and Proper Clause, and disregard the Constitution's requirements for the laying and collection of taxes. Such a dramatic shift in the Constitution's equilibrium compels the Supreme Court's immediate evaluation of the ACA. Thousands of state and local governments, tens of thousands of employers, and tens of millions of Americans await the Court's consideration.

In Amicus Curiae's view, the Eleventh Circuit Court of Appeals correctly rejected the individual mandate and its penalty provision as exceeding Congress's enumerated powers. The Circuit Court erred, however, by rejecting the District Court's conclusion that

the individual mandate was an indispensible component that could not be severed from the rest of the law. In so doing, the Eleventh Circuit has exacerbated an already unworkable, inconsistent, and confusing conflict among federal district and circuit courts that have reviewed the ACA's constitutionality. These conflicts can be resolved only upon this Court's examination.

Further, it is also important to note that the Respondents also recommend accepting NFIB's petition as presented without any attempt to qualify or limit the question presented. *See* Consolidated Brief for Respondents, p. 8, 11 and 33.

Amicus Curiae Landmark Legal Foundation ("Landmark") encourages this Court to accept the National Federation Of Independent Business ("NFIB") (together with that of the State of Florida, et al.) petition for certiorari as providing the most logical opportunity for fully reviewing this unprecedented exercise of federal power and disparate lower court holdings.

ARGUMENT

"[C]ompelling reasons" require that the Court grant the National Federation Of Independent Business's ("NFIB") petition for writ of certiorari not only because "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," but also because *NFIB v. Sebelius* and its

companion case, *Florida v. HHS*, the Eleventh Circuit has in part "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10.

This petition presents the optimal vehicle for resolving the numerous and crucial issues that have been raised by individuals, entities, and states challenging the constitutionality of the ACA. Amicus curiae Landmark respectfully submits this brief in support of NFIB's petition and respectfully urges the Court to grant certiorari immediately.

I. THE SUPREME COURT MUST DETERMINE WHETHER ANY LIMITS TO FEDERAL POWER EXIST UNDER THE COMMERCE AND NECESSARY AND PROPER CLAUSES.

The Eleventh Circuit correctly concluded that the ACA's individual mandate exceeded Congress's Commerce Clause authority. The Commerce Clause is written in uncomplicated, plain English. Article I, Section 8 of the Constitution provides that "The Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes." Congress can tax interstate commerce, regulate interstate commerce, and even prohibit certain types of interstate commerce. However, there is nothing in the history of this Nation, let alone the history of the Constitution and the Commerce Clause, granting the federal government authority to

compel an individual to enter into a legally binding private contract against the individual's will and interests simply because the individual is living and breathing. Such a radical departure from precedent, law, and logic by a congressional majority since dismissed by the electorate is destructive of individual sovereignty and constitutional republicanism.

Is the Constitution a document of limited, enumerated powers or one granting unfettered federal power to compel private individuals to participate in private economic activity? If the latter, how is such extraordinary authority to be confined, defined and restrained? May the federal government compel an individual to purchase certain fruits and vegetables that are said to be healthy and limit the federal treasury's exposure to health-care related costs? May private individuals be compelled to purchase any good or service to advance some perceived collective public interest?

The ACA's individual mandate so thoroughly and fundamentally changes the relationship between the citizen and the federal government that the Court must provide direction respecting the contours of this new Commerce Clause power, which none of the lower courts bothered to entertain.

II. BY SEVERING THE INDIVIDUAL MANDATE FROM THE ACA, THE ELEVENTH CIRCUIT CREATED AN UNTENABLE FRAMEWORK FOR THE OPERATION OF THE ENTIRE STATUTE.

Although the Eleventh Circuit correctly determined that the individual mandate exceeded Congress's enumerated powers under the Commerce Clause and could not be sustained under the Taxing and Spending Clause, it erred in declining to overturn the entire Act. *Florida v. U.S. Dept. of Health and Human Services*, ___ F.3d ___, 2011 U.S. App. LEXIS 16806 (11th Cir. 2011). The Eleventh Circuit concluded the individual mandate provision, found in 26 U.S.C. § 5000A, could be properly severed from the remainder of the statute without endangering its operability. *Id.* at *264. According to the Eleventh Circuit, the ACA's two primary reforms, guaranteed issue and the prohibition on excluding preexisting conditions, could "fully operate as a law" absent the requirement that individuals purchase health insurance. *Id.* at *273.

The Eleventh Circuit's decision to sever the individual mandate while upholding the remaining provisions of the Act will result in impracticable and impossible outcomes in the statute's application on two levels. First, simply reconciling the Circuit Court's decision with existing circuit and district court decisions proves impossible. These conflicting opinions from various circuit and district courts offer distinct and mutually exclusive directives making consistent

application of the ACA unworkable. Second, application of the Circuit Court's directives will, according to Congress's own findings, undermine the ability of entities providing health care insurance to operate effectively.

It is thus crucial for the Court to consider immediately whether the Eleventh Circuit erred in overruling the District Court by severing the individual mandate provisions from the larger Act.

A. It Is Necessary For The Court To Decide Whether The Eleventh Circuit Erred In Severing The Individual Mandate To Avoid Inconsistent Application Of The ACA.

Going forward, absent an immediate, definitive opinion from the Court on the myriad of issues presented, application of the ACA throughout the country will be wildly inconsistent. With conflicting directives and guidance, all the parties affected by the ACA, the Executive branch, the individual states, employers, insurance companies, health care providers, and individual consumers will be at a loss as to how to apply and comply with its mandates. Additionally, imposition of the penalty provisions will be inconsistent, with some jurisdictions upholding the individual mandate and others forbidding its enforcement.

1. The Severing Of The Individual Mandate Prohibits The Federal Government From Enforcing The Penalty Provisions On Individuals In The Eleventh Circuit's Jurisdiction.

The federal government may not enforce the individual mandate in states subject to the Eleventh Circuit's jurisdiction. Thus, individuals who elect *not* to purchase health insurance are not subject to the Act's penalty provisions. *Florida v. HHS*, ___ F.3d ___, 2011 U.S. App. LEXIS 16806 at *285-86 (11th Cir. 2001). By severing the mandate, the federal government will lack the enforcement mechanism for incentivizing healthy individuals to purchase health insurance. This will have severe consequences for the Act's application. As Congress concluded, "if there were no requirement, many individuals would wait to purchase health insurance until they needed care." 42 U.S.C. § 18091(a)(2)(I). Health insurance companies cannot rely on the mandate to minimize "adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." 42 U.S.C. § 18091(a)(2)(F). Consequently, the failure to include (or the severing of) the individual mandate will not allow health insurance companies to manage risk by collecting premiums from healthy individuals. Health insurance companies subject to the Eleventh Circuit's jurisdiction must therefore prepare for a future without the possibility that healthy individuals will purchase coverage. *See*, *e.g.*, Scott R. Baker, Nicholas Bloom

and Steven J. Davis, "Business Class: Policy Uncertainty Is Choking Recovery," Bloomberg News, Oct. 5, 2011, available at http://www.bloomberg.com ("The legality of the individual mandate will remain unsettled until the Supreme Court rules on the matter. In sum, the new law has intensified the economic, political and legal uncertainties surrounding the U.S. health-care system.").

While the Eleventh Circuit was correct in determining Congress does not have the power, under the Commerce Clause, to compel individuals to purchase health insurance, it erred in severing the mandate from the larger statute. The ramifications of its decision are substantial, create a direct conflict with decisions of other circuit courts, and require immediate review by the Court.

2. The Fourth Circuit's Application Of The Anti-Injunction Act Requires Enforcement Of The Penalty Provision On Individuals And Entities Subject To Its Jurisdiction.

In contrast to the Eleventh Circuit's decision, the Fourth Circuit did not reach the constitutional question of whether the imposition of the individual mandate exceeded congressional power under the Commerce Clause. *Liberty University v. Geithner*, ___ F.3d ___, 2011 U.S. App. LEXIS 18618 (4th Cir. 2011). Instead, the Fourth Circuit determined individuals who elect not to purchase health insurance (and would

therefore be subject to the Act's penalty provision) were barred from challenging the ACA because of the Anti-Injunction Act ("AIA"). *Id.* at *6 (citing 26 U.S.C. § 7421(a)). The Fourth Circuit concluded that the Act constituted an effort to collect revenue and therefore a challenge is not permitted pursuant to the AIA until a payment is made under the ACA's penalty provision. *Id.* at *6 ("Because this suit constitutes a pre-enforcement action seeking to restrain the assessment of a tax, the Anti-Injunction Act strips us of jurisdiction."). As a result, the *Liberty University* Plaintiffs' complaint was dismissed for lack of jurisdiction. The Circuit Court continued, "The terms of the AIA declare that courts, save for specific statutory exceptions, not applicable here, may entertain 'no suit for the purpose of restraining the assessment or collection of any tax.'" *Id*. (citing 26 U.S.C. § 7421(a)).

Therefore, individuals subject to the Fourth Circuit's jurisdiction are compelled to comply with the individual mandate's penalty provisions. Unlike the Eleventh Circuit, entities providing health insurance within this jurisdiction will rely on assurances contained within the Act designed to incentivize healthy individuals to purchase insurance. However, as the Fourth Circuit declined to issue a substantive opinion regarding the individual mandate, the potential still exists for a later ruling of unconstitutionality. Parties within the Fourth Circuit's jurisdiction are now faced with prolonged uncertainty.

Moreover, the Fourth Circuit dismissed another suit initiated by the Commonwealth of Virginia for

lack of standing. *See Commonwealth of Virginia v. Sebelius*, ___ F.3d ___, 2011 U.S. App. LEXIS 18632 (4th Cir. 2011). Again, the court did not address the substantive merits of whether the individual mandate violated the Commerce Clause. Instead, the Fourth Circuit limited its analysis to whether the Commonwealth demonstrated that it had "suffered an injury in fact"; whether there existed a "causal connection between the injury and the conduct complained of"; and whether a "favorable judicial ruling would 'likely' redress that injury." *Id.* at *15-16. Like the decision relying on the Anti-Injunction Act, this opinion does not provide an optimal vehicle for resolving issues pertaining to constitutionality and severability of the individual mandate.

3. The Sixth Circuit's Decision To Uphold The Entire ACA Requires Enforcement Of The Penalty Provision On Individuals Subject To Its Jurisdiction.

Unlike the Fourth Circuit, which declined to rule on the constitutionality of the mandate, and the Eleventh Circuit, which declared the mandate unconstitutional but severed it from the larger Act, the Sixth Circuit upheld the mandate as a valid exercise of congressional power under the Commerce Clause. *Thomas More Law Center v. Obama*, ___ F.3d ___, 2011 U.S. App. LEXIS 13265 (6th Cir. 2011). The Sixth Circuit declined to overrule congressional findings that "the Federal Government has a significant role in

regulating health insurance, and the requirement is an essential part of this larger regulation of economic activity." *Id.* at *7 (citing 42 U.S.C. § 18091(a)(2)(H)).

Although not addressing the issue of severability specifically, the Sixth Circuit also stressed the integral part the individual mandate plays in ensuring the viability of the larger act. "Congress found that without the minimum coverage provision, other provisions in the Act, in particular the guaranteed issue and community rating requirements, would increase the incentives for individuals to 'wait to purchase health insurance until they needed care.'" *Id.* (citing 42 U.S.C. § 18091(a)(2)(I)). The Sixth Circuit continued, "This would exacerbate the current problems in the markets for health care delivery and health insurance." *Id.* (discussing 42 U.S.C. § 18091(a)(2)(I)).

Finally, the Sixth Circuit did address whether the Anti-Injunction Act barred consideration of the constitutionality of the individual mandate. It found that the "shared responsibility payment [individual mandate] has nothing to do with tax enforcement" and that "tax penalties imposed for substantive violations of laws not directly related to the tax code do not implicate the Anti-Injunction Act." *Id*. at *21. "[T]he most natural reading of the [penalty provisions] refers to the mechanisms the Internal Revenue Service employs to enforce penalties, not to the bar against pre-enforcement challenges to taxes." *Id*. at *27. The Anti-Injunction Act, the Sixth Circuit found, did not bar a direct challenge of the individual

mandate. Of course, this finding conflicts directly with the conclusions of the Fourth Circuit.

Application of the Sixth Circuit's opinion to the parties subject to its jurisdiction results in the assessment of the Act's penalty provisions on individuals who elect not to purchase health insurance. Starting in 2013, § 5000A's assessment will be applicable to individuals who fail to maintain the minimal essential coverage. 26 U.S.C. § 5000A. Unlike the Eleventh Circuit, employers within the Sixth Circuit's jurisdiction will be able to rely on the enforcement mechanisms of the ACA to incentivize healthy individuals to purchase health insurance.

4. Granting Certiorari To Review The Eleventh Circuit's Opinion Will Also Resolve Various Conflicts That Have Arisen At The District Court Level.

In addition to the various positions adopted by the circuits regarding the individual mandate, a number of district courts have issued opinions that will likely cause further inconsistency at the circuit court level. For example, in an opinion from the Middle District of Pennsylvania granting summary judgment to the plaintiffs, the court concluded Congress could not invoke its Commerce Clause power "to compel individuals to buy insurance as a condition of lawful citizenship or residency." *Bachman v. U.S. Dept. of Health and Human Services*, ___ F.Supp.2d ___,

2011 U.S. Dist. LEXIS 102897 at *2 (M.D. Pa. 2011). The District Court, however, distinguished itself by not only severing the individual mandate from the ACA, but by also severing provisions relating to pre-existing conditions and guaranteed issue. After noting that the federal government conceded that these provisions were "absolutely intertwined with the minimum coverage provision and must be severed should the individual mandate provision be severed," the District Court proceeded to do just that. *Id.* at *68. "Given the current structure of the Act, and with certain deference to the government's perspective of Congress's intent, the fate of the guaranteed issue reforms rises and falls with the minimum coverage provision." *Id.* at *70. The court continued, "Accordingly, the court finds that the minimum coverage provision, guaranteed issue, and preexisting condition provisions must be severed from the Act." *Id.*

By considering the issues contained in the Eleventh Circuit decision, this Court will provide immediate, definitive and necessary guidance to circuit courts who may soon consider issues such as those described above. Further, this Court will provide guidance in future cases where district courts are confronted with challenges to the ACA.

B. The Eleventh Circuit's Decision Provides The Best Vehicle For Resolving The Issue Of Whether The Individual Mandate And The Employer Mandate Are Severable From The ACA.

By issuing a writ of certiorari in the present case, the Court can properly reconcile the various issues that have been raised at the circuit and district court levels. The Eleventh Circuit's decision presents the best vehicle for resolving the issue of severability since it is the only circuit level case where severability has been raised and addressed. Furthermore, the Eleventh Circuit's decision addresses the larger question of whether Congress exceeded its constitutional authority under the Commerce Clause when it enacted the individual mandate.

As stated above, the Fourth Circuit limited its findings to jurisdictional issues only. In determining that the Anti-Injunction Act barred plaintiffs from challenging the individual mandate, the Fourth Circuit never considered the larger constitutional question. Accepting certiorari from this case would unnecessarily limit consideration to the sole issue of whether the AIA barred a challenge to the individual mandate.

As the Sixth Circuit concluded Congress did not exceed its constitutional authority in enacting the individual mandate, it never addressed the issue of whether this provision could be legitimately severed from the Act. The Eleventh Circuit is the only circuit

where both the issue of the mandate's constitutionality and its severability are extensively addressed. It is imperative the Court accept NFIB's petition for certiorari.

III. THE ELEVENTH CIRCUIT MISAPPLIED THIS COURT'S STANDARD IN SEVERING THE INDIVIDUAL MANDATE FROM THE ACT.

In addition to accepting review of the Eleventh Circuit's decision to resolve the conflicts within the circuit courts and provide guidance for lower courts going forward, certiorari is appropriate because the Eleventh Circuit misapplied this Court's standard by improperly severing the individual mandate from the larger Act.

A. The Court's Standard For Severability Is Well Established.

This Court's standard for determining whether an unconstitutional provision of a given statute may be properly severed from the larger body is clear: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 234 (1932)). A court may sever a provision unless: (1) it is "evident"

Congress would not have enacted the statute but for the severed provision; or (2) by severing the unconstitutional provision, the remaining statute would not be "fully operative as a law." This Court has concluded, "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (citing *Hill v. Wallace*, 259 U.S. 44, 70-72 (1922)).

B. The Act Itself Provides The Best Evidence Of The Individual Mandate's Necessity.

This Court need look no further than the text of the ACA to divine the importance Congress placed on the individual mandate. It states that 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(a)(2)(I) (emphasis added). Without the individual mandate, individuals would "wait to purchase health insurance until they needed care." 42 U.S.C. § 18091(a)(2)(I). This would create an unworkable system completely at odds with the legislation's policy goals. As at least one district court has noted, it "would exacerbate the current problems in the markets for health care delivery and health insurance." *See Thomas More Law Center*, ___ F.3d ___, 2011 U.S. App. LEXIS at *7 (referring to 42 U.S.C.

§ 18091(a)(2)(I)). Congress concluded that the individual mandate would reduce the number of the uninsured and would then lower health insurance premiums. 42 U.S.C. § 18091(a)(2)(F).

It is clear the larger purpose of the ACA was health insurance reform. President Obama repeatedly emphasized the importance of protecting "every American from the worst practices of the insurance industry." Remarks of President Obama, The State of the Union, delivered Jan. 27, 2009. In brief after brief, the federal government argued in support of the constitutionality of the mandate by emphasizing that the purpose of the Act was to reform health insurance. *See, e.g., State of Florida v. U.S. Dept. of Health and Human Services*, ___ F.Supp.2d ___, 2011 U.S. Dist. LEXIS 8822 (N.D. Fla. 2011) at *125-28 (referencing the federal government's concessions regarding the importance of reforming health insurance).

Although the Eleventh Circuit correctly recounted the test for whether a given provision was severable, it erred in applying this test. The court incorrectly concluded that congressional findings regarding the individual mandate "do not tip the scale away from the presumption of severability." *Florida v. HHS*, ___ F.3d ___, 2011 U.S. App. LEXIS at *281. The language of the Act itself serves as best evidence as to the importance placed on the individual mandate. Congress used the term "essential" to describe the effect the mandate would have on the health insurance industry. Use of such language supports three conclusions: (1) the Act was primarily designed to reform the

health insurance markets; (2) the Act could not function absent the mandate; and (3) Congress would not have enacted the Act "but for" the mandate.

C. Public Statements By President Obama Confirms The Importance Of The Individual Mandate.

President Obama believed the ACA would not be "fully operative as a law" absent the individual mandate. In a speech urging congressional enactment of the Act, he stated, "*the only way this plan works* is if everybody fulfills their responsibility, not just government, not just health insurance companies, but employees and individuals." He continued, "[s]ince [the ACA] will make sure that insurance is affordable for everybody, we're going to also say everybody needs to get insurance. Because if there are affordable options and people don't sign up, then the rest of us pay for somebody else's emergency room care." Thus, "[i]mproving *our health care system only works* if everybody does their part. . . ." Barack H. Obama, Remarks on Health Care Reform in College Park Maryland (September 17, 2009), in Public Papers of the Presidents, Administration of Barack H. Obama, 2009 (emphasis added). We take President Obama at his word and encourage the Court to do the same.

CONCLUSION

For reasons stated herein, Amicus Curiae Landmark respectfully urges the Court to accept NFIB's Petition for Writ of Certiorari.

Respectfully submitted,

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