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.*

STATES OF FLORIDA, *ET AL.*,

v.

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

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR STATE PETITIONERS ON SEVERABILITY

PAMELA JO BONDI
Attorney General of Florida
SCOTT D. MAKAR
Solicitor General
LOUIS F. HUBENER
TIMOTHY D. OSTERHAUS
BLAINE H. WINSHIP
Office of the Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, FL 32399
(850) 414-3300

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
BANCROFT PLLC
1919 M Street, N.W.
Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

March 13, 2012 (*Additional Counsel Listed on Inside Cover*)

GREG ABBOTT
Attorney General of Texas
P.O. Box 12548
Capitol Station
Austin, TX 78711
(512) 475-0131

JON BRUNING
Attorney General
of Nebraska
KATHERINE J. SPOHN
Special Counsel to the
Attorney General
Office of the Attorney
General of Nebraska
2115 State Capitol Building
Lincoln, NE 68508
(402) 471-2834

ALAN WILSON
Attorney General
of South Carolina
P.O. Box 11549
Columbia, SC 29211

MARK L. SHURTLEFF
Attorney General of Utah
Capitol Suite #230
P.O. Box 142320
Salt Lake City, UT 84114

LUTHER STRANGE
Attorney General
of Alabama
501 Washington Avenue
Montgomery, AL 36130

JAMES D. "BUDDY" CALDWELL
Attorney General
of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804

BILL SCHUETTE
Attorney General
of Michigan
P.O. Box 30212
Lansing, MI 48909

JOHN W. SUTHERS
Attorney General
of Colorado
1525 Sherman Street
Denver, CO 80203

ROBERT M. MCKENNA
Attorney General
of Washington
1125 Washington Street S.E.
P.O. Box 40100
Olympia, WA 98504

LAWRENCE G. WASDEN
Attorney General of Idaho
P.O. Box 83720
Boise, ID 83720

THOMAS W. CORBETT, JR.
Governor
LINDA L. KELLY
Attorney General
Commonwealth of
Pennsylvania
16th Floor
Strawberry Square
Harrisburg, PA 17120

JOSEPH SCIARROTTA, JR.
General Counsel
Office of Arizona Governor
JANICE K. BREWER
TOM HORNE
Attorney General of Arizona
1700 West Washington
Street, 9th Floor
Phoenix, AZ 85007

MARTY J. JACKLEY
Attorney General
of South Dakota
1302 East Highway 14
Pierre, SD 57501

WAYNE STENEJHEM
Attorney General
of North Dakota
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

GREGORY F. ZOELLER
Attorney General of Indiana
302 West Washington Street
Indianapolis, IN 46204

BRIAN SANDOVAL
Governor of Nevada
State Capitol Building
101 North Carson Street
Carson City, NV 89701

SAMUEL S. OLENS
Attorney General of Georgia
40 Capitol Square, SW
Atlanta, GA 30334

MICHAEL C. GERAGHTY
Attorney General
of Alaska
P.O. Box 110300
Juneau, AK 99811

MICHAEL DEWINE
Attorney General of Ohio
DAVID B. RIVKIN
LEE A. CASEY
Baker & Hostetler LLP
Special Counsel
30 East Broad Street
17th Floor
Columbus, OH 43215

MICHAEL B. WALLACE
Counsel for the
State of Mississippi
by and through Governor
PHIL BRYANT
Wise Carter Child &
Caraway, P.A.
P.O. Box 651
Jackson, MS 39205

MATTHEW MEAD
Governor of Wyoming
State Capitol
200 West 24th Street
Cheyenne, WY 82002

DEREK SCHMIDT
Attorney General of Kansas
Memorial Hall
120 SW 10th Street
Topeka, KS 66612

WILLIAM J. SCHNEIDER
Attorney General of Maine
Six State House Station
Augusta, ME 04333

TERRY BRANSTAD
Governor of Iowa
107 East Grand Avenue
Des Moines, IA 50319

J.B. VAN HOLLEN
Attorney General of
Wisconsin
114 East State Capitol
Madison, WI 53702

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional and Statutory Provisions

Other Authorities

REPLY BRIEF

Neither the federal government nor *Amicus* provides any convincing reason why the Affordable Care Act should stand if the individual mandate that was critical to its passage falls. Indeed, their competing visions of whether the core insurance provisions can survive invalidation of the mandate and the consequences for the remainder of the Act of invalidating both only underscore the interrelatedness of the constituent parts of the ACA and the centrality of the mandate. The reality remains that the individual mandate is the Act's key demand-side provision, and much of the balance of the Act aims to provide the supply necessary to ensure the near-universal coverage forced by the mandate and desired by Congress. The remainder involves provisions designed to pay for the costly core provisions and miscellany that no one could confidently predict would have been enacted independently of the ACA and its core components. The individual mandate is not some stand-alone "reform" that can be excised while leaving the balance of the ACA intact.

Moreover, as *Amicus* recognizes, once it is conceded that the guaranteed issue and community rating provisions fall with the mandate, then there is no logical stopping point. There is no reason whatsoever to conclude that a Congress motivated to provide insurance to those who wanted it but could not obtain it (and willing to commandeer those who could obtain it but did not want it) would have enacted the ACA.

At the outset, the Court should reject the federal government's novel and narrow conception of

severability as a series of discrete challenges to the Act's remaining provisions, each with its own separate standing requirement. As *Amicus* acknowledges, severability is a remedial inquiry that follows from a Court's conclusion that a party with standing to challenge a statutory provision has successfully demonstrated the provision's unconstitutionality. It is not a separate challenge to the other provisions of the Act that requires separate standing. So long as the challenge to the invalidated provision is properly before the Court (which it is here), so, too, is the severability inquiry.

The remedial inquiry focuses not on whether the balance of the Act can function independently (which is a necessary, but hardly sufficient condition) or on whether Congress would have preferred something to nothing, but rather on whether the balance of the Act can function in the *manner* Congress intended. As to that question, the federal government has no real answer. The federal government attempts to deny that Congress' goal was to provide near-universal coverage by ensuring near-universal demand through the mandate and near-universal supply through a series of supply-side initiatives. But Congress' own findings and the federal government's arguments elsewhere belie the effort. Beyond that, the federal government's brief is long on reasons why the Act is *capable* of functioning independently of the mandate, but bereft of arguments showing that the Act will function in the manner that Congress *intended* without it. And the federal government simply ignores the consequences of its concession that the guaranteed issue and community rating provisions must fall with the

mandate, even though that concession effectively seals the fate of the rest of the Act.

Amicus, for his part, does not dispute that core provisions of the ACA are inextricably intertwined. He instead emphasizes that the guarantee issue and community rating provisions—even more than the mandate—are at the heart of the Act and integral to the functioning of the balance of the Act. But *Amicus*' contention only bolsters the States' argument that the whole Act must fall, as *Amicus* fails to demonstrate that the two insurance regulations can survive without the mandate. Congress itself declared the mandate "essential" to their intended operation, and Congress lacked the political support to enact them without the mandate.

In the end, neither the federal government nor *Amicus* demonstrates that Congress would have enacted the ACA without the mandate, let alone without the mandate and the two insurance provisions that drove the legislative effort. The Court should not rescue provisions of an Act that never would have become law without the lynchpins that held the Act together. Accordingly, the Court should hold the Act invalid in its entirety.

ARGUMENT

I. The Court Can And Should Consider Whether The Mandate Is Severable.

As the States explained in their opening severability brief, *see* States' Br. 27–34, there is no separate standing requirement that must be satisfied before the Court may consider whether the individual mandate is severable from the balance of

the Act. Although the federal government continues to insist otherwise, it cannot identify a single case that supports its cause. The closest it comes is *Printz v. United States*, 521 U.S. 898 (1997), but *Printz* is readily distinguishable. *Printz* said nothing about Article III or standing, but instead simply "decline[d] to speculate" whether an invalid provision was severable from discrete provisions of a statute in the absence of a party with an interest in the question. *Id.* at 935. The Court has never cited *Printz* or any other decision as establishing the novel and narrow conception of its severability power that the federal government envisions.

Moreover, the federal government's argument is irreconcilable with *United States v. Booker*, 543 U.S. 220 (2005), the very case that it offers up as establishing the definitive severability inquiry. *See* Govt.'s Br. 27. Setting aside the fact that *Booker*'s three-part severability inquiry makes no mention of standing or the federal government's other prudential concerns, its substantive result cannot be squared with the notion that the severability power may be exercised only as "necessary to remedy an injury to a party before the Court." Govt.'s Br. 20.

Booker involved an as-applied challenge to the Sentencing Guidelines. The Court easily could have remedied the injury at hand with a limited ruling that the Guidelines were unconstitutional as applied to the individuals before it, which is precisely what the federal government requested. *United States v. Booker*, No. 04-104, Br. for United States 43–44. Yet the Court did not stop at holding the Guidelines invalid in the circumstances implicated by the defendants before the Court, but instead went on to

conclude that they could not be applied to *any* individuals, *even when their application was concededly constitutional*. *Booker*, 543 U.S. at 266–67. The Court did so because it concluded that the Guidelines would no longer "further Congress' basic objective" if they were mandatory as to some individuals but not others. *Id.* at 267. In other words, the Court employed its severability power to craft the remedy that it believed would best reflect *Congress'* intent, even though it went far beyond what was "necessary to remedy [the] injury to [the] part[ies] before the court." Govt.'s Br. 20.

That the Court never attempted to reconcile that remedial holding with *Printz* (or that *Printz*'s author, who was otherwise dissatisfied with the severability analysis in *Booker*, did not offer a *Printz*-based objection) is reason enough to conclude that *Printz* does not say what the federal government thinks it says. Indeed, even the dissenting Justices in *Booker* described "cases in which an invalid provision or application cannot be severed from the remainder of the statute" as a recognized "exception" to the general rule that the Court "is traditionally limited to issues presented in the case or controversy before the Court, and to the imposition of remedies that redress specific constitutional violations." *Booker*, 543 U.S. at 274 (Stevens, J., dissenting in part).

The incoherence of the federal government's alternative version of severability is clear from its arguments in this case. The federal government (erroneously) insists the States lack standing either to challenge the mandate directly or to seek invalidation of other provisions of the Act that

unquestionably injure them on the theory that the mandate is unconstitutional and inseverable. *See* Govt.'s AIA Reply Br. 17–18. Yet it concedes that the States *would* have standing to proceed on the latter theory, seeking the same remedy for the same injury, after some *other* party successfully challenges the mandate. *See* Govt.'s Br. 24. Indeed, the federal government suggests that the States may lurk in the background of *this* case and spring forward to pursue severability if Private Petitioners' challenge to the mandate is successful. *Id.* That makes no sense.

To confuse matters further, the federal government suggests that although this Court's invalidation of the mandate in response to Private Petitioners' challenge would eliminate the standing obstacle, this Court should still exercise its discretion not to reach severability questions "as a matter of prudence and judicial restraint." Govt.'s Br. 25.[1] That makes no sense even under the federal government's own novel theory. At that point, the States would be situated identically to a party that the federal government concedes could challenge the same provisions on severability grounds in a separate challenge. Indeed, the States could bring suit making the exact same severability argument the very next day. The federal government is silent

[1] Of course, *this* Court may always decline to reach an issue (as it did in *Printz*), but the federal government's arguments are not grounded in the discretion unique to this Court. It instead argues that *every* court could (and should) decline to reach severability in these circumstances, and that the Court of Appeals erred by failing to do so. *See* Govt.'s Br. 55 (asking Court to vacate Court of Appeals' severability analysis).

as to how it would serve judicial economy or the adversarial process—or the very strong public interest in resolving the severability question sooner rather than later, *see Amicus* Br. 23—to force the States to start all over again when by the federal government's own telling there is no defect in the case before the Court.[2]

In all events, the federal government concedes that the States have standing to raise severability as to at least some pieces of the ACA, which only underscores that its real complaint is not about the Court's *power* to reach severability, but about the substantive nature of the severability inquiry. Even though the federal government acknowledges that the States satisfy its standing test in part, it maintains the Court still cannot consider whether the mandate is inseverable from the Act as a whole, but must confine itself to deciding whether the mandate is inseverable only from whichever discrete

---

[2] Moreover, the federal government offers no satisfying answer as to *how* it envisions parties bringing separate follow-on "severability challenges" to each and every other provision of the ACA, as it would seem to require. It identifies no cause of action for bringing a "non-severability" or "legislative intent" challenge to an otherwise valid provision, but simply suggests severability might be raised in administrative proceedings if they exist, or as a defense if and when an enforcement action arises. It then maintains the Court need not be concerned about the issue *here* because the federal government is already "on record conceding the[] inseverability" of certain provisions. Govt.'s Br. 22. But even assuming its concession as to *two* of the ACA's several hundred provisions were reassuring, the federal government will have no reason to make such concessions in future cases if the Court adopts its position.

provisions the States have standing to challenge. But severability analysis does not work that way. Once a provision of an Act is invalidated, the question is not whether some other discrete provision of the statute can survive, but whether the balance of the Act can operate in the manner Congress intended. This would be obvious in the case of a law that included a non-severability clause. The entire balance of the Act would fall because that is the result most consistent with Congress' intent. The same result follows here. Petitioners have standing to challenge the mandate and are affected by other provisions of the ACA, and those provisions and the balance of the ACA cannot survive the mandate's invalidation because total invalidation is the result that reflects Congress' intent.

II. The Individual Mandate Cannot Be Severed From The Balance Of The ACA.

Neither the federal government nor *Amicus* provides any persuasive reason why the ACA should stand if the individual mandate falls. Indeed, their competing visions only reinforce the difficulty with allowing the periphery of the Act to survive the invalidation of the core. Although the federal government largely ignores the consequences of its own severability position, its concession that the guaranteed issue and community rating provisions cannot survive without the mandate effectively dooms the rest of the Act. *Amicus* seems to recognize as much, which is why he emphasizes the centrality of the insurance reforms to the rest of the Act and attempts to separate them from the mandate. But *Amicus*' argument that Congress *could* have wanted guaranteed issue and community

rating even without the mandate cannot overcome Congress' own findings to the contrary. Accordingly, the invalidation of the mandate brings down the guaranteed issue and community rating regulations, and the balance of the Act cannot survive without those core provisions.

A. Congress Intended the ACA to Stand or Fall with the Mandate.

As the States illustrated in their opening brief, *see* States' Br. 4–17, the ACA is a delicate balance of inextricably intertwined provisions intended to increase both the demand for and supply of insurance to meet at the point of near-universal coverage. Through the mandate, the Act artificially increases demand by forcing nearly every individual to obtain insurance. The Act then artificially increases supply by mandating that insurers, employers, and States provide insurance to discrete segments of the uninsured population. Because neither the demand side nor the supply side can achieve Congress' overall goal—near-universal coverage—without the other, the Act cannot "function in a *manner* consistent with the intent of Congress," *Alaska Airlines v. Brock*, 480 U.S. 678, 685 (1987), if any of its core provisions is removed. And because the rest of the Act is designed largely to offset or support its core provisions, "the statute created in [their] absence is legislation that Congress would not have enacted." *Id.*

Rather than respond to the substance of that argument, the federal government insists the supply-meets-demand conception is a "rhetorical" device that "bears no relation to what Congress was actually doing [in] the Affordable Care Act." Govt.'s

Br. 33. But the supply-meets-demand model is not some convenient construct conjured up by the States. It is how Congress itself described the ACA: "The [individual mandate], together with the other provisions of the Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services, and will increase the number and share of Americans who are insured." ACA § 1501(a)(2)(C). Through those combined efforts, Congress intended the Act to "achieve[] near-universal coverage." ACA § 1501(a)(2)(D).

Nor is this view of the ACA shared only by Congress and the States. The federal government has described the Act in the same manner, insisting that "individuals whose conduct is regulated by the minimum coverage provision … are unable to obtain [insurance] without the insurance market reforms, tax credits, cost-sharing, and Medicaid eligibility expansion that the Act will provide." Mem. Supp. Govt.'s Mot. Summ. J. 1–2 [R.E. 984–85]; *see also* States' Br. 17–18. And it is the federal government that has maintained the Act is a delicate fiscal balance, arguing that Congress "was careful to ensure that any increased spending … was offset by other revenue-raising and cost-saving provisions." Mem. Supp. Govt.'s Mot. Summ. J. 41 [R.E. 1024].

Indeed, even before this Court, the federal government continues to rely on the interrelatedness of the Act's core provisions to support its constitutional arguments. For example, it (erroneously) contends that forcing a costly Medicaid expansion upon the States is constitutional because their increased Medicaid spending will be "offset by other savings

States will achieve as a result of the Affordable Care Act's reforms." Govt.'s Medicaid Br. 11; *see also* Govt.'s AIA Reply Br. 16 n.7 (same). And it (again, erroneously) argues that the mandate and insurance regulations are necessary and proper because other core components such as the exchanges and the employer mandates "would be less effective" without them. Govt.'s Minimum Coverage Br. 31. In short, it is the federal government's belated attempt to convert the ACA into a series of "stand-alone provision[s]" designed to "independently advance[]" Congress' objectives that "bears no relation to what Congress was actually doing." Govt.'s Br. 33.

More fundamentally, the federal government's argument that Congress would have been satisfied with any one of the Act's many pieces operating independently of the others cannot be squared with its own position on severability. That is because the federal government simply ignores the consequences of its concession that the guaranteed issue and community rating provisions must fall with the mandate. But as the States have explained, *see* States' Br. 47–49, and *Amicus* aptly illustrates, *see Amicus* Br. 45–46, that concession undermines any effort to save the balance of the Act. The individual mandate is integral to the Act as a whole both because it is fully one-half of the demand-supply relationship and because the federal government recognizes its interconnection with the guaranteed issue and community rating provisions. Those latter two insurance regulations are integral for a different reason—they were the principal motivation for the enactment of the ACA. Forcing people who could buy insurance but did not want insurance to buy it

anyways (*i.e.*, the mandate) was a means to an end. But making insurance available to those who wanted it but could not buy it was an end itself. Indeed, for many it was the principal reason to vote for the Act. *See* States' Br. 47–50. Thus, as *Amicus* recognizes, the two insurance regulations were "a primary objective of the Act," as they "were regarded as the principal means of bringing new insureds into an otherwise risk-based insurance market." *Amicus* Br. 6, 28. Without them, the ACA would not have become law at all, as it would have provided no solution to the basic problem Congress sought to address: that "millions of people … had been unable to acquire affordable coverage because of their poor health." *Amicus* Br. 5.

That conclusion is underscored by the fact that "the effects of invalidating th[ose] provisions could not easily be limited." *Amicus* Br. 46. For example, the exchanges were "unquestionably an important objective of federal health care reform." *Amicus* Br. 45. Yet eliminating the insurance regulations would "significantly frustrate[]" their intended operation because the low-income individuals and small businesses that the exchanges are intended to serve would no longer have access to standardized insurance products that are not actuarially priced, "thus undermining much of what Congress hoped to achieve" through the exchanges. *Amicus* Br. 37, 46. Indeed, even the federal government is forced to acknowledge (with considerable understatement) that "the exchanges would not promote competition and lower costs as effectively without guaranteed-issue and community-rating rules." Govt.'s Br. 37.

The same is true of the employer regulations—eliminating the mandate, the insurance regulations, *and* the exchanges would undermine entirely their intended operation because their requirements and penalties are tied directly to the availability of non-actuarially priced insurance on the exchanges. *See, e.g.*, ACA §§ 1512 (requiring employers to inform employees of exchanges), 1513 (penalizing employers if they do not offer adequate insurance and an employee obtains it on an exchange). That is why *Amicus* maintains the employer regulations "can operate effectively" without the mandate, but *only* "provided that the guaranteed issue and community rating provisions (and the exchanges) remain in place." *Amicus* Br. 50.

The federal government contends the exchanges and employer regulations nonetheless may stand because comparable provisions are functioning in other jurisdictions without a mandate or analogous insurance regulations. *See* Govt.'s Br. 35–40. But as already explained, *see* States' Br. 37–38, independent functionality is a necessary but not sufficient condition to establish severability. "The more relevant inquiry … is whether the statute will function in a *manner* consistent with the intent of Congress." *Brock*, 480 U.S. at 685. That some States have exchanges or employer regulations without a mandate is thus of little value unless those provisions are operating consistently with *Congress*' intent. The federal government makes no attempt to demonstrate that they are. *See* Govt.'s Br. 35–37. To the contrary, the shortcomings of those States' approaches is precisely what led Congress to adopt a more comprehensive approach in the ACA. And the federal

government implicitly recognizes the limits of its own comparisons when it comes to the guaranteed issue and community rating provisions. Although some States have retained comparable regulations without an individual mandate, *see Amicus* Br. 44, the federal government readily and correctly rejects *Amicus'* argument that the independent functionality of those state provision is sufficient to render the mandate severable from the ACA's two regulations.[3]

For the same reason, the federal government gets nowhere by arguing that Congress has expanded Medicaid in the past without an individual mandate. To be sure, the Medicaid expansion *can* function independently of the mandate. But, once again, it would not function in the manner that Congress intended. That is because Congress did not just expand Medicaid, but fundamentally transformed it so that it could supply the very insurance coverage that the mandate forces low-income individuals to obtain. Indeed, Congress connected the dots by making clear that Medicaid coverage satisfies the mandate. ACA § 1501(b), 26 U.S.C.A. § 5000A(f)(1)(A)(ii). Needless to say, that specific provision linking the Medicaid expansion to the mandate would not survive the latter's invalidation. Nor would the rest of the Medicaid expansion if congressional intent is to guide the severability analysis.

---

[3] Moreover, that States have been reluctant to enact individual mandates to accompany their own health insurance reforms may just reflect the fact that governments closer to the people are more sensitive to the liberty incursion of such a mandate.

Moreover, the federal government makes no real attempt (in either its severability or its Medicaid brief) to deal with the consequences for the balance of the Act if the Court holds both the mandate *and* the Medicaid expansion unconstitutional. Eliminating the mandate, the two insurance regulations, *and* the Medicaid expansion would gut the ACA's projected insurance increase by more than 80%, from 32 million down to as low as 6 million individuals, if not lower. *See* Letter from Douglas Elmendorf, Director, Cong. Budget Office (CBO), to the Hon. Nancy Pelosi, Speaker, U.S. House of Reps. 9 (Mar. 20, 2010) (estimating that 16 million of projected 32 million increase would come from Medicaid expansion); *see also* CBO, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* 2 (June 16, 2010) (estimating that, without mandate, 5 million fewer would purchase insurance, 6–7 million fewer would enroll in Medicaid, and 4–5 million fewer would obtain employer-sponsored insurance). And at that point, the Act would cease to provide *any* insurance option to the two main groups whose needs Congress sought to address: the low-income and those with pre-existing conditions. The federal government does not even attempt to explain how an ACA that achieves only a small fraction of what Congress set out to accomplish can still "function in a *manner* consistent with the intent of Congress." *Brock*, 480 U.S. at 685.

The federal government alternatively claims Congress must have intended the mandate to be severable because some of the Act's provisions have taken effect in advance of the mandate. Govt.'s Br. 29. Once again, that at most establishes only

independent functionality, and not even that as to any of the Act's core provisions, which do not take effect until the mandate becomes operative, further underscoring their interrelatedness. Moreover, some of the provisions with different effective dates are no less tied to the mandate and core insurance provisions because they simply provide transition rules until those core provisions take effect. For example, the temporary high risk health insurance pool program ends when the insurance regulations take effect. ACA § 1101, 42 U.S.C. § 18001; *see also, e.g.*, ACA § 1001, 42 U.S.C. § 300gg-11(a)(2) (phasing in prohibition on annual benefits limits), 42 U.S.C. § 300gg-18(b)(1) (phasing in requirement to provide certain value for premiums); ACA § 1421, I.R.C. § 45R(d)(3)(B) (phasing in new terms for small business tax credits); ACA §2001(a)(4) (temporary benefits to States willing to implement Medicaid expansion ahead of schedule). Those transitional rules can hardly function as Congress intended if the transition will not occur. The same is true with regard to the various "revenue offset provisions" already in effect. *See, e.g.*, ACA §§ 9003–08. Congress would not have put those provisions in place had it known the massive spending on the exchanges and the Medicaid expansion that they are generating revenue to offset would not occur.

Finally, the federal government gains nothing from noting that though the ACA has no severability clause, *other* statutes it amends do. *See* Govt.'s Br. 43. Whether provisions of the ACA are severable from the pre-existing statutory schemes that they amend says nothing about whether they are severable from *the ACA*. If anything, the fact that

Congress legislated against a "background" of statutes that *do* contain severability clauses, *id.*, is all the more reason to conclude that Congress acted deliberately when it omitted the severability clause included in earlier versions of the Act, particularly given that "Congress fully anticipated legal challenges to the constitutionality of" the mandate. *Amicus* Br. 29.

In sum, all of the federal government's efforts to convince the Court to invalidate the two insurance regulations but keep everything else suffer from the same flaw: They fail to demonstrate that those other provisions will "function in a *manner* consistent with the intent of Congress" without the mandate and the core provisions that concededly fall with it, *Brock*, 480 U.S. at 685, and instead demonstrate at most independent functionality and a general tendency to "expand access to health care." Govt.'s Br. 34. Moreover, the federal government does not meaningfully respond to the States' argument that the political impetus behind the ACA was the mandate and the two insurance regulations, meaning both the ability and the desire to enact the ACA would have been lacking had Congress known those key provisions would not survive. As those political realities and the undeniably integrated relationships at the core of the Act confirm, the ACA without its key provisions "is legislation that Congress would not have enacted." *Brock*, 480 U.S. at 685.

B. The Mandate Cannot Be Severed from the Core Insurance Regulations.

Unlike the federal government, *Amicus* does not deny the interrelatedness of core provisions of the

ACA, or that some of those provisions cannot function as Congress intended if others are removed. But in *Amicus*' view, it is the guaranteed issue and community rating regulations, not the individual mandate, that are critical to the Act's intended operation. *Amicus* contends that those two provisions can stand without the mandate, and that therefore the rest of the Act can stand as well. *See Amicus* Br. 48. *Amicus*' argument cannot survive its flawed premise.

Amicus first takes issue with the Court's own severability inquiry and its focus on whether the balance of an act can "function in a *manner* consistent with the intent of Congress" once the invalidated provision is removed. *Brock*, 480 U.S. at 685. According to *Amicus*, *Brock* "focus[es] attention on the wrong question" by "inviting a comparison between the judicially modified statute and the statute originally enacted by Congress," instead of asking whether "'the legislature would have preferred what is left of its statute to *no statute at all*.'" *Amicus* Br. 16 (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) (emphasis added by *Amicus*)).

But a comparison of the statute with and without the invalid provision is inevitable, and the resulting inquiry into congressional intent is not simply a question of whether Congress would have preferred something to nothing. *Brock* does not ask courts to determine whether legislation will function in the *exact same* manner without the invalidated provision—if it did, the answer would always be no. But *Brock* and any other severability analysis worthy of the name necessarily require some comparison

between the original legislation and the balance of the act and an inquiry into whether the balance will continue to function as Congress intended. That is why courts must consider factors such as the invalid provision's "importance … in the original legislative bargain," *Brock*, 480 U.S. at 685, and its role "in the context of Congress'" broader legislative goals, *INS v. Chadha*, 462 U.S. 919, 934 (1982).

Amicus seems to suggest that once the challenged provision is invalidated, it simply falls out of the equation, leaving a court to ask only "whether Congress would prefer to go back to" the law as it existed before the new legislation came about. *Amicus* Br. 25. But that is precisely the sort of "tautological" inquiry that *Brock* warned against, as Congress' dissatisfaction with the old law will always be "apparent from the existence of" the new one. *Brock*, 480 U.S. at 685 n.7. Thus, a court must focus not on whether "Congress would have enacted *some* form of" legislation if the only alternative were the status quo, but on whether "the statute created in [the invalidated provision's] absence is legislation that Congress would not have enacted." *Id.*

Here, any notion that Congress would have enacted the insurance regulations without the mandate is readily rebutted by Congress' own findings. Congress could not have been clearer that it considered the mandate "*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." ACA § 1501(a)(2)(I) (emphasis added). Indeed, Congress explained that the mandate was supposed to serve *two* critical functions with respect

to the intended operation of those regulations—to "minimize th[e] adverse selection" they would create and to offset the tremendous costs they would generate by "broaden[ing] the health insurance risk pool to include healthy individuals." *Id.*

Amicus contends the Court should disregard Congress' findings because Congress made them to address its commerce power, not the severability question. But the purpose of the findings cannot alter their content. Indeed, in the absence of a severability or non-severability clause, Congress will rarely, if ever, make express findings about its intent in the event of partial invalidity. Accordingly, courts will almost inevitably examine findings made for some other purpose. Here, the findings provide a direct answer to the question whether Congress believed "the policies [it] sought to advance" through the insurance regulations "can be effectuated" without the mandate. *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion). In contending otherwise, *Amicus* seems to suggest that Congress did not *really* consider the mandate "essential," but only used that label to bolster a weak constitutional argument. *See Amicus* Br. 32–33. But the inquiry into legislative intent demanded by the severability analysis is difficult enough without looking a gift horse in the mouth. If Congress finds one provision "essential" to another, there is no basis for ignoring that finding if one of the provisions happens to be unconstitutional.

Indeed, if anything, Congress' findings are *more* relevant for severability purposes than for constitutional purposes because the severability inquiry focuses solely on Congress' *intentions*, which

is precisely what those findings embody.[4] *Amicus* mistakenly suggests the States ask the Court to focus on something quite different, namely, whether, "as a practical matter, guaranteed issue and community rating can[] work in an acceptable way without the countervailing effects of" the mandate. *Amicus* Br. 33. But the States fully agree with *Amicus* that "this kind of predictive factfinding about the interplay of complex economic forces falls more naturally within the scope of legislative, rather than judicial, competence." *Amicus* Br. 34. That is why the Court should not second-guess Congress' judgment that the insurance regulations were too costly—both fiscally and politically—to enact without an individual mandate to subsidize them.

Yet despite his professed disagreement with that kind of "empirical" approach to severability, *Amicus* Br. 6, that is precisely what *Amicus* invites the Court to do. According to *Amicus*, the Court may leave the

---

[4] The federal government fails to grasp that distinction between severability and constitutional analysis when it erroneously contends that the States' opening brief concedes that the mandate "is necessary to make effective the Act's guaranteed-issue and community-rating insurance market reforms." Govt.'s Br. 26. As the States explained, *see* States' Br. 38 n.16, that Congress' characterization of the relationship between the mandate and those regulations should be accepted for *severability* purposes does not mean it should be accepted for *constitutional* purposes as well. Simply calling the mandate "essential" does not make it a "law[] necessary and proper for carrying into Execution" the commerce power, U.S. Const. art. I, § 8, cl. 18, particularly given that Congress enacted the mandate to *counteract* the effects of those regulations, not to make those regulations effective. *See* States' Minimum Coverage Br. 33–35.

insurance regulations in place because eliminating the mandate would not be "so calamitous that no rational Congress could favor that limited remedy." *Amicus* Br. 35. But that is not the standard. This Court does not review statutes the way it reviews allegedly inconsistent jury verdicts. The standard is not calamity or whether any rational Congress could pass such a statute, but rather "what the Congress that actually passed the Act" would have wanted. Govt.'s Br. 42. As to that question, even *Amicus* is forced to concede that the insurance regulations "were meant to work together with" the mandate and "likely will operate less ideally without" it. *Amicus* Br. 25; *see also Amicus* Br. 9 ("Congress expected those provisions to work in concert").

Moreover, *Amicus* simply ignores the States' argument that the political realities were such that Congress could not have enacted the two insurance provisions without the mandate even had it wanted to do so. As the States explained, *see* States' Br. 13, the Act's proponents secured the critical insurance industry support for those regulations only by promising to include an individual mandate to provide the industry with a multi-billion dollar annual subsidy to offset their costs. Thus, "the importance of the [mandate] in the original legislative bargain" cannot be overstated. *Brock*, 480 U.S. at 685. Severability is not a means by which Congress may use the courts to circumvent accountability constraints on its legislative power. *See Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 636 (1895) (courts may not "substitute for the law intended by the legislature one they may never have been willing, by itself, to enact"). *Amicus* is silent as to why the

Court should leave in place regulations that Congress lacked the support to enact without the promise of the unconstitutional mandate.

Amicus alternatively insists the mandate must be severed "[b]ecause the effects of invalidating the guaranteed issue and community rating provisions could not easily be limited" given their integral relationship to other core provisions. *Amicus* Br. 46. *Amicus*' argument that the *rest* of the Act could not function as Congress intended without those regulations makes a convincing case for *total* invalidation of the ACA. *See supra*, pp. 12–13. But it provides no basis for concluding that Congress believed the insurance regulations could operate in the manner it intended without the mandate. Rather, it underscores that the mandate and the inextricably interrelated guaranteed issue and community rating regulations are at the very heart of the entire Act. Congress' own findings make clear that it did not intend to have one without the other, and without those core provisions "it is evident that the Legislature would not have enacted" the balance of the ACA. *Champlin Ref. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932). Accordingly, both those regulations and the rest of the Act must fall with the mandate.

CONCLUSION

The Court should hold the ACA invalid in its entirety.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
BANCROFT PLLC
1919 M Street, N.W.
Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

PAMELA JO BONDI
Attorney General of Florida
SCOTT D. MAKAR
Solicitor General
LOUIS F. HUBENER
TIMOTHY D. OSTERHAUS
Deputy Solicitors General
BLAINE H. WINSHIP
Special Counsel
Office of the Attorney
General of Florida
The Capitol, Suite PL-01
Tallahassee, FL 32399
(850) 414-3300

KATHERINE J. SPOHN
Special Counsel to the Attorney General
Office of the Attorney General of Nebraska
2115 State Capitol Building
Lincoln, NE 68508

GREG ABBOTT
Attorney General of Texas
P.O. Box 12548
Capitol Station
Austin, TX 78711

March 13, 2012 *Counsel for State Petitioners*