

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

---

---

IN THE  
**Supreme Court of the United States**

---

NATIONAL FEDERATION OF INDEPENDENT  
BUSINESS, ET AL., PETITIONERS

v.

KATHLEEN SEBELIUS, ET AL.

---

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,  
ET AL., PETITIONERS

v.

STATES OF FLORIDA, ET AL.

---

STATES OF FLORIDA, ET AL., PETITIONERS

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

---

**On Petitions for a Writ of Certiorari  
to the United States Court of Appeals  
for the Eleventh Circuit**

---

**BRIEF OF CHAMBER OF COMMERCE OF THE  
UNITED STATES OF AMERICA AS *AMICUS  
CURIAE* IN SUPPORT OF THE PETITIONS FOR  
CERTIORARI**

---

*(Counsel listed on inside cover)*

---

---

ROBIN S. CONRAD	K. LEE BLALACK II
SHANE B. KAWKA	<i>(Counsel of Record)</i>
KATHRYN COMERFORD TODD	lblalack@omm.com
NATIONAL CHAMBER LITIGATION	BRIAN D. BOYLE
CENTER, INC.	ANTON METLITSKY
1615 H Street, N.W.	O'MELVENY & MYERS LLP
Washington, D.C. 20062	1625 Eye Street, N.W.
(202) 463-5337	Washington, D.C. 20006
	(202) 383-5300

*Attorneys for Amicus Curiae*

## TABLE OF CONTENTS

	<b>Page</b>
INTEREST OF <i>AMICUS CURIAE</i> .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	2
REASONS FOR GRANTING THE PETITIONS.....	7
A. The Viability Of The Entire PPACA, And Not Only The Individual Mandate, Is A Question Of Overriding Importance To The Business Community, And To The Nation .....	7
B. The Eleventh Circuit’s Severability Analysis Is Clearly Incorrect, And Will Have Disastrous Consequences For The Health Insurance Market If Left Standing .....	11
CONCLUSION.....	18

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b><u>CASES</u></b>	
<i>Alaska Airlines, Inc. v. Brock</i> , 480 U.S. 678 (1987).....	12, 14
<i>Carter v. Carter Coal Co.</i> , 298 U.S. 238 (1936).....	17
<i>Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.</i> , 130 S. Ct. 3138 (2010).....	12
<i>Goudy-Bachman v. U.S. Dep’t of Health and Human Servs.</i> , __ F. Supp. 2d __, No. 1:10- CV-763, 2011 WL 4072875 (M.D. Pa. Sept. 13, 2011).....	10
<i>Virginia ex rel. Cuccinelli v. Sebelius</i> , 728 F. Supp. 2d 768 (E.D. Va. 2010).....	10
<b><u>FEDERAL STATUTES</u></b>	
Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(a), 124 Stat. 119, 244 (codified at 26 U.S.C. § 5000A(a)) .....	3, 13, 14
42 U.S.C. § 300gg-4(a).....	12
42 U.S.C. § 300gg(a)(1) .....	13
42 U.S.C. § 18091(a)(2)(I) .....	3, 14, 17
<b><u>STATE STATUTES</u></b>	
Ky. Rev. Stat. Ann. § 304.17A-060(2)(A) (1994) (repealed 1998) .....	16
Me. Rev. Stat. tit. 24-A, § 2736-C(3) .....	16
N.H. Rev. Stat. § 420-G:6.....	16

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
N.J. Stat. § 17B:27A-22 .....	16
N.Y. Ins. L. § 3231.....	16
N.Y. Ins. L. § 3232.....	16
Vt. Stat. Ann. tit. 8, § 4080B(d)(1).....	16
Wash. Code § 48.43.012(1).....	16
<b><u>OTHER AUTHORITIES</u></b>	
Scott R. Baker et al., <i>Policy Uncertainty Is Choking Recovery</i> , Bloomberg News (Oct. 5, 2011).....	9
Jonathan Gruber, <i>Why We Need the Individual Mandate: Without a Mandate, Health Reform Would Cover Fewer With Higher Premiums</i> , Center for American Progress (Apr. 8, 2010) .....	15
Mark A. Hall, <i>An Evaluation of New York’s Reform Law</i> , 25 J. Health Pol., Pol’y & L. 71 (2000).....	16
Bradley Herring, <i>An Economic Perspective on the Individual Mandate’s Severability from the PPACA</i> , 364 New Eng. J. Med. 16e (Mar. 10, 2011).....	15
Adele M. Kirk, <i>Riding the Bull: Experience with Individual Market Reform in Washington, Kentucky and Massachusetts</i> , 25 J. Health Pol., Pol’y & L. 133 (2000).....	16

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
Anthony T. Lasso, <i>Community Rating and Guaranteed Issue in the Individual Health Insurance Market</i> , National Institute for Health Care Management Foundation (Jan. 2011).....	15
Dennis P. Lockhart, <i>Business Feedback on Today's Labor Market</i> (Nov. 11, 2010) .....	9
Roberta B. Meyer, <i>Justification for Permitting Life Insurers to Continue to Underwrite on the Basis of Genetic Information and Genetic Test Results</i> , 27 Suffolk U. L. Rev. 1271 (1993).....	16

**BRIEF OF *AMICUS CURIAE* CHAMBER OF  
COMMERCE OF THE UNITED STATES OF  
AMERICA IN SUPPORT OF THE PETITIONS  
FOR CERTIORARI**

This brief is submitted on behalf of the Chamber of Commerce of the United States of America in support of the petitions for certiorari.<sup>1</sup>

**INTEREST OF *AMICUS CURIAE***

The Chamber of Commerce of the United States of America (“the Chamber”) is the world’s largest business federation, representing the interests of 300,000 direct members and indirectly representing an underlying membership of three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. More than 96 percent of the Chamber’s members are small businesses with one hundred or fewer employees. The Chamber advocates on issues of vital concern to the nation’s business community and has frequently participated as *amicus curiae* before this Court and other courts. And in particular, the Chamber has participated as *amicus curiae* in litigation concerning the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 (“PPACA”) in the

---

<sup>1</sup> No counsel for any party has authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *amicus* states that all counsel of record for all parties were timely notified of the intent to file this brief; the parties’ letters consenting to the filing of this brief have been filed with the Clerk’s office.

Courts of Appeals for the Fourth, Eleventh, and District of Columbia Circuits.

Resolution of the fate of the PPACA is of critical importance to Chamber members. The majority of the Chamber's members provide health insurance to their employees. Indeed, employers are the country's largest providers of health benefits, providing coverage for more than 160 million people and more than 60 percent of nonelderly Americans. More generally, the PPACA imposes a myriad of costly obligations on the business community—as well as on states and consumers. Uncertainty over the future of the PPACA seriously undermines the ability of American businesses to plan for the future, and to make informed decisions concerning investment in growth and hiring. Accordingly, both swift resolution of the constitutionality of the individual mandate, and clarification as to which portions of the PPACA, if any, will remain if the individual mandate falls, are crucial to Chamber members.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

The Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010 (“PPACA” or “the Act”), contains an extensive set of reforms primarily intended to make health insurance available to millions of uninsured Americans and to increase the quality of health insurance for all Americans. The Act's insurance reforms are interdependent and built upon one central provision: the requirement to maintain minimum essential coverage under Section 1501.



PPACA, Pub. L. No. 111-148, § 1501(a), 124 Stat. 119, 244 (codified at 26 U.S.C. § 5000A(a)).

The individual mandate is indispensable to the operation of the PPACA's health insurance reforms. Congress understood that simply requiring insurers to provide coverage to all applicants at the same price without regard to their health status could not occur unless healthy individuals were also incented or required to purchase coverage. Standing alone, these new insurance requirements (the core of which is known as the guaranteed-issue and community-rating reforms) would lead to less affordable health insurance because individuals would wait to purchase health insurance until they absolutely need it, forcing insurers to raise premiums for everyone else. To prevent such behavior, often referred to as "adverse selection," Congress included a minimum essential coverage requirement in the PPACA—the so-called individual mandate.

By requiring individuals to maintain a minimum level of health insurance coverage, the law was drafted to prevent the adverse selection that would otherwise undermine the new insurance requirements. Through the individual mandate, the law was structured to allow guaranteed-issue, community-rating, and other insurance reforms to function without adverse selection, as Congress intended. The PPACA would not have been enacted without it. As Congress explained in the Act, the individual mandate "is essential to creating effective health insurance markets in which improved health insurance products that ... do not exclude coverage of pre-existing conditions can be sold." 42 U.S.C. § 18091(a)(2)(I).

Although the Chamber takes no position on the constitutionality of the individual mandate,<sup>2</sup> there should be no dispute that the mandate's constitutional validity is a question of overriding national importance to the business community—as well as to the federal and state governments and to consumers. The circuit conflict that has developed concerning that question should be resolved by this Court in this case. The constitutionality of the mandate, however, is only the first half of the important issue at stake. The second half of the issue—of crucial importance to the business community and to the Nation as a whole—is whether, and to what extent, the remainder of the PPACA will remain in force if the individual mandate is invalidated.

The business community has a tremendous interest in assuring that, if the mandate is struck down, the fate of the remaining provisions of the Act is resolved quickly. Numerous PPACA provisions impose substantial requirements and costs on American businesses. As a result, businesses will have to change their practices and make important decisions to comply with the new requirements. But businesses cannot make rational decisions concerning how to comply with the law and budget for its costs without knowing what the law is and how it will be enforced and applied in the future. Certainty is necessary before businesses can make decisions concerning investment in growth and in jobs.

---

<sup>2</sup> The Chamber also takes no position on whether the first and second questions presented in the petition for certiorari filed by several States, in case No. 11-400, should be granted, or on the merits of those questions.

Thus, the Chamber strongly urges the Court not to limit its review to the constitutionality of the mandate, but also to consider as a separate question which additional provisions of the PPACA are considered non-severable from the individual mandate, and thus fall with it, if the mandate is held unconstitutional. Putting off consideration of the severability question will only extend the cloud of uncertainty hanging over American businesses and our economy.

This Court's immediate review of the severability question is also critical because the Eleventh Circuit's incorrect severability decision will wreak havoc on the health insurance market if left to stand. While the court of appeals held the individual mandate unconstitutional, it further held that the mandate could be severed from the remainder of the Act. That position is untenable. If the PPACA's remaining insurance reform provisions were left standing in the absence of the mandate, individuals and employers who sponsor health insurance coverage for their employees would encounter real and significant market disruption. Health care costs would rise and fewer individuals would obtain coverage—precisely the opposite of Congress's intentions. A proper application of this Court's severability jurisprudence therefore requires a finding that, at the very least, the health insurance reform provisions in the PPACA are non-severable from the individual mandate and must necessarily fall with it.

For instance, the United States has explained that two of the principal health insurance reforms in the PPACA—the guaranteed-issue and community-rating reforms—would necessarily fall with the minimum coverage mandate. *See Consolidated Brief*

for Respondents at 10, *Nat'l Fed'n of Indep. Bus. v. Sebelius* and *Florida v. Dep't of Health and Human Servs.* (Nos. 11-393 & 11-400) (U.S.) (“[T]he [Eleventh Circuit’s] conclusion that the guaranteed-issue and community-rating provisions could be severed from the minimum coverage provision was incorrect.”). In the absence of the mandate, individuals will have no reason to purchase insurance until they become sick, which will drive up insurance premiums for the remaining consumers. The increase in premiums would in turn cause healthy individuals to stop purchasing (or refrain from obtaining) health insurance, causing premiums to rise still further. This “premium spiral” has been experienced in various states—such as New York, Kentucky, and Washington—where similar health insurance reforms were enacted without an accompanying minimum coverage mandate. The legislative record confirms that Congress understood this market dynamic and would not have enacted guaranteed-issue and community-rating reforms in the absence of the individual mandate. Yet if the court of appeals’ decision is allowed to stand, all the negative consequences that Congress sought to avoid by enacting the individual mandate would necessarily come to pass.

The Chamber also submits that the severability inquiry does not end with the guaranteed-issue and community-rating reforms alone. Rather, the other insurance reform requirements in the PPACA, beyond guaranteed-issue and community-rating, also depend on the existence of a fully insured marketplace. Invalidating the individual mandate while retaining these other provisions would similarly un-

dermine the purpose of the Act and disrupt the market for health insurance.

At the certiorari stage, however, it is not necessary for the Court to conduct an in-depth severability analysis of the entire Act. The Court need only recognize that swift determination not only of the mandate's constitutionality, but of the viability of the remainder of the Act, is critical. The conclusion of the court of appeals—that the individual mandate is unconstitutional, but that the remainder of the PPACA will function as Congress intended and thus should remain standing—would have disastrous consequences for the health insurance market, and requires this Court's immediate attention. Indeed, all parties agree that the court of appeals' severability analysis was erroneous, and should be considered by this Court. American businesses need certainty now. This need for certainty will not be satisfied merely by swift review of the constitutionality of the individual mandate, although this first step is essential. The Court should also seek full briefing on a separate and equally important question presented: whether that mandate, if unconstitutional, is severable from the remainder of the Act.

#### **REASONS FOR GRANTING THE PETITIONS**

##### **A. The Viability Of The Entire PPACA, And Not Only The Individual Mandate, Is A Question Of Overriding Importance To The Business Community, And To The Nation.**

The PPACA is one of the most significant and complicated congressional enactments in decades. It “comprehensively reform[s] and regulate[s] more

than one-sixth of the national economy,” “via several hundred statutory provisions and thousands of regulations that put [a] myriad [of] obligations and responsibilities on individuals, employers, and the states.” Appendix to the Petition for Certiorari in *Nat’l Fed’n of Indep. Bus., et al. v. Sebelius, et al*, No. 11-393 (“NFIB Pet. App.”) 491a.

The PPACA’s numerous provisions—and the “myriad [of] obligations and responsibilities” they impose—will have an enormous effect on American businesses. Businesses—large and small alike—will have to significantly alter their investment and hiring decisions not only to comply with the Act’s requirements, but also to absorb the costs that such compliance will impose.

Continued uncertainty over the fate not only of the individual mandate, but also of all the other PPACA provisions, will seriously undermine the business community’s ability to make informed decisions, thereby undermining the growth of the Nation’s economy. Businesses must plan. They must plan how and when to grow. They must plan whether to create jobs or allocate capital to comply with other mandates. As long as the viability of the PPACA remains in serious question, this planning must incorporate risks of legal uncertainty that are too extensive for the average business to bear without sacrificing growth. And while risks associated with legal uncertainty always represent a significant cost, those costs—for American businesses, and the American economy—are particularly high given the breadth and complexity of the PPACA. Indeed, commentators have noted that uncertainty concerning the future of PPACA is contributing to the slow

pace of the economic recovery in the United States.<sup>3</sup> For this reason alone, the Court should grant the petitions for certiorari and resolve whether the individual mandate is constitutional and, if it is not, to what extent the remainder of the legislation built upon the individual mandate can survive.

Moreover, the high cost of uncertainty over the PPACA's validity is not limited to the business community. Businesses are not the only entities struggling to comply with the law. Individuals and governments (including the federal government) are also currently struggling to meet the complicated and numerous new requirements of the Act. If the Court were to invalidate the individual mandate, but withhold consideration of the severability question, the processes of compliance and implementation would only become more advanced. And later decisions as to whether all or a significant part of the PPACA falls with the mandate would be all the more costly and difficult, with implementation even further under way. The longer the fate of the PPACA

---

<sup>3</sup> See, e.g., Dennis P. Lockhart, *Business Feedback on Today's Labor Market* (Nov. 11, 2010) (President of Federal Reserve Bank of Atlanta explaining that "a number of ... factors ... are impeding hiring. Prominent among these is the lack of clarity about the cost implications of the recent health care legislation. We've frequently heard strong comments to the effect of 'my company won't hire a single additional worker until we know what health insurance costs are going to be.'"), available at [http://www.frbatlanta.org/news/speeches/lockhart\\_111110](http://www.frbatlanta.org/news/speeches/lockhart_111110). cfm; Scott R. Baker et al., *Policy Uncertainty Is Choking Recovery*, Bloomberg News (Oct. 5, 2011) (explaining that uncertainty about the future of the PPACA is a major factor in slowing economic recovery), available at <http://www.bloomberg.com/news/2011-10-06/policy-uncertainty-is-choking-recovery-baker-bloom-and-davis.html>.

remains undecided, the more costly it will be to comply with whatever resolution of the severability question this Court eventually reaches.

Finally, while the reasons in favor of considering the severability question are overwhelming, there is no compelling reason for denying review of that question. The severability issue was litigated and decided below, and all parties agree that the individual mandate's severability should be considered as a separate question presented. Moreover, denying review of the severability question now would not prevent this Court from having to review it eventually. Past experience in the lower courts demonstrates that those courts are unlikely to agree on a uniform approach to severability in the future.

Four lower courts have thus far found the mandate unconstitutional, and they have settled on four completely different severability outcomes. See NFIB Pet. App. 179a-194a (Eleventh Circuit opinion below) (holding the individual mandate is severable from the remainder of the PPACA); NFIB Pet. App. 365a-379a (district court opinion below) (holding the mandate is non-severable from the remainder of the PPACA); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 790 (E.D. Va. 2010) (severing the individual mandate “and directly-dependent provisions which make specific reference to [it]” from the remainder of the PPACA); *Goudy-Bachman v. U.S. Dep’t of Health and Human Servs.*, \_\_ F. Supp. 2d \_\_, No. 1:10-CV-763, 2011 WL 4072875, at \*21 (M.D. Pa. Sept. 13, 2011) (holding the mandate non-severable from the guaranteed-issue and community-rating condition provisions, but leaving the remainder of the PPACA intact). There is no reason to believe



that, in the absence of additional guidance from this Court, further percolation of the severability question would help resolve this disagreement among the lower courts on the proper application of this Court's severability principles to the PPACA. The question of severability will therefore eventually fall to this Court. Given that this Court will ultimately be forced to decide how to apply severability principles to the PPACA's complex provisions (if the mandate is held unconstitutional), there is especially little reason to decline to address the severability issue in tandem with the Court's consideration of the mandate's constitutionality.

**B. The Eleventh Circuit's Severability Analysis Is Clearly Incorrect, And Will Have Disastrous Consequences For The Health Insurance Market If Left Standing.**

The importance of resolving the uncertainty over which provisions of the PPACA, if any, will remain if the mandate is struck down is by itself sufficient to warrant this Court's review of the severability question. But this Court should also review that question because the Eleventh Circuit's severability decision is contrary to this Court's precedent, and will have disastrous consequences for the health insurance market if allowed to stand.

1. This Court has explained that when a court strikes down a particular statutory provision on the grounds that it exceeds Congress's constitutional powers, the remaining provisions in the act will remain standing "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that

which is not.” *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quotation marks omitted); see also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010). In short, the question is whether Congress would have enacted the remaining provisions in the absence of the invalid one. See *Alaska Airlines*, 480 U.S. at 685 (“The final test” for severability holds that “the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.”). That overarching question turns on an assessment of whether the remaining provisions “will function in a *manner* consistent with the intent of Congress” in the absence of the invalidated provision. *Id.*

A proper application of these established principles demonstrates that the court of appeals erred in holding the individual mandate severable from the remainder of the PPACA. While an exhaustive survey of the proper scope of severability is unnecessary at the certiorari stage, the Eleventh Circuit’s error—and the disastrous adverse consequences for the health insurance market that will result if the decision stands—is perhaps best illustrated through a brief analysis of the Act’s guaranteed-issue and community-rating provisions.

The PPACA’s guaranteed-issue provisions bar health insurers from denying coverage based on a subscriber’s preexisting conditions or medical history. See, e.g., 42 U.S.C. § 300gg-4(a) (“A group health plan and a health insurance issuer offering group or individual health insurance coverage may not establish rules for eligibility (including continued eligibility) of any individual to enroll under the

terms of the plan or coverage based on any of the following health status-related factors....”). The PPACA’s community-rating provisions prescribe that insurers may not charge higher premiums based on preexisting conditions and certain other factors. *See, e.g.*, 42 U.S.C. § 300gg(a)(1). Those provisions therefore preclude health insurers from increasing premiums due to any condition other than age, geography, and tobacco use. The provisions also establish limits on the extent of permissible variations in premiums based on those three factors. *Id.* § 300gg(a)(1)(A)(ii)–(iv).<sup>4</sup>

The United States has conceded, as it must, that the PPACA’s guaranteed-issue and community-rating provisions cannot survive without the individual mandate. *See, e.g.*, Consolidated Brief for Respondents at 10 (“[T]he [Eleventh Circuit’s] conclusion that the guaranteed-issue and community-rating provisions could be severed from the minimum coverage provision was incorrect.”).<sup>5</sup> Those insurance reforms prohibit denying coverage or raising

---

<sup>4</sup> Both the guaranteed-issue and community-rating provisions are found in Title I, Section 1201 of the PPACA. PPACA § 1201 (codified at 42 U.S.C. §§ 300gg – 300gg-7).

<sup>5</sup> The United States took the same position in the lower courts in this litigation. *See* Response/Reply Brief for the United States at 58, *Florida v. Dep’t of Health & Human Servs.*, Nos. 11-11021, 11-11067 (11th Cir. May 18, 2011) (“[T]he guaranteed-issue and community-rating provisions ... cannot be severed from the minimum coverage requirement.”); Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment at 40, *Florida v. Dep’t of Health & Human Servs.*, No. 3:10-cv-91 (N.D. Fla. Nov. 23, 2010) (“As defendants have made clear ... the guaranteed-issue and community insurance industry reforms in Section 1201 will stand or fall with the minimum coverage mandate.”).

premiums based on preexisting conditions, and in the absence of the mandate, they would not “function in a *manner* consistent with the intent of Congress.” *Alaska Airlines*, 480 U.S. at 685.

Congress also fully recognized the interrelationship between those reforms and the mandate in the express terms of the Act:

[I]f there were no [minimum coverage] requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement 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.

PPACA § 1501(a)(2)(I), 42 U.S.C. § 18091(a)(2)(I). In light of Congress’s own explanation of its intent, the guaranteed-issue and community-rating provisions are plainly non-severable from the individual mandate.

As the United States has starkly explained, “[i]t is well known that community-rating and guaranteed issue, coupled with voluntary insurance, tends to lead to a death spiral of individual insurance.”

Consolidated Brief for Respondents at 32 (quoting Uwe E. Reinhardt, Prepared Statement for Making Health Care Work for American Families: Ensuring Affordable Coverage: Hearing Before the Subcomm. on Health of the H. Comm. on Energy & Commerce, 111th Cong. 11 (Mar. 17, 2009), *available at* [http://democrats.energycommerce.house.gov/Press\\_111/20090317/testimony\\_reinhardt.pdf](http://democrats.energycommerce.house.gov/Press_111/20090317/testimony_reinhardt.pdf)).<sup>6</sup>

Congress's concerns about an "implosion" of the health insurance markets are further reinforced by the actual experience of various states that have implemented comparable community-rating and guar-

---

<sup>6</sup> Experts in the health care field share the view that the individual mandate is essential to the intended operation of the PPACA's guaranteed-issue and community-rating provisions. *See, e.g.*, Bradley Herring, *An Economic Perspective on the Individual Mandate's Severability from the PPACA*, 364 *New Eng. J. Med.* 16e (Mar. 10, 2011), *available at* <http://www.nejm.org/doi/full/10.1056/NEJMp1101519?source=hrc> ("Although they are politically popular, these community-rating and guaranteed-issue provisions can reduce the stability of private health insurance markets.... The primary purpose of the individual mandate is to mitigate this adverse selection...."); Anthony T. Lasso, *Community Rating and Guaranteed Issue in the Individual Health Insurance Market*, National Institute for Health Care Management Foundation, at 2 (Jan. 2011), *available at* <http://nihcm.org/pdf/EV-LoSassoFINAL.pdf> (stressing the "distortions that can result from community rating and guaranteed issue regulations in the non-group market when there are no provisions in place to keep people enrolled in coverage"); Jonathan Gruber, *Why We Need the Individual Mandate: Without a Mandate, Health Reform Would Cover Fewer With Higher Premiums*, Center for American Progress, at 1 (Apr. 8, 2010), *available at* [http://www.americanprogress.org/issues/2010/04/pdf/individual\\_mandate.pdf](http://www.americanprogress.org/issues/2010/04/pdf/individual_mandate.pdf) ("Without the individual mandate, the entire structure of reform would fail.").

anteed-issue provisions without an individual mandate. Seven states have enacted guaranteed-issue laws without an accompanying mandate. Ky. Rev. Stat. Ann. § 304.17A-060(2)(A) (1994) (repealed 1998); Me. Rev. Stat. tit. 24-A, § 2736-C(3); N.H. Rev. Stat. § 420-G:6; N.J. Stat. § 17B:27A-22; N.Y. Ins. L. §§ 3231, 3232; Vt. Stat. Ann. tit. 8, § 4080B(d)(1); Wash. Code § 48.43.012(1). Studies in those states reveal precisely the type of adverse selection problems that Congress sought to avoid in the PPACA. See Mark A. Hall, *An Evaluation of New York's Reform Law*, 25 J. Health Pol., Pol'y & L. 71, 97 (2000) ("Following reform, the overall percentage of the population with insurance has worsened...."); Roberta B. Meyer, *Justification for Permitting Life Insurers to Continue to Underwrite on the Basis of Genetic Information and Genetic Test Results*, 27 Suffolk U. L. Rev. 1271, 1291 (1993) (New York's community rating requirement "has led to an increase in rates for young, healthy insureds" and "many of them have dropped their health insurance coverage"). Indeed, the Kentucky market reforms were repealed because they destabilized the health insurance market. Cf. Adele M. Kirk, *Riding the Bull: Experience with Individual Market Reform in Washington, Kentucky and Massachusetts*, 25 J. Health Pol., Pol'y & L. 133, 151 (2000) ("The Kentucky reform experience has become notorious for the mass exit of insurers from its market.").

For those reasons, there is no basis to doubt Congress's express understanding that the individual mandate is "essential" to the proper functioning of a health insurance market that includes the PPACA's guaranteed-issue and community-rating provisions.

42 U.S.C. § 18091(a)(2)(I). The individual mandate and those reforms are a tightly interwoven group, which must stand or fall together. *Cf. Carter v. Carter Coal Co.*, 298 U.S. 238, 315-16 (1936) (“These two sets of requirements are not like a collection of bricks, some of which may be taken away without disturbing the others, but rather are like the interwoven threads constituting the warp and woof of a fabric, one set of which cannot be removed without fatal consequences to the whole.”).

2. Although the PPACA severability analysis cannot end with the guaranteed-issue and community-rating provisions—and indeed, the Chamber submits that *all* the Act’s insurance reform provisions are non-severable from the mandate—the severability analysis concerning those two provisions demonstrates not only the court of appeals’ legal error, but also the dire consequences for both purchasers and sellers of health insurance if that error is not corrected. If, for example, the mandate falls while the guaranteed-issue and community-rating provisions remain, many will wait to purchase health insurance until they need health care services. Then—as the United States has repeatedly explained—health insurance premiums will spiral out of control, causing others to drop their existing coverage or forego the purchase of coverage.

Indeed, the turmoil in the health insurance market that would result from the Eleventh Circuit’s decision is the precise consequence that Congress sought to avoid by including an individual mandate in the first place. This reality renders it all the more crucial that this Court review the Eleventh Circuit’s severability analysis. This Court’s review is the only

meaningful avenue for avoiding the inevitable market disruption that the Eleventh Circuit's decision will produce. Accordingly, along with review of the individual mandate's constitutionality, this Court should also consider, as a separate question presented, whether the individual mandate—if unconstitutional—is severable from the remainder of the Act.

### CONCLUSION

The petitions for a writ of certiorari should be granted insofar as they present the questions whether the individual mandate in the PPACA is constitutional, and if not, whether it is severable from the remainder of the Act.

Respectfully submitted,

ROBIN S. CONRAD

SHANE B. KAWKA

KATHRYN COMERFORD TODD

NATIONAL CHAMBER LITIGATION  
CENTER, INC.

1615 H Street, N.W.

Washington, D.C. 20062

(202) 463-5337

K. LEE BLALACK II

*(Counsel of Record)*

lblalack@omm.com

BRIAN D. BOYLE

ANTON METLITSKY

O'MELVENY & MYERS LLP

1625 Eye Street, N.W.

Washington, D.C. 20006

(202) 383-5300

October 2011