IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 11-11021-HH

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,
Defendants/Appellants/Cross-Appellees,

v.

STATE OF FLORIDA, by and through
Attorney General Pam Bondi, et al.,
Plaintiffs/Appellees/Cross-Appellants.

Appeal from the United States District Court
for the Northern District of Florida

Plaintiffs/Appellees' Petition for Hearing En Banc

PAMELA JO BONDI
ATTORNEY GENERAL OF FLORIDA
Scott D. Makar (Fla. Bar No. 709697)
Solicitor General
Joseph W. Jacquot (Fla. Bar No. 189715)
Special Counsel
Louis F. Hubener (Fla. Bar No. 0140084)
Timothy D. Osterhaus (Fla. Bar No. 0133728)
Deputy Solicitors General
Blaine H. Winship (Fla. Bar No. 0356913)
Special Counsel
Office of the Attorney General of Florida
The Capitol, Suite PL-01

Tallahassee, Florida 32399-1050
Telephone: (850) 414-3300
Facsimile: (850) 488-4872
Email: scott.makar@myfloridalegal.com
Attorneys for Plaintiff/Appellee States

Michael A. Carvin
Gregory G. Katsas
C. Kevin Marshall
Hashim M. Mooppan
Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
Email: macarvin@jonesday.com
Email: ggkatsas@jonesday.com
Email: ckmarshall@jonesday.com
Email: hmmooppan@jonesday.com
Attorneys for Plaintiffs/Appellees National Federation of Independent Business and Individuals

Karen R. Harned
Executive Director
National Federation of Independent Business
Small Business Legal Center
1201 F Street, N.W., Suite 200
Washington, DC 20004
Telephone: (202) 314-2061
Facsimile: (202) 554-5572
Of counsel for Plaintiff National Federation of Independent Business

David B. Rivkin (D.C. Bar No. 394446)
Lee A. Casey (D.C. Bar No. 447443)
Baker & Hostetler LLP
1050 Connecticut Avenue, N.W., Ste. 1100
Washington, DC 20036
Telephone: (202) 861-1731
Facsimile: (202) 861-1783
Attorneys for Plaintiff/Appellee States

Katherine J. Spohn
Special Counsel to the Attorney General
Office of the Attorney General of Nebraska
2115 State Capitol Building
Lincoln, Nebraska 68508
Telephone: (402) 471-2834

Facsimile: (402) 471-1929
Email: katie.spohn@nebraska.gov
Attorney for the State of Nebraska

Bill Cobb
Deputy Attorney General
for Civil Litigation
Office of the Attorney General of Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-0131
Facsimile: (512) 936-0545
Email: bill.cobb@oag.state.tx.us
Attorney for the State of Texas

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rule 26.1-1, counsel for the State Plaintiffs/Appellees provide the following certificate of interested persons:

(A) Trial Judges

Timothy, Elizabeth M. (Magistrate Judge)
Vinson, Roger (Senior Judge)

(B) Plaintiffs and Associated Persons

Ahlburg, Kaj
Branstad, Terry E., Governor of the State of Iowa, on behalf of the people of Iowa
Brown, Mary
Commonwealth of Pennsylvania, by and through Thomas W. Corbett, Jr., Governor, and William H. Ryan, Jr., Acting Attorney General
Harned, Karen R.
National Federation of Independent Business (NFIB)
State of Alabama, by and through Luther Strange, Attorney General
State of Alaska, by and through John J. Burns, Attorney General
State of Arizona, by and through Janice K. Brewer, Governor, and Thomas C. Horne, Attorney General
State of Colorado, by and through, John W. Suthers, Attorney General
State of Florida, by and through Pam Bondi, Attorney General
State of Georgia, by and through Samuel S. Olens, Attorney General
State of Idaho, by and through Lawrence G. Wasden, Attorney General
State of Indiana, by and through Gregory F. Zoeller, Attorney General
State of Kansas, by and through Derek Schmidt, Attorney General
State of Louisiana, by and through James D. "Buddy" Caldwell, Attorney General
State of Maine, by and through William J. Schneider, Attorney General
State of Michigan, by and through Bill Schuette, Attorney General
State of Mississippi, by and through Haley Barbour, Governor
State of Nebraska, by and through Jon Bruning, Attorney General
State of Nevada, by and through Brian Sandoval, Governor

State of North Dakota, by and through Wayne Stenehjem, Attorney General
State of Ohio, by and through Michael DeWine, Attorney General
State of South Carolina, by and through Alan Wilson, Attorney General
State of South Dakota, by and through Marty J. Jackley, Attorney General
State of Texas, by and through Greg Abbott, Attorney General
State of Utah, by and through Mark L. Shurtleff, Attorney General
State of Washington, by and through Robert M. McKenna, Attorney General
State of Wisconsin, by and through J.B. Van Hollen, Attorney General
State of Wyoming, by and through Matthew H. Mead, Governor

(C) Counsel for the Plaintiffs

Baker & Hostetler LLP
Carvin, Michael A.
Casey, Lee Alfred
Cobb, William James, III
Hubener, Louis F.
Jacquot, Joseph W.
Jones Day
Kawski, Clayton P.
Katsas, Gregory G.
Makar, Scott D.
Marshall, C. Kevin
Mooppan, Hashim M.
Obhof, Larry James, Jr.
Office of the Attorney General, Florida
Office of the Attorney General, Nebraska
Office of the Attorney General, Texas
Osterhaus, Timothy D.
Ramos-Mrosovsky, Carlos
Rivkin, David Boris, Jr.
Smith, Chesterfield H., Jr.
Spohn, Katherine Jean
Winship, Blaine H.
Wisconsin Department of Justice

(D) Defendants

Geithner, Timothy F. (Secretary, U.S. Department of Treasury)
Sebelius, Kathleen (Secretary, U.S. Department of Health and Human Svcs.)

Solis, Hilda L. (Secretary, U.S. Department of Labor)
United States Department of Health and Human Services
United States Department of Labor
United States Department of Treasury

(E) Counsel for the Defendants

Beckenhauer, Eric B.
Bondy, Thomas M.
Brinkmann, Beth S.
Chaifetz, Samantha L.
Gershengorn, Ian Heath
Katyal, Neal Kumar
Kennedy, Brian G.
Kirwin, Thomas F.
Klein, Alisa B.
Lieber, Shiela
Stern, Mark B.
United States Department of Justice
West, Tony

(F) Amici Curiae

Aaron, Henry
AARP
Aderholt, Robert
Akerlof, George
Alexander, Rodney
American Academy of Pediatrics
American Association of People with Disabilities
American Center for Law and Justice
American Civil Rights Union
American Hospital Association
American Nurses Association
American Public Health Association
Arrow, Kenneth
Association of American Medical Colleges
Athey, Susan
Bachmann, Michele
Bachus, Spencer

Barrasso, John
Bishop, Rob
Blackburn, Marsha
Bliss, Lawrence
Blumberg, Linda L.
Boe, Donna
Boehner, John A.
Bolkcom, Joe
Bond, Kit
Breast Cancer Action
Bridgham, Robert
Broun, Paul
Brown, Lisa
Brownback, Sam
Bunning, Jim
Burgess, Michael
Burman, Leonard E.
Burr, Richard
Burton, Dan
Cantor, Eric
Carcieri, Donald L. (Governor of Rhode Island)
Carroll, Morgan
Catholic Health Association of the United States
Chaffetz, Jason
Chambliss, Saxby
Chandra, Amitabh
Chase, Maralyn
Chernew, Michael
Children's Dental Health Project
Coburn, Tom
Cochran, Thad
Coffman, Mike
Cole, Tom
Coleman, Garnet
Collins, Susan
Conaway, Mike
Conway, Steve
Cook, Philip
Corker, Bob
Cornyn, John

Crapo, Mike
Craven, Margaret
Cushing, Robert
Cutler, David
Davis, Geoff
DeMint, Jim
DiPentima, Rich
Donovan, Christopher
Ellis, Johnny
Ensign, John
Enzi, Mike
Errington, Sue
Eves, Mark
Families USA
Family Research Council
Family Violence Prevention Fund
Farrar, Jessica
Federation of American Hospitals
Fisher, Susan
Flake, Jeff
Fleming, John
Florida Advocacy Center for People with Disabilities
Florida Alliance for Retired Americans
Florida Community Health Action Information Network
Florida Pediatric Society, Florida chapter of the American Academy of Pediatrics
Fontana, Steve
Foster, Dan
Foxx, Virginia
Frank, William
Franks, Trent
French, Patsy
Friends of Cancer Research
Gardnener, Pat
Garrett, Scott
Garry Miller, Rodgers,
Glazier, Rick
Gohmert, Louie
Goldin, Claudia
Gottfried, Richard
Grassley, Chuck

Graves, Tom
Gray Panthers
Gregoire, Christine (Governor of Washington)
Gross, Tal
Gruber, Jonathan
Hadley, Jack
Hall, Ralph
Harper, Greg
Hatch, Jack
Hatch, Orrin
Hawks, Bob
Head, Helen
Heath, Martha
Heinz, Matt
Hensarling, Jeb
Herger, Wally
Hickenlooper, John (Governor of Colorado)
Ho, Vivian
Horwitz, Jill
Hubbard, Pamela
Human Services Coalition of Dade County
Hundstad, Jim
Huntley, Tom
Hutchison, Kay Bailey
Inhofe, James
Innes, Melissa Walsh
Isakson, Johnny
Jenkins, Lynn
Johanns, Mike
Jones, Walter
Jordan, Jim
Jorgensen, Pete
Judge David L. Bazelon Center for Mental Health Law
Katz, Lawrence
Keiser, Karen
Kessley, Jeffrey
King, Steve
Kline, Adam
Kline, John
Kloucek, Frank

Krueger, Liz
Kyl, Jon
Lamborn, Doug
Larson, Mark
Latta, Robert
LeMieux, George
Lenes, Joan
Leriche, Lucy
Lesser, Matthew
Levy, Frank
Lindert, Peter
Litvack, David
Lopes, Phil
Lucas, Larry
Lummis, Cynthia
Lungren, Dan
Mack, Connie
Maier, Steven
Malek, Sue
Manno, Roger
Manzullo, Donald
March of Dimes Foundation
Marchant, Kenny
Maskin, Eric
Mathern, Tim
McCain, John
McCarthy, Kevin
McClintock, Tom
McCluskey, David
McConnell, Mitch
McCullough, Jim
McMorris, Cathy
McSorley, Cisco
Mental Health America
Miller, Jeff
Monheit, Alan C.
Moon, Marilyn
Moran, Jerry
Murnane, Richard J.
Murphy, Erin

Mushinsky, Mary
National Alliance on Mental Illness
National Alliance on Mental Illness (NAMI) – Florida
National Association of Children's Hospitals
National Association of Community Health Centers
National Association of Public Hospitals and Health Systems
National Breast Cancer Coalition
National Committee to Preserve Social Security and Medicare
National Disability Rights Network
National Health Law Program
National Organization for Rare Disorders
National Partnership for Women and Families
National Senior Citizens Law Center
National Women's Health Network
National Women's Law Center
Neugebauer, Randy
Nichols, Len M.
Olson, Pete
Orrock, Nan
Ortiz, Feliz
Ovarian Cancer National Alliance
Paul, Ron
Pawlenty, Tim (Governor of Minnesota)
Pence, Mike
Perdue, Don
Pingree, Hannah
Pitts, Joe
Pollack, Harold
Posey, Bill
Price, Tom
Pugh, Ann
Rabin, Matthew
Radonovich, George
Ram, Kesha
Raskin, Jamie
Rebitzer, James B.
Rendell, Edward, former Governor of Pennsylvania
Reich, Michael
Rice, Thomas
Risch, James

Ritter, Elizabeth
Roberts, Pat
Rockefeller, Phil
Rogers, Mike
Rosenbaum, Diane
Rosenberg, Samuel
Ruhm, Christopher
Sargent Shriver National Center on Poverty Law
Scalise, Steve
Schlachman, Donna
Service Employees International Union Healthcare Florida, Local 1991
Sessions, Pete
Shadegg, John
Shelby, Richard
Shields, Chip
Sinema, Kyrsten
Skinner, Jonathan
Small Business Majority Foundation, Inc.
Smith, Adrian
Smith, Lamar
Snowe, Olympia
Snyder, Rick (Governor of Michigan)
State of Iowa, by and through Tom Miller, Attorney General
State of Kentucky, by and through Jack Conway, Attorney General
State of Maryland, by and through Douglas F. Gansler, Attorney General
State of Oregon, by and through John Kroger, Attorney General
State of Vermont, by and through William H. Sorrell, Attorney General
Stewart, Mimi
Swartz, Katherine
Takumi, Roy
The ARC of the United States
Thune, John
Tiahrt, Todd
Till, George
Todd, Akin
Van de Water, Paul N.
Vitter, David
Voices for America's Children
Wamp, Zach
Warner, Kenneth

Warren, Rebekah
Welles, Jeanne Kohl
Westmoreland, Lynn
Wheeler, Scott
Wicker, Roger
Wilson, Joe
Witt, Brad
Wizowaty, Suzi
Young Invincibles
Zuckerman, Stephen

(G) Attorneys for Amici

American Center for Law and Justice
Annino, Paolo G.
Arnold & Porter LLP
Asay, Bridget C.
Bader, Hans Frank
Baer, Ivy
Barauskas, Aleksas Andrius
Barry, Dennis
Berger, Adam J.
Bobroff, Rochelle
Burns, Guy M.
Center for American Progress
Competitive Enterprise Institute
Constitutional Accountability Center
Dubanevich, Keith Scott
Family Research Council
Fisher, Karen
Gage, Larry S.
Gilden, Lisa
Hatton, Melinda Reid
Hogan Lovells US LLP
Houser, Kristin
Iowa Department of Justice
Johnson, Pope, Bokor, Ruppel & Burns
Judicial Crisis Network
Kanner, Sheree R.
Kass, Michael D.

Kazman, Sam
Kendall, Douglas T.
King & Spalding
Klukowski, Kenneth Alan
Kraner, Sara A.
Law Offices of Tragos and Sartes
Lazarus, Simon
Micklos, Jeffrey G.
Millhiser, Ian Ross
Mudron, Maureen D.
Office of the Attorney General, Kentucky
Office of the Attorney General, Maryland
Office of the Attorney General, Vermont
Oregon Department of Justice
Perella, Dominic F.
Perkins, Jane
Roe, Rebecca J.
Rosen, Richard Lawrence
Rutzick, William
Sandler, Joseph Eric
Sandler, Reiff and Young
Schantz, Mark
Schroeter, Goldmark & Bender
Severino, Carrie Lynn
Somers, Sarah
Stetson, Catherine E.
Tragos, George E.
White, Edward Lawrence, III
Wydra, Elizabeth Bonnie

/s/Scott D. Makar
Attorney for
Plaintiffs/Appellees

March 10, 2011

ATTORNEY STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following questions of exceptional importance:

1. Whether Congress exceeded its constitutional authority in enacting the Patient Protection and Affordable Care Act (the "Act"), which includes an "individual mandate" provision requiring all Americans (with limited exceptions) to obtain federally-approved health insurance or pay a monetary penalty?

2. Whether the grounds upon which the district court determined that the individual mandate was non-severable, which included the federal government's view that the individual mandate is absolutely necessary for the Act's insurance market reforms to work and Congress's express decision to remove a severability clause from the Act's final version, supports invalidation of the entire Act.

/s/Scott D. Makar
Counsel of Record for
Plaintiffs/Appellees

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

FEDERAL CONSTITUTIONAL PROVISIONS & STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

1. Whether Congress exceeded its constitutional authority in enacting the Patient Protection and Affordable Care Act (the "Act"), which includes an "individual mandate" provision requiring all Americans (with limited exceptions) to obtain federally-approved health insurance or pay a monetary penalty?

2. Whether the grounds upon which the district court determined that the individual mandate was non-severable, which included the federal government's view that the individual mandate is absolutely necessary for the Act's insurance market reforms to work and Congress's express decision to remove a severability clause from the Act's final version, supports invalidation of the entire Act?

STATEMENT OF THE COURSE OF PROCEEDINGS, DISPOSITION, AND FACTS

This appeal is unprecedented in its scope, scale, and importance. It involves a constitutional challenge by over half the States of this Nation against a massive piece of legislation that affects virtually everyone and every business; it also imposes immense and unparalleled fiscal obligations on the States. The federal act is extraordinary in terms of its effect on the future of federal-state relations.

It arises out of expedited litigation brought by twenty-six states (the "Plaintiff States" or "State Appellees"), the National Federation of Independent Business ("NFIB"), and two private citizens ("Individual Plaintiffs") (collectively the "Plaintiffs") challenging the constitutionality of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (the "ACA" or "Act"). Named as defendants are the United States Department of Health and Human Services, the Department of Treasury, the Department of Labor, and their respective secretaries (collectively the "Defendants").

The Plaintiffs' Amended Complaint contained six counts asserting the Act was unconstitutional because:

(1) the requirement in section 1501 of the Act that all citizens (with limited exceptions), beginning in 2014 must obtain federally-approved health insurance or pay a monetary penalty (the

"individual mandate") exceeds Congress's authority under the Commerce Clause, violates the Constitution's federalism and dual-sovereignty principles and the Ninth and Tenth Amendments (Count I);

(2) the individual mandate and penalty violate the Fifth Amendment right of individuals to make healthcare decisions for themselves (Count II);

(3) alternatively, if the penalty imposed for failing to comply with the individual mandate is found to be a tax, it is an unconstitutional unapportioned capitation or direct tax in violation of U.S. Const. art. I, §§ 2 and 9, and the Ninth and Tenth Amendments (Count III);

(4) it unlawfully coerces and commandeers the States by forcing them to alter, expand, and assume additional liability and expense of the Medicaid program in violation of core federalism and dual-sovereignty principles in the Constitution, article IV, section 4, and the Ninth and Tenth Amendments (Count IV);

(5) it commandeers the States to administer and support elements of the ACA's provision for state-specific insurance exchanges in violation of federalism and dual-sovereignty principles, Article I, and the Ninth and Tenth Amendments (Count V); and

(6) it requires states to provide health insurance to all state workers who work more than 30 hours/week (the "employer mandate") and penalizes or taxes States based upon plan attributes and coverage decisions made by their employees, in violation of federalism and dual-sovereignty principles, Article I, and the Ninth and Tenth Amendments (Count VI).

See generally Am. Compl. (Doc. 42). Defendants moved to dismiss four of the counts for lack of jurisdiction (under Rule 12(b)(1)), and all six for failure to state a claim upon which relief can be granted (Rule 12(b)(6)). (Doc. 55)

The district court partially granted the motion on Rule 12(b)(6) grounds as to Counts II, III, V, and VI. (Doc. 79 at 65) Count II was dismissed because the district court concluded that individuals possess no fundamental right that would render the individual mandate unconstitutional. (Doc. 79 at 60) As to Count III, the court rejected Defendants' argument that the individual mandate penalty was "a tax" that could not be challenged via the Anti-Injunction Act. (Doc. 79 at 24-26, 57-58) This conclusion mooted Plaintiffs' claim that if it were a tax, it would be an unconstitutional tax. *Id.*[1] On Count V, the Court's order accepted Defendants' reading of the ACA that States may choose voluntarily whether to support and administer various facets of the ACA's insurance exchange regime; under this construction the Act escaped commandeering problems. (Doc. 79 at 50) As to Count VI, the court concluded that the federal government could require States to offer health insurance benefits to state officers and workers and could directly tax or penalize States under the ACA's employment regime under established

[1] The district court subsequently noted that every court to consider the Taxing Clause justification for the individual mandate (even those ruling for the government) had rejected it, including Anti-Injunction Act arguments. (Doc. 150 at 4 n.4 (citing *Goudy-Bachman v. U.S. Dep't of Health & Human Servs*., 2011 WL 223010, at *9-*12 (M.D. Pa. Jan. 24, 2011); *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 786-88 (E.D. Va. 2010); *Liberty Univ., Inc. v. Geithner*, __ F. Supp. 2d __, 2010 WL 4860299, at *9-*11 (W.D. Va. Nov. 30, 2010); *U.S. Citizens Assoc. v. Sebelius*, __F. Supp. 2d __, 2010 WL 4947043, at *5 (N.D. Ohio Nov. 22, 2010); *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882, 890-91 (E.D. Mich. 2010)).

Supreme Court precedent. (Doc. 79 at 46 (citing *Garcia v. San Antonio Metro. Auth.*, 469 U.S. 528 (1985) and *Maryland v. Wirtz*, 392 U.S. 183 (1968))

On January 31, 2011, the district court granted summary judgment for the Plaintiffs on Count I,[2] holding the individual mandate provision of the Act unconstitutional; it declared the remainder of the Act void because the individual mandate was not severable. (Doc. 150) It also issued a final judgment. (Doc. 151)

The district court's analysis concluded that the individual mandate went beyond Congress's authority under the Commerce Clause and the Necessary and Proper Clause (U.S. Const. art I, § 8) by attempting to regulate "inactivity" as commerce. (Doc. 150 at 56, 63) The court further concluded that the individual mandate could not be severed from the rest of the Act because of its complex and intertwined provisions and its threshold importance to the entire Act, as conceded by the federal government:

> the defendants have acknowledged that the individual mandate and the Act's health insurance reforms, including the guaranteed issue and community rating, rise or fall together as these reforms "cannot be severed from the [individual mandate]." See, e.g., Def. Opp. at 40. As explained in my order on the motion to dismiss: "the defendants concede that [the individual mandate] is absolutely necessary for the

[2] The district court sided with the federal government on Count IV because "existing caselaw is inadequate to support" a Spending Clause coercion claim. (Doc. 150 at 10) The court took note of the federal government's tremendous exertion of "power over the states" due to its spending might, but concluded that "states have little recourse to remaining the very junior partner in this [Medicaid] partnership." (*Id.* at 12)

> Act's insurance market reforms to work as intended. In fact, they refer to it as an 'essential' part of the Act at least fourteen times in their motion to dismiss."

(*Id*. at 63-64; 71) Moreover, the district court noted that Congress specifically, and presumably intentionally, decided to delete the "severability clause" that had been included in an earlier House-passed version of the Act. (*Id.* at 67-68)

Finally, the district court entered a declaratory judgment in Plaintiffs' favor (Doc. 151), which the court deemed to be the functional equivalent of an injunction against further implementation of the Act. (Doc. 150 at 69) When Defendants sought clarification of the district court's order, which the court deemed the equivalent of a stay request; the court ultimately stayed its order contingent upon the federal government's filing of its notice of appeal within seven days and seeking expedited review by this Court. (Doc. 167, 169) The Plaintiffs have filed concurrently with this Petition a response to the Defendants' motion for expedition, which proposes the same expedited briefing set forth here in this Petition; the State Plaintiffs have filed a protective notice of cross-appeal to ensure the preservation of issues decided adversely to them below.

ARGUMENT

Hearing en banc is warranted in this exceptional and time sensitive[3] case involving constitutional issues of first impression that have national importance and urgency. A common thread in all pending appeals involving the constitutionality of the Patient Protection and Affordable Care Act is the need for expedited, but thorough, review of the issues presented. These dual goals can be met in this case due to the fortuity that the Court's next scheduled en banc sitting is the week of June 6, 2011,[4] which dovetails with the expedited briefing schedule proposed by Plaintiffs.[5]

---

[3] Plaintiffs note that their request is time sensitive (*see* 11th Cir. R. 27-1(b)(1)) because a slightly expedited briefing schedule is necessary for this Court to hear this matter en banc at its sitting the week of June 6, 2011.

[4] En banc review is requested only for the week of June 6, 2011. If en banc review is available only at a later date, such as the en banc sitting scheduled in the Fall of 2011, it is not requested because the goal of expedited review would not be met. Instead, panel review and resolution at the earliest practicable date is requested.

[5] The Plaintiffs have contemporaneously filed their response to the Defendants' request for expedition, setting forth the following proposed briefing schedule that would enable en banc hearing during the week of June 6, 2011:

Defendants' Initial Brief	April 18th
Plaintiffs' Answer/Initial Brief on Cross-Appeal	May 9th
Defendants' Reply/Answer Brief on Cross-Appeal	May 23rd

This expedited three-brief schedule is premised on convenience to the Court and Plaintiffs fully addressing cross-appeal matters in their May 11th brief. If the Court allows, and time permits, it is suggested that the State Plaintiffs be afforded a reply (Continued…)

I. The constitutionality of the individual mandate and its severability present issues of exceptional importance warranting en banc review.

Hearing en banc is warranted in this case because the challenge to the constitutionality of the Act is an issue of exceptional importance. *See* Fed. R. App. P. 35; 11th Cir. R. 35-3. Indeed, this case is the first that was filed to challenge the constitutionality of the individual mandate of the Act, which will require that everyone (with limited exceptions) must purchase federally-approved health insurance or be subject to a monetary penalty. Challenges to the Act have been brought throughout the country, resulting in district courts rendering differing rulings; some strike down the mandate as unconstitutional, while others uphold it. The net result is substantial uncertainty and the urgent need for judicial resolution and clarity for the benefit of the people and businesses subject to the Act's provisions. Given the significant expenditures being incurred by the federal government, States, businesses, and individuals across the nation, in an effort to comply with the provisions in the Act, the need to resolve this matter in an expeditious manner is imperative.

In addition, as Appellants' motion to expedite described, in each of the cases where an appeal has been lodged involving the constitutionality of the ACA and its

---

brief on cross-their appeal on May 30th, which would be one week prior to the June 6th en banc sitting.

individual mandate,[6] the parties and appellate courts have deemed the important issues to warrant expedited review. As the district court noted at the outset of this litigation, the "citizens of this country have an interest in having this case resolved as soon as practically possible." (Doc. 18 at 4) He reemphasized this point in his clarification order, noting it "is very important to everyone in this country that this case move forward as soon as practically possible." (Doc. 167 at 19-20)

While time is of the essence, so too is ensuring appellate review by all members of this Court. If the United States Supreme Court decides to grant certiorari, it will no doubt benefit institutionally from thorough appellate review on the matter. Where an appeal is expedited for resolution – and time is available for en banc hearing, as it appears fortuitously to be in this case – the Supreme Court would benefit from the full court's views.

In this regard, this Court has noted the "special importance of cases decided by the en banc court to establishing law of the circuit" where exceptionally important issues are at stake. *Cone Corp. v. Hillsborough Cnty.*, 995 F.2d 185, 186 (11th Cir. 1993). Initial review by a panel might, under ordinary circumstances where timing is not so critical and the issues less compelling, suffice to move a

[6] *See* Appellants' Motion for Expedition at 5 (discussing *Commonwealth of Va. v. Sebelius*, Nos. 11-1057 & 11-1058 (4th Cir.); *Liberty Univ., Inc. v. Geithner*, No. 10-2347 (4th Cir.); *Thomas More Law Ctr. v. Obama*, No. 10-2388 (6th Cir.); *Mead v. Holder*, No. 11-5047 (D.C. Cir.)).

case progressively closer to Supreme Court review, by allowing time for the panel to decide the case and then for either party to seek en banc rehearing of the panel's decision. Here, however, this ordinary process is likely to prove unworkable or unpredictable given the urgency and importance of resolving the issues presented.

Further, this Court's en banc sitting already scheduled for early June provides the Court with the opportunity to both (a) expedite the matter, as all parties now say is warranted; and (b) allow each active member of the Court to participate fully in the adjudication of issues of exceptional importance from the outset of the appeal. En banc review eliminates the possibility of delay arising from a later request for en banc rehearing of a panel opinion.

As the Supreme Court noted fifty-one years ago, en banc courts "are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *United States v. American-Foreign S. S. Corp.*, 363 U.S. 685, 689 (1960).[7] It is respectfully urged that this case is one for which an en banc hearing is warranted, enabling each member of the Court to participate fully on the exceptional issues presented. In short, the confluence of the Court's en banc sitting in June and the exceptionally important issues presented are

[7] The Court applied the prior version of § 46(b) that limited en banc review to active judges.

compelling grounds for en banc hearing under the extraordinary circumstances this case presents.

Resolution of this case is of national significance as it puts at issue both the constitutionality of the mandate and its severability (by which the district court invalidated the entire Act). This weighs in favor of en banc review, which would allow the Court's ten active judges to weigh in on both aspects of the district court's ruling. Specifically, the district court narrowed its ruling to the question of whether Congress has the constitutional power to regulate "inactivity," here the failure of some Americans to have health care insurance. The district court held it

> would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause. If it has the power to compel an otherwise passive individual into a commercial transaction with a third party merely by asserting-as was done in the Act-that compelling the actual transaction is *itself* "commercial and economic in nature, and substantially affects interstate commerce" [*see* Act § 1501(a)(1)], it is not hyperbolizing to suggest that Congress could do almost anything it wanted.

(Doc. 150 at 42 (emphasis in original)).

The district court noted in his clarification order that "[e]ven the district courts that have upheld the individual mandate seem to agree that 'activity' is indeed required before Congress can exercise its authority under the Commerce Clause. They have simply determined that an individual's decision not to buy health insurance qualifies as activity." (Doc. 167 at 3 n.1 (noting that the district court in *Mead v. Holder, supra*, "concluded that '[m]aking a choice is an

affirmative action, whether one decides to do something or not do something,' and, therefore, Congress can regulate 'mental activity' under the commerce power.") (citation omitted))

In conclusion, acknowledging that an en banc hearing is warranted in only the most compelling of cases, Plaintiffs submit this case is the exception, not the rule. The typical process, by which a panel renders a decision followed by en banc rehearing, would not meet the dual goals of expeditious and thorough appellate review under the urgent circumstances presented. Plaintiffs recognize the decision to grant en banc hearing is an entirely discretionary one, but urge that this case presents the proper circumstances for the exercise of this degree of review.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that the Court grant this motion, establish an expedited briefing schedule, and set this case for oral argument during the Court's en banc sitting the week of June 6, 2011. If en banc review is available only at a later date, it is not requested; instead, panel review and resolution at the earliest practicable date is requested.

Respectfully Submitted,

/s/Scott D. Makar

Scott D. Makar (Fla. Bar No. 709697)
Solicitor General
Joseph W. Jacquot (FBN 189715)
Special Counsel
Louis F. Hubener (FBN 0140084)
Timothy D. Osterhaus (FBN 133728)
Deputy Solicitors General
Blaine H. Winship (FBN 0356913)
Special Counsel
Office of the Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, Florida 32399-1050
Telephone: (850) 414-3300
Facsimile: (850) 488-4872
scott.makar@myfloridalegal.com
Attorneys for Appellee States

Michael A. Carvin
Gregory G. Katsas
C. Kevin Marshall
Hashim M. Mooppan
Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
Email: macarvin@jonesday.com
Attorneys for Appellees National Federation of Independent Business & Individuals

STATE OF FLORIDA, by and through PAM BONDI, ATTORNEY GENERAL OF THE STATE OF FLORIDA;

STATE OF SOUTH CAROLINA, by and through ALAN WILSON, ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA;

STATE OF NEBRASKA, by and through JON BRUNING, ATTORNEY GENERAL OF THE STATE OF NEBRASKA;

STATE OF TEXAS, by and through GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS;

STATE OF UTAH, by and through MARK L. SHURTLEFF, ATTORNEY GENERAL OF THE STATE OF UTAH;

STATE OF LOUISIANA, by and through JAMES D. "BUDDY" CALDWELL, ATTORNEY GENERAL OF THE STATE OF LOUISIANA;

STATE OF ALABAMA, by and through LUTHER STRANGE, ATTORNEY GENERAL OF THE STATE OF ALABAMA;

BILL SCHUETTE, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ON BEHALF OF THE PEOPLE OF MICHIGAN;

STATE OF COLORADO, by and through JOHN W. SUTHERS, ATTORNEY GENERAL OF THE STATE OF COLORADO;

COMMONWEALTH OF PENNSYLVANIA, by and through THOMAS W. CORBETT, Jr., GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA, & WILLIAM H. RYAN, Jr., ACTING ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA;

STATE OF WASHINGTON, by and through ROBERT M. McKENNA, ATTORNEY GENERAL OF THE STATE OF WASHINGTON;

STATE OF IDAHO, by and through LAWRENCE G. WASDEN, ATTORNEY GENERAL OF THE STATE OF IDAHO;

STATE OF SOUTH DAKOTA, by and through MARTY J. JACKLEY, ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA;

STATE OF INDIANA, by and through GREGORY F. ZOELLER, ATTORNEY GENERAL OF THE STATE OF INDIANA;

STATE OF NORTH DAKOTA, by and through WAYNE STENEHJEM, ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA;

David B. Rivkin
Lee A. Casey
Baker & Hostetler LLP
1050 Connecticut Avenue, N.W., Ste. 1100
Washington, DC 20036
Telephone: (202) 861-1731
Facsimile: (202) 861-1783
Attorneys for Plaintiff/Appellee States

Katherine J. Spohn
Special Counsel to the Attorney General
Office of the Attorney General of Nebraska
2115 State Capitol Building
Lincoln, Nebraska 68508
Telephone: (402) 471-2834
Facsimile: (402) 471-1929
Email: katie.spohn@nebraska.gov
Attorney for the State of Nebraska

Bill Cobb
Deputy Attorney General
for Civil Litigation
Office of the Attorney General of Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-0131
Facsimile: (512) 936-0545
Email: bill.cobb@oag.state.tx.us
Attorney for the State of Texas

STATE OF MISSISSIPPI, by and through HALEY BARBOUR, GOVERNOR OF THE STATE OF MISSISSIPPI;

STATE OF ARIZONA, by and through JANICE K. BREWER, GOVERNOR OF THE STATE OF ARIZONA, and THOMAS C. HORNE, ATTORNEY GENERAL OF THE STATE OF ARIZONA;

STATE OF NEVADA, by and through BRIAN SANDOVAL, GOVERNOR OF THE STATE OF NEVADA;

STATE OF GEORGIA, by and through SAMUEL S. OLENS, ATTORNEY GENERAL OF THE STATE OF GEORGIA;

STATE OF ALASKA, by and through JOHN J. BURNS, ATTORNEY GENERAL OF THE STATE OF ALASKA;

STATE OF OHIO, by and through MICHAEL DeWINE, ATTORNEY GENERAL OF THE STATE OF OHIO;

STATE OF KANSAS, by and through DEREK SCHMIDT, ATTORNEY GENERAL OF THE STATE OF KANSAS;

STATE OF WYOMING, by and through MATTHEW H. MEAD, GOVERNOR OF THE STATE OF WYOMING;

STATE OF WISCONSIN, by and through J.B. VAN HOLLEN, ATTORNEY GENERAL OF THE STATE OF WISCONSIN;

STATE OF MAINE, by and through
WILLIAM J. SCHNEIDER,
ATTORNEY GENERAL OF THE
STATE OF MAINE;

TERRY E. BRANSTAD, GOVERNOR
OF THE STATE OF IOWA, ON
BEHALF OF THE PEOPLE OF IOWA;

NATIONAL FEDERATION OF
INDEPENDENT BUSINESS, a
California nonprofit mutual benefit
corporation;

MARY BROWN, an individual; &

KAJ AHLBURG, an individual.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2011, I filed the foregoing Response with the Court by federal express, overnight delivery and served copies on the following counsel by first class regular mail and email at the addresses provided below:

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
THOMAS F. KIRWIN
United States Attorney
BETH S. BRINKMANN
Deputy Assistant Attorney General
MARK B. STERN
THOMAS M. BONDY
ALISA B. KLEIN
SAMANTHA L. CHAIFETZ
Attorneys, Appellate Staff
Civil Division, Room 7531
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001
Beth.Brinkmann@usdoj.gov
Alisa.Klein@usdoj.gov
Samantha.Chaifetz@usdoj.gov

Attorneys for Appellants

/s/Scott D. Makar
Attorney for Plaintiffs/Appellees