NO. _____

In the
Supreme Court of the United States

STATES OF FLORIDA, SOUTH CAROLINA, NEBRASKA, TEXAS, UTAH, LOUISIANA, ALABAMA, COLORADO, PENNSYLVANIA, WASHINGTON, IDAHO, SOUTH DAKOTA, INDIANA, NORTH DAKOTA, MISSISSIPPI, ARIZONA, NEVADA, GEORGIA, ALASKA, OHIO, KANSAS, WYOMING, WISCONSIN, AND MAINE; BILL SCHUETTE, ATTORNEY GENERAL OF MICHIGAN; AND TERRY BRANSTAD, GOVERNOR OF IOWA,

Petitioners,

v.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Congress exceed its enumerated powers and violate basic principles of federalism when it coerces States into accepting onerous conditions that it could not impose directly by threatening to withhold all federal funding under the single largest grant-in-aid program, or does the limitation on Congress's spending power that this Court recognized in *South Dakota v. Dole*, 483 U.S. 203 (1987), no longer apply?

2. May Congress treat States no differently from any other employer when imposing invasive mandates as to the manner in which they provide their own employees with insurance coverage, as suggested by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), or has *Garcia*'s approach been overtaken by subsequent cases in which this Court has explicitly recognized judicially enforceable limits on Congress's power to interfere with state sovereignty?

3. Does the Affordable Care Act's mandate that virtually every individual obtain health insurance exceed Congress's enumerated powers and, if so, to what extent (if any) can the mandate be severed from the remainder of the Act?

PARTIES TO THE PROCEEDING

Petitioners, who were the appellees/cross-appellants below, are 26 States: Florida, by and through Attorney General Pam Bondi; South Carolina, by and through Attorney General Alan Wilson; Nebraska, by and through Attorney General Jon Bruning; Texas, by and through Attorney General Greg Abbott; Utah, by and through Attorney General Mark L. Shurtleff; Louisiana, by and through Attorney General James D. "Buddy" Caldwell; Alabama, by and through Attorney General Luther Strange; Attorney General Bill Schuette, on behalf of the People of Michigan; Colorado, by and through Attorney General John W. Suthers; Pennsylvania, by and through Governor Thomas W. Corbett, Jr., and Attorney General Linda L. Kelly; Washington, by and through Attorney General Robert M. McKenna; Idaho, by and through Attorney General Lawrence G. Wasden; South Dakota, by and through Attorney General Marty J. Jackley; Indiana, by and through Attorney General Gregory F. Zoeller; North Dakota, by and through Attorney General Wayne Stenehjem; Mississippi, by and through Governor Haley Barbour; Arizona, by and through Governor Janice K. Brewer and Attorney General Thomas C. Horne; Nevada, by and through Governor Brian Sandoval; Georgia, by and through Attorney General Samuel S. Olens; Alaska, by and through Attorney General John J. Burns; Ohio, by and through Attorney General Michael DeWine; Kansas, by and through Attorney General Derek Schmidt; Wyoming, by and through Governor Matthew H. Mead; Wisconsin, by and through Attorney General J.B. Van Hollen; Maine, by and

through Attorney General William J. Schneider; and Governor Terry E. Branstad, on behalf of the People of Iowa. The National Federation of Independent Business, Kaj Ahlburg, and Mary Brown were also appellees below.

Respondents, who were the appellants/cross-appellees below, are the U.S. Department of Health & Human Services; Kathleen Sebelius, Secretary, U.S. Department of Health & Human Services; the U.S. Department of Treasury; Timothy F. Geithner, Secretary, U.S. Department of Treasury; the U.S. Department of Labor; and Hilda L. Solis, Secretary, U.S. Department of Labor.

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PETITION FOR CERTIORARI

This case offers this Court an ideal vehicle to resolve pressing and persistent constitutional questions arising out of the Patient Protection and Affordable Care Act. It represents an unprecedented challenge—involving over half the States in the Nation—to an unprecedented legislative initiative. The Act is without precedent both in its coercive impositions on the States and in its effort to force individuals to engage in commerce so that the federal government may regulate them. Both features of the Act raise constitutional issues that go to the heart of our system of limited government and the Constitution's division of authority between the federal government and the States. Of the various challenges working their way through the federal courts, only this case allows the Court to address both of these fundamental questions. And no other case combines the sovereign authority of over half the Nation's States with individuals whose liberty is infringed by the Act's failure to respect limits on the federal government's enumerated powers. That combination ensures that the Court will be able to reach the merits of the critical issues raised in this case. Thus, no matter what the Court does with other cases involving challenges to the Act, it should grant plenary review in this case, and do so expeditiously.

The Act dramatically expands federal regulation of the health care and health insurance industries. It is universal in scope, imposing new obligations on everyone from the States to insurance companies to private employers to individuals. The States challenge three of the Act's core provisions: its significant Medicaid expansions, which Congress has

forced upon the States by threatening to withhold billions in federal funding unless States comply; the employer mandates, which impose harsh penalties upon States that do not offer their employees a federally mandated level of insurance; and the Act's individual mandate, which requires nearly all individuals (including those currently eligible for, but not participating in, state-funded Medicaid) to maintain health care insurance or pay a penalty to the federal government. The States maintain that the remainder of the Act cannot stand without those unconstitutional provisions.

The Eleventh Circuit correctly held that the individual mandate is unconstitutional. But it erred in rejecting the States' Medicaid challenge based on a reading of the coercion doctrine that would deprive it of all force as a meaningful limitation on Congress's vast spending power. And the court misapplied this Court's severance doctrine to leave the entire rest of the Act standing even though the mandate indisputably served as the centerpiece of the delicate compromise that produced the Act. Indeed, the Court of Appeals left standing provisions of the Act that even the government conceded were inextricably intertwined with the mandate.

The grave constitutional questions surrounding the ACA and its novel exercises of federal power will not subside until this Court resolves them. Time is of the essence. States need to know whether they must adapt their policies to deal with the brave new world ushered in by the ACA. This case presents the ideal vehicle for the Court to resolve these controversies. The Court should grant plenary review.

OPINIONS BELOW

The Eleventh Circuit's opinion (Pet.App.1) is not yet reported in the Federal Reporter but is available at 2011 WL 3519178. The summary judgment opinion of the District Court for the Northern District of Florida (Pet.App.300) is not yet reported in the Federal Supplement but is available at 2011 WL 285683. The District Court's motion-to-dismiss opinion (Pet.App.402) is reported at 716 F. Supp. 2d 1120.

JURISDICTION

The Eleventh Circuit rendered its decision on August 12, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The U.S. Constitution's General Welfare Clause, Commerce Clause, Necessary and Proper Clause, and Tenth Amendment are reproduced in the appendix, along with relevant provisions of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (collectively, the "ACA" or "Act"). Pet.App.493–553.

STATEMENT OF THE CASE

A. The Affordable Care Act

The ACA is a massive collection of sweeping changes that impose substantial new federal obligations on every corner of society and compel financial action from nearly every citizen of the

United States. The Act's core provisions work in tandem to increase both supply and demand for health insurance in an attempt to achieve Congress's goal of imposing "near-universal" insurance coverage on the Nation. ACA § 1501(a)(2)(D), (G). The Act also contains hundreds of revenue-raising or cost-cutting provisions intended to help offset the significant new expenses its core provisions will generate.

1. The Individual Mandate and the Insurance Provisions

The ACA mandates that each "applicable individual shall, for each month beginning after 2013, ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month." ACA § 1501(b); 26 U.S.C. § 5000A(a). This mandate to maintain health insurance applies to all individuals except foreign nationals residing here unlawfully, incarcerated individuals, and individuals falling within two narrow religious exemptions. *Id.* § 5000A(d). A covered individual who fails to comply with the mandate is subject to a financial "penalty." *Id.* § 5000A(b)(1), (c). The penalty provision contains its own limited set of exemptions, *id.* § 5000A(e), but exemption from the penalty does not obviate the individual's obligation to comply with the mandate. The two are separate.

The mandate is designed not just to target individuals who consume health care services without paying for them, but also to "broaden the health insurance risk pool to include healthy individuals." ACA § 1501(a)(2)(G). Congress also

intended the mandate to counteract the effects of costly insurance industry changes, most prominently, the "guaranteed issue" provision, which requires insurers to enroll every applicant for insurance, and the "preexisting conditions" change, which prohibits insurers from denying, canceling, capping, or increasing the cost of coverage based on an individual's preexisting health conditions or history. ACA § 1201. Those coverage mandates would have substantially increased the cost of insurance (and presumably would have been strenuously opposed by the insurance industry) absent the individual mandate's effect of forcing healthy individuals to purchase coverage they would otherwise not obtain. The mandate also forces numerous individuals who qualify for Medicaid under pre-existing law, but for whatever reason have previously declined to participate, to obtain coverage.

2. The Medicaid Expansions

Medicaid was originally designed in 1965 as a cooperative program that offered federal funding to States that voluntarily established health insurance plans for needy residents. Social Security Act of 1965, Title XIX, codified at 42 U.S.C. § 1396 *et seq*. At its inception, Medicaid covered approximately 4 million individuals and cost about $1 billion nationwide.[1] It has since expanded dramatically and is now the single largest federal grant-in-aid program to the States. Medicaid accounts for more than 40% of all federal funds dispersed to States—

[1] John Klemm, Ph.D., Medicaid Spending: A Brief History, 22 Health Care Fin. Rev. 105, 106 (Fall 2000).

$251 billion in 2009 alone—and approximately 7% of federal spending.[2] In recent years, most States have received at least $1 billion in federal Medicaid funding, which covers at least half of each State's total Medicaid costs. 11th Cir. Record Excerpts ("R.E.") 1551–55.

The ACA substantially expands the eligibility and coverage thresholds that States must adopt to remain eligible to participate in Medicaid. Whereas States previously retained significant flexibility to determine who would be covered by Medicaid, the ACA requires States to cover all individuals with incomes up to 133% of the poverty level (with a 5% "income disregard" provision that effectively raises that number to 138%). ACA §§ 2001(a), 2002(a). Although the federal government will initially fund 100% of that expansion, by 2017, States will be responsible for 5% of those costs, with that number increasing to 10% by 2020. ACA § 2001(a)(3). Congress offered no increased funding to cover the millions of individuals who were previously eligible for Medicaid and opted not to enroll, but now must enroll to comply with the individual mandate. *Id.*

The Act also establishes a new "minimum essential coverage" level that States must provide to

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[2] The Long-Term Budget Outlook, June 2010, CBO, at 29-30, *available at* http://www.cbo.gov/ftpdocs/115xx/doc11579/06-30-LTBO.pdf; Budget of the United States Government: State-by-State Tables Fiscal Year 2010, *available at* http://www.gpoaccess.gov/usbudget/fy10/sheets/bis/8_3.xls; A Citizen's Guide to the Federal Budget—FY2002, http://www.gpoaccess.gov/usbudget/fy02/pdf/ guide.pdf at 9.

Medicaid recipients, eliminating flexibility States previously enjoyed to determine what level of coverage to provide. *Id.* § 2001(a)(2). And the Act locks States into maintaining formerly discretionary choices through its "maintenance of effort" provision, which requires that, "as a condition for receiving any Federal payments," a State "shall not have in effect eligibility standards, methodologies, or procedures … that are more restrictive than … [those] in effect on the date of enactment of the [ACA]" until the State has complied with other aspects of the ACA. *Id.* § 2001(b). The effect is to both eliminate discretion and essentially punish States for having voluntarily extended more generous coverage. Finally, the Act requires States not only to pay the costs of care and services, but also to assume responsibility for providing "the care and services themselves." ACA § 2304. In conjunction with these expansions, the federal government predicts that federal Medicaid spending will increase by $434 billion by 2020. R.E. 1425.

Unlike when it has amended Medicaid in the past, Congress did not tie its new conditions only to those additional federal funds made newly available under the ACA. It instead made the new terms a condition of continued participation in Medicaid, thereby threatening each State with the loss of all federal Medicaid funds—on average, more than a billion dollars per year—unless it adopts the Act's substantial expansions of state obligations.

3. The Employer Mandates

The Act treats States like any other employer in imposing a collection of employer mandates designed

to compel expansion of employer-sponsored insurance. ACA §§ 1511–15. Under those provisions, a State must provide every employee working 30 or more hours a week with a federally mandated level of insurance, or face substantial penalties. No accommodation is made for the unique sovereign status of the States.

B. The District Court Proceedings

Shortly after Congress passed the ACA, Florida and 12 other States brought this action seeking a declaration that the Act is unconstitutional. They have since been joined by 13 additional States, the National Federation of Independent Business ("NFIB"), and individuals Kaj Ahlburg and Mary Brown. The States argued that, *inter alia*, the individual mandate exceeds Congress's enumerated powers, the Medicaid expansions are unconstitutionally coercive, and the employer mandates impermissibly interfere with state sovereignty. The States maintained the entire Act must be invalidated because its central unconstitutional provisions cannot be severed.

The District Court dismissed the States' challenge to the employer mandates, holding it foreclosed by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Pet.App.463. The parties then filed cross-motions for summary judgment on the individual mandate and Medicaid challenges.

The District Court granted summary judgment to the federal government on the Medicaid expansions and in favor of the States on the individual mandate. As to Medicaid, the court found

existing precedent insufficient to support invalidation of spending legislation as unconstitutionally coercive. Pet.App.315. Although the court acknowledged "the difficult situation in which the states find themselves," it concluded that "unless and until" this Court "revisit[s] and reconsider[s] its Spending Clause cases," "the states have little recourse to remaining the very junior partner in th[e state-federal] partnership." Pet.App.315.

As to the individual mandate, the District Court concluded that the Commerce Clause does not grant Congress power to "penalize a passive individual for failing to engage in commerce." Pet.App.354. The court also concluded that the mandate could not be justified under the Necessary and Proper Clause because it undermines "'essential attributes' of the Commerce Clause limitations on the federal government's power." Pet.App.381. The court also rejected the argument that the mandate is a valid exercise of Congress's taxing power, concluding that the penalty attached to the mandate is not a tax. Pet.App.189.

Finally, the District Court concluded that the individual mandate is not severable from the rest of the Act. The court first noted the federal government's concession that "the individual mandate and the Act's health insurance reforms … will rise or fall together," which it found "extremely significant because the various insurance provisions, in turn, are the very heart of the Act itself." Pet.App.382, 388. Examining the interplay between the mandate, the insurance changes, and the rest of the Act, the court concluded that "[i]t would be

impossible to ascertain on a section-by-section basis if any particular statutory provision could stand (and was intended by Congress to stand) independently of the individual mandate," and that any attempt to do so would "be tantamount to rewriting a statute in an attempt to salvage it." Pet.App.394.

C. The Eleventh Circuit's Decision

The Eleventh Circuit affirmed the District Court's holdings as to the Medicaid expansions and the individual mandate, but reversed the court's severance holding. Pet.App.3.

1. "[N]ot without serious thought and some hesitation," the Eleventh Circuit rejected the States' coercion challenge to the Medicaid expansions. Pet.App.66. The court recognized that "many circuits [have] conclu[ded] that the [coercion] doctrine, twice recognized by the Supreme Court, is not a viable defense to Spending Clause legislation," and that "[e]ven in those circuits that do recognize the coercion doctrine, it has had little success." Pet.App.62–63. But the court concluded that "[t]o say the coercion doctrine is not viable or does not exist," as some circuits have, "is to ignore Supreme Court precedent." Pet.App.65. It further noted, "[i]f the government is correct that Congress *should* be able to place any and all conditions it wants on the money it gives to the states, then the Supreme Court must be the one to say it." Pet.App.65–66.

The court considered five factors relevant to analysis of the States' claim: (1) "Congress reserved the right to make changes to the [Medicaid] program"; (2) "the federal government will bear nearly all of the costs associated with the

expansion"; (3) "states have plenty of notice … to decide whether they will continue to participate in Medicaid"; (4) "states have the power to tax and raise revenue, and therefore can create and fund programs of their own if they do not like Congress's terms"; and (5) the Secretary of Health and Human Services has "discretion to withhold all or merely a portion of funding from a noncompliant state." Pet.App.66–69. The court found those factors, "[t]aken together," sufficient to defeat the States' claim. Pet.App.69.

2. The Eleventh Circuit held the individual mandate unconstitutional. In a joint opinion by Chief Judge Dubina and Judge Hull, the court concluded that "[t]he federal government's assertion of power, under the Commerce Clause, to issue an economic mandate for Americans to purchase insurance from a private company for the entire duration of their lives is unprecedented, lacks cognizable limits, and imperils our federalist structure." Pet.App.171.

The court rejected the theory that "because Americans have money to spend and must inevitably make decisions on where to spend it, the Commerce Clause gives Congress the power to direct and compel an individual's spending in order to further its overarching regulatory goals." Pet.App.113. The court observed that "Congress has never before exercised this supposed authority," and that "th[is] Court has never … interpret[ed] the Commerce Clause to allow Congress to dictate the financial decisions of Americans through an economic mandate." Pet.App.115,116.

The Eleventh Circuit also rejected the federal government's attempt to justify the mandate by aggregating each individual's decision not to purchase health insurance to produce a substantial effect on commerce. The court found that theory "limitless," observing that, "[g]iven the economic reality of our national marketplace, any person's decision not to purchase a good would, when aggregated, substantially affect interstate commerce." Pet.App.124. The court concluded that "the government's struggle to articulate cognizable, judicially administrable limiting principles only reiterates the conclusion we reach today: there are none." Pet.App.137. The court also concluded that the mandate could not be justified as essential to a larger regulatory scheme, noting that this Court has never employed that reasoning to sustain a federal regulation "where plaintiffs contend that the entire class of activity is outside the reach of congressional power." Pet.App.160.

Finally, the court concluded that the mandate cannot be sustained as an exercise of Congress's taxing power because the mandate "is a civil regulatory penalty and not a tax." Pet.App.188.

3. The Eleventh Circuit reached precisely the opposite conclusion as the District Court on severability: it deemed the mandate entirely severable from the Act; not a single provision beyond the mandate was invalidated. As to the bulk of the Act—including the Medicaid expansions and employer mandates—the Eleventh Circuit found it sufficient that "[e]xcising the individual mandate … does not prevent the remaining provisions from being 'fully operative as a law.'" Pet.App.191.

Examining the guaranteed issue and preexisting conditions provisions in more detail, the court rejected Congress's finding that the mandate is essential to those provisions and the federal government's concession that they cannot be severed from the mandate. Concluding that "multiple features … weaken the mandate's practical influence on the two insurance product reforms," the court deemed the interrelatedness of those provisions insufficient to warrant non-severability, "particularly … because the reforms of the health insurance help consumers who need it the most." Pet.App.201,203–204.

4. Judge Marcus concurred in the majority's rejection of the States' coercion claim and its conclusion that the individual mandate cannot be sustained under Congress's taxing power, but dissented from its holding that the mandate exceeds Congress's powers under the Commerce and Necessary and Proper Clauses.

REASONS FOR GRANTING THE PETITION

The ACA effects a dramatic expansion of federal authority that destroys the "healthy balance of power between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). This Court should grant plenary review to restore that essential balance. This case, and this case alone, provides a vehicle to address all the major objections to the Act's reworking of Our Federalism, and to do so in the context of an extraordinary challenge to federal overreaching brought by over half the Nation's States.

First, the Court should grant certiorari to confirm that all the other limits on Congress's enumerated powers—and the very process of enumeration itself—are not rendered nugatory by a limitless spending power. The Court has long recognized that a federal financial inducement can be so massive as to leave States with no choice but to accept it, no matter how destructive to their sovereignty the attached conditions may be. This case presents an ideal opportunity to reaffirm that principle, which has been largely ignored and even expressly rejected by multiple courts of appeals. By conditioning *all* of the States' federal Medicaid funding—for most States, more than a billion dollars each year—upon agreement to substantially expand their Medicaid programs, the ACA passes the point at which pressure turns into compulsion and achieves forbidden direct regulation of the States.

Simply put, if that does not cross the line into improper coercion, then no statute ever will. The amounts at issue are staggering, the conditions attach to pre-existing pots of funding, not just new money, and the Act locks States into previously voluntary choices. The Court should grant plenary review to reaffirm that such a coercive exercise of Congress's spending power is neither necessary nor proper and violates the Tenth Amendment and fundamental federalism principles inherent in the Constitution.

Second, this Court should grant certiorari to consider whether Congress may treat States no differently from any other employer for purposes of the employer mandates without running afoul of the Constitution's fundamental structural limits. While

the Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), abandoned any judicial effort to impose such limits, subsequent cases have demonstrated a revitalized effort by this Court to enforce the Constitution's structural guarantees of federalism. The dissenting Justices in *Garcia* predicted that the decision would not stand the test of time, and subsequent developments have demonstrated the wisdom of that prediction. Only this Court can reconsider *Garcia*, and it should grant plenary review to do so here.

Third, the Court should grant certiorari to examine the Eleventh Circuit's erroneous severability determination. Four courts have struck down the individual mandate, and each has reached a different conclusion as to how much of the balance of the Act should remain in place. Given the fundamental reordering of the health care market worked by the ACA, the extent to which the Act survives is every bit as practically, if not doctrinally, important as whether the mandate is constitutional. Lower courts have divided on both questions. This Court should grant certiorari in a case that provides the Court with the best opportunity to consider both the constitutionality of the mandate and the severability question that arises if the mandate and/or the Medicaid provisions are struck down. The decision below is the only Court of Appeals decision to reach the severability question and is thus an ideal vehicle to address it. It is also a particularly appropriate candidate for this Court's review because the Eleventh Circuit's severability analysis is inconsistent with this Court's precedents. The court's decision erroneously leaves the entire Act in place—

even provisions that the federal government concedes cannot be divorced from the mandate—notwithstanding compelling evidence that Congress intended the mandate to function as the Act's essential lynchpin and would never have passed the Act without it. The Court should grant plenary review.

I. The Court Should Grant Review To Determine Whether Core Provisions of the ACA Violate the Tenth Amendment and the Broader Federalism Principles That the Amendment Reflects.

A. The Court Should Resolve Whether the ACA's Expansions to Medicaid Are Unconstitutionally Coercive.

The decision below cannot be reconciled with this Court's precedent concerning the scope of Congress's spending power. Indeed, the Eleventh Circuit's decision threatens to render for naught all of this Court's efforts to put outer limits on Congress's enumerated powers. If Congress can condition federal mandates on the continued availability of vast sums of taxpayer money that States previously accepted based on an earlier set of conditions, then anything that Congress is denied the power to do directly can be accomplished indirectly via the spending power. That cannot be correct.

"[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [courts] to admit inability to intervene when one or the other level of Government has tipped the scales too far." *United States v.*

Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring). Courts surely have the ability to intervene when the federal government threatens States with the loss of billions in federal funding unless they capitulate to its demands. The Eleventh Circuit's conclusion to the contrary not only is incorrect, but exemplifies the lower courts' confusion concerning—if not outright nullification of—this Court's spending power jurisprudence. This Court should grant plenary review to consider the States' spending power challenge.

1. Courts Are Deeply Divided Over Whether and How to Apply the Coercion Doctrine.

"No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." *New York v. United States*, 505 U.S. 144, 178 (1992). There is no exception to that general rule for legislation that depends on Congress's spending power, and so this Court has long "recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion,'" *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)), "in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government." *Steward Machine*, 301 U.S. at 585; *see also United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring) ("The limits on the spending power have not been much discussed, but if the relevant standard is parallel to the Commerce Clause cases, then the

limits and the analytical approach in those precedents should be respected."). That line between pressure and compulsion ensures that whether to accept federal funds and the conditions that come with them "remains the prerogative of the States not merely in theory, but in fact." *Dole*, 483 U.S. at 211–12.

"To say that the coercion doctrine is not viable or does not exist is to ignore Supreme Court precedent." Pet.App.65; *see also Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 570 (4th Cir. 1997) (en banc) (plurality opinion) ("if th[is] Court meant what it said in *Dole*, then … a Tenth Amendment claim of the highest order lies where" Congress exercises its spending power coercively). Yet that is precisely what multiple courts of appeals have done, reasoning that "courts are not suited to evaluating whether the states are faced … with an offer they cannot refuse or merely a hard choice." *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981); *see also N.H. Dep't of Emp't Sec. v. Marshall*, 616 F.2d 240, 246 (1st Cir. 1980). Although the first courts to do so reached that conclusion before *Dole*, that has not prevented other courts from following their lead even after *Dole* reaffirmed the coercion doctrine's vitality. *See, e.g.*, *Nevada v. Skinner*, 884 F.2d 445, 448–49 (9th Cir. 1989) (coercion doctrine presents "questions of policy and politics that range beyond [the judiciary's] normal expertise" and should be discarded because States are "adequately protected by the national political process"); *Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000) (declaring doctrine "unclear" and "suspect").

Although other courts have been more reluctant to reject openly a doctrine that this Court continues to recognize, their cursory disposal of strong coercion claims leaves little room for doubt that such claims will never prevail in their courts. *See, e.g.*, *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 287 (5th Cir. 2005) (en banc) (threatened loss of $800 million non-coercive because State could have "declin[ed] federal funds"); *A.W. v. Jersey City Pub. Sch.*, 341 F.3d 234, 255 (3d Cir. 2003) ("state's powers as a political sovereign, especially its authority to tax, appear more than capable of preventing undue coercion"); *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc) (threatened loss of $250 million "politically painful," not coercive); *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997) (coercion "not reflected" by threatened loss of all Medicaid funding).

By contrast, the Fourth Circuit not only has refused to discard this Court's precedent, but has proved the coercion doctrine capable of meaningful application. *See Riley*, 106 F.3d at 569 (withholding $60 million education grant based on State's failure to comply with single condition would be unconstitutionally coercive). As Judge Luttig's plurality opinion for the en banc court in *Riley* explained, the coercion doctrine provides a critical check on Congress's power to "impose its policy preferences upon the States by placing conditions upon the return of revenues that were collected from the States' citizenry in the first place." *Id.* at 570. Accordingly, when Congress "withholds the entirety of a substantial federal grant" from States that refuse to "submit to the policy dictates of Washington in a

matter peculiarly within their powers as sovereign States," then "a Tenth Amendment claim of the highest order lies." *Id.*

The Fourth Circuit is not alone in continuing to recognizing the vital role the coercion doctrine plays. Although the Eleventh Circuit erred in its application of the doctrine to the States' claim, *see infra* Part I.A.2, it agreed that "Congress cannot … threaten the loss of funds so great and important to the state's integral function … as to compel the state to participate in the 'optional' legislation." Pet.App.66. Moreover, four judges on the en banc Eighth Circuit would have applied the coercion doctrine to hold the threatened loss of $250 million in education funding unconstitutional. *See Jim C.*, 235 F.3d at 1083 (Bowman, J., dissenting) ("proportion of federal funds … placed at risk … (100%), the amount of those funds (some $250,000,000), and the difficulty of making up for th[at] loss … all lead to the conclusion that pressure has turned into compulsion"). And while six judges on the en banc Fifth Circuit found the threatened loss of $800 million in education funding insufficient to establish coercion "under the current state of the law," they raised the compelling question, "[i]f not now, and on this showing, when, and on what showing will federal grants be deemed unconstitutionally coercive?" *Pace*, 403 F.3d at 300 n.2 (Jones, J., concurring in part and dissenting in part). This case provides an ideal opportunity for this Court to reaffirm that the coercion doctrine places real, not wholly theoretical, limits on Congress's spending power.

2. The Eleventh Circuit Erred in Rejecting the States' Compelling Coercion Claim.

By any measure, the States' coercion claim is one of the strongest ever presented. Medicaid is the single largest federal grant-in-aid program to the States. It accounts for more than 40% of *all* federal funds that States receive, and approximately 7% of all federal spending. The majority of States receive more than *$1 billion* in Medicaid funding each year—all raised from taxpayers—with that number only projected to increase under the ACA. States spend, on average, 20% of their budgets on Medicaid, and federal funds cover at least half (oftentimes more) of each State's costs. R.E. 1555. Although the precise impact of Medicaid funding differs from State to State, the loss of all Medicaid funding would be devastating to any State.

The ACA's expansions to Medicaid were expressly crafted to exploit the threat of that devastating loss by putting all of that funding—not just a distinct pot of newly available funds—on the line. In the past, when Congress sought to expand Medicaid coverage, it offered additional funding to States that agreed to additional obligations, without threatening existing funding of States that did not. *See, e.g.*, American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 5001(f); Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9401(b). The ACA employs a dramatically different approach. Rather than offer increased funding to States willing and able to increase eligibility and coverage, Congress made the ACA's substantial expansions to Medicaid a mandatory

condition of continued participation. The ACA essentially holds the States hostage based on their earlier decision to establish a Medicaid infrastructure and accept federal funds subject to different conditions. The ACA uses the States' decision to accept earlier federal inducements against them and, in doing so, presents States with no real choice: they must abandon completely the existing Medicaid system and funding or accept the radical new conditions. This amounts to a massive bait-and-switch.

As more than half of the States are here attesting, there is no plausible argument that a State could afford to turn down a federal inducement as massive as all Medicaid funding, particularly when doing so would mean taking on 100% of the burden of covering its neediest residents' medical costs, even though massive amounts of money would still be extracted from in-state taxpayers to fund Medicaid in the other 49 States. The latter point is critical. It might be acceptable for this Court to abandon any effort to police limits on the spending power if the money used to induce the States to "accept" conditions were coming from some place other than taxpayers. But there is no such pot of money. Because the Medicaid funds used to induce the States come from their own taxpayers, the "option" of declining federal funds and paying for medical care for the indigent through new taxes on in-state taxpayers already funding that care in the other 49 States is illusory.

Tellingly, the ACA itself recognizes that the States have no meaningful choice but to accept the new conditions and continue to participate in

Medicaid: the Act mandates that millions of individuals covered by Medicaid must obtain insurance coverage, yet it provides no alternative to Medicaid. Even the federal government has not attempted to argue that the States have any real choice in the matter. It has instead simply insisted that spending legislation can *never* be coercive, no matter how much money is on the table. *See* Pet.App.65–66 (noting government's argument that "Congress *should* be able to place any and all conditions it wants on the money it gives to the states").

The Eleventh Circuit acknowledged the merit of the States' argument but, "not without serious thought and some hesitation," Pet.App.66, rejected it. The Eleventh Circuit's reasoning was erroneous and confirms the need for this Court's review. For example, the court stressed that the States "have plenty of notice … to decide whether they will continue to participate in Medicaid." Pet.App.68. But notice of a coercive choice does not make it less coercive. And, of course, when the States originally accepted Medicaid funds subject to certain conditions, they did not have notice that their participation in the program and development of the necessary infrastructure would be used by Congress to hold them hostage to later demands.

The Eleventh Circuit's analysis also gives short shrift to the enormous amount of federal funds—raised from taxpayers in the States—tied to the ACA's new conditions. To illustrate, Florida devotes approximately 26% of its entire state budget to Medicaid and received *$8 billion* in federal Medicaid funding in 2008. To maintain existing, pre-ACA

benefits without federal funding, Florida would have to devote more than *60%* of all state tax revenues to Medicaid. R.E. 493. To do so without eliminating more than a third of existing spending, Florida would need its residents to pay *billions* more in taxes, while Florida would at the same time "be deprived of the benefits of a return … of the federal tax monies collected from" those same residents to fund Medicaid. *Jim C.*, 235 F.3d at 1083 (Bowman, J., dissenting). If that implausible "alternative" is sufficient to render a State's continued participation in Medicaid voluntary "not merely in theory, but in fact," then the coercion doctrine itself is "more rhetoric than fact." *Dole*, 483 U.S. at 211–12.

The Eleventh Circuit also found it significant that "Congress reserved the right to make changes to the [Medicaid] program." Pet.App.66. But the States are not arguing that Congress may not make changes to Medicaid. They are arguing that Congress may not *force* changes upon the States by threatening them with the loss of billions of federal dollars. The court also deemed it relevant that the federal government will initially "bear nearly all of the costs associated with the expansion." Pet.App.67. But "the coercion inquiry focuses on the financial inducement offered by Congress," *Madison v. Virginia*, 474 F.3d 118, 128 (4th Cir. 2006), not on the amount of money a State is "being coerced into spending." Pet.App.68. The very purpose of the doctrine is to protect the *State*'s prerogative to determine whether the inducement Congress has offered is worth the costs that come with it.

Finally, there is no merit to the Eleventh Circuit's attempt to sidestep the issue by claiming

that States do *not* risk all Medicaid funding by rejecting the ACA's terms. *See* Pet.App.68–69. That a State must comply with the ACA or opt out of Medicaid has been an undisputed fact throughout this litigation. As the federal government explained from the outset, "the mandatory coverage of groups that Congress has designated as 'categorically needy' is and always has been *the* core requirement of Medicaid. … States retain[] discretion to expand *but not contract* the coverage. *The Act does not change those central features*." Govt.'s Dist. Ct. Mot. to Dismiss Mem. 16 (some emphasis added); *see also* Govt.'s 11th Cir. Resp./Reply Br. 54 (ACA expansions "relate to the very contours of the program itself—the basic eligibility requirements"). That understanding is confirmed by the Act, which amends the Medicaid statute to provide that a State "*must* [cover] … all individuals … whose income … does not exceed 133 percent of the poverty line." 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (emphasis added) (ACA § 2001(a)(1)(C)); *see also* ACA § 2001(b) (rendering compliance with maintenance-of-effort provision "a condition for receiving *any Federal payments*" (emphasis added)).

It is not remotely plausible that Congress left open the kind of gaping hole the Eleventh Circuit contemplated in one of the ACA's central mechanisms for imposing "near-universal" health insurance coverage. ACA § 1501(a)(2)(D). The statute the court cited does not support that untenable conclusion: it grants the Secretary discretion to continue funding "parts of [a State's] plan not affected" by a State's noncompliance with discrete provisions, not to continue funding a plan

that fails to comply with core program requirements. *See* 42 U.S.C. § 1396c.

In sum, there is no dispute that the ACA threatens States with the loss of literally *billions* of dollars of federal funding *each year* if they do not capitulate to Congress' demand to significantly expand their Medicaid programs. As the 26 States that have joined forces to bring this petition have attested, Congress has left States with no choice but to accept its new conditions. "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions." *New York*, 505 U.S. at 162. Because that is precisely what the ACA's coercive tactics would achieve, the Court should grant certiorari and hold the Medicaid expansions unconstitutional.

B. The Court Should Resolve Whether the ACA's Employer Mandate Provisions Are Constitutional as Applied to the States.

The ACA requires each State to provide all full-time employees with a federally mandated level of health insurance and imposes harsh penalties on any State that fails to do so. In this regard, States are treated no differently from any other employer. Those provisions dramatically interfere with state sovereignty and violate the Tenth Amendment.

The District Court held the States' challenge to the employer mandate provisions foreclosed by *Garcia*. *Garcia* overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), and held that Congress may subject States to generally applicable

employer regulations even when those regulations interfere with essential attributes of state sovereignty. *Garcia*, 469 U.S. at 531. The *Garcia* Court reached that conclusion based on reasoning that is very difficult to square with subsequent developments in this Court's enumerated powers and Tenth and Eleventh Amendment jurisprudence. Contrary to numerous more recent decisions recognizing the critically important judicial role in enforcing the Constitution's structural provisions, *Garcia* assumed that structural aspects of federalism could be enforced only through the political process. *See id.* at 554 ("the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process, rather than one of result").

In a dissent joined by Chief Justice Burger, then-Justice Rehnquist and Justice O'Connor, Justice Powell correctly charged the majority in *Garcia* with "substantially alter[ing] the federal system embodied in the Constitution." *Id.* at 557. His dissent admonished that "[t]he States' role in our system of governance is a matter of constitutional law, not of legislative grace," and emphasized that "the Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized." *Id.* at 567–68. The dissent also noted the majority's departure from the "many cases in which the Court has recognized not only the role, but also the importance, of state sovereignty." *Id.* at 574. In a separate dissent, Justice O'Connor concluded that the majority's opinion "provide[d] scant comfort to those who

believe our federal system requires something more than a unitary, centralized government," but joined Justice Rehnquist in predicting that "this Court will, in time, again assume its constitutional responsibility." *Id.* at 589.

As Justices Rehnquist and O'Connor predicted, the animating reasoning of *Garcia* has since been largely rejected by this Court. In stark contrast to *Garcia*'s political-process-oriented view of the Constitution's structural limitations, more recent decisions have confirmed that the Tenth and Eleventh Amendments and the protections they embody impose real, judicially enforceable limits on Congress's ability to interfere with state sovereignty. *See, e.g.*, *New York*, 505 U.S. at 177 (striking down federal law as unconstitutional incursion on state sovereignty); *Printz v. United States*, 521 U.S. 898, 935 (1997) (same); *see also Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (rejecting effort to treat States like other employers for purposes of the Americans with Disabilities Act). As Justice Kennedy observed in his *Lopez* concurrence, the temptation for the political process to yield to "momentary political convenience" is too strong, and federalism "is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the Court] to admit inability to intervene." 514 U.S. at 578. It has been over 25 years since the *Garcia* dissenters predicted that the Court would need to reconsider this issue and resume "its constitutional responsibility." 469 U.S. at 589. Numerous doctrinal developments in the intervening quarter-century make clear that *Garcia*, not *National League of Cities*, is the jurisprudential

outlier. Only this Court can reconsider *Garcia*. This Court should grant plenary review to do so.

II. The Court Should Grant Plenary Review to Consider the Severability of the Individual Mandate in Conjunction with the Question of the Mandate's Constitutionality.

Four courts have struck down the individual mandate as exceeding Congress's enumerated powers, and each has come to a different conclusion as to the consequences for the balance of the ACA. That severability question is of enormous practical importance. The Act's myriad provisions are universal in scope, imposing new obligations on everyone from the States to private employers to insurance companies to individuals. Some provisions have already taken effect, and many others require significant steps to be taken immediately to make compliance possible by the impending effective dates. States in particular must shoulder enormous burdens to comply with provisions of the Act that would not survive a proper severability analysis. This is an ideal case in which to consider both the severability question and the antecedent questions whether the mandates and the Medicaid changes are constitutional. This Court should grant certiorari to resolve which, if any, of the Act's hundreds of provisions will stand if those provisions fall.

A. The Severability Question Has Produced Widely Varying Results.

The four courts that have addressed whether the individual mandate is severable from rest of the ACA have purported to apply the same "well

established" standard for severability. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (unconstitutional provision may be severed "[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"). Yet each court has reached a different conclusion. As is clear from those opinions, how the severability analysis applies in these unusual circumstances is a complex question that warrants this Court's full consideration and definitive resolution.

In the first opinion to invalidate the individual mandate and address severability, the District Court "sever[ed] only section 1501 [of the ACA] and directly-dependent provisions which make specific reference to [it]." *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 790 (E.D. Va. 2010). The court did not base that conclusion on a finding that Congress would "have enacted those provisions which are within its power, independently of that which is not," or that the remaining provisions are "fully operative as a law." *Brock*, 480 U.S. at 684. The court instead declared it "virtually impossible with the present record to determine whether Congress would have passed" the ACA without the mandate, or "what, if any, portion of the bill would not be able to survive" without it. *Virginia*, 728 F. Supp. 2d at 789. The court then arbitrarily drew the line at provisions that "make specific reference to" the mandate, *id.* at 790, thereby leaving in place the Act's remaining core provisions.

The District Court in this case concluded that this Court's precedent required a very different result: it held the mandate non-severable and

invalidated the entire Act. Pet.App.396–97. Although the court recognized "the *normal* rule … that partial invalidation is proper," it found this case "anything but … typical." Pet.App.383 (quotation marks omitted). After careful review of Congress's findings and the delicate fiscal balance the Act was designed to achieve, the court found it "reasonably 'evident' … that the individual mandate was an essential and indispensable part of the health reform efforts," and that Congress did not intend the Act to survive without it. Pet.App.396.

The Eleventh Circuit concluded that this Court's precedent compelled precisely the opposite result: it severed *only* the mandate, and left the rest of the Act standing. Pet.App.205. Indeed, it did not even invalidate provisions that the federal government conceded must fall with the mandate. As to everything but the guaranteed issue and preexisting conditions provisions, the court found it sufficient that "[e]xcising the individual mandate … does not prevent the remaining provisions from being 'fully operative as a law.'" Pet.App.191. The court engaged in no separate analysis of whether Congress "*would have* enacted those provisions … independently of" the mandate. *Brock*, 480 U.S. at 684 (emphasis added). As to the guaranteed issue and preexisting conditions provisions, the court acknowledged Congress's express finding that "the individual mandate operates '*together with the other provisions of this Act*'" to achieve Congress's intended changes. Pet.App.203 n.142 (quoting 42 U.S.C. § 18091(a)(2)(C)). And it acknowledged the federal government's concession that these provisions could not be severed from the mandate.

Pet.App.204 n.144. But the court severed them anyway, concluding that Congress's assessment of the mandate's importance to the insurance provisions was erroneous, and that those changes are too important to fall because they "help consumers who need it the most." Pet.App.204.

Most recently, the District Court in *Goudy-Bachman v. U.S. Dep't of Health and Human Servs.*, —— F.Supp.2d ——, 2011 WL 4072875 (M.D. Penn. Sept. 13, 2011), took yet another approach: it found the mandate non-severable from the guaranteed issue and preexisting condition provisions, but left the rest of the Act intact. *Id.* at *21. Much like the District Court in *Virginia*, the court did not attempt to ascertain Congress's intent as to the bulk of the Act, positing that any effort to do so "would be a[n] immense undertaking, and ultimately speculative at best." *Id.* at *20. The court thus effectively limited its analysis to the two insurance provisions, which it concluded "rise[] and fall[] with" the mandate. *Id.* at *21.

As those four divergent opinions make clear, there is serious confusion as to how to apply this Court's severability jurisprudence to the ACA. That confusion stems in large part from the unusual facts at hand, including the extraordinary length and complexity of the Act and "the haste with which the final version of the 2,700 page bill was rushed to the floor for a Christmas Eve vote." *Virginia*, 728 F. Supp. 2d at 789. That lack of transparency makes it difficult to determine both to what extent the Act's several hundred provisions can function without the mandate, and whether Congress would have enacted even those provisions that on their face appear

unrelated to the mandate without the delicate compromise of which the mandate was an essential part.

The disagreement among lower courts also evinces deeper uncertainty as to the state of severability law. Each court acknowledged compelling evidence that this is the rare instance in which "it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *Brock*, 480 U.S. at 684. Yet while the District Court in this case gave effect to Congress's evident intent, the courts in *Virginia* and *Goudy-Bachman* concluded that they were still required to leave the bulk of the Act intact, and the Eleventh Circuit concluded that nothing short of a non-severability clause could overcome the presumption of severability. Those conflicting conclusions reflect underlying confusion as to just how strong the presumption of severability is. This Court should grant certiorari and resolve this confusion.

B. This is an Ideal Vehicle for Review of the Severability Question and the Underlying Constitutional Challenge to the Mandate.

This case presents an ideal vehicle for addressing whether and to what extent the ACA and the challenged provisions can survive. This case alone allows the Court to resolve both of the major constitutional challenges to the statute—the spending clause and individual mandate issues—in a single case. This case alone allows this Court to address the severability question in a case where

both lower courts have addressed that question. And this case alone allows the Court to do so in the context of 26 States who are already feeling the substantial financial impacts of the ACA's sweeping changes. The Court should grant review expeditiously to consider whether and to what extent "this massive and sweeping" legislation, Pet.App.206 n.145, is to remain the law of the land.

The individual mandate "represents a wholly novel and potentially unbounded assertion of congressional authority" with "far-reaching implications for our federalist structure." Pet.App.101, 205. It is now clear that the Courts of Appeals are deeply divided as to its constitutionality. One court upheld the mandate through a strained and misguided as-applied analysis, another rejected challenges to the mandate without reaching the merits, and the Court of Appeals here invalidated the mandate as exceeding Congress's power. *See Thomas More Law Ctr. v. Obama*, —— F.3d ——, 2011 WL 2556039, at *16 (June 29, 2011) (opinion of Sutton, J.); *Liberty Univ. v. Geithner*, —— F.3d ——, 2011 WL 3962915 (Sept. 8, 2011); Pet.App.2. All three decisions have generated separate opinions disagreeing with the majority's analysis. *See Thomas More*, 2011 WL 2556039, at *34 (Graham, J., sitting by designation, dissenting); *Liberty Univ.*, 2011 WL 3962915, at *22 (Davis, J., dissenting); Pet.App.208 (Marcus, J., dissenting). District courts have also continued to divide on the question. *Compare Virginia*, 728 F. Supp. 2d at 788 (mandate unconstitutional), Pet.App.300 (same), *and Goudy-Bachman*, 2011 WL 4072875, at *21 (same), *with Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d

882 (E.D. Mich. 2010) (mandate constitutional), *and Liberty Univ. v. Geithner*, 753 F.Supp.2d 611 (W.D. Va. 2010) (same). The deep division among the lower courts over whether an Act of Congress is constitutional is a question manifestly worthy of this Court's attention.

The challenges to the mandate and the Act as a whole also warrant resolution sooner rather than later. The mandate takes effect in 2014, meaning millions of individuals must already begin planning to afford the significant financial burden it will impose on them for the rest of their lives. The States are also struggling to figure out how to afford the substantial new costs—costs for which the ACA offers no increased federal funding and costs that manifestly give the States standing to object to the mandate—of extending Medicaid coverage to millions of currently eligible but unrolled individuals who will be forced to enroll to comply with the mandate.

Moreover, the mandate is the centerpiece of a "sweeping and comprehensive Act" that imposes a "large number and diverse array of new, or expanded, federally-funded programs, grants, studies, commissions, and councils." Pet.App.4, 24. Even as to provisions not yet in effect, the substantial costs of implementation are already being felt by States, private employers, and individuals. For example, Florida anticipates spending more than $5 million in FY2011 to begin implementing the ACA's Medicaid expansions. R.E. 574. And States must decide *now* whether to undertake the cumbersome process of creating "health benefit exchanges," as the federal

government will preempt the process in any State that fails to make progress toward implementing exchanges by 2013. *See* ACA § 1321(c).

Because invalidation of the mandates and Medicaid provisions could result in invalidation of the entire Act—including already operative provisions—timely resolution of both the constitutional questions and the severance question is essential. And this is a particularly appropriate case in which to consider the severability question because the answer may well differ depending on whether the individual mandate alone is unconstitutional or whether the individual and employer mandates and Medicaid provisions all violate the Constitution. Addressing severability in a case with only the individual mandate at issue would be an artificial exercise.

Finally, this case provides a unique assurance that the Court can reach the merits of the individual mandate. The States believe that both the States—who must shoulder huge new financial burdens for currently eligible, but non-participating individuals who will be forced onto the Medicaid rolls by the individual mandate—and the individual petitioners and NFIB have standing to challenge the mandate. *Cf. Bond v. United States*, 131 S. Ct. 2355 (2011) (confirming individual standing to raise Tenth Amendment challenges without questioning States' standing). But some courts have questioned the standing of States and the ability of individual taxpayers to challenge the mandate. While neither objection is valid, a case involving both States and individuals as challengers offers the Court the best opportunity to ensure that it can resolve these

critically important issues on the merits.[3] This Court can and should grant plenary review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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[3] To the extent the Court wishes to consider whether the tax Anti-Injunction Act, 26 U.S.C. § 7421(a), affects the analysis, the arguably jurisdictional nature of that question would make it appropriate for separate briefing. Addressing that question here would maximize the chances of reaching the merits, both because the Act would not apply in this case if it is not jurisdictional, and because it likely would not reach the States anyway, as they are not taxpayers subject to the mandate. *See South Carolina v. Regan*, 465 U.S. 367 (1984); *cf. Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533 (2002).

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