

IN THE SUPREME COURT OF THE UNITED STATES

No. 11-393

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, ET AL., PETITIONERS
v.
KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

No. 11-398

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
ET AL., PETITIONERS
v.
STATE OF FLORIDA, ET AL.

No. 11-400

STATE OF FLORIDA, ET AL., PETITIONERS
v.
DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION FOR ADDITIONAL TIME FOR ORAL ARGUMENT
AND FOR ALLOCATION OF ARGUMENT TIME

Pursuant to Rules 21 and 28 of the Rules of this Court, the Solicitor General, on behalf of the Department of Health and Human Services and the other federal parties (the Government), respectfully moves that the total time allotted for oral argument on the question concerning the application of the Anti-Injunction Act (AIA) in these cases raising challenges to the Patient Protection and Affordable Care Act, Pub. L. No. 11-148 (Affordable

Care Act or Act), be expanded from 60 minutes to 90 minutes. All parties and the Court-appointed amicus on the AIA issue join in this request to expand the argument time.

The Solicitor General respectfully further moves that the total oral argument time allotted for the four separate issues in these cases be allocated among the parties and amici as set forth below. The parties are in agreement on the allocation of time for the minimum coverage provision and Medicaid issues. With respect to the AIA and severability issues, however, although the amicus curiae appointed by the Court on each of those issues agrees with the allocation of argument time to him under the proposed allocation set forth below, counsel for the private and state parties do not agree with the proposed allocation.

Minimum Coverage Provision (No. 11-398)

Consistent with standard practice, the parties agree, and the Solicitor General requests, that the argument time allotted to the constitutionality of the minimum coverage provision (No. 11-398) be allocated equally to petitioners (the Government) and respondents, with 60 minutes for each side. We have been informed that, pursuant to Rule 28.4 of the Rules of this Court, counsel for the two sets of respondents (Florida et al. and NFIB et al.) will file a motion to divide between them the total time allocated to respondents' side on that issue.

Medicaid (No. 11-400 (Question 1))

With respect to the constitutionality of the extension of Medicaid eligibility (No. 11-400), the parties also agree, and the Solicitor General requests, that the argument time be allocated equally to petitioners (Florida et al.) and respondents (the Government).

Anti-Injunction Act (No. 11-398)

a. The Solicitor General first proposes that the total argument time allotted to the AIA issue be expanded to 90 minutes. That expansion is appropriate in light of: the importance of this threshold issue, which has divided the lower courts and will determine whether the Court can entertain respondents' challenge to the minimum coverage provision of the Affordable Care Act at all; the complexity of the legal issues involved; and the Court's appointment of an amicus to argue that these suits are barred by the AIA. We are authorized to represent that, as noted above, the Court-appointed amicus on this issue and counsel for the respondents join in this request to expand the oral argument time.

b. For the reasons explained in point c below, the Government requests that the 90 minutes of expanded argument time be allocated as follows:

Amicus Robert Long:	40 minutes
Petitioners (the Government):	30 minutes
Respondents:	20 minutes

We are authorized to represent that the amicus agrees with this allocation of argument time and joins in this motion.

Counsel for both sets of respondents, however, disagree with the allocation of argument time proposed here. They have informed us that they will file their own motion proposing an allocation of more time to them and requesting, pursuant to Rule 28.4, that the total argument time allocated to respondents in turn be divided between them. To the extent respondents seek an allocation of more time on the AIA issue to enable both sets of respondents to participate in the oral argument, that interest does not justify reducing the time allocated to the Government. Nor does the Government in any event perceive a need for both sets of respondents to participate that could justify such a reduction in the Government's argument time, especially since respondents agree with each other and with the Government that this challenge to the constitutionality of the Affordable Care Act's minimum coverage provision is not barred by the AIA. But the Government does not object to a division of respondents' time between their two counsel, as long as any such division does not diminish the allocation requested for the Government, which, for the reasons explained below, we believe is necessary here.

c. The Court-appointed amicus alone will argue in support of the proposition that this suit is barred by the AIA. He accordingly requests that 40 minutes of the argument time be

allocated to him - slightly less than half the total of 90 minutes of expanded oral argument time proposed above. The Government believes that this is a reasonable request. The Government requests that of the remaining time, 30 minutes be allocated to the Government and 20 minutes to respondents.

The Government and both sets of respondents take the position that, contrary to the submission by the amicus, this suit challenging the constitutionality of the minimum coverage provision is not barred by the AIA. All the parties therefore seek the same bottom-line result on this issue - i.e., a holding that the AIA does not bar the Court from considering the merits of that challenge. But the Government, alone among the parties, has a critical long-term institutional interest in the sound application of the AIA, because the Government has been and will continue to be the defendant in numerous cases in this Court and the lower courts in which the AIA is at issue. It therefore is important that there be an opportunity for counsel for the Government to present, and for the Court to consider, a full explanation of the Government's position, which will be afforded by our proposed allocation. By contrast, respondents' primary interest in the AIA issue is that this particular case should be permitted to proceed - a position with which, as noted above, the Government agrees.

The nature of the arguments presented by the parties further supports the allocation of argument time proposed above. The

Government argues that the text of 26 U.S.C. 5000A (Supp. IV) as added by the Affordable Care Act, when read together with other relevant provisions of the Internal Revenue Code, does not trigger the AIA's bar. Respondents have not taken issue with that submission, and they will receive full relief on the AIA issue if the Court agrees with it, because the Court in that event would be able to consider the challenge to the constitutionality of the minimum coverage provision. But respondents also advance additional, and broader, arguments in support of the proposition that the AIA does not bar their suits. States Cert.-Stage Br. 14-18; NFIB Cert.-Stage Br. 14-16. The Government does not agree with those additional arguments by respondents, which in the Government's view are contrary to the text, purposes, and judicial construction of the AIA. See Gov't Cert.-Stage Reply Br. 2-11. Counsel for the Government therefore must have sufficient time at oral argument not only to advance the Government's position that the AIA does not bar respondents' challenge to the minimum coverage provision and to oppose the amicus's contrary position, but also to oppose respondents' additional arguments against application of the AIA. Respondents, by contrast, will have no need to devote any of their argument time to opposing the Government's argument for why the AIA does not bar their challenge. For these reasons as well, it is appropriate that, of the 50 minutes remaining after the amicus is allocated 40 minutes of argument time, the Government be

allocated 30 minutes and respondents 20 minutes.

d. If the Court does not expand the argument time to 90 minutes for the AIA issue, then for the reasons given above, the Government proposes the following allocation of argument time:

Amicus Robert Long:	30 minutes
Petitioners (the Government):	20 minutes
Respondents:	10 minutes

Severability (No. 11-393 & No. 11-400 (Question 3))

a. In its order granting certiorari, the Court allotted a total of 90 minutes of argument time to the severability issue. For the reasons stated in point b below, the Government proposes the following allocation of that time:

Petitioners:	30 minutes
Respondents (the Government):	30 minutes
Amicus Bartow Farr:	30 minutes

We are authorized to represent that the Court-appointed amicus requests that he be allocated 30 minutes to defend the position, adopted by the court of appeals, that if the minimum coverage provision is held unconstitutional, it is severable from all remaining provisions of the Affordable Care Act. The amicus has further informed us that he would object to any allocation in which he received less than 30 minutes of the argument time.

We have been informed by counsel for petitioners, however, that they do not agree with the allocation set forth above. They

accordingly will file their own motion proposing an allocation of more time to them and less to the Government, and, pursuant to Rule 28.4, requesting that the argument time allocated to petitioners' side on severability in turn be divided between them. To the extent petitioners seek more argument time on the severability issue to enable both sets of petitioners to participate, that interest does not justify an unequal allocation of argument time to the Government. Nor does the Government in any event perceive a reason for both sets of petitioners to participate that could justify such a result, especially since, as with the AIA, petitioners agree with each other on the result they seek. But the Government does not object to a division of petitioners' argument time between their two counsel, as long as the Government is allocated time equal in amount to the total allocated to petitioners, so that the Government can defend the continuing validity of the numerous provisions of the Act that both sets of petitioners contend must fall.

b. The Government believes that the amicus's request for 30 minutes of argument time is reasonable. The Government requests that the Court then allocate equally between counsel for petitioners and counsel for the Government the one hour of oral argument time that remains. That equal allocation of 30 minutes to each reflects the standard allocation of argument time between the parties on the two sides of a case, and thus the allocation that

would have occurred in this case if the Court had not appointed an amicus and expanded the total argument time accordingly.

Equal allocation of argument time also is supported by the nature of the arguments the parties make. Neither petitioners nor the Government agrees with the court of appeals' holding on severability. But unlike with respect to the AIA issue, on which all parties agree on the proper end result (that the AIA does not bar this suit challenging the minimum coverage provision), petitioners and the Government do not agree on the proper result on severability if the Court were to hold the minimum coverage provision unconstitutional. Petitioners contend that in that event the entire Affordable Care Act must fall, while the Government takes the position that the Act's provisions concerning guaranteed issue and community rating in the insurance market are inseverable from the minimum coverage provision but that the rest of the Act is severable. The Government is thus in a position between the amicus and petitioners. Accordingly, counsel for the Government must have sufficient time at oral argument not only to respond to the amicus's position that the minimum coverage provision is severable from the Act's community-rating and guaranteed-issue provisions, but also to respond to petitioners' argument that the minimum coverage provision is inseverable from the entire rest of the Act.

In addition, petitioners' argument that the entire Act must fall if the minimum coverage provision were held unconstitutional

encompasses hundreds of statutory provisions, the vast majority of which do not apply to petitioners but are of great importance to the Government and to numerous individuals and entities not before the Court. The Government also has expertise with respect to the various provisions of the Act it is charged with administering, and it therefore has a perspective on the severability issue that is quite distinct from that of both the amicus and petitioners. The Government's manifest interest in defending the effective functioning of the Act's numerous provisions therefore requires that counsel for the Government, like petitioners, have the full 30 minutes that would be made available under the equal allocation proposed above.

For the foregoing reasons, this motion to expand the total time allotted on the Anti-Injunction Act issue, and to allocate the argument time on all four issues as proposed above, should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

FEBRUARY 2012