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

IN THE

Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, ET AL.,
Petitioners

v.

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Respondents

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

v.

STATE OF FLORIDA, ET AL.,
Respondents

STATES OF FLORIDA, ET AL.,
Petitioners

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Respondents

COMBINED RESPONSE OF STATES AND PRIVATE PARTIES TO MOTION FOR ADDITIONAL TIME FOR ORAL ARGUMENT AND FOR ALLOCATION OF ARGUMENT TIME, AND MOTION FOR DIVIDED ARGUMENT

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The twenty-six States as well as the four private individuals who are parties in this case and NFIB (collectively the "Private Challengers") submit this response to the Solicitor General's Motion for Additional Time for Oral Argument and for Allocation of Argument Time. Pursuant to Supreme Court Rule 28.4, the States and the Private Challengers also move for divided argument between themselves.

With regard to the Solicitor General's motion, the States and the Private Challengers support his request for enlargement of the oral argument in No. 11-398 concerning the Anti-Injunction Act (AIA). The States and the Private Challengers also agree with the Solicitor General's proposed allocation of time for the oral argument in No. 11-398 on the constitutionality of the individual mandate. Finally, the States agree with the Solicitor General's proposed allocation of time for the oral argument in No. 11-400 on the constitutionality of the Medicaid expansion.

However, the States and the Private Challengers oppose the Solicitor General's proposed allocation of time for the oral arguments concerning the AIA (No. 11-398) and severability (Nos. 11-393 & 11-400). As to both issues, we respectfully suggest that the United States has focused on its own interest in maintaining a middle-ground position and responding to both those who have challenged the statute and those appointed to defend specific positions, and has lost sight of what division would best serve the Court and reflect the alignment of the parties on each issue.

However the Court determines to allocate argument time as between petitioners, respondents, and amici, the States and the Private Challengers jointly

move for equally divided argument as between themselves in the three arguments (constitutionality of individual mandate, AIA, and severability) in which they both are involved. The States and the Private Challengers represent distinct interests, and divided argument will ensure that the Court can consider and resolve the full range of arguments presented by these cases.

I. Response on Argument Allocation

(a) AIA

The States and the Private Challengers fully agree that enlarging the argument time on the AIA question would materially assist the Court. But the Solicitor General's proposed allocation of the expanded time would give 70 of the 90 minutes to counsel who believe that the AIA should be broadly construed and who agree on the bottom line that the challenges to the individual mandate in this case should fail, either on the merits or for lack of jurisdiction. To be sure, the Solicitor General contends that in the unique circumstances of this case, the AIA does not bar the specific challenges at issue here. But as his motion makes clear, the Solicitor General takes that position begrudgingly and in full recognition that it is contrary to the federal government's long-term interests. Indeed, the motion makes clear that the federal government is at least as concerned, if not more concerned, with rebutting the States' and Private Challengers' broader arguments about the AIA's inapplicability as with securing a narrow exception to the AIA to cover the facts of this case but no others. That underscores the reality that, as to the AIA issue, the Solicitor General can win by losing. A ruling that the AIA applies in this

case would be fully consistent with the federal government's long-term interest in the AIA's broad application and its short-term interest in defending the individual mandate against constitutional attack. For all these reasons, allocating a full 70 minutes to counsel who oppose the challengers' broader argument against the AIA's application is inequitable and will not best serve the Court in exploring these issues.

Instead, the States and the Private Challengers respectfully suggest allocating 30 minutes each to the respondents, the United States, and the Court-appointed amicus. This is the same basic allocation that the Solicitor General himself recommends when it comes to the severability issue. While we understand the amicus' desire for additional time, 30 minutes—the full amount allocated to a party in a standard argument—seems more than ample to argue for the AIA's application, especially in light of the Solicitor General's expressed desire to join the amicus in rebutting the challengers' broader arguments against the AIA's application. The premise of the Solicitor General's motion is that the federal government is really in the middle on this issue, between the amicus on the one hand and the state and private respondents on the other. Our proposed 30-30-30 allocation fully reflects that premise. If the Court concludes that the amicus needs more than 30 minutes, we respectfully suggest that any additional time come out of the federal government's time, so that at least one-third of the argument time will be allocated to parties without an institutional interest in the AIA's broad applicability.

Although we agree with the Solicitor General's suggestion that the allocation of argument time is a separate question from how the States and the Private Challengers divide their argument time *inter se*, it is still worth emphasizing that the States have unique arguments against the AIA's application based on their status as States and on this Court's decision in *South Carolina v. Regan*, 465 U.S. 367 (1984). Those arguments would not benefit the Private Challengers, and the Solicitor General has already signaled that he will vigorously oppose the States' argument in this respect. That reality underscores the need for both sets of challengers—state and private—to have ample time to argue against the AIA's applicability, and the fact that the amicus will not be alone in resisting some of the challengers' principal contentions against the AIA's applicability. Although those are far from the only arguments that the AIA does not apply, it is undeniable that under the Solicitor General's proposal, 70 of the 90 minutes would be allocated to counsel opposing arguments that are every bit as much in the long-term institutional interests of the States as a broadly applicable AIA is in the long-term interest of the federal government.

Finally, if the Court does not enlarge the argument time concerning the AIA, the Solicitor General's suggestion that challengers be relegated to 10 minutes is wholly unrealistic. That proposal would allocate 50 of the 60 minutes to counsel with an interest in the AIA's broad application. Even accepting the federal government's premise that it is really in the middle on the AIA, and assuming that it would divide its time equally between opposing the challengers' arguments and

the amicus' arguments, that would still leave the argument time lopsidedly divided with two-thirds of the argument time dedicated to refuting the challengers' position on the AIA. If the Court is inclined to decline the motion to enlarge the argument, we respectfully suggest that a 20-20-20 allocation—the same one this Court ordered after appointing an amicus in *Bond v. United States*, No. 09-1227—would be far more equitable and would be of greater assistance to the Court.

(b) Severability

On the severability issue, not only does the federal government squarely oppose the severability arguments advanced by the challengers and have a long-term interest fully consistent with that of the Court-appointed amicus, it is not even clear that the federal government disagrees with the bottom-line position of the amicus. Although the federal government disagrees with the reasoning of the Court of Appeals as to severability, it has advanced at least one argument—that the challengers lack standing to address the severability of the individual mandate—that it contends would support the judgment below. Under these circumstances, the Solicitor General's proposed allocation, with 60 minutes of the argument allocated to counsel with a long-term interest in urging broad standards for severability and a short-term interest in defending the judgment below, is clearly inappropriate. Moreover, as a practical matter, the most significant debate between the parties is whether substantially all of the ACA falls along with the individual mandate or not. The differences between the positions of the federal government and the amicus are small compared to the basic divide that separates the parties and that also

separated the District Court and the Court of Appeals. The federal government's own severability brief confirms as much; that brief spends almost three times as many pages arguing that all or virtually all of the ACA should be upheld in this case, based on either standing arguments (U.S. Severability Brief at 14-25) or substantive severability arguments (*id.* at 28-44) as it does arguing that two individual provisions, out of the several hundred that comprise the ACA, are not severable from the individual mandate (*id.* at 44-54). In sum, by any reasonable measure, the federal government is far more closely aligned with the amicus than with the challengers.

Under these circumstances, we respectfully suggest that a more equitable allocation of time would give the challengers 40 minutes, the federal government 25 minutes, and the Court-appointed amicus 25 minutes. Indeed that allocation, in giving 50 of 90 minutes to the side of the case seeking to preserve all or most of the ACA, is generous to that side of the case. Moreover, if the Court is inclined to give either the amicus or the federal government more than 25 minutes, it should take that time from the other, rather than from the challengers.

We fully appreciate that the United States finds itself betwixt and between when it comes to the AIA and severability, and has taken positions that are in some tension with its long-term interests. But the United States' felt-need to spend as much time refuting the arguments of the parties it nominally supports on the AIA, and to stake out its own middle-ground position on severability, should not be the driving factor for the allocation of argument time on those issues. Both the States

and the Private Challengers have a clear interest in the Court reaching the merits, finding the individual mandate unconstitutional, and striking down the balance of the ACA. Those unapologetic arguments against the AIA and severability should be fully vetted. For the foregoing reasons, we respectfully suggest that our proposed division of argument time would be of material assistance to the Court.

II. Motion for Divided Argument

However the Court decides to allocate argument time as between the various petitioners, respondents, and court-appointed amici, the States and the Private Challengers jointly move for an equal division of argument time between them in the three arguments in which they each are involved, on issues regarding the constitutionality of the individual mandate, the AIA, and severability. This mirrors the equal division of time in the Eleventh Circuit oral argument, which covered the full range of issues (although the AIA was not raised by any party). On each of these issues, the Court would benefit from hearing the distinct perspectives and contentions of the States and the Private Challengers. As the Court's briefing and scheduling orders reflect, this is an unusually complex and important case, in which it is particularly important that the Court be presented with a complete and comprehensive set of arguments from the full range of affected interests. Moreover, in the context of extended, 120- and 90-minute sessions, divided argument would not be disruptive to the Court or to the orderly and efficient presentation of the issues. *Cf. McConnell v. FEC* (hearing from 4 separate advocates in morning session and 5 separate advocates in afternoon session). Finally, the federal

government has no objection to any division of time as between the States and the Private Challengers.

Cutting across all three issues is the question of standing. The federal government continues to press objections to the standing of both the States and NFIB to challenge the individual mandate. To ensure that any standing inquiries—which have potential downstream consequences on a series of issues, including the AIA and severability—may be adequately addressed, both the States and the Private Challengers should participate fully in the oral arguments.

On the constitutionality of the individual mandate, the States and the Private Challengers have distinct interests and perspectives, have different bases for standing, and both presented argument in the Court of Appeals below. Given the unprecedented claim of power asserted by the federal government, respondents believe it would benefit the Court to hear from the two parties distinctly protected by limits on the federal government's power: the States and the People. *See* U.S. Const. amend. X.

With respect to the AIA, as noted above, the States have advanced substantial state-specific arguments, which the federal government will likely oppose vigorously, for why the AIA is inapplicable to them *qua* states. The States should be fully heard on those arguments. For their part, the Private Challengers have no stake in how the state-specific arguments are resolved, but have a critical stake in pressing alternative arguments that would render the AIA inapplicable to all of the challengers in this case.

Finally, with respect to severability, the federal government argues at length that each challenger may advance non-severability arguments only against specific ACA provisions for which the challenger would have standing to maintain an independent claim. While the States and the Private Challengers believe that this argument is incorrect, its pendency counsels strongly in favor of divided argument, so that the Court may address severability while hearing from the full range of challengers: states, small businesses (as represented by NFIB), and private individuals, each of which is directly affected by different provisions of the ACA.

III. Conclusion

For the various reasons stated above, the States and Private Challengers respectfully recommend that the argument time be assigned as follows:

Individual Mandate

Federal petitioners	60 minutes
State respondents	30 minutes
Private respondents	30 minutes

AIA

Court-appointed amicus	30 minutes
Federal petitioners	30 minutes
State respondents	15 minutes
Private respondents	15 minutes

Severability

State petitioners	20 minutes
Private petitioners	20 minutes
Federal respondents	25 minutes
Court-appointed amicus	25 minutes

Medicaid

State petitioners	30 minutes
Federal respondents	30 minutes

Respectfully submitted,

February 3, 2012

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CERTIFICATE OF SERVICE

I, Paul D. Clement, a member of the Supreme Court Bar, hereby certify that three copies of the attached Combined Response of States and Private Parties to Motion for Additional Time for Oral Argument and for Allocation of Argument Time and Motion for Divided Argument were served on:

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