No. 11-398

# In The Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

*Petitioners,*

vs.

STATE OF FLORIDA, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE IN SUPPORT OF RESPONDENTS REGARDING THE ANTI-INJUNCTION ACT ISSUE AND URGING AFFIRMANCE IN PART, REVERSAL IN PART

JAY ALAN SEKULOW
*Counsel of Record*
JORDAN SEKULOW
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON SR.
WALTER M. WEBER
EDWARD L. WHITE III
ERIK M. ZIMMERMAN
MILES L. TERRY
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]
*Counsel for Amicus Curiae*

February 13, 2012

[redacted]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued



STATUTES

TABLE OF AUTHORITIES – Continued

## INTEREST OF THE AMICUS CURIAE

Amicus curiae, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to defending constitutional liberties secured by law.[1] ACLJ attorneys have argued before this Court and other federal and state courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003). ACLJ attorneys have also participated as amicus curiae in numerous cases involving constitutional issues before this Court and lower federal courts. *E.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Van Orden v. Perry*, 545 U.S. 677 (2005).

The ACLJ has been active in litigation concerning the Patient Protection and Affordable Care Act of 2010 ("ACA" or "Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010), Pub. L. No. 111-152, 124 Stat. 1029 (2010), in particular, with regard to the minimum coverage provision, otherwise known as the "individual mandate," 26 U.S.C. § 5000A, which requires millions of Americans to purchase and maintain Federal Government-approved health insurance from a private company for the remainder of their lives or be penalized annually. The ACLJ has filed amicus curiae

[1] No counsel for a party authored this brief in whole or in part. No person or entity aside from amicus curiae, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed notices with this Court consenting to the filing of amicus curiae briefs.

briefs in support of the following challenges to the ACA: *Virginia v. Sebelius*, No. 3:10-CV-188-HEH (E.D. Va.), and Nos. 11-1057, 11-1058 (4th Cir.); *TMLC v. Obama*, No. 10-2388 (6th Cir.); and *Florida v. United States Dep't of Health & Human Servs.*, No. 3:10-CV-91-RV-EMT (N.D. Fla.), Nos. 11-11021-HH, 11-11067-HH (11th Cir.), and Nos. 11-393, 11-398, 11-400 (U.S.). In the brief filed in Case No. 11-398, the ACLJ urged this Court to affirm the United States Court of Appeals for the Eleventh Circuit's judgment that the individual mandate is unconstitutional. In the brief filed in Case Nos. 11-393 and 11-400, the ACLJ urged this Court to reverse the Eleventh Circuit's judgment that the unconstitutional individual mandate is severable from the rest of the ACA and rule the entire ACA invalid.

Additionally, the ACLJ represents the plaintiffs in a challenge to the individual mandate: *Mead v. Holder*, No. 1:10-CV-00950-GK (D.D.C.), *appeal sub. nom. Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir.). The ACLJ has filed a petition for a writ of certiorari in *Seven-Sky v. Holder*, No. 11-679 (U.S. Nov. 30, 2011). Accordingly, the ACLJ has an interest that may be affected by the instant case.

The ACLJ is dedicated to the founding principles of a limited Federal Government and to the belief that the Constitution contains meaningful boundaries that Congress may not trespass – no matter how serious the nation's healthcare problems. The ACLJ believes that the Constitution does not empower Congress to require Americans to purchase and maintain

health insurance from a private company for the rest of their lives or pay an annual penalty. The ACLJ is deeply troubled by the fundamental alteration to the nature of our federalist system of government that would be required to recognize a novel Congressional power to mandate that citizens buy a product from a private company. The ACLJ urges this Court to rule the entire ACA invalid.

## SUMMARY OF THE ARGUMENT

The Anti-Injunction Act ("AIA") applies to truly revenue-raising tax statutes. The individual mandate and its penalty are not truly revenue-raising tax provisions. The purchase of health insurance, as required by the individual mandate, does not provide revenue to the Federal Government, as the insurance is not purchased directly from the Federal Government. The penalty provision also is not a tax, but, instead, is a regulatory penalty designed to compel American citizens to purchase health insurance from private companies. Because the individual mandate and penalty are not taxes, the AIA does not bar this Court from reaching the merits of Respondents' claims.

Moreover, the purpose of the AIA is to protect the Federal Government's ability to assess and collect taxes expeditiously. Respondents did not file their lawsuit to restrain the Federal Government's assessment or collection of any tax. Rather, the purpose of

their lawsuit is to challenge the constitutionality of the individual mandate, which does not go into effect until January 1, 2014, and any penalty for non-compliance with the individual mandate is not due and owed until April 15, 2015. This lawsuit, then, cannot be for the purpose of restraining the assessment or collection of any tax; no assessment or collection of any exaction related to the individual mandate is possible for at least three years from now, and the Government's interest in the prompt collection of taxes is not implicated by this Court's review of the Eleventh Circuit's decision now. Therefore, the AIA does not apply.

Accordingly, this Court should proceed to resolve the merits of Respondents' claims. This Court should affirm the Eleventh Circuit's judgment that the individual mandate is unconstitutional, reverse the Eleventh Circuit's judgment that the unconstitutional individual mandate is severable from the rest of the ACA, and hold that the entire ACA is invalid.



## ARGUMENT

### THE ANTI-INJUNCTION ACT DOES NOT BAR THIS COURT FROM REACHING THE MERITS OF RESPONDENTS' CLAIMS

### A. Introduction

Among Respondents' claims is their challenge to the constitutionality of the individual mandate provision, 26 U.S.C. § 5000A, which states in part that

"[a]n 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." 26 U.S.C. § 5000A(a). The penalty provision of the individual mandate states:

> If a taxpayer who is an applicable individual, or an applicable individual, for whom the taxpayer is liable under paragraph (3), *fails to meet the requirement of subsection (a)* [*i.e.*, the individual mandate] for 1 or more months, then, except as provided in subsection (e) [which provides certain exemptions], there is hereby imposed on the taxpayer a *penalty with respect to such failures* in the amount determined under subsection (c).

26 U.S.C. § 5000A(b)(1) (emphasis added). The individual mandate goes into effect on January 1, 2014. *See* 26 U.S.C. § 5000A(a). For those applicable individuals who do not purchase the Federal Government-approved health insurance, their penalty is due and owed on April 15, 2015, the date on which their federal income tax returns must be filed. *See* 26 U.S.C. § 5000A(b). Respondents brought this action in March 2010, approximately five years before any exaction may be assessed and collected by the Federal Government, to challenge the constitutionality of the individual mandate.

### B. The Anti-Injunction Act applies to truly revenue-raising tax statutes. The Anti-Injunction Act does not apply here because the individual mandate and its penalty are not truly revenue-raising tax provisions.

The AIA states in relevant part that "no suit for the purpose of restraining the assessment or collection of *any tax* shall be maintained in any court by any person, whether or not such person is the person against whom *such tax* was assessed." 26 U.S.C. § 7421(a) (emphasis added). As this Court has explained, the AIA is to be read literally and applies to "truly revenue-raising tax statutes." *Bob Jones Univ. v. Simon,* 416 U.S. 725, 736-43 (1974). There are at least four reasons why the individual mandate and its penalty are *not taxes.* Because they are not taxes, the AIA does not bar Respondents' action from proceeding to the merits.[2]

First, in Congress's findings supporting the individual mandate, Congress relied *exclusively* on its Commerce Clause authority. 42 U.S.C. § 18091(1) (Congressional finding that the mandate to purchase health insurance "is commercial and economic in

[2] In addition, the claims of the State Respondents, at minimum, would not be barred. Simply put, if the State Respondents were unable to advance their claims now, they would have no alternative remedy; the State Respondents cannot pay a "tax" to the Federal Government and then sue for its return. *See South Carolina v. Regan,* 465 U.S. 367, 378 (1984) (explaining that the AIA does not apply to lawsuits "brought by aggrieved parties for whom [Congress] has not provided an alternative remedy").

nature, and substantially affects interstate commerce"); 42 U.S.C. § 18091(2) (Congressional finding regarding "[e]ffects on the national economy and interstate commerce," which includes statements made to bolster Congress's assertion of Commerce Clause power and focuses solely on the goal of forcing people into the insurance market). Congress's findings do not mention its taxing power in support of the individual mandate and its penalty, which is unsurprising since Section 5000A's stated purpose is not to generate tax revenue but to create "effective health insurance markets" by forcing millions of Americans to purchase health insurance from private companies. *See* 42 U.S.C. § 18091(2)(I).

Second, Congress consciously chose not to refer to the penalty as a "tax" in the ACA. Underscoring that Congress knows the difference between a penalty and tax, Congress distinguished between "taxes" and "penalties" throughout the ACA. Although Section 5000A imposes a "penalty" while expressly relying upon the Commerce Clause, other sections of the ACA impose a "tax" on particular activities or entities. *E.g.,* 26 U.S.C. § 4191 (*tax* on medical devices); 26 U.S.C. § 4980I (*tax* on high cost employer-sponsored health coverage); 26 U.S.C. § 5000B (*tax* on indoor tanning services). Congress's decision to label the individual mandate penalty a "penalty" and not a "tax" is noteworthy. Unlike a penalty, which compels or punishes behavior, "a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government." *United States v.*

*Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (internal citations omitted). The terms "penalty" and "tax" are "not interchangeable . . . and if an exaction [is] clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *United States v. La Franca*, 282 U.S. 568, 572 (1931); *see also Duncan v. Walker*, 533 U.S. 167, 173 (2001) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citations and quotation marks omitted).[3]

Although the "practical operation" of a provision is more informative than "the precise form of descriptive words which may be applied to it," *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941), it is telling that both the practical operation of the individual mandate penalty *and* the words Congress used to describe it are tied to the congressional purpose of forcing many more Americans into the health insurance market, not any purpose of raising revenue for the Federal Government. If each applicable

[3] Congress's placement of the individual mandate inside the Internal Revenue Code and listing it among the "Miscellaneous Excise Taxes" is insignificant and gives rise to no inference that Congress intended it to be a tax, as the Internal Revenue Code itself points out. 26 U.S.C. § 7806(b) ("No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title. . . .").

individual purchases health insurance, fulfilling Congress's purpose, the penalty is not triggered and the Federal Government would not generate any revenue because health insurance is not purchased directly from the Federal Government. Moreover, if the individual mandate is held unconstitutional, the penalty is meaningless and unenforceable. There would be no behavior to compel and nothing to penalize; thus, no revenue is provided to the Federal Government.[4]

Third, Congress also indicated that the penalty is not a tax by prohibiting the use of traditional tax enforcement measures to collect the penalty. The Special Rules subsection of Section 5000A declares that a person "shall not be subject to any criminal

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[4] It is telling that every federal court to consider the argument that Section 5000A's exaction is a tax, other than the United States Court of Appeals for the Fourth Circuit, has rejected it. *TMLC v. Obama*, 651 F.3d 529, 550 (6th Cir. 2011) (Sutton, J., concurring); *id.* at 566 (Graham, J., dissenting); *Goudy-Bachman v. United States Dep't of Health & Human Servs.*, 764 F. Supp. 2d 684, 695 (M.D. Pa. 2011); *Mead v. Holder*, 766 F. Supp. 2d 16, 40-41 (D.D.C. 2011); *Liberty Univ. v. Geithner*, 753 F. Supp. 2d 611, 627-29 (W.D. Va. 2010), *vacated,* 2011 U.S. App. LEXIS 18618 (4th Cir. Sept. 8, 2011); *Florida v. United States Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1130-44 (N.D. Fla. 2010); *U.S. Citizens Ass'n v. Sebelius*, 754 F. Supp. 2d 903, 909, 911-24 (N.D. Ohio 2010); *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 782-88 (E.D. Va. 2010), *vacated,* 656 F.3d 253 (4th Cir. 2011); *TMLC v. Obama*, 720 F. Supp. 2d 882, 890-91 (E.D. Mich. 2010). *But see Liberty Univ., Inc. v. Geithner*, 2011 U.S. App. LEXIS 18618 (4th Cir. Sept. 8, 2011); *Seven-Sky v. Holder*, 661 F.3d 1, 23 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

prosecution or penalty" for failing to timely pay the penalty. 26 U.S.C. § 5000A(g)(2)(A). In addition, "[t]he Secretary shall not . . . file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section," or "levy on any such property with respect to such failure." 26 U.S.C. § 5000A(g)(2)(B). Had Congress intended the penalty to be a tax, it would have made the traditional tax enforcement measures applicable.

Finally, Congress specifically listed multiple revenue offset provisions within the ACA. Notably, the individual mandate penalty is not listed as a revenue producing provision, which underscores that Congress did not consider the penalty to be one of the many revenue generating provisions of the ACA, such as those noted previously and other taxes such as the tax on elective cosmetic medical procedures. Title IX – Revenue Provisions, Subtitle A – Revenue Offset Provisions of the ACA, *available at* http://www.healthcare.gov/law/resources/authorities/title/ix-revenue-provisions.pdf (last visited Jan. 31, 2012).

In sum, Congress did not make the individual mandate and its penalty truly revenue-raising tax provisions. As such, the AIA does not bar this pre-enforcement challenge to the constitutionality of the individual mandate from proceeding to the merits.

### C. The Anti-Injunction Act's purpose is to protect the Federal Government's ability to assess and collect taxes expeditiously. The Anti-Injunction Act does not apply here because this lawsuit will be resolved years before the Federal Government can assess or collect any exaction; thus, this case does not thwart the Anti-Injunction Act's purpose.

As this Court has explained, the main purpose of the AIA is to protect "the [Federal] Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference 'and to require that the legal right to the disputed sums be determined in a suit for refund.'" *Bob Jones Univ.*, 416 U.S. at 736 (quoting *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962)). Respondents did not file their lawsuit, in contravention of the AIA, "for the purpose of restraining the assessment or collection of any tax. . . ." 26 U.S.C. § 7421(a). Rather, the purpose of their lawsuit, filed in March 2010, is to challenge the constitutionality of the individual mandate. The individual mandate does not go into effect until January 1, 2014, and any penalty for non-compliance with the individual mandate is not due and owed until April 15, 2015. A lawsuit, then, such as this one, cannot be "for the purpose of restraining the assessment or collection of any tax" if no current assessment or collection of any

tax related to the suit is possible. *See id.* Therefore, the AIA does not apply to this action.[5]

The inapplicability of the AIA to the case at hand is illustrated by the fact that, in the typical case in which the AIA bars a claim, one or more of the following three key events occurred *before* the plaintiff sued:

1) a tax-related law or policy relevant to the plaintiff's conduct *took effect*;

2) an activity or event allegedly triggering application of that law or policy to the plaintiff *occurred*; or

3) the government or an income-providing entity *began the process* of collecting, assessing, or withholding funds, investigating current or past tax liability, or otherwise establishing the plaintiff's tax liability.

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[5] Of the many courts to consider the applicability of the AIA as it relates to challenges to the individual mandate, only the Fourth Circuit determined that the AIA applies. The Fourth Circuit determined that the AIA applies not only to taxes but also to penalties. *Compare Liberty Univ.*, 2011 U.S. App. LEXIS 18618 (holding that the AIA applies), *with Seven-Sky*, 661 F.3d 1 (holding the AIA inapplicable), *TMLC*, 651 F.3d 529 (same), *Goudy-Bachman*, 764 F. Supp. 2d 684 (same), *and Florida*, 716 F. Supp. 2d 1120 (same). Even if the Fourth Circuit were correct about the breadth of the AIA, the AIA still does not apply here. As discussed above, no tax or penalty is being collected or assessed by the Federal Government at this time, and the purpose of the AIA will not be frustrated by this lawsuit, which will be resolved before the individual mandate goes into effect and any exaction is due and owed.

In *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), this Court held that the AIA barred a lawsuit seeking to prevent the collection of allegedly *past due* social security and unemployment taxes. *Id.* at 2. In so holding, this Court observed that "[t]he manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes *alleged to be due* without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue." *Id.* at 7 (emphasis added). Moreover, "in general, the Act prohibits suits for injunctions barring the collection of federal taxes *when the collecting officers have made the assessment and claim that it is valid*." *Id.* at 8 (emphasis added).[6]

A review of the purpose of the Tax Injunction Act ("TIA") of 1937, which the *Williams Packing* Court characterized as "comparable" to the AIA, is instructive. *See id.* at 6. The *Williams Packing* Court cited a Senate Report concerning the TIA which stated:

> The existing practice of the Federal courts in entertaining tax-injunction suits against State officers makes it possible for foreign

[6] Because this case does not fall within the terms of the AIA, there is no need to address the *Williams Packing* exception for cases *otherwise subject to the AIA* (such as those involving allegedly past due taxes) in which the plaintiff can demonstrate irreparable harm and that the government has no likelihood of success. *See* 370 U.S. at 7-8.

> corporations doing business in such States to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy.

*Id.* at 7 n.6 (quoting S. Rep. No. 1035, 75th Cong., 1st Sess. 2). This Court made a similar observation about the TIA's purpose in *Hibbs v. Winn*, 542 U.S. 88 (2004), noting that Congress "trained its attention on taxpayers who sought to avoid paying their tax bill" and sought "to stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances." *Id.* at 104-105. Put differently, the TIA's drafters sought to ensure that taxpayers who contested their liability for *current or past due* taxes must first pay the amounts to the government to avoid the problem of the government being without substantial sums of money for extended periods of time.

Earlier cases from this Court confirm that the AIA's chief purpose is to deal with the problem of taxpayers withholding assessed or past due taxes. For example, in *State R.R. Tax Cases*, 92 U.S. 575 (1876), this Court observed that the AIA addressed the problem of courts enjoining *the collection of assessed taxes*

that "enable[d] the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in the proper manner," and also encouraged corporations to withhold the entirety of their currently due taxes to contest a small portion of their assessments. *Id.* at 615-17. In light of the problem of taxpayers withholding *past due* taxes to contest a small portion of them, this Court observed that the AIA "shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence." *Id.* at 613-14.

Similarly, in *Snyder v. Marks*, 109 U.S. 189 (1883), this Court held that the AIA "applies to all *assessments of taxes*, made under color of their offices, by internal revenue officers" and declares that public officers "shall not be enjoined *from collecting a tax claimed to have been unjustly assessed*, when those officers, in the course of general jurisdiction over the subject matter in question, have made the assessment and claim that it is valid." *Id.* at 193, 194 (emphasis added); *see also Cheatam v. United States*, 92 U.S. 85, 89 (1876) (holding that a refund suit was barred because it was brought more than six months *after* the tax was assessed, and noting that "[i]t is essential to the honor and orderly conduct of the government that its taxes [alleged to be due] should be promptly paid. . . .").

Moreover, in *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974), the requirements of 26 U.S.C. § 501(c)(3)

for maintaining tax-exempt status had been applicable to Bob Jones University long before it brought suit, and revoking that status would have led to imminent tax liability. Before the University brought suit, "[t]he Commissioner of Internal Revenue [had already] instructed the District Director to commence administrative procedures leading to the revocation of petitioner's § 501(c)(3) ruling letter." *Id.* at 735. The University stated that "it would be subject to 'substantial' federal income tax liability if the Service were allowed to carry out its threatened action," estimating over one million dollars in tax liability over a two-year period. *Id.* at 738.

The AIA barred the University's suit because the Federal Government had already initiated the process of establishing the University's current tax liability, such that granting the University an injunction would halt the ongoing administrative process and "interrupt the assessment and collection of taxes." *Id.* at 739-40, n.10. In this context, this Court observed that "the principal purpose [of the AIA is] the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference." *Id.* at 736-37; *see also Alexander v. "Americans United" Inc.*, 416 U.S. 752, 762 n.13 (1974) (holding that the AIA barred a suit challenging denial of Section 501(c)(3) tax-exempt status because "the imposition of a federal tax . . . follows from the Service's withdrawal of § 501(c)(3) status").

In contrast, the present lawsuit *does not implicate* the Federal Government's need to promptly collect taxes that are currently due, or past due, because the individual mandate and penalty do not take effect until January 1, 2014. No person in the country can possibly engage in any activity that can trigger any collection, assessment, withholding, or investigation related to the individual mandate until that time. Thus, Respondents are not the subject of any investigatory or administrative proceedings relating to the collection or assessment of the individual mandate penalty, nor could they be for at least three years from now. In other words, this case is much different from the typical situation in which the tax code enforcement and collection process is already underway before a lawsuit is filed. Consequently, this lawsuit is not brought "for the purpose of restraining the assessment or collection of any tax," in contravention of the AIA. *See* 26 U.S.C. § 7421(a). This Court is not prevented from proceeding to the merits of Respondents' claims.

## CONCLUSION

Amicus curiae respectfully requests that this Court conclude that the Anti-Injunction Act does not bar it from resolving the merits of Respondents' claims. Amicus curiae further requests that this Court affirm the Eleventh Circuit's judgment that the individual mandate is unconstitutional, reverse the Eleventh Circuit's judgment that the individual

mandate is severable from the rest of the ACA, and rule the entire ACA invalid.

Respectfully submitted,

JAY ALAN SEKULOW
*Counsel of Record*
JORDAN SEKULOW
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON SR.
WALTER M. WEBER
EDWARD L. WHITE III
ERIK M. ZIMMERMAN
MILES L. TERRY
AMERICAN CENTER FOR
LAW & JUSTICE
[redacted]
*Counsel for Amicus Curiae*

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