No. 11-438

In the Supreme Court of the United States

LIBERTY UNIVERSITY, ET AL., PETITIONERS

v.

TIMOTHY GEITHNER, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
SAMANTHA L. CHAIFETZ
DANA KAERSVANG
JOEL MCELVAIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

The minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, requires that, beginning in 2014, non-exempted individuals maintain a minimum level of health insurance or pay a tax penalty. 26 U.S.C.A. 5000A. The employer responsibility provision of the Act requires that, beginning in 2014, under certain circumstances, an assessable payment will be imposed on a large employer that does not offer adequate health insurance coverage to its full-time employees. 26 U.S.C.A. 4980H. The questions presented are:

1. Whether the court of appeals correctly held that petitioners' challenges to the minimum coverage provision and the employer responsibility provision are barred by the Anti-Injunction Act, 26 U.S.C. 7421(a).

2. Whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision, and, if this provision were found to be unconstitutional, whether other provisions of the Act should be severed from it.

3. Whether Congress had the power under Article I of the Constitution to enact the employer responsibility provision, and, if this provision were found to be unconstitutional, whether other provisions should be severed from it.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-164a) is not yet reported but is available at 2011 WL 3962915. The opinion of the district court (Pet. App. 165a-256a) is reported at 753 F. Supp. 2d 611.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2011. The petition for a writ of certiorari was filed on October 7, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119

(Affordable Care Act or Act),[1] to address a profound and enduring crisis in the market for health care, which accounts for more than 17% of the Nation's gross domestic product. Millions of people do not have health insurance and, as a result, they consume health care services for which they do not pay, shifting billions of dollars of health care costs to other market participants. The result is higher insurance premiums that, in turn, make insurance unaffordable to even more people. At the same time, insurance companies use restrictive underwriting practices to deny coverage or charge more to millions of people because of pre-existing medical conditions.

In the Affordable Care Act, Congress addressed these problems through a comprehensive program of economic regulation and tax measures. The Act includes provisions designed to make affordable health insurance more widely available, to protect consumers from restrictive insurance underwriting practices, and to reduce the amount of uncompensated medical care.

First, the Act builds upon the existing nationwide system of employer-based health insurance that is the principal private mechanism for financing health care. The Act establishes new tax incentives for small businesses to purchase health insurance for their employees, 26 U.S.C.A. 45R,[2] and, under certain circumstances, will impose assessable payments on large employers that do not offer adequate coverage to full-time employees,

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[1] Amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

[2] Because the Affordable Care Act has not yet been codified in the United States Code, this brief cites to the United States Code Annotated (U.S.C.A.) for ease of reference. All such citations are either to the 2011 Edition or the 2011 Supplement of the U.S.C.A.

26 U.S.C.A. 4980H (the employer responsibility provision).[3]

Second, the Act provides for the creation of health insurance exchanges to allow individuals, families, and small businesses to leverage their collective buying power to obtain health insurance at rates that are competitive with those of typical large employer group plans. 42 U.S.C.A. 18031. The Act also offers federal tax credits to assist eligible households with incomes from 133% to 400% of the federal poverty level to purchase insurance through the exchanges. 26 U.S.C.A. 36B.

Third, the Act expands eligibility for Medicaid to cover individuals under age 65 with income below 133% of the federal poverty level. 42 U.S.C.A. 1396a(a)(10)(A)(i)(VIII).

Fourth, the Act regulates insurers to prohibit industry practices that have prevented individuals from

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[3] Subject to certain exceptions, when the employer responsibility provision takes effect in 2014, it will apply to employers that have an average of at least 50 full-time equivalent employees during the preceding calendar year. 26 U.S.C.A. 4980H(c)(2)(A) and (E); 26 U.S.C.A. 4980H note. Such an employer will be required to make an assessable payment if it "fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan," and at least one of its full-time employees has enrolled in a qualified health plan purchased on a health insurance exchange "with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee." 26 U.S.C.A. 4980H(a)(1) and (2). Such a large employer is also subject to making an assessable payment if it offers coverage but one or more of its full-time employees receive a tax credit or cost-sharing reduction for coverage on an exchange because the employer-provided coverage is not affordable or because the employer pays for less than 60% of the total allowed costs of benefits provided under the plan. 26 U.S.C.A. 36B(c)(2)(C), 4980H(b)(1).

obtaining and maintaining health insurance. Beginning in 2014, the Act will bar insurers from refusing coverage because of a pre-existing medical condition, 42 U.S.C.A. 300gg-1(a), 300gg-3(a) (the guaranteed-issue provision), thereby guaranteeing access to insurance to many previously unable to obtain it. The Act will also bar insurers from charging higher premiums based on a person's medical history, 42 U.S.C.A. 300gg (the community-rating provision), requiring instead that premiums generally be based on community-wide criteria.

Fifth, the Act amends the Internal Revenue Code to provide that a non-exempted individual who fails to maintain a minimum level of health insurance must pay a tax penalty. 26 U.S.C.A. 5000A (the minimum coverage provision). That insurance requirement, which takes effect in 2014, 26 U.S.C.A. 5000A(a), may be satisfied through enrollment in an employer-sponsored insurance plan; an individual market plan, including one offered through a new health insurance exchange; a grandfathered health plan; a government-sponsored program such as Medicare or Medicaid; or similar federally-recognized coverage, 26 U.S.C.A. 5000A(f).

The amount of the tax penalty owed under the minimum coverage provision is calculated as a percentage of household income, subject to a floor and capped at the price of the forgone insurance coverage. The penalty is reported on the individual's federal income tax return for the taxable year and is assessed and collected in the same manner as certain other assessable tax penalties under the Internal Revenue Code. Individuals who are not required to file income tax returns for a given year are not required to pay the tax penalty. 26 U.S.C.A. 5000A(b)(2), (c)(1) and (2), (e)(2) and (g).

2. a. Petitioners are Liberty University and two individuals who do not have health insurance coverage. They brought this suit in the United States District Court for the Western District of Virginia. Liberty University alleged that it offers health insurance policies and other "healthcare reimbursement options" to its employees, but that it objects to federal regulation of the terms of those policies. Second Am. Compl. paras. 29, 31. The individual petitioners acknowledged that they participate in the market for health care services, but alleged that they prefer to pay for health care services as they need them. *Id.* paras. 34, 38.

Petitioners contended that Congress may not override their preferred means of financing health care costs, and that the minimum coverage provision and the employer responsibility provision exceed Congress's commerce and taxing powers. The district court concluded that the Anti-Injunction Act, 26 U.S.C. 7421(a), did not preclude consideration of petitioners' claims. Pet. App. 192a-200a. The court upheld the provisions as valid exercises of Congress's power under the Commerce Clause. *Id.* at 201a-219a.[4]

b. On appeal, the government did not challenge the district court's conclusion that the Anti-Injunction Act did not bar consideration of petitioners' claims. See Gov't C.A. Br. 5 n.1. After oral argument, the court of appeals *sua sponte* asked the parties to brief several questions, including whether the Anti-Injunction Act "divest[s] federal courts of jurisdiction in this case." 10-2347 Docket entry No. 94 (4th Cir. May 23, 2011). In response, the government filed a supplemental brief

[4] The district court did not decide whether the minimum coverage provision is also independently authorized by Congress's taxing power. Pet. App. 200a n.13.

explaining that, although it had argued for the applicability of the Anti-Injunction Act in the district court, "[o]n further reflection, and on consideration of the decisions rendered thus far in the [Affordable Care Act] litigation," the government no longer believed that the Anti-Injunction Act bars pre-enforcement challenges to the minimum coverage provision. Gov't Supp. Br. 2.

A divided panel of the court of appeals vacated the district court's judgment and remanded the case with instructions that it be dismissed for lack of jurisdiction. Pet. App. 1a-164a. The court recognized that neither party contended that the Anti-Injunction Act barred this suit, but concluded that it had an independent obligation to address the question because "when applicable, the [Anti-Injunction Act] divests federal courts of subject-matter jurisdiction." Pet. App. 21a-22a. The court held that "[b]ecause this suit constitutes a pre-enforcement action seeking to restrain the assessment of a tax, the Anti-Injunction Act strip[ped the courts] of jurisdiction." *Id.* at 12a.

The court noted that the Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Pet. App. 22a (quoting 26 U.S.C. 7421(a)). In the court's view, "the [Anti-Injunction Act] uses the term 'tax' in its broadest possible sense," including any exaction "so long as the method prescribed for its enforcement conforms to the process of tax enforcement." *Id.* at 23a-24a. The court concluded that the penalty imposed by the minimum coverage provision fell within this broad category for purposes of the Anti-Injunction Act.

In reaching that conclusion, the court of appeals acknowledged the Sixth Circuit's contrary holding in

Thomas More Law Center v. *Obama*, 651 F.3d 529, 539-540 (2011), petition for cert. pending, No. 11-117 (filed July 26, 2011). In that case (involving only a challenge to the minimum coverage provision), the Sixth Circuit noted that "the Anti-Injunction Act applies only to 'tax[es],'" while Congress "called the shared-responsibility payment" in the minimum coverage provision a "penalty." *Id.* at 539 (brackets in original) (quoting 26 U.S.C. 7421 and 26 U.S.C.A. 5000A). The Sixth Circuit further noted that "[o]ther provisions of the Internal Revenue Code * * * show that *some* 'penalties' amount to 'taxes' for purposes of the Anti-Injunction Act." *Ibid.* For example, the Sixth Circuit noted that the Internal Revenue Code provides that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by [subchapter B of chapter 68]." *Ibid.* (quoting 26 U.S.C. 6671(a)) (brackets in original); see also 26 U.S.C. 6665(a)(2). But Congress did not place the penalty established by the minimum coverage provision in Chapter 68. See *Thomas More Law Ctr.*, 651 F.3d at 540.

The court of appeals in this case rejected the reasoning of the Sixth Circuit, and concluded that 26 U.S.C. 6655(a)(2) and 6671(a) merely "declare explicitly what has been implicit—that the term 'tax' for purposes of the Code also refers to 'penalties' imposed by the Code." Pet. App. 37a. The court of appeals also rejected petitioners' contention that the penalty under the minimum coverage provision was not a "tax" for purposes of the Anti-Injunction Act because Congress primarily intended to impose a "regulatory penalty" (*id.* at 48a) rather than to raise revenue when it enacted the provision. The court held Congress's regulatory intent to be irrelevant, noting that this Court had "'abandoned . . .

distinctions' between 'regulatory and revenue-raising taxes'" for purposes of the Anti-Injunction Act. *Id.* at 49a (quoting *Bob Jones University* v. *Simon*, 416 U.S. 725, 741 n.12 (1974)). And the court rejected petitioners' contention that their suit was not "for the purpose of" restraining the assessment or collection of a tax, *id.* at 47a (quoting *Bob Jones University*, 416 U.S. at 738), because, according to petitioners, they intended to challenge only the Act's "requirement" to obtain health insurance and not the penalty that might result from the failure to do so. The court reasoned that, even if Section 5000A could be parsed in this manner, the Anti-Injunction Act would still bar this suit because a ruling in petitioners' favor "would necessarily preclude the Secretary from exercising his statutory authority to assess the accompanying penalty," *id.* at 154a n.14.

Judge Wynn concurred, but wrote separately to note that, if he were to reach the merits, he would uphold the minimum coverage and employer responsibility provisions as valid exercises of Congress's taxing power. Judge Wynn noted that "[a] tax, * * * as used in the Constitution, signifies an exaction for the support of the government." Pet. App. 53a (quoting *United States* v. *Butler*, 297 U.S. 1, 61 (1936)). Whether the exaction is labeled as a "penalty" or as an "assessable payment" is immaterial, he reasoned, because "the Supreme Court has instructed us to look not at what an exaction is called but instead at what it does." *Id.* at 54a. Judge Wynn noted that a taxing provision may not be invalidated simply because Congress had a regulatory purpose when enacting it. *Id.* at 55a (citing, *e.g.*, *United States* v. *Sanchez*, 340 U.S. 42, 44 (1950)). Although some pre-New Deal authorities had invalidated taxes with regulatory purposes, Judge Wynn noted that "both

older and newer opinions indicate that the revenue-versus-regulatory distinction was short-lived and is now defunct." *Id.* at 56a. He explained that an exaction is valid under the taxing power so long as it "bear[s] 'some reasonable relation' to raising revenue," is imposed for the general welfare, and violates no independent constitutional restriction. *Id.* at 58a-59a (quoting *United States* v. *Doremus*, 249 U.S. 86, 93 (1919)).

Applying those principles to this case, Judge Wynn concluded that the "[t]he practical operation of the [minimum coverage provision] is as a tax," given that any penalty under the provision applies only to taxpayers who are required to file a return, the penalty is reported on the taxpayer's income tax return and is generally calculated by reference to income, and the Secretary of the Treasury is empowered to enforce the provision like a tax. Pet. App. 61a. For similar reasons, Judge Wynn concluded that the employer responsibility provision is also a tax in its practical operation. *Id.* at 62a. Judge Wynn noted that both provisions will raise substantial revenues for the general treasury, *ibid.* (citing Letter from Douglas W. Elmendorf, Director, Cong. Budget Office (CBO), to Hon. Nancy Pelosi, Speaker, U.S. House of Representatives, Tbl. 4 (Mar. 20, 2010)), that the exactions will serve the general welfare, and that neither provision violates any other constitutional restriction. *Id.* at 63a-64a.

Judge Davis dissented, explaining that he did not believe the Anti-Injunction Act applied in this case. As an initial matter, he made clear that "[t]his question of statutory interpretation is wholly distinct from the constitutional question concerning Congress's power under the Taxing and Spending Clause, to enact" the minimum coverage and employer responsibility provisions. Pet.

App. 158a-159a n.2 (citation omitted). He noted that, for purposes of interpreting the Anti-Injunction Act (as distinguished from analysis of Congress's constitutional power to enact the challenged provisions), Congress had expressly stated when a penalty "should be treated as a tax for any and all other purposes" in the Code, but had not included the minimum coverage provision in those instructions. *Id.* at 75a (citing 26 U.S.C. 6665(a)(2), 6671(a)). He also explained that the congressional directive that the penalty under the minimum coverage provision "shall 'be assessed and collected in the same manner'" as taxes, *ibid.* (quoting 26 U.S.C.A. 5000A(g)(1)), did not mean that the Anti-Injunction Act's jurisdictional bar was also incorporated, *ibid.* Judge Davis observed that application of the Anti-Injunction Act to the employer responsibility provision "present[ed] a closer question" because the employer responsibility provision imposes an "assessable payment" and twice refers to that payment as a "tax." *Id.* at 78a (quoting 26 U.S.C.A. 4980H(a), (b)(2) and (c)(7)). Based on "legislative history and Congressional purpose," however, he concluded that the Anti-Injunction Act similarly does not apply to pre-enforcement challenges to the employer responsibility provision. *Id.* at 79a.

Turning to the merits, Judge Davis reasoned that the minimum coverage provision addresses conduct with "direct effects on the health insurance and health services markets," Pet. App. 108a, distinguishing it from the provisions at issue in *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), in which an attenuated chain of "inference upon inference" was needed to link the regulated activities to interstate commerce, Pet. App. 106a (quoting *Lopez*, 514 U.S. at 567). Judge Davis rejected the notion

that this rationale would support congressional enactment of a hypothetical "purchase mandate for broccoli" or "GM car[s]," because the substantial effects on commerce that he described arise from transactions that are already occurring, namely, the obtaining of medical care that "must be provided even to those who cannot pay, which allows some (the uninsured) to consume care on another's (the insured's) dime." *Id.* at 114a. Judge Davis had "no hesitation in concluding [that] Congress rationally determined that addressing the $43 billion annual cost-shifting from the uninsured to the insured could only be done via regulation before the uninsured are in need of emergency medical treatment." *Id.* at 117a.

Judge Davis also would have upheld the employer responsibility provision, reasoning that "[i]t is well settled that Congress may regulate terms of employment under the Commerce Clause." Pet. App. 136a. He noted the congressional judgment underlying the provision, which was undisputed by petitioners: that employers that do not offer health insurance to their employees "gain an unfair economic advantage" over other employers and that those employers contribute to the spiral of increased costs for the insured population, which makes it "more difficult for [other] employers to insure their employees." *Id.* at 137a (quoting H.R. Rep. No. 443, 111th Cong., 2d Sess. 985-986 (2010)).

3. The Solicitor General has filed a petition for a writ of certiorari in *Department of Health & Human Services* v. *Florida*, No. 11-398 (filed Sept. 28, 2011), which presents the question whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision. The government's petition also suggests that the Court direct the parties in that

case to address the question whether the challenge to the minimum coverage provision is barred by the Anti-Injunction Act.[5]

ARGUMENT

Petitioners challenge two components of the Affordable Care Act's comprehensive measures for addressing the crisis in the national health care market. First, petitioners contend that Congress did not have the power under Article I of the Constitution to enact the minimum coverage provision. Pet. 22-38. Second, petitioners contend that Congress likewise lacked the power under Article I to enact the employer responsibility provision. Pet. 22-31, 38-42. And as a threshold matter, petitioners seek review of the court of appeals' holding that their pre-enforcement challenge to both provisions is barred by the Anti-Injunction Act. Pet. 9-22. Petitioners further urge that, if the minimum coverage provision or employer responsibility provision is held unconstitutional, no other provision of the Act can be severed from those provisions. Pet. 42-46.

The question of the constitutionality of the minimum coverage provision is clearly an important one on which the courts of appeals have reached conflicting results.

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[5] In addition to this petition and the federal government's petition in No. 11-398, there are four other pending petitions presenting questions regarding the constitutionality of the minimum coverage provision and threshold questions of whether the claims can be adjudicated. See *Virginia* v. *Sebelius*, No. 11-420 (filed Sept. 30, 2011); *National Fed'n of Indep. Bus.* v. *Sebelius*, No. 11-393 (filed Sept. 28, 2011); *Florida* v. *Dep't of Health & Human Servs.*, No. 11-400 (filed Sept. 27, 2011); *Thomas More Law Ctr.* v. *Obama*, No. 11-117 (filed July 26, 2011). The petition in 11-400 also asserts a Tenth Amendment challenge to the employer responsibility provision as applied to the States as employers. See 11-400 Pet. 26-29.

The question whether the Anti-Injunction Act bars the courts from entertaining pre-enforcement challenges to the minimum coverage provision is likewise an important one on which the courts of appeals have disagreed. The government believes that both questions would best be addressed in connection with its certiorari petition in *Department of Health & Human Services* v. *Florida*, No. 11-398, and that the Court should accordingly hold this petition pending a decision in that case. Alternatively, as the government suggested in its *Florida* petition, the Court could grant review in this case—limited to the applicability of the Anti-Injunction Act to pre-enforcement challenges to the minimum coverage provision—and consider appointing an amicus to defend the Fourth Circuit's judgment. See 11-398 Pet. 34 n.7.

Petitioners' challenge to the employer responsibility provision does not merit review. The court of appeals correctly held that the Anti-Injunction Act barred that challenge, and that holding does not conflict with the decision of any other court of appeals. Moreover, the employer responsibility provision is plainly constitutional under this Court's precedents.

1. The question whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision is important, and the courts of appeals have reached conflicting conclusions on it. Compare *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 540-549 (6th Cir. 2011); *id.* at 555-565 (Sutton, J., concurring in the judgment), with *Florida* v. *United States Dep't of Health & Human Servs.*, 648 F.3d 1235, 1268-1313 (11th Cir. 2011), petitions for cert. pending, Nos. 11-393 (filed Sept. 28, 2011), 11-398 (filed Sept. 28, 2011), and 11-400 (filed Sept. 27, 2011). The federal government's petition for a writ of certiorari in *Florida*

asks the Court to resolve that question. Granting the government's *Florida* petition is particularly warranted because the court of appeals in that case "str[uck] down as unconstitutional a central piece of a comprehensive economic regulatory scheme enacted by Congress" to address a matter of grave national importance. *Id.* at 1328-1329 (Marcus, J., dissenting). The government's petition explains why Congress had the power under Article I to enact the minimum coverage provision. See 11-398 Pet. 12-32.

It does not appear necessary to grant review in this case to address the same question, particularly given that the court of appeals in this case did not reach the merits.[6] Petitioners here would be free to file an amicus brief on the relevant issues in the *Florida* case.

2. a. The applicability of the Anti-Injunction Act to pre-enforcement challenges to the minimum coverage provision is also an important question on which the courts of appeals have divided. Compare Pet. App. 1a-164a with *Thomas More Law Ctr.*, 651 F.3d at 539-540. Therefore, we believe the Court should review the Anti-Injunction Act question along with the question of Congress's Article I power to enact the minimum coverage provision.

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[6] This case would also present a particularly poor vehicle to review the extent to which other provisions of the Act could be severed from the minimum coverage provision if it were found to be unconstitutional. Petitioners did not argue in the court of appeals that any other portions of the Act must fall if the minimum coverage provision or the employer responsibility provision were invalidated. The government has instead suggested that the Court grant the severability questions presented in the certiorari petitions filed by the private parties and the States in the *Florida* case. See Fed. Gov't Br. in Resp. at 26-33, *National Fed'n of Indep. Bus.* v. *Sebelius*, Nos. 11-393 & 11-400 (Oct. 17, 2011).

As the government explained in its certiorari petition in *Florida*, the Court may consider both questions in the context of that case. 11-398 Pet. 33. That course would likely prove a more effective way of considering the relevant issues surrounding the Anti-Injunction Act and pre-enforcement challenges to the minimum coverage provision. The States in the *Florida* case contend that the Anti-Injunction Act "does not apply to States in the same manner as it applies to individual taxpayers," and that "[e]ven assuming the [Anti-Injunction Act] might bar some challenges to the [minimum coverage provision] (and the States maintain it does not), it would not bar the States' challenge." States' Br. in Resp. at 14, *Department of Health and Human Servs.* v. *Florida*, No. 11-398 (Oct. 17, 2011). While the federal government agrees that the Anti-Injunction Act does not bar pre-enforcement challenges to the minimum coverage provision for the reasons discussed below, it disagrees with the States that there is any legally relevant distinction between them and private plaintiffs for purposes of determining the Anti-Injunction Act's applicability to their pre-enforcement challenge.[7] In any event, it would be most natural for the Court to consider the state-specific arguments about the Anti-Injunction Act (and whether the States have standing and are otherwise

[7] Moreover, the federal government does not believe that the States have standing and are otherwise proper parties to challenge the minimum coverage provision, which applies only to private individuals, not States. Cf. States' Br. in Resp. at 16-17, *Florida*, *supra* (No. 11-398) (contending that the States do have standing to challenge the minimum coverage provision). The Eleventh Circuit held only that one of the individual plaintiffs in *Florida* had standing. 648 F.3d at 1243. That court described "the question of the state plaintiffs' standing to challenge the individual mandate [as] an interesting and difficult one" but concluded that it did not need to decide it. *Ibid.*

proper parties to challenge the minimum coverage provision) in *Florida*, rather than in this case, which involves only private petitioners. In the alternative, the Court could use this case as a vehicle for consideration of the Anti-Injunction Act's applicability to pre-enforcement challenges to the minimum coverage provision (since that was the basis for the judgment below) and grant this petition to that limited extent.

b. The government agrees with petitioners that the Anti-Injunction Act does not bar petitioners' challenge to the minimum coverage provision, albeit for reasons different than those advanced by petitioners. The Anti-Injunction Act, with express exceptions not relevant here, provides 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). The purpose of the Anti-Injunction Act is to preserve the government's ability to assess and collect taxes with "a minimum of preenforcement judicial interference, and to require that the legal right to the disputed sums be determined in a suit for refund." *Bob Jones University* v. *Simon*, 416 U.S. 725, 736 (1974) (internal quotation marks and citation omitted). The Anti-Injunction Act, when applicable, bars any suit seeking relief that "would necessarily preclude" the assessment or collection of taxes under the Internal Revenue Code, regardless of the plaintiff's professed motivation for the suit. *Id.* at 731-732.

In the view of the court of appeals in this case, any "exaction constitutes a 'tax' for purposes of the [Anti-Injunction Act] so long as the method prescribed for its assessment conforms to the process of tax enforcement." Pet. App. 23a-24a. That interpretation of the scope of

the Anti-Injunction Act is overly broad, as demonstrated by this Court's decision in *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008). In that case, the Court observed that 26 U.S.C. 7422, "the primary statute governing the refund process, is written much more broadly" than the Anti-Injunction Act. 553 U.S. at 13. While the Anti-Injunction Act "applies to suits 'restraining the assessment or collection of any *tax*," *ibid.* (quoting 26 U.S.C. 7421(a)), the refund statute refers to suits seeking "the recovery of any internal revenue *tax* alleged to have been erroneously or illegally assessed or collected, or of any *penalty* claimed to have been collected without authority, or of any *sum* alleged to have been excessive or in any manner wrongfully collected," 26 U.S.C. 7422(a) (emphases added). If the court of appeals were correct that the Anti-Injunction Act necessarily encompasses any "exaction" under the Internal Revenue Code, Pet. App. 23a-24a, then, contrary to this Court's conclusion in *Clintwood Elkhorn Mining Co.*, the refund statute's addition of the terms "penalty" and "any sum" would not render that statute "much * * * broad[er]." 553 U.S. at 13.

Thus, as *Clintwood Elkhorn Mining Co.* indicates, it is necessary to examine the Anti-Injunction Act's text when determining its applicability. By its terms, the statute bars suits seeking to restrain the "assessment and collection of any *tax*." 26 U.S.C. 7421(a) (emphasis added). In the Internal Revenue Code, Congress has provided precise instructions as to the circumstances in which exactions designated as "penalties" will be subject to all of the statutory rules, including the Anti-Injunction Act, that the Internal Revenue Code applies to "taxes." See Pet. App. 74a (Davis, J., dissenting) ("When Congress has wished 'penalties' to be treated as

'taxes,' it has said so expressly."). For example, Section 6671(a) of the Internal Revenue Code provides that, "[e]xcept as otherwise provided, any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter [B of Chapter 68]." 26 U.S.C. 6671(a). In addition, 26 U.S.C. 6665(a)(2) applies the same rule to penalties under all of Chapter 68.

Because of those provisions, the Anti-Injunction Act bars a suit to restrain assessment or collection of penalties established under Chapter 68 of the Internal Revenue Code. See *Warren* v. *United States*, 874 F.2d 280, 282 (5th Cir. 1989) ("The reference in the Anti-Injunction Act to 'tax' is deemed also to refer to *certain* penalties.") (emphasis added) (citing 26 U.S.C. 6671(a)); *Souther* v. *Mihlbachler*, 701 F.2d 131, 132 (10th Cir. 1983) (per curiam) ("[T]he penalties imposed pursuant to § 6682 are 'taxes' under [the Anti-Injunction Act]. Such penalties are taxes by definition and are to be treated as taxes.") (citing 26 U.S.C. 6671(a)); *Botta* v. *Scanlon*, 314 F.2d 392, 393 (2d Cir. 1963) ("The appellants argue that assessments under § 6672 are in the nature of a penalty and that they do not come within the prohibition of [the Anti-Injunction Act] against suits to restrain the collection of a 'tax.' But it is expressly provided in § 6671(a) of the Code that 'except as otherwise provided, any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter [including § 6672].' There is no provision to the contrary applicable to § 6672.") (second set of brackets in original).

The penalty established by the minimum coverage provision, however, does not appear in Chapter 68 of the Internal Revenue Code. It appears in Chapter 48 of

Subtitle D (26 U.S.C.A. 5000A). The "penalty" it imposes is therefore not a "tax" for purposes of the Anti-Injunction Act.

To be sure, Section 5000A of the Internal Revenue Code, as added by the Affordable Care Act, directs that the penalty under the minimum coverage provision "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68," 26 U.S.C.A. 5000A(g)(1), and such penalties are in turn "assessed and collected in the same manner as taxes." 26 U.S.C. 6671(a). The minimum coverage provision thus incorporates provisions in the Internal Revenue Code that address the Secretary of the Treasury's authority to make assessments of taxes, see 26 U.S.C. 6201 *et seq.* (Ch. 63), and his authority to collect taxes upon assessment, see 26 U.S.C. 6301 *et seq.* (Ch. 64), subject to express limitations on that authority specified in the minimum coverage provision itself, 26 U.S.C.A 5000A(g)(2).

The cross-reference to the Secretary's assessment and collection authority, however, does not incorporate the Anti-Injunction Act. The Anti-Injunction Act is not a provision that instructs the Secretary how to apply his assessment or collection authority; those subjects are addressed in considerable detail elsewhere in the Internal Revenue Code. The Anti-Injunction Act instead addresses the timing of judicial review of issues bearing on liability under the Code. 26 U.S.C. 7421(a). Accordingly, as the Sixth Circuit explained, Sections 5000A(g)(1), 6665(a)(2), 6671(a), and 7421(a) are "most natural[ly] read[]" as references to "the mechanisms the Internal Revenue Service employs to enforce penalties," but not to incorporate other provisions such as the Anti-Injunction Act. *Thomas More Law Ctr.*, 651 F.3d at 540;

accord Pet. App. 196a (Davis, J., dissenting) ("Instructions to assess and collect the Act's exactions in the same manner as the penalties under § 6671 does not convey anything about the jurisdiction of a court to hear a suit challenging that assessment and collection.").

The fact that the Secretary of the Treasury will assess and collect the tax penalty under the minimum coverage provision in the same manner as assessments expressly referred to as taxes under the Code does provide further confirmation, however, that the penalty is a tax in its practical operation, and that it represents a valid exercise by Congress of its taxing power under Article I of the Constitution. See *Jefferson County* v. *Acker*, 527 U.S. 423, 439-440 (1999) (exaction denominated as "license fee" had the "practical impact" of a tax, in part because it was collected in the manner of a tax); 11-398 Pet. 26-29. Labels are immaterial in "passing on the constitutionality of a tax law," *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941), and if Section 5000A can reasonably be interpreted as a valid exercise of the taxing power, then the courts must adopt that interpretation, even if another interpretation of congressional intent is also reasonable, see *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). By contrast, the use of precise statutory terms can be dispositive on matters of statutory interpretation, such as that involving the applicability of the Anti-Injunction Act under the complex statutory framework of the Internal Revenue Code. Of particular relevance here, Congress need not provide that every exercise of its taxing power under the Constitution is subject to the statutory bar in the Anti-Injunction Act, and it did not do so in this case. See Pet. App. 158a-159a n.2 (Davis, J., dissenting) ("This question of statu-

tory interpretation is wholly distinct from the constitutional question concerning Congress's power under the Taxing and Spending Clause to enact" the minimum coverage and employer responsibility provisions.) (citation omitted).

3. Petitioners' challenge to the employer responsibility provision (Pet. 22-31, 38-42) does not merit review.

a. The court of appeals correctly held that petitioners' request for pre-enforcement review of the employer responsibility provision is barred by the Anti-Injunction Act, and there is no conflict among the circuits on that question. The employer responsibility provision imposes, under specified circumstances, an "assessable payment" on large employers that do not offer their full-time employees adequate health insurance. See 26 U.S.C.A. 4980H(a); see also 26 U.S.C.A. 4980H(b). The Act expressly refers to that assessable payment as a "tax," 26 U.S.C.A. 4980H(b)(2) and (c)(7), and as noted above, the Anti-Injunction Act applies to any "tax," 26 U.S.C. 7421(a). In this respect, the employer responsibility provision differs from the minimum coverage provision, 26 U.S.C.A. 5000A, which does not refer to the exaction it imposes as a "tax," but rather only as a "penalty."[8]

[8] In its opening brief in the court of appeals, the government did not raise the Anti-Injunction Act as a barrier to review of petitioners' challenge to the minimum coverage provision or the employer responsibility provision. See Gov't C.A. Br. 5 n.1. In the government's supplemental brief to the court of appeals, it addressed only the applicability of the Anti-Injunction Act to pre-enforcement challenges to the minimum coverage provision. As explained in our response (at 18-21) to the States' and private parties' certiorari petitions in the *Florida* case, and in this response, the government believes that the Anti-Injunction Act bars pre-enforcement challenges to the employer responsibility provision, but not the minimum coverage provision.

Petitioners contend that the Anti-Injunction Act does not bar their challenge to the employer responsibility provision because that provision is a "regulatory" provision that is not truly "revenue-generating." Pet. 15, 29. The court of appeals correctly rejected that rationale for finding the Anti-Injunction Act inapplicable, because this Court has made clear that the distinctions between "regulatory and revenue-raising taxes" have been "abandoned" for purposes of the Anti-Injunction Act. Pet. App. 49a (quoting *Bob Jones University*, 416 U.S. at 741 n.12).

Petitioners also contend that they challenge only the supposed "mandate[]" for employers to offer health insurance, not the associated penalties, and that their suit is therefore not "for the purpose of" restraining the assessment or collection of a tax. Pet. 13, 16. The court of appeals correctly rejected that argument as well. No matter how petitioners characterize their motives in bringing this suit, a ruling in their favor "would necessarily preclude" the Secretary of the Treasury from assessing or collecting the assessable payment under the employer responsibility provision, and so the Anti-Injunction Act bars their suit. *Bob Jones University*, 416 U.S. at 731-732. Petitioners thus must pursue the remedy that Congress made available to them if they wish to challenge the employer responsibility provision: they must pay any tax imposed by that provision and pursue their claim in a refund action. See 26 U.S.C. 7422.[9]

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[9] To the extent petitioners make these same arguments against applicability of the Anti-Injunction Act to their pre-enforcement challenge to the minimum coverage provision, see Pet. 13, 15, those arguments are incorrect for the same reasons.

b. Even apart from the threshold barrier to review posed by the Anti-Injunction Act, petitioners' challenge to the employer responsibility provision would not merit review. The provision is plainly constitutional as an exercise of Congress's commerce power and its taxing power. There is no conflict among the circuits on this question; as petitioners acknowledge, in "no case but this one" has a party challenged on appeal Congress's Article I power to enact this provision as a general matter. Pet. 6; cf. Fed. Gov't Br. in Resp. at 18-26, *National Fed'n of Indep. Bus.* v. *Sebelius*, Nos. 11-393 & 11-400 (Oct. 17, 2011) (discussing States' distinct Tenth Amendment challenge to the employer responsibility provision as applied to States as employers).

Under certain circumstances, the employer responsibility provision imposes an assessable payment on large employers that fail to offer their full-time employees adequate health insurance coverage. 26 U.S.C.A. 4980H. Congress enacted that provision on the basis of an assessment that "employers who do not offer health insurance to their workers gain an unfair economic advantage relative to those employers who do provide coverage, and millions of hard-working Americans and their families are left without health insurance." H.R. Rep. No. 443, 111th Cong., 2d Sess. 985 (2010). This state of affairs results in "a vicious cycle because these uninsured workers turn to emergency rooms for health care which in turn increases costs for employers and families with health insurance," making it more difficult for employers to provide coverage. *Ibid.*

It has been settled since *United States* v. *Darby*, 312 U.S. 100 (1941), and *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), that Congress's commerce power authorizes the regulation of wages, hours, and

other terms of employment. And Congress has long used that authority to regulate the content and availability of group health insurance plans offered by employers under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, and other statutes. Petitioners contend that under *Darby* and *Jones & Laughlin Steel*, Congress "can regulate working conditions, including wages and hours," but cannot regulate "fringe benefits." Pet. 40. But given that "fringe benefits" can readily be regarded as a form of wages, petitioners' distinction does not make economic sense, and they fail to offer any constitutionally relevant distinction between the two categories of employee compensation. See Pet. App. 136a-139a (Davis, J., dissenting).

c. The employer responsibility provision is also authorized by Congress's taxing power. See Pet. App. 61a-65a (Wynn, J., concurring). The taxing power is "comprehensive," *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 581-582 (1937), and, in "passing on the constitutionality of a tax law," a court is "concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Nelson*, 312 U.S. at 363 (quoting *Lawrence* v. *State Tax Comm'n*, 286 U.S. 276, 280 (1932)).

The "practical operation" of the employer responsibility provision is as a tax. *Nelson*, 312 U.S. at 363 (quoting *Lawrence*, 286 U.S. at 280). Under certain circumstances, the provision imposes an "assessable payment" on large employers that do not provide adequate health insurance coverage to their full-time employees. 26 U.S.C.A. 4980H(a); see also 26 U.S.C.A. 4980H(b). The provision is administered exclusively by the Internal Revenue Service, see 26 U.S.C.A. 4980H(d), and it will unquestionably be "productive of some revenue,"

Sonzinsky v. *United States*, 300 U.S. 506, 514 (1937). See also Pet. App. 62a (Wynn, J., concurring) (citing Letter from Douglas W. Elmendorf, Director, CBO, to Hon. Nancy Pelosi, Speaker, U.S. House of Representatives, Tbl. 4 (Mar. 20, 2010)).

In fact, the employer responsibility provision is just the latest example of Congress's use of its taxing power to encourage employers to provide health insurance. See CBO, *Key Issues in Analyzing Major Health Proposals* 29 (2008). For example, unlike most other forms of employee compensation, employer payments of health insurance premiums are generally excluded from an employee's income for purposes of both federal income tax and payroll taxes. See 26 U.S.C. 106. In addition, employers can deduct such premium payments as business expenses. 26 U.S.C. 162 (2006 & Supp. III 2009). It is immaterial that Congress had a regulatory motivation in enacting the employer responsibility provision, just as it did when enacting the pre-existing provisions in the Internal Revenue Code encouraging employer-provided health insurance. A tax "does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed," even if "the revenue purpose of the tax may be secondary." *United States* v. *Sanchez*, 340 U.S. 42, 44 (1950).

Because the Anti-Injunction Act poses a threshold barrier to petitioners' pre-enforcement challenge to the employer responsibility provision, and because that challenge fails in any event under settled precedent involving Congress's commerce and taxing power, this Court's review is unwarranted.

CONCLUSION

The Court should hold the petition in this case pending the disposition of the government's petition for a writ of certiorari in *Department of Health & Human Services* v. *Florida*, No. 11-398 (filed Sept. 28, 2011), and then dispose of this petition as appropriate in light of the Court's decision in that case. In the alternative, the Court could grant this petition, limited to the question whether the Anti-Injunction Act bars pre-enforcement challenges to the minimum coverage provision.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

TONY WEST
Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
SAMANTHA L. CHAIFETZ
DANA KAERSVANG
JOEL MCELVAIN
Attorneys

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