No. 11-679

In the Supreme Court of the United States

SUSAN SEVEN-SKY, AKA SUSAN SEVENSKY, ET AL.,
PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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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 questions presented are:

1. Whether the court of appeals correctly concluded that Congress had the power under Article I of the Constitution to enact the minimum coverage provision.

2. Whether the court of appeals correctly concluded that petitioners did not state a claim that the minimum coverage provision will violate their rights under the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-127) is reported at 661 F.3d 1. The opinion of the district court (Pet. App. 128-194) is reported at 766 F. Supp. 2d 16.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2011. The petition for a writ of certiorari was filed on November 30, 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, and, under certain circumstances, will require large employers that do not offer adequate coverage to full-time employees to make assessable payments, 26 U.S.C.A. 4980H.

Second, the Act provides for the creation of health insurance exchanges to allow individuals, families, and small businesses to leverage their collective buying

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

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 obtaining and maintaining health insurance. Beginning in 2014, the Act will bar insurers from refusing coverage because of a pre-existing medical condition, see, *e.g.*, 42 U.S.C.A. 300gg-1, 300gg-3, or charging higher premiums based on a person's medical history, see, *e.g.*, 42 U.S.C.A. 300gg(a)(1).

Fifth, the Act provides that, beginning in 2014, nonexempted federal income taxpayers who fail to maintain a minimum level of health insurance coverage for themselves or their dependents will owe a tax penalty for each month in the taxable year during which minimum coverage is not maintained. 26 U.S.C.A. 5000A. The amount of the penalty will be calculated as a percentage of household income for federal income tax purposes, subject to a floor and a cap. 26 U.S.C.A. 5000A(c). It will be reported on the taxpayer's federal income tax return for the taxable year, and assessed and collected by the Internal Revenue Service under the Internal Revenue Code in the same manner as assessable penalties. 26 U.S.C.A. 5000A(b)(2) and (g).

Individuals who are not required to file federal income tax returns for a given year are exempt from the penalty. Congress also exempted individuals whose premium payments would exceed 8% of their household income, individuals who establish that obtaining coverage would be a hardship pursuant to standards to be set by the Secretary of HHS, and members of recognized Indian tribes. 26 U.S.C.A. 5000A(e). Individuals who meet specified criteria for religious exemptions, individuals who are incarcerated, and undocumented aliens are not subject to the minimum coverage provision. 26 U.S.C.A. 5000A(d).

Various types of insurance coverage are deemed to satisfy the minimum coverage requirement. 26 U.S.C.A. 5000A(f). For example, minimum coverage includes participation in government-sponsored programs such as Medicare, Medicaid, CHIP, and programs offered by the Departments of Defense and Veterans Affairs. 26 U.S.C.A. 5000A(f)(1)(A). It also includes employer-sponsored plans and plans offered in the non-group market. 26 U.S.C.A. 5000A(f)(1)(B)-(D); 42 U.S.C.A 18011.

2. a. Petitioners are four individuals who currently do not maintain health insurance coverage. They brought this suit in the United States District Court for the District of Columbia to challenge the minimum coverage provision. They do not dispute that they have participated in the market for health care services, but maintain that they "do not want or need" health insurance. Pet. 5; see Pet. App. 234-246. They contend that Congress may not override their preferences to pay for health care expenses as they arise by requiring them to obtain minimum health insurance coverage, and they urge that the minimum coverage provision exceeds Con-

gress's commerce and taxing powers. *Id.* at 230-231, 238, 241, 244.

Two of the petitioners also contend that application of the minimum coverage provision to them will violate the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* Pet. App. 230, 234-241. For example, petitioner Lee alleges that he "has a sincerely held religious belief that God will provide for his physical, spiritual, and financial well-being" and that "[b]eing forced to buy health insurance conflicts with Lee's religious faith because he believes that he would be indicating that he needs a backup plan and is not really sure whether God will, in fact, provide for his needs." *Id.* at 235; see *id.* at 239 (same allegation by petitioner Seven-Sky).

The district court upheld the minimum coverage provision as a valid exercise of Congress's commerce power. Pet. App. 154-183. The court also dismissed the claim that the provision will violate RFRA on alternative grounds. *Id.* at 187-191.

First, the court held that petitioners' allegations of a conflict between the minimum coverage provision and their religious convictions "does not rise to the level of a substantial burden" as required for relief under RFRA. Pet. App. 189. The court concluded that petitioners had "failed to allege any facts demonstrating that [the] conflict [they asserted] is more than a *de minimis* burden on their Christian faith." *Ibid.* Moreover, petitioners "routinely contribute to other forms of insurance, such as Medicare, Social Security, and unemployment taxes, which present the same conflict with

their belief that God will provide for their medical and financial needs." *Id.* at 190.[2]

Second, the district court held that, even if the minimum coverage provision "does substantially burden the exercise of [petitioners'] Christian faith, [they] have failed to state a claim for relief under RFRA because [the minimum coverage provision] serves a compelling public interest and is the least restrictive means of furthering that interest." Pet. App. 190 (citing 42 U.S.C. 2000bb-1(b)). The Court noted that Congress had a "compelling interest" in "reforming the health care market by increasing coverage" and that petitioners had failed to suggest any less restrictive means of attaining Congress's objective. *Id.* at 190-191.

b. The court of appeals affirmed. Pet. App. 1-127. The court first concluded that the Anti-Injunction Act, 26 U.S.C. 7421, does not bar petitioners' claim. See Pet. App. 9-30. It then upheld the minimum coverage provision as a valid exercise of Congress's commerce powers. See *id.* at 30-46.

The court rejected petitioners' contention that the minimum coverage provision impermissibly regulates persons who are presently "inactive" in the health insurance market. Pet. App. 34-35. The court noted that there is no basis for petitioners' argument about "inactivity" in the text of the Constitution and that imposing such a limitation would be both unprecedented and unworkable. *Id.* at 35-39. The court explained that the

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[2] The district court also observed that it was "unclear" how the minimum coverage provision "puts substantial pressure on [petitioners] to modify their behavior and to violate their belief, as it permits them to pay a shared responsibility payment in lieu of actually obtaining health insurance." Pet. App. 189. That observation about the allegations in petitioners' complaint was not necessary to the district court's holding.

limits on Congress's authority recognized in *United States* v. *Morrison*, 529 U.S. 598 (2000), and *United States* v. *Lopez*, 514 U.S. 549 (1995), are not implicated by the minimum coverage provision because it "certainly is focused on economic behavior" that "does substantially affect interstate commerce." Pet. App. 36-37.

The court concluded that here, much as in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), Congress reasonably determined that regulation of a class—the uninsured—was necessary because of their aggregate effect on an interstate market, Pet. App. 37-39, and "the lack of harm attributable to any particular uninsured individual, like their lack of overt participation in a market, is of no consequence," *id.* at 45; see *id.* at 43-45. The court also observed that the minimum coverage provision addresses a market that is "rather unique" "both because virtually everyone will enter or affect it, and because the uninsured inflict a disproportionate harm on the rest of the market as a result of their later consumption of health care services." *Id.* at 41; see *id.* at 35.

Given those characteristics, the court explained that "Congress, which would, in our minds, clearly have the power to impose insurance purchase conditions on persons who appeared at a hospital for medical services—as rather useless as that would be—is merely imposing the mandate in reasonable anticipation of virtually inevitable future transactions in interstate commerce." Pet. App. 39-40.

The court of appeals also affirmed the dismissal of the RFRA claim asserted by petitioners Seven-Sky and Lee. In a brief footnote, the court agreed with the district judge's determination that petitioners failed to allege facts showing that the minimum coverage provision

will substantially burden their religious exercise. Pet. App. 8-9 n.4.

c. Judge Kavanaugh dissented on the ground that the Anti-Injunction Act precluded reaching the merits of petitioners' claims. Pet. App. 47-125.

3. On November 14, 2011, the Court granted certiorari on the question "[w]hether Congress had the power under Article I of the Constitution to enact the minimum coverage provision," and on the antecedent question "[w]hether the [pre-enforcement] suit brought by respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a)." *Department of Health & Human Servs.* v. *Florida*, No. 11-398; Gov't Pet. at i, *Department of Health & Human Servs.* v. *Florida*, No. 11-398 (filed Sept. 28, 2011). Opening briefs on those two questions are due on January 6, 2012, and the Court has scheduled oral argument on them for March 26 and 27, 2012.[3]

In addition to this petition, several others have been filed presenting questions regarding the constitutionality of the minimum coverage provision and threshold questions of whether the claims can be adjudicated. See *Liberty University* v. *Geithner*, No. 11-438 (Oct. 7, 2011); *Virginia* v. *Sebelius*, No. 11-420 (Sept. 30, 2011); *Thomas More Law Ctr.* v. *Obama*, No. 11-117 (July 26, 2011). The federal government has suggested that the Court hold those petitions pending the disposition of

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[3] The Court also granted petitions for writs of certiorari to consider severability issues and challenges to the Act's expansion of Medicaid eligibility. See *Florida* v. *Department of Health & Human Servs.*, No. 11-400 (Nov. 14, 2011); *National Fed'n of Indep. Bus.* v. *Sebelius*, No. 11-393 (Nov. 14, 2011). Oral argument on those questions is scheduled for March 28, 2012.

Department of Health & Human Services v. *Florida* and then dispose of them as appropriate in light of the Court's decision in that case.

DISCUSSION

Petitioners contend that Congress did not have the power under Article I of the Constitution to enact the minimum coverage provision. Pet. 9-15. Two of the petitioners also assert that the minimum coverage provision will violate their rights under the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* Pet. 15-19.

1. The first of these issues—the constitutionality of the minimum coverage provision—is clearly an important one, and this Court has granted certiorari to address it in *Department of Health & Human Services* v. *Florida,* No. 11-398. There is no need to grant the petition in this case to consider that same question. Instead, this petition should be held (like the petitions in *Liberty University*, *Thomas More Law Center*, and *Virginia*) and then disposed of as is appropriate after the Court's decision in *Florida.* Petitioners briefly contend that "review of the D.C. Circuit's decision in tandem with the Florida decision is appropriate" (Pet. 2), but they fail to explain why that is so. In any event, simultaneous consideration is not feasible because the due dates for briefs in *Florida* begin on January 6, 2012.

2. The second question presented by the petition—whether the minimum coverage provision will violate the rights of petitioners Seven-Sky and Lee under RFRA—does not merit this Court's review. The court of appeals correctly rejected that claim, and its decision—the first by a circuit court to address an as-applied challenge to the minimum coverage provision under

RFRA—does not conflict with any decision of this Court or of any other court of appeals. Moreover, the court's decision turned on the fact-specific particulars of petitioners' own religious beliefs as alleged in their complaint, and petitioners do not allege it has broader significance. Further review is not warranted.

Congress exempted from the minimum coverage requirement individuals who qualify for specified "[r]eligious exemptions." 26 U.S.C.A. 5000A(d)(2). The Affordable Care Act's "[r]eligious conscience exemption" incorporates a longstanding provision of the Internal Revenue Code that applies to individuals who are members of religious sects that "make provision for their dependent members" and who are "conscientiously opposed to acceptance of the benefits of any private or public insurance" (including Medicare and Social Security benefits). 26 U.S.C.A. 1402(g)(1) (incorporated by Section 5000A(d)(2)(A)). In addition, the Affordable Care Act's "[h]ealth care sharing ministry" provision exempts members of organizations that are tax-exempt under Section 501(c)(3) of the Internal Revenue Code and the members of which share a common set of religious or ethical beliefs, share medical expenses among themselves in accordance with those beliefs, and retain membership even after they develop a medical condition. 26 U.S.C.A. 5000A(d)(2)(B).

Petitioners Seven-Sky and Lee do not claim to qualify for either of these statutory exemptions that Congress specifically provided in the Affordable Care Act itself. They urge, instead, that they are entitled to their own exemption under RFRA, which prohibits the federal government from imposing a substantial burden on a person's exercise of religion unless the burden is the least restrictive means of furthering a compelling gov-

ernmental interest. 42 U.S.C. 2000bb-1; 42 U.S.C. 2000bb(b). A substantial burden upon religious exercise exists when government action "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas* v. *Review Bd.*, 450 U.S. 707, 718 (1981). As courts have recognized, the claimed "beliefs must be sincere and the practices at issue must be of a religious nature.'" *Levitan* v. *Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002) (citing *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531 (1993)). "An inconsequential or *de minimis* burden on religious practice does not rise to this level, nor does a burden on activity unimportant to the adherent's religious scheme." *Kaemmerling* v. *Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (citing *Levitan*, 281 F.3d at 1320-1321).

The court of appeals and district court correctly concluded that Seven-Sky and Lee failed to allege facts showing that the minimum coverage provision will impose a substantial burden on their religious exercise. Pet. App. 8-9, n.4; *id.* at 187-191. Although Seven-Sky and Lee alleged that they will not enroll in Medicare, entitlement to Medicare Part A is automatic for anyone who is entitled to Social Security benefits. *Id.* at 143 (citing 42 U.S.C. 426(a)). And petitioners did not allege that they would forgo Social Security insurance benefits. Indeed, they "routinely contribute to other forms of insurance, such as Medicare, Social Security, and unemployment taxes, which present the same [asserted] conflict with their belief that God will provide for their medical and financial needs." *Id.* at 190. If paying Social Security taxes and receiving benefits under that program (and participating in other insurance programs) do not substantially burden their belief that "God will pro-

vide for [their] physical, spiritual, and financial well-being" (*id.* at 235), then purchasing health insurance would not either.

To the extent petitioners contend their own particular religious beliefs distinguish between private and government-provided insurance, cf. Pet. 19, a RFRA claim based on the specifics of these two petitioners' personal religious doctrine would not merit this Court's review.

Moreover, the district court dismissed petitioner's RFRA claim on an additional ground, which presents an alternative ground for affirmance. As the district court explained, even if the minimum coverage provision substantially burdened petitioners' religious exercise, their claim would still fail because the provision "serves a compelling public interest and is the least restrictive means of furthering that interest." Pet. App. 190 (citing 42 U.S.C. 2000bb-1(b)). First, "Congress's compelling interest—reforming the health care market by increasing coverage—applies to [petitioners], just as it applies to all individuals." *Id.* at 190-191. Second, the minimum coverage provision is "the least restrictive means of furthering this compelling interest." *Id.* at 191. Indeed, "when pressed at oral argument to name a less restrictive means of lowering health insurance premiums or otherwise improving access to health care, [petitioners] could not do so." *Ibid.*

The district court's alternative holding is consistent with the conclusions of courts that have repeatedly declined to exempt persons who assert religious objections to Social Security but fall outside of the statutory exceptions to that program provided by Congress. See, *e.g.*, *United States* v. *Lee*, 455 U.S. 252 (1982); *Droz* v. *Commissioner*, 48 F.3d 1120, 1123-1124 (9th Cir. 1995), cert.

denied, 516 U.S. 1042 (1996). As the Court explained in *Lee*, "mandatory participation is indispensable to the fiscal vitality" of a "comprehensive insurance system." 455 U.S. at 258.

Congress crafted an express religion-based exemption to Social Security (26 U.S.C. 1402(g)) to exempt only those religious sects that "provide[] for their own needy," *Varga* v. *United States*, 467 F. Supp. 1113, 1117 (D. Md. 1979), aff'd, 618 F.2d 106 (4th Cir. 1980), and courts have recognized that permitting individuals who do not belong to such groups (and thus are not "provided for" in this way) "to opt out" would "threaten the integrity" of the scheme, *Droz*, 48 F.3d at 1123. Likewise, here, Congress established a comprehensive scheme, and exempted individuals who belong to groups with established records of providing for the medical needs of their members and the members of which have a demonstrated history of maintaining membership even after they become ill. Congress was not required to exempt Seven-Sky or Lee, who do not belong to such a group and who thus fail to provide any assurance that they will not consume health care services for which they cannot pay.

CONCLUSION

The Court should hold the petition in this case pending the disposition of *Department of Health & Human Services* v. *Florida*, No. 11-398 (oral argument scheduled for March 26 and 27, 2012), and then dispose of it as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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