No. 14-350

In the Supreme Court of the United States

ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC., ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in rejecting petitioners' challenge to a Social Security Administration handbook as foreclosed by directly applicable circuit precedent without first resolving the government's jurisdictional objections.

2. Whether the district court reasonably concluded that petitioners forfeited their claim that the enactment of the Patient Protection and Affordable Care Act's individual-coverage provision, 26 U.S.C. 5000A, violated the Origination Clause.

3. Whether the court of appeals erred in holding that petitioners' challenges to an interim final regulation were mooted by the issuance of a revised regulation following notice-and-comment rulemaking.

4. Whether the court of appeals erred in rejecting petitioners' claim that the individual-coverage provision, which requires most people to maintain health coverage or pay a tax penalty, constitutes a taking of private property in violation of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 746 F.3d 468. The opinion of the district court (Pet. App. 12a-56a) is reported at 901 F. Supp. 2d 19.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2014. A petition for rehearing was denied on April 28, 2014 (Pet. App. 57a). On July 18, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 25, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are two organizations of health care providers. They filed this action in the United States District Court for the District of Columbia seeking to raise a variety of challenges to the Patient Protection and Affordable Care Act (Affordable Care Act or Act), Pub. L. No. 111-148, 124 Stat. 119,[1] to an interim final regulation governing certain Medicare payments, and to internal handbooks used by the Department of Health and Human Services (HHS) and the Social Security Administration (SSA). The district court dismissed petitioners' claims for lack of standing or for failure to state a claim. Pet. App. 12a-56a.

a. As relevant here, the district court first held that petitioners lacked standing to challenge provisions of an SSA handbook describing the relationship between Social Security retirement benefits and Medicare Part A benefits. Pet. App. 18a-29a. Medicare Part A provides insurance coverage for hospital and certain related services. *Id.* at 19a. By statute, every individual over age 65 who is entitled to Social Security retirement benefits is also entitled to Medicare Part A benefits, though individuals are not required to use the Medicare benefits to which they are entitled. *Ibid.* (citing 42 U.S.C. 426(a)). An individual may also avoid entitlement to Medicare Part A by choosing not to apply for Social Security benefits or by withdrawing a previously filed application and repaying any benefits received. *Ibid.* (citing 42 U.S.C. 426(a) and 20 C.F.R. 404.640).

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

The Social Security Program Operations Manual System (POMS) is an SSA handbook intended for internal use by employees processing claims for benefits. Pet. App. 19a. Consistent with the statutory and regulatory scheme, the POMS explains that an individual entitled to Social Security benefits is automatically entitled to Medicare Part A benefits as well, but that an individual can avoid entitlement to Social Security benefits by not applying for them or by withdrawing a previously filed application and repaying any benefits received. *Id.* at 19a-20a.

Petitioners challenged those POMS provisions, asserting that individuals have a right to disclaim their legal entitlement to Medicare Part A benefits while continuing to receive Social Security benefits. Pet. App. 23a. The district court held that petitioners lacked Article III standing to bring that claim. *Id.* at 23a-29a. The court also held, in the alternative, that petitioners' claim failed on the merits because the D.C. Circuit had "squarely rejected" an identical claim in *Hall* v. *Sebelius*, 667 F.3d 1293, 1294 (2012), cert. denied, 133 S. Ct. 840 (2013). Pet. App. 29a n.3.

b. The district court next declined to address petitioners' claim that Congress violated the Origination Clause in enacting the Affordable Care Act's individual-coverage provision, which imposes a tax penalty on people who fail to maintain health coverage. Pet. App. 36a-38a; see 26 U.S.C. 5000A. The Origination Clause provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. Const. Art. I, § 7, Cl. 1. The Affordable Care Act began as a House-passed revenue measure, but the Senate amended the

House bill by striking its text and replacing it with the text that became the Act, including the individual-coverage provision. See *Sissel* v. *HHS*, 951 F. Supp. 2d 159, 161-162 (D.D.C. 2013), aff'd, 760 F.3d 1 (D.C. Cir. 2014). Petitioners contended that the individual-coverage provision qualifies as a "Bill[] for raising Revenue" and that the procedure used to enact it violated the Origination Clause's requirements. But petitioners raised that claim for the first time in a supplemental brief addressing this Court's decision in *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566 (2012) (*NFIB*). Pet. App. 36a. That brief was filed two years into the litigation and after the government's motion to dismiss had been fully briefed, and the district court therefore held that petitioners had forfeited their Origination Clause claim "by failing to assert it in their complaint or opposition to the [government's] motion to dismiss." *Ibid.*

c. The district court rejected petitioners' challenges to an interim final regulation governing certain Medicare payments and to related provisions of a Medicare claims-processing manual. Pet. App. 40a-54a. The manual provisions, which are known as "change requests," were issued in 2009. *Id.* at 43a. They enforce longstanding Medicare requirements by providing that a claim for services ordered or referred by a physician will not be paid by Medicare unless the claim includes a federally assigned identifying number for the ordering or referring physician and that physician's information is on file in an HHS database. *Id.* at 43a-44a. In March 2010, the Affordable Care Act "essentially ratified" that requirement and directed HHS to promulgate an implementing regulation. *Id.*

at 44a (citing Affordable Care Act §§ 6402(a), 6405(a) and (c), 124 Stat. 756, 768-769). In May 2010, HHS promulgated the required regulation as an interim final rule accompanied by a request for public comment. 75 Fed. Reg. 24,437 (May 5, 2010).

Petitioners argued that HHS violated the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, by adopting the change requests and interim final regulation without notice-and-comment procedures, and further argued that HHS did not have authority to adopt the requirements at issue. Pet. App. 46a-50a. The district court held that petitioners lacked standing to assert some of their challenges, *id.* at 45a-50a, and that their remaining arguments failed to state a claim upon which relief could be granted because the relevant statutes, including the Affordable Care Act, "supply ample authority" for the challenged requirements, *id.* at 53a.

d. Finally, the district court rejected petitioners' claim that the Affordable Care Act's individual-coverage provision violates the Just Compensation Clause of the Fifth Amendment. Pet. App. 38a-40a. This Court upheld the individual-coverage provision in *NFIB*, holding that "Congress had the power to impose the exaction in [Section] 5000A under the taxing power." 132 S. Ct. at 2598. The district court concluded that *NFIB* foreclosed petitioners' takings challenge in light of longstanding precedent holding that a tax cannot be an unconstitutional taking unless it is "so arbitrary as to constrain the conclusion that it was not the exertion of taxation, but a confiscation of property." Pet. App. 38a-39a (quoting *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 24 (1916)).

2. The court of appeals affirmed. Pet. App. 1a-11a.

a. The court of appeals held that its decision in *Hall* "clearly foreclosed" petitioners' challenge to the POMS provisions stating that entitlement to Medicare Part A benefits follows automatically from entitlement to Social Security retirement benefits. Pet. App. 6a-8a. *Hall* held that "[c]itizens who receive Social Security benefits and are 65 or older are automatically entitled under federal law to Medicare Part A benefits" and that "[t]here is no statutory avenue for those who are 65 or older and receiving Social Security benefits to disclaim their legal entitlement to Medicare Part A benefits." 667 F.3d at 1294.

The court of appeals noted that the district court had rejected petitioners' claim for lack of standing, and that the government had also argued that the district court lacked jurisdiction under 42 U.S.C. 405(h). Pet. App. 7a.[2] The court of appeals recognized that *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998), "normally bars a court from addressing a substantive merits claim before addressing all jurisdictional vulnerabilities." Pet. App. 7a. But the court concluded that there is "an exception within *Steel Co.*" permitting a court to proceed directly to the merits if its decision is controlled by "prior or simultaneous rulings on an identical merits question."

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[2] Section 405(h) provides that claims arising under the Social Security and Medicare statutes cannot be brought under 28 U.S.C. 1331. Instead, parties bringing such claims must exhaust their administrative remedies and then seek judicial review of the agency's decision under 42 U.S.C. 405(g). See *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 10-20 (2000); see also 42 U.S.C. 1395ii (making Section 405(h) applicable to Medicare); *Heckler* v. *Ringer*, 466 U.S. 602, 614-615 (1984).

Ibid. (citing 523 U.S. at 98-101). The court found that exception satisfied here because its prior decision in *Hall* had resolved the same merits question and squarely foreclosed petitioners' claim. *Id.* at 6a-8a.

b. The court of appeals upheld the district court's conclusion that petitioners forfeited their Origination Clause claim. Pet. App. 4a-6a. The court explained that under the circumstances of this case, the district court was "perfectly reasonable in applying the standard rule" that a plaintiff forfeits an argument by failing to assert it in response to a motion to dismiss. *Id.* at 6a.

c. The court of appeals next held that petitioners' challenges to the interim final regulation and related change requests (manual provisions) addressing Medicare referrals had been rendered moot. Pet. App. 8a-9a. The court explained that the interim final regulation had been "superseded" by a final regulation issued after notice and comment, and that the final regulation included substantive changes made in response to the comments received. *Id.* at 8a.

d. Finally, the court of appeals rejected petitioners' claim that the individual-coverage provision violates the Just Compensation Clause because it is so "arbitrary" as to constitute "a confiscation of property" rather than a tax. Pet. App. 2a-4a (quoting *Brushaber*, 240 U.S. at 24-25). Petitioners argued that the individual-coverage provision results in a taking because it is part of a broader reform to the insurance market that, in their view, encourages "healthy private individuals" to purchase insurance subsidizing medical care for "unhealthy private individuals." *Id.* at 3a (quoting Pet. C.A. Br. 32). The court rejected petitioners' suggestion that "any redis-

tributive purpose sweeps an otherwise valid tax into the narrow group of measures condemned by *Brushaber*." *Id.* at 4a.

ARGUMENT

Petitioners renew (Pet. 7-36) their challenges to the POMS provisions addressing Medicare Part A, the Affordable Care Act, and the superseded interim final regulation and related change requests. The court of appeals correctly sustained the district court's dismissal of those claims, and its decision does not conflict with any decision by this Court or another court of appeals. No further review is warranted.

1. Petitioners first contend (Pet. 11-16) that the court of appeals erred and created a circuit conflict by rejecting their challenge to the POMS provisions without first resolving the government's jurisdictional objections. Those arguments rest on a fundamental misunderstanding of the court's decision.

The court of appeals rejected petitioners' claim based on *Hall* v. *Sebelius*, 667 F.3d 1293, 1294 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 840 (2013), which held that an identical challenge was foreclosed by the Social Security and Medicare statutes. Pet. App. 6a-8a. Petitioners note that, under *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), a court must assure itself of jurisdiction before proceeding to the merits. Petitioners assume that because the court of appeals disposed of their claim without resolving the government's jurisdictional objections, the court must have held that *Hall* rendered their claim so insubstantial as to fail to raise a federal question suf-

ficient to confer jurisdiction under 28 U.S.C. 1331.[3] Based on that understanding, petitioners assert (Pet. 8) that the court departed from decisions holding that only "a decision of *this Court*" can "render a question so insubstantial as not to present a federal question." They further argue (*ibid.*) that the court erred by failing to decide whether, if their claim was too insubstantial to invoke federal-question jurisdiction under Section 1331, the purported "unique equity jurisdiction" of the United States District Court for the District of Columbia "provided an *alternate* basis for jurisdiction."

Petitioners misconceive the basis for the decision below. The court of appeals did not dismiss their claim on the *jurisdictional* ground that it failed to raise a substantial federal question. Instead, the court rejected their claim *on the merits* under what it termed an "exception within *Steel Co.* for a *merits decision* resting entirely on prior or simultaneous rulings on an identical merits question." Pet. App. 7a (emphasis added) (citing *Steel Co.*, 523 U.S. at 98-101). Other courts of appeals have likewise interpreted *Steel Co.*—and this Court's decisions in *Norton* v. *Mathews*, 427 U.S. 524, 530-531 (1976), and *Secretary of Navy* v. *Avrech*, 418 U.S. 676, 678 (1974) (per curiam), which *Steel Co.* discussed—to permit a court to proceed to the merits despite the existence of unresolved jurisdictional questions "where the outcome of

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[3] "Federal courts lack subject-matter jurisdiction [under Section 1331] when an asserted federal claim is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 628 n.3 (2009) (citation and internal quotation marks omitted).

[an] appeal is foreordained by circuit precedent on a merits issue." *Rivera-Martinez* v. *Ashcroft*, 389 F.3d 207, 209-210 n.7 (1st Cir. 2004) (per curiam), cert. denied, 545 U.S. 1142 (2005); see also, *e.g.*, *Center for Reprod. Law & Policy* v. *Bush*, 304 F.3d 183, 194 (2d Cir. 2002) (Sotomayor, J.) ("[W]here, as here, * * * a controlling decision of this Court has already entertained and rejected the same constitutional challenge to the same provision, the Court may dispose of the case on the merits without addressing a novel question of jurisdiction.").

Petitioners do not contend that the court of appeals erred by recognizing this exception to the jurisdiction-first rule under *Steel Co.*, and they do not cite any decision adopting a contrary reading of *Steel Co.*[4] In addition, because the court rejected petitioners' claim on the merits rather than for lack of jurisdiction under 28 U.S.C. 1331, their assertion (Pet. 8, 13-16) that the "unique equity jurisdiction" they believe the district court possessed provided an alternative basis for jurisdiction is beside the point. Finally, petitioners do not seek this Court's review of the court of appeals' holding that their claim fails on the merits—a conclusion that *Hall* correctly found to be compelled by the text of the relevant statutes, and one that this Court

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[4] All of the cases on which petitioners rely (Pet. 8, 12-13) addressed the circumstances under which a claim is too insubstantial to support jurisdiction; none of them addressed *Steel Co.* See *Hagans* v. *Lavine*, 415 U.S. 528, 536-539 (1974); *Goosby* v. *Osser*, 409 U.S. 512, 518-519 (1973); *Page* v. *Bartels*, 248 F.3d 175, 192 (3d Cir. 2001); *Holy Cross Coll., Inc.* v. *Louisiana High Sch. Athletic Ass'n*, 632 F.2d 1287, 1289 (5th Cir. 1980) (per curiam); *Molina-Crespo* v. *Califano*, 583 F.2d 572, 573-574 (1st Cir. 1978); *Knight* v. *Alsop*, 535 F.2d 466, 469-470 (8th Cir. 1976).

has already declined to review in *Hall* itself. See 133 S. Ct. 840 (2013).[5]

2. Petitioners next contend (Pet. 17-23) that the court of appeals erred in upholding the district court's finding that they forfeited their Origination Clause claim. That case-specific determination was correct and neither conflicts with any decision by another court of appeals nor presents any broader legal question warranting this Court's review.

Petitioners principally argue (Pet. 9, 22-23) that the district court's forfeiture holding contravened Federal Rule of Civil Procedure 15(b)(2), which provides that if "an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." By its terms, however, Rule 15(b)(2) applies to issues *tried* by consent; petitioners cite no authority applying it where, as here, the case is resolved on a motion to dismiss. Cf. *Harris* v. *Secretary, United States Dep't of Veterans Affairs*, 126 F.3d 339, 344 (D.C. Cir. 1997) ("[T]he case was decided on a motion for summary judgment, and so Rule 15(b) did not apply.").

In any event, Rule 15(b)(2) is irrelevant for the additional reason that the district court found petition-

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[5] There is no merit to petitioners' suggestion (Pet. 11, 13) that the court of appeals violated the Due Process Clause by rejecting their claim based on the result of earlier litigation in which they did not participate. The court's reliance on *Hall* was a routine application of *stare decisis*, and the decision on which petitioners rely expressly recognized the difference between binding a nonparty to the outcome of earlier litigation as a matter of "res judicata" (which can raise due process concerns) and deciding a subsequent case brought by a different party "under principles of *stare decisis*" (which does not). *South Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 167-168 (1999).

ers' Origination Clause claim forfeited not merely because they failed to plead it in their complaint, but also because they failed to assert it in "opposition to the [government's] motion to dismiss." Pet. App. 36a. As the court of appeal concluded, the district court was "perfectly reasonable in applying the standard rule inferring concession from gaps in a plaintiff's opposition to a motion to dismiss," *id.* at 6a, and petitioners cite no authority suggesting that Rule 15(b)(2) displaces that ordinary forfeiture rule.[6]

Petitioners also assert (Pet. 17-18) that their Origination Clause claim is not subject to forfeiture because it goes to the constitutionality of the Affordable Care Act's enactment and "the very existence of a supposedly enacted law is not subject to waiver." But ordinary principles of litigation forfeiture apply equally to constitutional claims; indeed, "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); see also, *e.g.*, *Liberty Univ., Inc.* v. *Lew*, 733 F.3d 72, 87 n.3 (4th Cir.) (holding that plaintiffs forfeited an Origination Clause challenge to the Affordable Care Act by failing to raise it in the district

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[6] The Rule 15 cases on which petitioner relies (Pet. 9, 22) all applied the rule to an issue omitted from the pleadings but litigated by consent at trial (or, in one case, an evidentiary hearing in a habeas proceeding). None addressed the sort of forfeiture at issue here. See *Banks* v. *Dretke*, 540 U.S. 668, 704-705 (2004) (habeas proceeding); *Clark* v. *Martinez*, 295 F.3d 809, 814-815 (8th Cir. 2002); *D. Federico Co.* v. *New Bedford Redev. Auth.*, 723 F.2d 122, 126 (1st Cir. 1983).

court or in initial briefing in the court of appeals), cert. denied, 134 S. Ct. 683 (2013).[7]

3. Petitioners contend (Pet. 8-9, 23-25) that their challenge to an interim regulation governing Medicare referrals and to related change requests (manual provisions) survived the promulgation of a revised final regulation. The court of appeals correctly rejected that argument, and its factbound application of mootness principles does not warrant further review.

The court of appeals correctly held that the notice-and-comment procedures accompanying the promulgation of the final rule mooted petitioners' claim that the issuance of the interim final regulation without public comment violated the Administrative Procedure Act. Pet. App. 8a. Petitioners "d[id] not dispute" that point below, *ibid.*, and they do not appear to dispute it in this Court. Instead, petitioners contend that their *substantive* challenge to the interim final regulation and change requests remain live. See

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[7] Although petitioners do not seek this Court's review of the merits of their Origination Clause claim, see Pet. ii., they assert in the body of the petition (at 18-21) that the enactment of the individual-coverage provision violated the requirement that revenue bills originate in the House. That argument is meritless. As the D.C. Circuit held shortly after it decided this case, the individual-coverage provision "is not a 'Bill[] for raising Revenue' within [this] Court's accepted meaning of that phrase" because the revenue raised by that provision is "merely incidental to the main object," which is to encourage the purchase of health insurance. *Sissel* v. *HHS*, 760 F.3d 1, 7-8 (2014). And in any event, the enactment of the individual-coverage provision complied with the procedure required by the Origination Clause "because the bill that later became the Affordable Care Act originated in the House of Representatives" as a bill for raising revenue. *Sissel* v. *HHS*, 951 F. Supp. 2d 159, 170 (D.D.C. 2013), aff'd, 760 F.3d 1 (D.C. Cir. 2014); see *id.* at 170-174.

Pet. 24 ("The merits dispute between [petitioners] and the Administration continues in both the final rule and the change requests."). Petitioners assert (Pet. 8-9, 24) that the decision below conflicts with prior D.C. Circuit decisions holding that the issuance of a final regulation does not moot substantive challenges to a superseded interim regulation if those challenges "are equally applicable to the final rule." *American Mar. Ass'n* v. *United States*, 766 F.2d 545, 554 n.14 (1985).

That purported intra-circuit disagreement would not warrant this Court's review even if it existed. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In fact, however, the principle on which petitioners rely has no application here. In the court of appeals, petitioners conceded that the Affordable Care Act authorizes the policies adopted in the final regulation and the change requests, and their only substantive challenge to those policies was their claim that "[the Affordable Care Act] is facially invalid" under the Origination Clause. Pet. C.A. Br. 52; see *id.* at 51 ("The * * * merits question hinges on [the Act's] validity because—without [the Act]—HHS would lack the authority to" adopt the challenged policies.) Because the lower courts correctly found that petitioners forfeited their Origination Clause argument, Pet. App. 4a-6a, 36a-38a, that substantive challenge cannot save their claim from mootness.

Petitioners also contend (Pet. 23-25) that their claim is not moot because the final regulation did not completely supersede the interim regulation and related change requests. But petitioners failed to raise those arguments in the court of appeals, which consequently did not address them. See Pet. App. 8a-9a; Pet. C.A. Reply Br. 23-27. Because this Court is "a

court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), it does not ordinarily consider issues that were neither pressed nor passed upon in the court of appeals, see *United States* v. *Williams*, 504 U.S. 36, 41 (1992). And in any event, petitioners do not explain how their particular objections to the interim final regulation and the change requests survived the promulgation of the final regulation. Indeed, petitioners do not identify *any* substantive objection other than their forfeited claim that the Affordable Care Act is invalid in its entirety under the Origination Clause.[8]

4. Finally, petitioners contend (Pet. 27-36) that the individual-coverage provision violates the Just Compensation Clause of the Fifth Amendment. The court of appeals correctly rejected that claim, and petitioners do not contend that its decision conflicts with any decision by another court of appeals.

The individual-coverage provision requires most Americans to maintain health coverage or to pay a tax penalty. 26 U.S.C. 5000A; see *NFIB* v. *Sebelius*, 132 S. Ct. 2566, 2580 (2012). In *NFIB*, this Court upheld the individual-coverage provision as a valid exercise of Congress's power to "lay and collect Taxes." U.S. Const. Art. I, § 8, Cl. 1; see 132 S. Ct. at 2594-2600. That holding forecloses petitioners' Takings Clause claim because a long line of this Court's precedents establishes that the levying of a tax does not consti-

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[8] In the alternative, petitioners contend (Pet. 25-27) that the district court should have granted them leave to amend their complaint after granting the government's motion to dismiss. But petitioners forfeited that claim because they "never asked for leave to amend [their] complaint in the district court." *United States* v. *SLM Corp.*, 659 F.3d 1204, 1211 (D.C. Cir. 2011).

tute a Fifth Amendment taking unless the tax is so "arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property." *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 24-25 (1916). Indeed, this Court recently reaffirmed that it is "beyond dispute that taxes and user fees are not takings." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (brackets, ellipsis, and citation omitted).

Petitioners contend (Pet. 27-36) that the individual-coverage provision constitutes a taking rather than a valid tax because it seeks to encourage the purchase of insurance. This Court, however, expressly held that the fact that Section 5000A "seeks to shape decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power." *NFIB*, 132 S. Ct. at 2596. "[T]axes that seek to influence conduct are nothing new," and "every tax is in some measure regulatory." *Ibid.* (brackets, citation, and internal quotation marks omitted). The court of appeals correctly held that this feature of the individual-coverage provision does not render it an unconstitutional taking, and petitioners do not cite any case invalidating a tax on comparable grounds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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