No. 15-622

In the Supreme Court of the United States

STEVEN F. HOTZE, 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 FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Anti-Injunction Act, which bars a suit "for the purpose of restraining the assessment or collection of any tax," 26 U.S.C. 7421(a), precludes a pre-enforcement challenge to 26 U.S.C. 4980H, which imposes a tax on certain employers that fail to offer their full-time employees adequate health coverage.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 784 F.3d 984. The opinion of the district court (Pet. App. 31a-71a) is reported at 991 F. Supp. 2d 864.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2015. A petition for rehearing was denied on August 17, 2015 (Pet. App. 72a-73a). The petition for a writ of certiorari was filed on November 12, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Steven Hotze is the founder and an employee of petitioner Braidwood Management, Inc.

(Braidwood). Petitioners filed this suit asserting constitutional challenges to two provisions of the Patient Protection and Affordable Care Act (Affordable Care Act or Act), Pub. L. No. 111-148, 124 Stat. 119.[1] Hotze challenged 26 U.S.C. 5000A, which generally requires individuals to maintain a minimum level of health coverage or make a payment to the Internal Revenue Service. See *King* v. *Burwell*, 135 S. Ct. 2480, 2486 (2015). Braidwood challenged 26 U.S.C. 4980H, which imposes a tax on an employer with 50 or more full-time employees if (1) the employer fails to offer its full-time employees adequate health coverage, and (2) one or more of those employees receives a tax credit under 26 U.S.C. 36B, a provision subsidizing the purchase of insurance by individuals who lack other access to affordable coverage. Petitioners alleged that the enactment of Sections 4980H and 5000A was inconsistent with the Origination Clause, U.S. Const. Art. I, § 7, Cl. 1, and that those provisions violate the Fifth Amendment's Just Compensation Clause. Petitioners sought to enjoin the enforcement of Sections 4980H and 5000A. Pet. App. 37a-38a.

2. The district court rejected petitioners' claims on the merits, holding that the enactment of Sections 4980H and 5000A complied with the Origination Clause and that those provisions do not constitute a taking of private property. Pet. App. 31a-71a.

3. A unanimous panel of the court of appeals vacated the district court's judgment and remanded with instructions to dismiss for lack of jurisdiction. Pet. App. 1a-30a. The court held that Hotze lacked Article III standing to challenge Section 5000A because peti-

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

tioners' complaint alleged that he had health coverage through Braidwood and thus failed to establish that he would be required to make a payment under Section 5000A. *Id.* at 13a-22a. The court then accepted the government's argument that Braidwood's challenge to Section 4980H was barred by the Anti-Injunction Act (AIA), which 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." 26 U.S.C. 7421(a); see Pet. App. 22a-29a.

The court of appeals relied on *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566 (2012) (*NFIB*), which held that the AIA did not preclude a pre-enforcement challenge to Section 5000A. *Id.* at 2582-2584. The court explained that *NFIB* held that the Section 5000A payment is not a "tax" within the meaning of the AIA because Congress "chose to describe" that payment "not as a 'tax,' but as a 'penalty.'" Pet. App. 24a (quoting *NFIB*, 132 S. Ct. at 2583). But the court observed that unlike the Section 5000A payment, the exaction imposed in Section 4980H is "*labeled* as a tax" in both Section 4980H itself and in another provision of the Affordable Care Act. *Ibid.* The court thus concluded that "*NFIB* requires a holding in [the government's] favor" in this case. *Ibid.*

The court of appeals rejected petitioners' reliance on *Liberty University, Inc.* v. *Lew*, 733 F.3d 72 (4th Cir.), cert. denied, 134 S. Ct. 683 (2013), which held that the Section 4980H payment is not a "tax" within the meaning of the AIA. *Id.* at 87-89; see Pet. App. 25a-28a. The court explained that the Fourth Circuit's reasoning was inconsistent with the statutory text and with this Court's decision in *NFIB*. Pet. App. 26a-28a.

4. The court of appeals denied rehearing en banc without noted dissent. Pet. App. 72a-73a.

ARGUMENT

Petitioners renew their contention (Pet. 7-12) that the AIA does not bar Braidwood's attempt to restrain the collection of the payment required by 26 U.S.C. 4980H. The court of appeals correctly rejected that argument, and the shallow conflict between the decision below and the Fourth Circuit's decision in *Liberty University, Inc.* v. *Lew*, 733 F.3d 72, cert. denied, 134 S. Ct. 683 (2013), does not warrant this Court's review. The issue has not recurred in the Fourth Circuit, and *Liberty University*'s erroneous AIA holding has not had any practical effect. In addition, this case would not be an appropriate vehicle in which to take up the question presented because Braidwood lacks Article III standing. Further review is not warranted.

1. The court of appeals correctly held that the AIA bars Braidwood's pre-enforcement challenge to Section 4980H.

a. The AIA provides that, with certain enumerated exceptions not applicable here, "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). "This statute protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes." *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2582 (2012). "Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund." *Ibid.*; see *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 736

(1974). Where the AIA applies, it divests the court of subject-matter jurisdiction. *Id.* at 749; accord, *e.g.*, *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962) (*Williams Packing*).

In *NFIB*, this Court held that the AIA did not bar a pre-enforcement challenge to 26 U.S.C. 5000A, which imposes a "penalty" on individuals who fail to maintain health coverage. 26 U.S.C. 5000A(b). The Court relied on the "text of the pertinent statutes" and the label that Congress applied to the payment required by Section 5000A. 132 S. Ct. at 2582-2583. The Court emphasized that the AIA "applies to suits 'for the purpose of restraining the assessment or collection of any *tax*,'" but that Congress had described the Section 5000A payment "not as a 'tax,' but as a 'penalty.'" *Ibid.* (quoting 26 U.S.C. 5000A(b) and (g)(2), 7421(a)). The Court explained that "Congress's decision to label [the Section 5000A] exaction a 'penalty' rather than a 'tax' is significant because the Affordable Care Act describes many other exactions it creates as 'taxes.'" *Id.* at 2583; see *ibid.* ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.").

Braidwood seeks to restrain the assessment and collection of the payment required by Section 4980H. Its claim is barred by the AIA because, in contrast to the payment required by Section 5000A, the exaction imposed by Section 4980H is "*labeled* as a tax." Pet. App. 24a. Section 4980H(c)(7), entitled "*Tax nondeductible*," addresses the "denial of deduction *for the tax imposed by this section*" (emphasis added).[2] Sec-

[2] Section 4980H(c)(7) cross-references a provision specifying that no deduction is allowed for "*[t]axes* imposed by chapters 41, 42, 43,

tion 4980H(b)(2) refers to "[t]he aggregate amount of *tax*" that an employer must pay under Section 4980H (emphasis added). And another provision of the Affordable Care Act likewise describes the assessment imposed by Section 4980H as a "tax." 42 U.S.C. 18081(f)(2)(A) (referring to the "tax imposed by [S]ection 4980H"). The court of appeals correctly concluded that this "textual evidence is 'the best evidence' of whether an exaction constitutes a 'tax' for the purposes of the AIA" and compels the conclusion that the AIA applies to Section 4980H. Pet. App. 24a (quoting *NFIB*, 132 S. Ct. at 2583).

b. Petitioners contend (Pet. 7-10) that the court of appeals should have followed the Fourth Circuit's decision in *Liberty University*. But as the court of appeals explained, *Liberty University* identified no sound reason to disregard Congress's deliberate decision to label the Section 4980H payment a "tax."

Liberty University relied primarily on the fact that several provisions in Section 4980H refer to the required payment as an "assessable payment." 733 F.3d at 88.[3] But as the court of appeals explained, *Liberty University* erred "in interpreting the statutory references to the [Section 4980H] exaction as an 'assessable payment' in a way that nullified the references to it as a 'tax.'" Pet. App. 26a. Those two labels are not mutually exclusive, and "the natural conclusion to draw from Congress's interchangeable use of the terms 'assessable payment' and 'tax' in Section 4980H

44, 45, 46, and 54." 26 U.S.C. 275(a)(6) (emphasis added). That list of nondeductible "taxes" includes the tax imposed by Section 4980H, which is located in Chapter 43 of Title 26.

[3] The title of one subparagraph also refers to "assessable penalties." 26 U.S.C. 4980H(c)(2)(D).

is simply that Congress saw no distinction between the two terms." *Halbig* v. *Sebelius*, 27 F. Supp. 3d 1, 14 (D.D.C. 2014), appeal dismissed, No. 14-5018, 2015 WL 5209629 (D.C. Cir. 2015); see Pet. App. 26a. The contrary conclusion advocated by petitioners and adopted by the Fourth Circuit in *Liberty University* disregards Congress's deliberate choices to label the exaction imposed by Section 4980H a "tax" and to make the AIA broadly applicable to "*any* tax." 26 U.S.C. 7421(a) (emphasis added).

Petitioners also echo (Pet. 9-10) *Liberty University*'s suggestion that it would be "anomalous" to permit individuals to bring pre-enforcement challenges to Section 5000A while denying employers the ability to bring such challenges to Section 4980H. 733 F.3d at 88-89. But there is no anomaly because the two provisions serve different purposes, apply to different categories of taxpayers, and are administered through different procedures. For example, the tax in Section 4980H is enforceable by levies and by the filing of notices of lien, whereas the shared responsibility payment in Section 5000A is not. Pet. App. 27a; see 26 U.S.C. 5000A(g)(2)(B). "Summary-enforcement tools such as these * * * are 'the very tools the Anti-Injunction Act was enacted to protect.'" Pet. App. 27a (quoting *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 540 (6th Cir. 2011), cert. denied, 133 S. Ct. 61 (2012)); see *United States* v. *American Friends Serv. Comm.*, 419 U.S. 7, 12 (1974) (per curiam) (identifying one of the objectives of the AIA as "efficient and expeditious collection of taxes with a minimum of preenforcement judicial interference") (citation and internal quotation marks omitted). Furthermore, Section 4980H provides that the Secretary of the Treasury

"shall prescribe rules * * * for the *repayment* of" a payment made under Section 4980H under specified circumstances. 26 U.S.C. 4980H(d)(3) (emphasis added). That provision, which has no analogue in Section 5000A, necessarily contemplates that employers will challenge exactions imposed under Section 4980H in post-collection suits rather than through pre-enforcement actions. Pet. App. 27a-28a. It is thus unsurprising that Congress made Section 4980H subject to the AIA while exempting Section 5000A.

Petitioners emphasize (Pet. 8-10) that the exaction in Section 4980H is not among the "penalties" in Subchapter 68B of the Internal Revenue Code that are treated as "taxes" for purposes of the AIA by virtue of 26 U.S.C. 6671(a), which 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 68B. But that is immaterial. The circumstances under which the AIA applies to "penalties" were highly relevant in *NFIB* because Congress had repeatedly labeled the exaction in Section 5000A a "penalty" and not a "tax." 132 S. Ct. at 2583. By contrast, Congress chose to describe the exaction in Section 4980H as a "tax," and the AIA thus applies by its plain terms—without the need for any "deem[ing]" like that accomplished in Section 6671(a).

c. Petitioners separately contend (Pet. 11-12) that even if the Section 4980H exaction qualifies as a "tax" within the meaning of the AIA, Braidwood's suit should be allowed to proceed under *South Carolina* v. *Regan*, 465 U.S. 367 (1984), because Braidwood purportedly lacks any alternative avenue by which to litigate its claim. That contention—framed as a separate question presented (Pet. i)—does not warrant

review because petitioners failed to raise it below and the court of appeals thus did not address it. See *United States* v. *Williams*, 504 U.S. 36, 41-42 (1992) ("[This Court's] traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below.") (citation and internal quotation marks omitted).

In any event, petitioners' reliance on *Regan* is misplaced. In that case, South Carolina sought to challenge a tax imposed on the holders of certain state-issued bonds. 465 U.S. at 370-372. The Court explained that the AIA bars a pre-enforcement suit where, as is typically the case, the party seeking to challenge a tax has "the option of paying the tax and bringing suit for a refund." *Id.* at 374. In *Regan*, however, South Carolina itself would "incur no tax liability" and therefore could not sue for a refund. *Id.* at 378-380. The Court held that the AIA did not bar South Carolina's suit because "the State w[ould] be unable to utilize any statutory procedure" to raise its challenge. *Id.* at 380.[4]

In this case, in contrast, Braidwood is free to raise its challenge by "paying the [Section 4980H] tax and

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[4] Two of the three court of appeals cases on which petitioners rely (Pet. 11-12) likewise involved challengers who could not "pay the tax in question and sue for a refund because they [we]re not the taxpayers" subject to liability. *Dominion Nat'l Bank* v. *Olsen*, 771 F.2d 108, 117 (6th Cir. 1985); see *Sigmon Coal Co.* v. *Apfel*, 226 F.3d 291, 300 (4th Cir. 2000), aff'd on other grounds, 534 U.S. 438 (2002). Petitioners' third case is wholly inapposite because the court found that the unusual suit at issue there "d[id] not seek to restrain the assessment or collection of any tax" but instead challenged the procedure by which the government planned to return money that had already been collected. *Cohen* v. *United States*, 650 F.3d 717, 725 (D.C. Cir. 2011) (en banc).

bringing suit for a refund." *Regan*, 465 U.S. at 374. Petitioners do not appear to argue otherwise. Instead, they assert only that a refund action is not "realistic" because Braidwood would prefer to alter its conduct to avoid liability rather than making the payment required under Section 4980H and then seeking a refund. But a taxpayer may not avoid the AIA simply by asserting that it would prefer not to utilize the statutorily required refund procedure. *Alexander* v. *"American United," Inc.*, 416 U.S. 752, 762 & n.13 (1974); see *Bob Jones Univ.*, 416 U.S. at 746-748. Such a rule would be directly contrary to "[t]he manifest purpose" of the AIA, which is "to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for a refund." *Williams Packing*, 370 U.S. at 7.[5]

2. Although the decision below created a shallow conflict with the Fourth Circuit's decision in *Liberty University*, that conflict does not warrant this Court's

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[5] Petitioners' amicus asserts that the AIA does not apply to so-called "regulatory taxes." Physicians & Surgeons Amicus Br. 10-12. That argument is not before the Court because petitioners have never raised it. See *FTC* v. *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 n.4 (2013). In any event, the tax imposed by Section 4980H "is proportionate rather than punitive." *Liberty Univ.*, 733 F.3d at 98. It bears no resemblance to the "penal" tax on marijuana at issue in the decision on which amicus principally relies. *Robertson* v. *United States*, 582 F.2d 1126, 1127 (7th Cir. 1978). Nor is this a case in which the AIA is inapplicable because a tax "is just one of the many collateral consequences that can result from a failure to comply with [a legal] requirement" enforceable by nontax means. *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1127 (10th Cir. 2013), aff'd, 134 S. Ct. 2751 (2014). The tax imposed by Section 4980H is the only consequence of an employer's failure to provide qualifying coverage.

intervention because the issue has arisen in only a handful of cases and the Fourth Circuit's erroneous AIA holding has had no practical effect. In *Liberty University* itself, the Fourth Circuit rejected the challengers' claims on the merits and thus did not restrain the assessment or collection of the Section 4980H tax. 733 F.3d at 91-105. And it appears that neither the Fourth Circuit itself nor any district court in that circuit has relied on *Liberty University* to allow a challenge to Section 4980H to proceed.[6]

Nor have challenges to Section 4980H been allowed to go forward in other circuits. Two district courts have expressly rejected the Fourth Circuit's holding as inconsistent with the text of the relevant statutes and with this Court's decision in *NFIB*. *Northern Arapaho Tribe* v. *Burwell*, No. 14-cv-247, 2015 WL 4639324, at *5-*9 (D. Wyo. July 2, 2015), appeal pending, No. 15-8099 (10th Cir. filed Aug. 28, 2015); *Halbig*, 27 F. Supp. 3d at 12-16. One other district court followed *Liberty University*, but the Tenth Circuit ordered that the case be dismissed after this Court rejected the underlying claim on the merits in a suit brought by individual plaintiffs whose claims did not implicate the AIA. *Oklahoma* v. *Sebelius*, No. 11-cv-30, 2013 WL 4052610, at *9-*12 (E.D. Okla. Aug. 12, 2013), rev'd, No. 14-7080 (10th Cir. July 28, 2015), cert. denied, 135 S. Ct. 1178 (2015); see *King* v. *Burwell*, 135 S. Ct. 2480, 2495-2496 (2015). Accordingly, no court has restrained the assessment or collection of the Section 4980H tax, and the Fourth Circuit has not

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[6] Thus, although petitioners state (Pet. 7) that "[b]usinesses located within the Fourth Circuit can bring a pre-enforcement challenge to" Section 4980H based on *Liberty University*, they do not identify any business that has actually done so.

had the opportunity to reconsider *Liberty University*'s AIA holding in light of the criticism of that holding in subsequent decisions.[7] At least unless and until the Fourth Circuit reaffirms *Liberty University* or another court of appeals adopts the same rule, the shallow conflict created by that decision does not merit this Court's review.

3. Even if the question presented otherwise warranted certiorari, this case would not be an appropriate vehicle in which to consider it because Braidwood lacks Article III standing to challenge Section 4980H. Petitioners acknowledge (Pet. 2) that Braidwood provides health coverage to "all its employees." See Pet. App. 9a, 78a. An employer that provides such coverage owes a tax under Section 4980H only if one or more of its full-time employees receives a premium tax credit under 26 U.S.C. 36B. 26 U.S.C. 4980H(b)(1)(B); see Pet. App. 6a. Section 36B, in turn, allows an individual who is eligible for employer-sponsored coverage to obtain a tax credit only if the individual's required contribution to the employer-sponsored coverage exceeds 9.5% of the individual's household income or the employer-sponsored plan fails to cover at least 60% of the total cost of the benefits expected to be provided. 26 U.S.C. 36B(c)(2)(C); see Pet. App. 6a & n.3.[8]

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[7] One court of appeals has stated that the Section 4980H payment is not a tax within the meaning of the AIA, but that statement was unexplained dicta in a case that did not involve a challenge to Section 4980H. See *Korte* v. *Sebelius*, 735 F.3d 654, 671 (7th Cir. 2013), cert. denied, 134 S. Ct. 2903 (2014).

[8] Section 4980H imposes a separate tax on employers with 50 or more full-time employees that fail to offer their full-time employ-

Braidwood will thus face liability under Section 4980H only if (1) it requires its employees to contribute more than 9.5% of their income to obtain coverage or its plan fails to cover at least 60% of the total allowed cost of benefits, and (2) one or more of its full-time employees obtains a tax credit under Section 36B. Petitioners imply (Pet. 3, 11) that Braidwood may be required to alter its health plan in some unspecified manner in order to avoid Section 4980H liability. But petitioners have neither pleaded specific facts to support that suggestion nor explained how Braidwood's existing plan fails to satisfy any of the requirements of Section 4980H. For example, petitioners state (Pet. 3) that Braidwood's current plan is a "high deductible" plan with a deductible of roughly $4000. But such a deductible is not inconsistent with the requirement that a plan cover 60% of the total allowed cost of benefits. Cf. 78 Fed. Reg. 25,912 (May 3, 2013) (proposing, as an example of a "safe harbor" plan design "that clearly would satisfy the 60 percent threshold," a plan "with a $4,500 integrated medical and drug deductible").

Accordingly, as the court of appeals found, petitioners' complaint "at no point clearly alleges that the health-insurance policy that Braidwood already provides to Dr. Hotze [and its other employees] fails to satisfy" the requirements of either Section 4980H or Section 5000A. Pet. App. 9a. Based on that finding, the court of appeals held that Hotze lacked Article III standing to challenge Section 5000A because the health coverage he receives through Braidwood places him in compliance with Section 5000A. *Id.* at 13a-22a.

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ees health coverage at all. 26 U.S.C. 4980H(a). Braidwood is not subject to that provision because it offers health coverage.

The court's AIA holding meant that it had no occasion to consider Braidwood's standing. But for much the same reason, the allegations in the complaint do not establish that Braidwood will suffer any Article III injury due to Section 4980H because petitioners have not alleged that Braidwood's existing health plan will expose it to any liability under that provision.[9] And because Braidwood's claim is barred by an independent jurisdictional defect, this case would not be an appropriate vehicle in which to take up a challenge to the court of appeals' interpretation of the AIA.

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[9] When the government challenged Braidwood's standing in the court of appeals, petitioners again did not clearly represent that Braidwood faces liability under Section 4980H. Instead, they relied on the Fourth Circuit's decision in *Liberty University*, which held that an employer had standing to challenge Section 4980H because it alleged that it would incur "additional costs because of the administrative burden of assuring compliance" or "due to an increase in the cost of care" purportedly attributable to Section 4980H. 733 F.3d at 89-90; see Pet. C.A. Reply Br. 9. But whatever the merits of *Liberty University*'s holding about the standing of the employer in that case, petitioners' complaint includes no comparable allegations about increased administrative or other costs attributable to Section 4980H, and such costs thus cannot provide the basis for Article III standing here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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