No. _____

IN THE

Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, KAJ AHLBURG, AND MARY BROWN,

Petitioners,

v.

KATHLEEN SEBELIUS, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress effected a sweeping and comprehensive restructuring of the Nation's health-insurance markets in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 109 (2010) (collectively, the "ACA" or "Act"). But the Eleventh Circuit and the Sixth Circuit now have issued directly conflicting final judgments about the facial constitutionality of the ACA's mandate that virtually every individual American must obtain health insurance. 26 U.S.C. § 5000A. Moreover, despite the fact that the mandate is a "requirement" that Congress itself deemed "essential" to the Act's new insurance regulations, 42 U.S.C. § 18091(a)(2)(I), the Eleventh Circuit held that the mandate is severable from the remainder of the Act.

The question presented is whether the ACA must be invalidated in its entirety because it is non-severable from the individual mandate that exceeds Congress' limited and enumerated powers under the Constitution.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs-Appellees below, are: National Federation of Independent Business ("NFIB"); Kaj Ahlburg; and Mary Brown. NFIB is a nonprofit mutual benefit corporation that promotes and protects the rights of its members to own, operate, and grow their small businesses across the fifty States and the District of Columbia. NFIB is not a publicly traded corporation, issues no stock, and has no parent corporation. There is no publicly held corporation with more than a 10% ownership stake in NFIB.

Respondents, who were Defendants-Appellants/Cross-Appellees below, are: Kathleen Sebelius, Secretary, U.S. Dep't of Health & Human Servs.; Timothy F. Geithner, Secretary, U.S. Dep't of Treasury; Hilda L. Solis, Secretary, U.S. Dep't of Labor; the U.S. Dep't of Health & Human Servs.; the U.S. Dep't of Treasury; and the U.S. Dep't of Labor.

In addition, 26 States, by and through their Attorneys General or Governors, were Plaintiffs-Appellees/Cross-Appellants below: Alabama; Alaska; Arizona; Colorado; Florida; Georgia; Idaho; Indiana; Iowa; Kansas; Louisiana; Maine; Michigan; Mississippi; Nebraska; Nevada; North Dakota; Ohio; Pennsylvania; South Carolina; South Dakota; Texas; Utah; Washington; Wisconsin; and Wyoming.

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Petitioners NFIB, Ahlburg, and Brown respectfully submit this petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (Pet.App. 1a) is not yet reported in the Federal Reporter, but is available at 2011 WL 3519178. The summary-judgment opinion of the District Court for the Northern District of Florida (Pet.App. 286a) is not yet reported in the Federal Supplement, but is available at 2011 WL 285683. The district court's motion-to-dismiss opinion (Pet.App. 384a) is reported at 716 F. Supp. 2d 1120.

JURISDICTION

The Eleventh Circuit entered judgment on August 12, 2011. The time for filing a petition for rehearing en banc elapsed 45 days later, on September 26, 2011. Fed. R. App. P. 35(c), 40(a)(1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces the Constitution's Commerce Clause, Necessary and Proper Clause, and Tax Clause. U.S. Const., art. 1, § 8, cls. 1, 3, 18. It also reproduces the ACA's individual mandate, 26 U.S.C. § 5000A, and selected other provisions from the Act.

STATEMENT OF THE CASE

1. The ACA enacts a "comprehensive and complex regulatory scheme" that "contain[s] hundreds of new laws about hundreds of different

areas of health insurance and health care." Pet.App. 21a, 23a. For example, the Act regulates health-insurance companies, *id.* 27a-33a, provides for the creation and subsidization of new health-insurance exchanges, *id.* 33a-39a, requires certain employers to offer health insurance to their employees, *id.* 46a-49a, and expands the States' health-insurance obligations under Medicaid, *id.* 49a-51a.

Beginning in 2014, the Act imposes new "guaranteed-issue" and "community-rating" insurance requirements, which almost entirely prevent insurers from considering health status when offering or pricing health insurance. *Id.* 27a-29a (citing 42 U.S.C. §§ 300gg, 300gg-1, 300gg-3, 300gg-4). These regulations, along with others, significantly increase "the business costs of insurers," *id.* 186a, because they "require[] private insurers … to cover the unhealthy," but forbid "*pric[ing] that coverage* [based] on actuarial risks," *id.* 134a (n.114); *see also id.* 131a (n.107) ("The CBO estimates … costs for health insurance in the individual market [will] rise by 27% to 30%."). Additionally, these regulations expose insurers to the economic risk that "healthy people [will] wait until they are sick to obtain insurance, knowing they could not then be turned away." *Id.* 186a. Thus, "Congress sought to mitigate [these] reforms' regulatory costs on private insurers." *Id.* 134a.

The individual mandate is the "essential" "requirement" enacted by Congress to achieve that goal. 42 U.S.C. § 18091(a)(2)(I). Beginning in 2014, the mandate imposes a legal "requirement" that every individual in America (with a few exceptions) "shall … ensure that [he or she] … is covered under

minimum essential coverage." 26 U.S.C. § 5000A(a), (d), (f). Compliance with that legal command is enforced by "a penalty" on all "taxpayer[s] who … fail[] to meet the requirement" (unless they can invoke some additional exemptions). *Id.* § 5000A(b), (c), (e). *See also* Pet.App. 39a-40a, 44a-45a.

To be sure, the mandate's purpose and effect is not *solely* limited to off-setting the costs imposed on insurers under the ACA's new regulations. In addition, by decreasing the number of uninsured individuals, the mandate reduces the amount of "cost-shifting" to insurers that occurs when healthcare professionals pass on the expenses from providing uncompensated care for some of the uninsured. *Id.* 11a-12a, 15a (citing 42 U.S.C. § 18091(a)(2)(A), (F)). "In reality," however, because "cost-shifters are largely persons who either (1) are exempted from the mandate, (2) are excepted from the mandate penalty, or (3) are now covered by the Act's Medicaid expansion" or its new "insurance reforms" concerning "preexisting health conditions," "the primary persons regulated by the individual mandate are not cost-shifters but *healthy individuals* who forego purchasing insurance." *Id.* 131a-133a; *see also* 42 U.S.C. § 18091(a)(2)(I) (finding that the mandate "will minimize … adverse selection and broaden the health insurance risk pool to include healthy individuals").

In short, the mandate primarily "forces healthy and voluntarily uninsured individuals to purchase insurance from private insurers and pay premiums *now* in order to subsidize the private insurers' costs in covering more unhealthy individuals under the Act's reforms." Pet.App. 134a. Indeed, this subsidy

will eliminate *two-thirds* of the increase in premiums caused by the Act's provisions regulating insurers, lowering premiums by "15 to 20 percent."[1]

2. Petitioners NFIB, Ahlburg, and Brown (along with 26 States) brought this action challenging the ACA's facial validity. *Id.* 2a. As relevant here, they argued that the mandate exceeds Congress' Article I authority and that it is non-severable from the remainder of the Act. *Id.* 3a.

a. The district court ruled for Petitioners on summary judgment.

The court first held that Petitioners have standing to challenge the mandate. Ahlburg and Brown have standing because "they are needing to take investigatory steps and make financial arrangements now [in order] to ensure compliance" with "the financial expense they will definitely incur under the [mandate] in 2014." *Id.* 302a-305a. And "NFIB has associational standing" since Brown is an "NFIB member." *Id.* 305a; *see also id.* 430a-431a.

The court then held that the "mandate is outside Congress' Commerce Clause power, and it cannot be otherwise authorized by an assertion of power under the Necessary and Proper Clause." *Id.* 365a. The court concluded that "[i]t would be a radical departure from existing case law to hold" that Congress' commerce power allows it "to compel an otherwise passive individual into a commercial transaction with a third party." *Id.* 338a. The court also reaffirmed its earlier conclusion that the

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[1] CBO, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance*, 2 (June 16, 2010), http://www.cbo.gov/ftpdocs/113xx/doc11379/Eliminate_Individual_Mandate_06_16.pdf.

mandate is not a valid exercise of Congress' taxing power (and likewise is not shielded from challenge as a "tax" under the Anti-Injunction Act). *Id.* 290a-291a (n.4); *see also id.* 413a-417a.

The court finally held that the "mandate cannot be severed" from the remainder of the ACA, because "it is reasonably 'evident[]' … that [it] was an essential and indispensable part of the health reform efforts, and that Congress did not believe other parts of the Act could (or … would want them to) survive independently." *Id.* 379a. Accordingly, the court entered a declaratory judgment that the entire Act is void. *Id.* 381a, 383a.

b. The Government moved to clarify whether that declaratory judgment was immediately operative. *Id.* 468a-469a, 480a-481a. The district court confirmed that it was, *id.* 481a-486a, but then stayed its judgment pending appeal, *id.* 491a-492a. The court reasoned that "[i]t would be extremely disruptive and cause significant uncertainty" "to enjoin and halt the Act's implementation while the case is pending appeal." *Id.* 488a. Conversely, though, because "state[s,] … businesses, families, and individuals are having to expend time, money, and effort in order to comply with all of the Act's requirements," *id.* 489a, the court conditioned the stay "upon the defendants['] … seeking an expedited appellate review," *id.* 492a. The court emphasized that "[i]t is very important to everyone in this country that this case move forward as soon as practically possible," because "[a]lmost everyone agrees that the Constitutionality of the Act is an issue that will ultimately have to be decided by the Supreme Court." *Id.*

c. The Eleventh Circuit affirmed in part and reversed in part. In an opinion jointly authored by Chief Judge Dubina and Judge Hull, the court held that the mandate is facially unconstitutional, but severable from the remainder of the ACA.

On standing, the court held that "it is beyond dispute that … the individual plaintiffs and the NFIB have standing to challenge the individual mandate." *Id.* 10a. "In fact," the court emphasized, "the government expressly concedes that one of the individual plaintiffs—Mary Brown—has standing." *Id.* 8a. Similarly, the Government on appeal abandoned its earlier claim that the Anti-Injunction Act bars Petitioners' suit. *See id.* 164a (raising a "tax" argument only as a merits defense).

On the merits, the court summarized its lengthy constitutional analysis as follows:

> "[T]he individual mandate exceeds Congress's enumerated … power[s] and is unconstitutional. This economic mandate represents a wholly novel and potentially unbounded assertion of congressional authority: the ability to compel Americans to purchase an expensive health insurance product that they have elected not to buy, and to make them re-purchase that insurance product every month for their entire lives. We have not found any generally applicable, judicially enforceable limiting principle that would permit us to uphold the mandate without obliterating the boundaries inherent in the system of enumerated congressional powers.

Id. 195a; *see also id.* 95a-179a.

The court, however, held that the mandate was severable from the rest of the ACA. It concluded that the Act's "wholesale invalidation" would be improper "[i]n light of the stand-alone nature of hundreds of the Act's provisions and their manifest lack of connection to the individual mandate." *Id.* 184a. Moreover, it reached the same conclusion for the "guaranteed-issue" and "community-rating" requirements, *id.* 193a-194a, even though Congress had *expressly* deemed the mandate "essential" to those regulations, *id.* 184a, and the Government had *conceded on appeal* that the "mandate cannot be severed from [them]," *id.* 194a (n.144). Undeterred, the court suggested several reasons why the mandate was not as "essential" as Congress and the Executive Branch had believed. *Id.* 188a-191a.

Judge Marcus concurred in part and dissented in part. Although agreeing that Petitioners have standing and that the mandate cannot be upheld as a valid "tax," *id.* 197a (n.1), he would have upheld the mandate as a valid exercise of Congress' commerce power, *id.* 199a-200a. In reaching that conclusion, he relied in part upon the Sixth Circuit's decision likewise rejecting a facial challenge to the mandate. *Id.* 221a-222a; *see also Thomas More Law Ctr. v. Obama*, No. 10-2388, --- F.3d ----, 2011 WL 2556039 (6th Cir. June 29, 2011), *petition for cert. filed*, No. 11-117 (U.S. July 26, 2011).[2]

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[2] The Fourth Circuit also recently rejected two challenges to the mandate, but without reaching the merits. *Liberty Univ. v. Geithner*, No. 10-2347, --- F.3d ----, 2011 WL 3962915, at *1 (4th Cir. Sept. 8, 2011) (private-plaintiffs barred by Anti-Injunction Act); *Virginia ex rel. Cuccinelli v. Sebelius*, Nos. 11-1057 & 11-1058, --- F.3d ----, 2011 WL 3925617, at *1 (4th Cir. Sept. 8, 2011) (State-plaintiff lacked standing).

d. The Eleventh Circuit's judgment is now final, because no party timely sought rehearing en banc. Accordingly, Petitioners now seek review of the Eleventh Circuit's holding that the unconstitutional mandate is severable from the rest of the ACA.

REASONS FOR GRANTING THE PETITION

The district court in this case observed that "[a]lmost everyone agrees that the Constitutionality of the [individual mandate] is an issue that will ultimately have to be decided by the Supreme Court." Pet.App. 492a; *see also Thomas More*, 2011 WL 2556039, at *23 (Sutton, J., concurring in part) ("[T]he court[s] of appeals are … utterly non-final in this case."). Since then, it has become critical that this Court determine the constitutionality of the mandate: (1) there is a square conflict between the Eleventh Circuit and the Sixth Circuit, (2) on the facial constitutionality of a federal statute, (3) that the Eleventh Circuit concluded "is unprecedented, lacks cognizable limits, and imperils our federalist structure," Pet.App. 162a, (4) but that was identified by Congress as an "essential" component of a "complex regulatory scheme" that "comprehensively reform[s] and regulate[s] more than one-sixth of the national economy," *id.* 23a, 184a, 491a. Indeed, this Court's review of the mandate is now virtually inescapable, because the Government has not sought en banc review in the Eleventh Circuit and thus inevitably will be filing its own petition for a writ of certiorari in order to challenge that court's judgment invalidating a significant Act of Congress.

Particularly given that this Court already will be reviewing the constitutionality of the mandate,

Petitioners respectfully submit that this Court should grant their petition seeking review of the mandate's severability from the ACA.

First, it is critical that this Court *simultaneously* resolve the merits question whether the mandate is unconstitutional and the related remedial question whether the rest of the ACA is non-severable. Consolidating review of the merits and severability is generally appropriate for prudential reasons, and that is especially true here, because the Act's severability is itself an exceptionally important federal question that warrants this Court's immediate review. Harmful uncertainty currently pervades the Nation concerning the fate of the entire ACA in light of the mandate's potential unconstitutionality. Both private individuals and public officials share a pressing need for a conclusive judicial determination of the extent to which the sweeping legislation will survive, as that decision will eliminate the legal contingency clouding their personal, business, and regulatory decisionmaking. Indeed, deferring review of the non-severability question would be particularly deleterious at this crucial time. Delay now would effectively eliminate this Court's ability to resolve the ACA's validity before the end of the 2011 Term, thus dragging out the national uncertainty *until at least early 2013*, which is the soonest practical date a decision would be rendered in the 2012 Term, if not much later.

Second, this case is the *best vehicle* for definitively resolving the validity of the entire ACA. The Sixth Circuit's decision in *Thomas More* is a poor vehicle. Most importantly, the plaintiffs there do not have undisputed standing to challenge the

mandate. Nor have they even challenged the remainder of the ACA. The Fourth Circuit's decision in *Liberty University* is also an inferior vehicle. Most obviously, the court there did not even reach the merits. Instead, over the opposition of both the plaintiffs and the Government, the court held that the Anti-Injunction Act bars a plaintiff from challenging the ACA's mandate to purchase insurance unless that plaintiff has incurred the so-called "tax" penalty for non-compliance. If necessary, this Court can consider that threshold objection in this case just as easily as in that one. And in any event, the objection is patently meritless, which explains why the Fourth Circuit is the only court to have adopted it.

Accordingly, this Court should grant review of the Eleventh Circuit's decision below, where both the mandate's unconstitutionality and the ACA's non-severability were exhaustively litigated by Petitioners here, who have undisputed standing.

I. WHETHER THE MANDATE IS NON-SEVERABLE FROM THE REST OF THE ACA IS AN EXCEPTIONALLY IMPORTANT FEDERAL QUESTION THAT WARRANTS THIS COURT'S IMMEDIATE REVIEW

Often, when this Court grants certiorari to decide whether a statute is constitutional, it will additionally decide the remedial question whether the provision at issue is non-severable. *E.g.*, *New York v. United States*, 505 U.S. 144, 151-54, 186-87 (1992) (deciding severability in the first instance after reversing the courts below on the statute's constitutionality). By immediately resolving whether the rest of an unconstitutional statute

survives, this Court wisely forecloses wasteful and chaotic satellite litigation on severability that this Court otherwise likely would have to resolve later. Accordingly, that prudential practice is sufficient ground here for this Court to resolve both the extant circuit split on the mandate's constitutionality *and* the mandate's severability from the ACA, even though the severability question is not (yet) the subject of an independent circuit split.[3]

Moreover, this Court's immediate review of the severability question is imperative given the pervasive economic ramifications from ongoing uncertainty about this remedial issue. The ACA "comprehensively reform[s] and regulate[s] more than one-sixth of the national economy," "via several hundred statutory provisions and thousands of regulations that put myriad obligations and responsibilities on individuals, employers, and the states." Pet.App. 491a. Thus, until this Court decides the extent to which the ACA survives, the entire Nation will remain mired in doubt, which imposes an enormous drag on the economy. Individuals, employers, and States will lack a firm understanding of their rights and duties when planning their affairs. Providers of health insurance will have no idea what rules will govern their industry. Government officials will not know what regulatory measures need to be developed. Everyone will needlessly put off significant decisions that may

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[3] *Cf. Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, No. 10-763, --- F. Supp. 2d ----, 2011 WL 4072875, at *21 (M.D. Pa. Sept. 13, 2011) (holding, in conflict with the Eleventh Circuit, that some of the ACA's new insurance regulations are non-severable from the unconstitutional mandate).

be affected by the resolution of these contingencies. And all of those harms will be incurred *even if* this Court ultimately upholds the Act in its entirety.[4]

Of course, delay will be exponentially more harmful if this Court eventually *invalidates* the Act in whole or significant part. Not only will time have been lost for enacting necessary alternatives to the ACA, but countless resources will have been wasted complying with the ACA in the meanwhile. Obviously, "state[s,] … businesses, families, and individuals are having to expend time, money, and effort in order to comply with all of the Act's requirements," as is the Federal Government. *Id.* 489a. And "[r]eversing what is presently in effect (and what will be put into effect in the future) may prove enormously difficult." *Id.*

Finally, the harmful delay from deferring review of severability would be particularly protracted given this Court's calendar constraints. If this Court now declines to review severability along with the merits, then any later review of severability would necessarily occur *next Term* at the earliest, given the time required for two rounds of briefing and argument. As a practical matter then, the ACA's validity would not be resolved before January of

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[4] Illustrative of this phenomenon is a report by the President of the Federal Reserve Bank of Atlanta: "[A] number of … factors … are impeding hiring. Prominent among these is the lack of clarity about the cost implications of the recent health care legislation. We've frequently heard strong comments to the effect of 'my company won't hire a single additional worker until we know what health insurance costs are going to be.'" Dennis P. Lockhart, *Business Feedback on Today's Labor Market* (Nov. 11, 2010), http://www.frbatlanta.org/news/speeches/lockhart_111110.cfm.

2013, which is the soonest an issue of this magnitude would be decided in the 2012 Term. Indeed, it could well take much longer, depending on the time it takes for future cases to come up the pipeline. Dragging out the uncertainty so long would be especially destructive, as that would trigger various ACA provisions that become effective on January 1, 2013, and necessitate increased preparation for provisions that become effective on January 1, 2014. *See* http://healthreform.kff.org/Timeline.aspx.

In sum, the district court was clearly correct that "[t]he sooner th[e] issue" of the ACA's validity "is finally decided by the Supreme Court, the better off the entire nation will be." Pet.App. 491a.

II. THE ELEVENTH CIRCUIT'S DECISION IS THE BEST VEHICLE FOR A DEFINITIVE RESOLUTION OF THE ACA'S VALIDITY

The Eleventh Circuit's decision in this case squarely passed on the mandate's constitutionality and its severability, because both questions were vigorously pressed by Petitioners here, who had undisputed standing to do so. Importantly, however, that is not true for either the Sixth Circuit's decision in *Thomas More* or the Fourth Circuit's decision in *Liberty University*, nor are there any countervailing considerations that favor review in those cases.

A. The Sixth Circuit's *Thomas More* Decision Suffers From Vehicle Problems Due To The Plaintiffs' Contested Standing And Their Failure To Litigate Severability

Thomas More is a poor vehicle for two reasons: *first*, there is a potential standing objection that may prevent this Court from reaching the merits; and *second*, the petitioners there neither presented nor

preserved the critical question whether the mandate is non-severable from the rest of the Act.

1. The standing of the *Thomas More* plaintiffs was disputed below and is not free from doubt. Specifically, the Government moved to dismiss in the Sixth Circuit after learning that the lead plaintiff had obtained insurance during the appeal. 2011 WL 2556039, at *3. Although the court denied the motion, *id.* at *3-6, its reasoning is hardly unassailable. The court primarily relied upon *post-judgment* declarations of present injury that were hastily filed by two other plaintiffs. *Id.* at *3 (distinguishing this Court's refusal to consider such belated declarations in *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1150 n.* (2009)). The court also relied on the *future* injury that those plaintiffs allege they will suffer when the mandate goes into effect in 2014. *Id.* at *4-6. Whether or not the Sixth Circuit's rationales are correct, even the *non-trivial possibility* that this Court might disagree militates strongly against selecting *Thomas More* for further review, given the importance of a final resolution this Term.

By contrast, Petitioners' standing here is undisputed and indisputable. Not only did "the government expressly concede[] that … Mary Brown … has standing to challenge the individual mandate," Pet.App. 8a, but the Eleventh Circuit held that "it is beyond dispute that … the individual plaintiffs and the NFIB have standing to challenge the individual mandate," *id.* 10a.[5]

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[5] Moreover, NFIB's extensive membership significantly reduces any risk of mootness problems. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718 (2007).

2. Furthermore, the *Thomas More* petitioners have not presented the question whether the mandate is non-severable from the rest of the ACA. Pet. at i, No. 11-117. Indeed, the Act's non-severability was neither pressed nor passed upon at *any* stage in that case. Instead, the plaintiffs limited their requested relief to the invalidation of the mandate (and its penalty), *not* the entire Act. 2011 WL 2556039, at *1; *see also Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 886, 895-96 (E.D. Mich. 2010). The critical question of the ACA's non-severability is thus neither presented nor preserved for review in *Thomas More*, presumably because that question is not personally important to the petitioners there.

By contrast, Petitioners here are directly presenting the question whether the ACA is non-severable from the mandate, because countless provisions of the Act aggrieve NFIB and its members. Accordingly, the question was extensively pressed and exhaustively passed upon at each stage below. Pet.App. 179a-194a, 365a-379a.

B. The Fourth Circuit's *Liberty University* Decision Is An Inferior Vehicle Because Its Anti-Injunction Act Holding Is Irrelevant At This Stage And Erroneous In Any Event

As *Liberty University* did not reach the merits, it obviously is not an appropriate vehicle for deciding the essential issues of the mandate's constitutionality and severability. Nor would it make sense to grant *Liberty University* along with this case in order to review its outlier holding that the Anti-Injunction Act shields the mandate from any judicial review until penalties are imposed. The

applicability of the Anti-Injunction Act can be reviewed, if necessary, just as easily in this case as in that one. And, in any event, that statute plainly does not bar challenges to the mandate.

1. The Anti-Injunction Act provides, with a few exceptions, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." 26 U.S.C. § 7421. At the outset, it is unclear whether this proscription is truly "jurisdictional" in nature. *Compare Bob Jones Univ. v. Simon*, 416 U.S. 725, 736, 742-46, 749 (1974) (describing the statute in *dicta* as "jurisdiction[al]," even though the statute does not use that term and has judicially created equitable exceptions), *with Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-03 (2011) (explaining that the term "jurisdictional" has been used too loosely in past cases and adopting a "bright line[] rule" requiring a "'clear' indication" of jurisdictional status), *and Bowles v. Russell*, 551 U.S. 205, 213-15 (2007) (holding that jurisdictional statutes may not have any judicially created equitable exceptions).

Either way, though, the Anti-Injunction Act is irrelevant to selecting the best vehicle for resolving the validity of the mandate and the ACA. If the statute is jurisdictional, then its application to the mandate can and must be decided in whichever case is chosen for review, including this one, *whether or not it was decided below*. Whereas, if the statute is not jurisdictional, then its application to the mandate should not be decided in any case, because the Government has *forfeited* any reliance on it, by taking the consistent appellate position that the statute is inapplicable. *Liberty Univ.*, 2011 WL

3962915, at *4; *Thomas More*, 2011 WL 2556039, at *6; *see also supra* at 6 (defense abandoned below).

2. In any event, the Anti-Injunction Act is clearly inapposite here, due to the critical distinction between the mandate and its penalty. The mandate itself is simply a free-standing legal "[r]equirement" that every "applicable individual shall … ensure that [he or she] … is covered under minimum essential coverage." 26 U.S.C. § 5000A(a), (d). By contrast, the "penalty" is simply a means of enforcing compliance with that legal command, which is imposed on all "taxpayer[s]" who *unlawfully* "fail[] to meet th[at] requirement," unless they are separately "except[ed]" from the "penalty." *Id.* § 5000A(b), (e). Given this relationship between the mandate and the penalty, there are three fundamental reasons why Petitioners' challenge to the mandate cannot possibly be foreclosed by the Anti-Injunction Act, which bars "suit[s] for the *purpose* of restraining the assessment or collection of any *tax*." 26 U.S.C. § 7421(a) (emphases added).

First, the monetary sanction for non-compliance with the mandate is not even "a[] tax" under § 7421(a). The sanction is not "an enforced contribution to provide for the support of government," but simply "an exaction imposed by statute as punishment for an unlawful act," which is the quintessential definition of a non-tax "penalty." *See United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996); *cf. Bob Jones Univ.*, 416 U.S. at 741 n.12 (citing case holding that courts will no longer determine whether Congress' *implicit* motive in imposing a monetary sanction for a *lawful* act was regulatory ("penalty") rather than

revenue-raising ("tax"), but casting no doubt on the established non-"tax" status of a monetary sanction for an explicitly unlawful act).

Second, even if the monetary sanction for non-compliance with the mandate were a "tax" as a statutory matter, under § 7421(a), the "purpose" behind Petitioners' "suit" is not to "restrain[]" that so-called "tax." Rather, Petitioners' "purpose" is to "restrain" the mandate's free-standing legal requirement that *they must buy costly insurance*, which itself is not a "tax" in any way, shape, or form. Petitioners' "purpose" here obviously has nothing to do with "restraining" the sanction for non-compliance with the mandate: *as law-abiding citizens*, they are completely indifferent to a so-called "tax" that they *will never incur*. *Compare* Pet.App. 304a (holding that Petitioners here have standing because they are "mak[ing] financial arrangements now to ensure compliance" with the mandate in 2014 if it is not invalidated), *with Bob Jones Univ.*, 416 U.S. at 738-39 (holding that a university's challenge to an IRS ruling on its tax-exempt status was for the "purpose of restraining … any tax" because the suit's goal was, at a minimum, to reduce the tax liability of the university's donors in order to increase the university's charitable receipts).

Third, Petitioners would have *no lawful means* of challenging Congress' command that they purchase insurance if the Anti-Injunction Act truly required them to violate the mandate simply to incur the so-called "tax" that authorizes suit. Indeed, the dilemma would be even worse for the millions of law-abiding individuals who are subject to the mandate but *exempt from the penalty*, because they could

never incur the so-called "tax" that is the supposed predicate to bringing a challenge. Pet.App. 44a. Not only would the complete absence of judicial review for all law-abiding individuals subject to the mandate underscore why the Anti-Injunction Act should not be interpreted to bar suits brought for the "purpose" of eliminating a substantive legal requirement, but the absence of such redress also reveals that there would be grave Due Process concerns with the contrary interpretation. *Cf. South Carolina v. Regan*, 465 U.S. 367, 373-81 (1984) (construing the Anti-Injunction Act not to bar a suit by a State challenging the federal taxation of interest earned by third-parties holding State-issued bearer bonds, given the absence of any alternative means for the State to obtain judicial review).

III. THE ELEVENTH CIRCUIT INCORRECTLY SEVERED THE UNCONSTITUTIONAL MANDATE FROM THE REST OF THE ACA

Although Petitioners leave for future briefing their defense of the Eleventh Circuit's invalidation of the mandate, they will briefly summarize here why the Eleventh Circuit erred in severing the remainder of the ACA. In short, neither the new insurance regulations nor the rest of the Act can survive the invalidation of the mandate, which was at the heart of the ACA's carefully crafted compromise.

The standard for non-severability is well settled. After a statute's unconstitutional provisions are stricken, the "remaining provisions" also must be invalidated where "it is evident that the Legislature would not have enacted those provisions … independently of that which is invalid." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S.

Ct. 3138, 3161 (2010) ("*FEF*"). If Congress "would not have been satisfied with what remains," *Williams v. Standard Oil Co.*, 278 U.S. 235, 242 (1929), severing the unconstitutional part would improperly "substitute, for the law intended by the legislature, one they may never have been willing by itself to enact," *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 636 (1895). In short, courts must ask whether the remaining part would "function in a *manner* consistent with … the original legislative bargain." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987); *see also R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 362 (1935) (invalid parts "so affect[ed] the dominant aim of the whole statute as to carry it down with them").

Here, it is beyond "evident" that the ACA's new insurance regulations cannot operate "independently" of the mandate (*FEF*, 130 S. Ct. at 3161) in "a *manner* consistent" with Congress' intent (*Alaska Airlines*, 480 U.S. at 685). The Government *conceded on appeal* that the "mandate cannot be severed" from those regulations, Pet.App. 194a (n.144), and Congress itself found that the mandate is "essential" to them, 42 U.S.C. § 18091(a)(2)(I), by "mitigat[ing] [their] regulatory costs on private insurers," Pet.App. 134a. The Eleventh Circuit opined that the mandate was not as "essential" as Congress had believed, because "other provisions … help to accomplish some of the same objectives" and the "mandate's operation and effectiveness are limited." *Id.* 188a-191a. But, contrary to that reasoning, the fundamental question for non-severability is whether Congress "would … have been satisfied with what remains," *Williams*, 278

U.S. at 242, *not* whether Congress *should* have been satisfied had it better understood the whole law.

Critically, moreover, "the insurance reforms" are "the Act's first component" and the heart of its efforts to ensure "Quality, Affordable Health Care for All Americans." Pet.App. 15a, 20a-21a, 27a. Thus, voiding the mandate and those regulations "so affect[s] the dominant aim of the whole statute as to carry it down with them." *Alton*, 295 U.S. at 362. Although the Eleventh Circuit emphasized "the stand-alone nature of hundreds of the Act's provisions and their manifest lack of connection to the individual mandate," Pet.App. 184a, that is irrelevant. The ACA nevertheless cannot "function in a *manner* consistent with … the original legislative bargain," *Alaska Airlines*, 480 U.S. at 685, once the heart of that bargain has been ripped out.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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