NO. 11-398

In the
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR STATE RESPONDENTS

PAMELA JO BONDI
Attorney General of Florida
SCOTT D. MAKAR
Solicitor General
LOUIS F. HUBENER
TIMOTHY D. OSTERHAUS
BLAINE H. WINSHIP
Office of the Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, FL 32399
(850) 414-3300

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
BANCROFT PLLC
1919 M Street, N.W.
Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

October 17, 2011 *(Additional Counsel Listed on Inside Cover)*

GREG ABBOTT
Attorney General of Texas
BILL COBB
Deputy Attorney General for Civil Litigation
Office of the Attorney General of Texas
P.O. Box 12548
Capitol Station
Austin, TX 78711
(512) 475-0131

JON BRUNING
Attorney General of Nebraska
KATHERINE J. SPOHN
Special Counsel to the Attorney General
Office of the Attorney General of Nebraska
2115 State Capitol Building
Lincoln, NE 68508
(402) 471-2834

ALAN WILSON
Attorney General of South Carolina
P.O. Box 11549
Columbia, SC 29211

MARK L. SHURTLEFF
Attorney General of Utah
Capitol Suite #230
P.O. Box 142320
Salt Lake City, UT 84114

LUTHER STRANGE
Attorney General of Alabama
501 Washington Avenue
Montgomery, AL 36130

JAMES D. "BUDDY" CALDWELL
Attorney General of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804

BILL SCHUETTE
Attorney General of Michigan
P.O. Box 30212
Lansing, MI 48909

JOHN W. SUTHERS
Attorney General of Colorado
1525 Sherman Street,
Denver, CO 80203

ROBERT M. MCKENNA
Attorney General of Washington
1125 Washington Street S.E.
P.O. Box 40100
Olympia, WA 98504

LAWRENCE G. WASDEN
Attorney General of Idaho
P.O. Box 83720
Boise, ID 83720

THOMAS W. CORBETT, JR.
Governor
LINDA L. KELLY
Attorney General
Commonwealth of
Pennsylvania
16th Floor
Strawberry Square
Harrisburg, PA 17120

JOSEPH SCIARROTTA, JR.
General Counsel
Office of Arizona Governor
JANICE K. BREWER
TOM HORNE
Attorney General of Arizona
1700 West Washington
Street, 9th Floor
Phoenix, AZ 85007

MARTY J. JACKLEY
Attorney General
of South Dakota
1302 East Highway 14
Pierre, SD 57501

WAYNE STENEJHEM
Attorney General
of North Dakota
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

GREGORY F. ZOELLER
Attorney General of Indiana
302 West Washington Street
Indianapolis, IN 46204

BRIAN SANDOVAL
Governor of Nevada
State Capitol Building
101 North Carson Street
Carson City, NV 89701

SAMUEL S. OLENS
Attorney General of Georgia
40 Capitol Square, SW
Atlanta, GA 30334

JOHN J. BURNS
Attorney General of Alaska
P.O. Box 110300
Juneau, AK 99811

MICHAEL DEWINE
Attorney General of Ohio
30 East Broad Street
17th Floor
Columbus, OH 43215

DEREK SCHMIDT
Attorney General of Kansas
Memorial Hall
120 SW 10th Street
Topeka, KS 66612

MATTHEW MEAD
Governor of Wyoming
State Capitol
200 West 24th Street
Cheyenne, WY 82002

J.B. VAN HOLLEN
Attorney General of Wisconsin
114 East State Capitol
Madison, WI 53702

WILLIAM J. SCHNEIDER
Attorney General of Maine
Six State House Station
Augusta, ME 04333

TERRY BRANSTAD
Governor of Iowa
107 East Grand Avenue
Des Moines, IA 50319

QUESTIONS PRESENTED

1. Whether Congress has the power under Article I of the Constitution to enact the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

2. Whether the suit brought by Respondents to challenge the minimum coverage provision is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a).

PARTIES TO THE PROCEEDING

Petitioners, who were the appellants/cross-appellees below, are the U.S. Department of Health & Human Services; Kathleen Sebelius, Secretary, U.S. Department of Health & Human Services; the U.S. Department of Treasury; Timothy F. Geithner, Secretary, U.S. Department of Treasury; the U.S. Department of Labor; and Hilda L. Solis, Secretary, U.S. Department of Labor.

The State Respondents, who were the appellees/cross-appellants below, are 26 States: Florida, by and through Attorney General Pam Bondi; South Carolina, by and through Attorney General Alan Wilson; Nebraska, by and through Attorney General Jon Bruning; Texas, by and through Attorney General Greg Abbott; Utah, by and through Attorney General Mark L. Shurtleff; Louisiana, by and through Attorney General James D. "Buddy" Caldwell; Alabama, by and through Attorney General Luther Strange; Attorney General Bill Schuette, on behalf of the People of Michigan; Colorado, by and through Attorney General John W. Suthers; Pennsylvania, by and through Governor Thomas W. Corbett, Jr., and Attorney General Linda L. Kelly; Washington, by and through Attorney General Robert M. McKenna; Idaho, by and through Attorney General Lawrence G. Wasden; South Dakota, by and through Attorney General Marty J. Jackley; Indiana, by and through Attorney General Gregory F. Zoeller; North Dakota, by and through Attorney General Wayne Stenehjem; Mississippi, by and through Governor Haley Barbour; Arizona, by and through Governor Janice K. Brewer and Attorney General Thomas C. Horne; Nevada, by and

through Governor Brian Sandoval; Georgia, by and through Attorney General Samuel S. Olens; Alaska, by and through Attorney General John J. Burns; Ohio, by and through Attorney General Michael DeWine; Kansas, by and through Attorney General Derek Schmidt; Wyoming, by and through Governor Matthew H. Mead; Wisconsin, by and through Attorney General J.B. Van Hollen; Maine, by and through Attorney General William J. Schneider; and Governor Terry E. Branstad, on behalf of the People of Iowa. The National Federation of Independent Business, Kaj Ahlburg, and Mary Brown are also Respondents, and were also appellees below.

TABLE CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

All parties to this case agree that the Court's review is warranted to resolve the grave constitutional questions surrounding the individual mandate. The federal government correctly points out that the Courts of Appeals are intractably divided as to whether the mandate is constitutional. That question is of self-evident importance both as a practical matter and because it raises questions that go to the heart of our system of constitutional government. The individual mandate calls into question two bedrock principles of our constitutional system—that the very process of enumerating the federal government's powers presupposes a lack of plenary federal authority, and that it is the States, not the federal government, that wield the police power.

The Court of Appeals correctly struck down the mandate as inconsistent with our system of federalism and the liberty it secures. The federal government has sought review, pointing to a circuit split concerning the constitutionality of this critically important federal statute. We are not aware of any comparable situation in which the Court has denied review. The Court should grant plenary review here.

The lower courts are equally divided as to whether and to what extent the Affordable Care Act can stand if the individual mandate falls. This unprecedented challenge—involving over half the States in the Nation—is the ideal vehicle in which to consider both the constitutional question and the severance question that results if the mandate is unconstitutional, as both of the lower courts in this

case addressed both questions, while reaching starkly different outcomes on the severability question. Although the Court presumably could reach the severability question as a necessarily included aspect of the federal government's first question presented, out of an abundance of caution, the Court should either modify that question to make clear that it includes the severability question or grant certiorari on, *inter alia*, the third question in the States' petition in No. 11-400. In all events, this case is the ideal vehicle to examine not only the mandate's constitutionality, but the severability question as well.

To the extent that the Court deems it necessary to consider whether the Anti-Injunction Act ("AIA") applies to challenges to the individual mandate, this is also a particularly appropriate case in which to consider that question. Even assuming—contrary to the holdings of the overwhelming majority of courts and the position of all parties—that the AIA might bar some suits seeking to challenge the mandate, the AIA would not bar the States' suit. It is not clear that the AIA applies to States at all, and it is clear, as this Court has already concluded, that the AIA does not bar a State's suit when the State lacks an alternative means to challenge the offending provision. *See South Carolina v. Regan*, 465 U.S. 367 (1984). Because the States have standing to challenge the mandate, and are not subject to the AIA, this case provides a unique assurance that the Court can reach the merits of the questions presented. The Court should grant plenary review.

OPINIONS BELOW

The opinion of the United States 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.274a) 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.394a) is reported at 716 F. Supp. 2d 1120.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2011. A timely petition for certiorari was filed on September 28, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The Affordable Care Act

The Affordable Care Act (the "ACA" or "Act") is a massive collection of sweeping changes that impose substantial new federal obligations on every corner of society and compel financial action both from the States and from nearly every citizen of the United States. The Act's core provisions work in tandem to increase both the supply and the demand for health insurance in an attempt to achieve Congress's goal of imposing "near-universal" insurance coverage on the Nation. ACA § 1501(a)(2)(D), (G). The Act also contains hundreds of revenue-raising or cost-cutting provisions intended to help offset the significant new costs of its core provisions.

The ACA mandates that each "applicable individual shall, for each month beginning after 2013, ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month." ACA § 1501(b); 26 U.S.C. § 5000A(a). This mandate to maintain health insurance applies to all individuals except foreign nationals residing here unlawfully, incarcerated individuals, and individuals falling within two narrow religious exemptions. *Id.* § 5000A(d). A covered individual who fails to comply with the mandate is subject to a financial "penalty." *Id.* § 5000A(b)(1), (c). The penalty provision contains its own limited set of exemptions, *id.* § 5000A(e), but exemption from the penalty does not obviate the individual's obligation to comply with the mandate. The two are separate.

The mandate is designed not just to target individuals who consume health care services without paying for them, but also to "broaden the health insurance risk pool to include healthy individuals." ACA § 1501(a)(2)(G). Congress also intended the mandate to counteract the effects of costly insurance industry changes, most prominently, the "guaranteed issue" provision, which requires insurers to enroll every applicant for insurance, and the "preexisting conditions" provision, which prohibits insurers from denying, canceling, capping, or increasing the cost of coverage based on an individual's preexisting health conditions or history. ACA § 1201. Those coverage mandates would have substantially increased the cost of insurance (and presumably would have been strenuously opposed by the insurance industry)

absent the individual mandate's effect of forcing healthy individuals to purchase coverage they would otherwise not obtain. The mandate also forces numerous individuals who qualify for Medicaid under pre-existing law, but for whatever reason have previously declined to participate, to obtain coverage.

B. The District Court Proceedings

Shortly after Congress passed the ACA, Florida and 12 other States brought this action seeking a declaration that the Act is unconstitutional. They have since been joined by 13 additional States, the National Federation of Independent Business ("NFIB"), and individuals Kaj Ahlburg and Mary Brown. The States argued that, *inter alia*, the individual mandate exceeds Congress's enumerated powers. The States maintained the entire Act must be invalidated because the individual mandate cannot be severed. The States also objected to other provisions of the Act on the grounds that they are an impermissible exercise of the spending power and violate the Tenth Amendment. *See* Petition for Certiorari, *Florida v. Dep't of Health & Human Servs.*, No. 11-400.

The federal government initially moved to dismiss the States' challenge to the individual mandate, arguing, *inter alia*, that it is barred by the AIA, 26 U.S.C. § 7421(a). The District Court rejected the argument, holding that the penalty attached to the mandate is not a "tax" for purposes of the AIA. Pet.App.401a–30a. The federal government then abandoned that argument on appeal and agreed with Respondents that the AIA poses no obstacle to Respondents' challenge.

The parties filed cross-motions for summary judgment on, *inter alia*, the constitutionality of the mandate. The District Court granted summary judgment to the States. Pet.App.274a.

The District Court concluded that the Commerce Clause does not grant Congress power to "penalize a passive individual for failing to engage in commerce." Pet.App.324a. If it did, "the enumeration of powers in the Constitution would have been in vain for it would be 'difficult to perceive any limitation on federal power.'" Pet.App.324a (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)). The court also concluded that the mandate could not be justified under the Necessary and Proper Clause because it undermines "'essential attributes' of the Commerce Clause limitations on the federal government's power." Pet.App.349a. The court also rejected the argument that the mandate is a valid exercise of Congress's taxing power, concluding that the penalty attached to the mandate is not a tax. Pet.App.158a.

The District Court then concluded that the individual mandate is not severable from the rest of the Act. The court first noted the federal government's concession that "the individual mandate and the Act's health insurance reforms … will rise or fall together," which it found "extremely significant because the various insurance provisions, in turn, are the very heart of the Act itself." Pet.App.350a, 356a. Examining the interplay between the mandate, the insurance provisions, and the rest of the Act, the court concluded that "[i]t would be impossible to ascertain on a section-by-section basis if any particular statutory provision

could stand (and was intended by Congress to stand) independently of the individual mandate," and that any attempt to do so would "be tantamount to rewriting a statute in an attempt to salvage it." Pet.App.361a.

C. The Eleventh Circuit's Decision

The Eleventh Circuit affirmed the District Court's holding that the individual mandate is unconstitutional but reversed the court's holding that the mandate cannot be severed from the rest of the Act. Pet.App.1a.

1. In a joint opinion by Chief Judge Dubina and Judge Hull, the court concluded that "[t]he federal government's assertion of power, under the Commerce Clause, to issue an economic mandate for Americans to purchase insurance from a private company for the entire duration of their lives is unprecedented, lacks cognizable limits, and imperils our federalist structure." Pet.App.155a–56a. The court rejected the theory that "because Americans have money to spend and must inevitably make decisions on where to spend it, the Commerce Clause gives Congress the power to direct and compel an individual's spending in order to further its overarching regulatory goals." Pet.App.103a. The court observed that "Congress has never before exercised this supposed authority," and that "th[is] Court has never … interpret[ed] the Commerce Clause to allow Congress to dictate the financial decisions of Americans through an economic mandate." Pet.App.105a, 106a.

The Eleventh Circuit also rejected the federal government's attempt to justify the mandate by

aggregating each individual's decision not to purchase health insurance to produce a substantial effect on commerce. The court found that theory "limitless," observing that, "[g]iven the economic reality of our national marketplace, any person's decision not to purchase a good would, when aggregated, substantially affect interstate commerce." Pet.App.113a. The court concluded that "the government's struggle to articulate cognizable, judicially administrable limiting principles only reiterates the conclusion we reach today: there are none." Pet.App.125a. The court also concluded that the mandate could not be justified as essential to a larger regulatory scheme, noting that this Court has never employed that reasoning to sustain a federal regulation "where plaintiffs contend that the entire class of activity is outside the reach of congressional power." Pet.App.145a.

Finally, the court concluded that the mandate cannot be sustained as an exercise of Congress's taxing power because the mandate "is a civil regulatory penalty and not a tax." Pet.App.171a.

2. The Eleventh Circuit reached precisely the opposite conclusion as the District Court on severability: it deemed the mandate entirely severable from the Act; not a single provision beyond the mandate was invalidated. As to the bulk of the Act—including other provisions that the States had challenged—the Eleventh Circuit found it sufficient that "[e]xcising the individual mandate … does not prevent the remaining provisions from being 'fully operative as a law.'" Pet.App.174a. Examining the guaranteed issue and preexisting conditions provisions in more detail, the court rejected

Congress's finding that the mandate is essential to those provisions and the federal government's concession that they cannot be severed from the mandate. Concluding that "multiple features … weaken the mandate's practical influence on the two insurance product reforms," the court deemed the interrelatedness of those provisions insufficient to warrant non-severability, "particularly … because the reforms of the health insurance help consumers who need it the most." Pet.App.183a, 185a.

3. Judge Marcus concurred in the majority's conclusion that the individual mandate cannot be sustained under Congress's taxing power but dissented from its holding that the mandate exceeds Congress's powers under the Commerce and Necessary and Proper Clauses.

ARGUMENT

I. The Court Should Grant Plenary Review To Decide Whether The Individual Mandate Is Constitutional And Whether The ACA Can Survive Without It.

The individual mandate "represents a wholly novel and potentially unbounded assertion of congressional authority: the ability to compel Americans to purchase an expensive health insurance product they have elected not to buy, and to make them re-purchase that insurance product every month for their entire lives." Pet.App.187a. Whether the Constitution grants Congress the power to impose such unprecedented regulation is a question with "far-reaching implications for our federalist structure," as the mandate "is breathtaking in its expansive scope" and "supersedes

a multitude of the states' policy choices in … key areas of traditional state concern." Pet.App.94a, 119a, 143a. Indeed, the Eleventh Circuit concluded that the mandate could not be upheld "without obliterating the boundaries inherent in the system of enumerated congressional powers." Pet.App.187a.

As all parties agree, it is now clear that the Courts of Appeals are divided as to whether the mandate is constitutional. One court rejected a facial challenge to the mandate through a strained and misguided as-applied analysis, another rejected challenges to the mandate without reaching the merits, and the Court of Appeals here invalidated the mandate as exceeding Congress's power. *See Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 554 (6th Cir. 2011) (opinion of Sutton, J.); *Liberty Univ. v. Geithner*, —— F.3d ——, 2011 WL 3962915 (4th Cir. Sept. 8, 2011); Pet.App.1a. All three decisions have generated separate opinions disagreeing with the majority's analysis. *See Thomas More*, 651 F.3d at 566 (Graham, J., sitting by designation, dissenting); *Liberty Univ.*, 2011 WL 3962915, at *22 (Davis, J., dissenting); Pet.App.189a (Marcus, J., dissenting).

District courts have also continued to divide on the question. *Compare Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, —— F. Supp. 2d ——, 2011 WL 4072875 (M.D. Pa. Sept. 13, 2011) (mandate unconstitutional), Pet.App.274a (same), *and Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (same), *with Liberty Univ. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010) (mandate constitutional), *and Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich.

2010) (same). Although the States firmly believe the decision below is correct, the States agree with the federal government that the lower courts are intractably divided and the question is of such immense constitutional consequence as to warrant this Court's resolution.

That is all the more true because it is not just the mandate, but the ACA as a whole, that hangs in the balance. The individual mandate is the centerpiece of a "sweeping and comprehensive" Act, Pet.App.20a, that imposes broad-ranging obligations on every corner of society, from States to insurance companies to private employers to individuals. There is a substantial question whether Congress intended any or all of the Act to survive if the individual mandate falls. Indeed, each of the four courts that has struck down the mandate has reached a different result as to the consequences for the balance of the Act. *See Virginia*, 728 F. Supp. 2d at 790 ("sever[ing] only section 1501 [of the ACA] and directly-dependent provisions which make specific reference to [it]"); Pet.App.363a (holding mandate non-severable and invalidating entire Act); Pet.App.186a (severing only the mandate and leaving remainder of Act in place); *Goudy-Bachman*, 2011 WL 4072875, at *21 (severing mandate and guaranteed issue and preexisting conditions provisions).

Given the grave doubt as to the individual mandate's constitutionality, the Court should not only grant the federal government's petition, but also grant review of, *inter alia*, the severance question raised in the States' petition for certiorari in No. 11-400. As set forth in that petition (at 33–

37), this case is the ideal vehicle for addressing both the constitutional question and the severance question, as this is the only case in which both lower courts considered both questions. Moreover, this case alone allows the Court to consider the equally weighty questions whether the Act's Medicaid expansion and employer mandate provisions are also constitutional, questions that are likely to influence resolution of the severability question. Accordingly, the Court should grant both petitions to determine the extent to which the ACA will stand. At a bare minimum, the Court should modify the federal government's first question presented to make clear that the severability question is squarely before the Court.

II. If The Court Is Inclined To Consider Whether The Anti-Injunction Act Applies, It Should Do So In This Case.

The federal government also suggests that, notwithstanding the parties' agreement that the AIA poses no obstacle, the Court direct the parties to address whether the AIA bars Respondents' challenge to the individual mandate. The AIA provides that, with certain exceptions not relevant here, "no suit for the purposes of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). The federal government initially contended that the AIA bars all pre-enforcement challenges to the mandate, including this challenge, but it reversed course before this case reached the Eleventh Circuit and

now agrees with the States and Private Respondents that the AIA does not apply. Pet. 33.

Although the overwhelming majority of courts (including the District Court in this case) have taken the same position, *see, e.g.*, Pet.App.401a–30a; *Thomas More*, 2011 WL 2556039, at *8; *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 627–29 (W.D. Va. 2010); *Virginia v. Sebelius*, 702 F. Supp. 2d 598, 604–05 (E.D. Va. 2010); *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 891 (E.D. Mich. 2010); *Goudy-Bachman v. Dep't of Health & Human Servs.*, 764 F. Supp. 2d 684, 694–96 (M.D. Pa. 2011); *U.S. Citizens Ass'n v. Sebelius*, 754 F. Supp. 2d 903, 909 (N.D. Ohio 2010), a divided panel of the Fourth Circuit recently became the first and only court to hold otherwise. *See Liberty Univ.*, 2011 WL 3962915, at *4–*16. In light of that lopsided split, the federal government suggests that the Court should consider the arguably jurisdictional AIA question. *See* Pet. 33 (citing *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962) for proposition that the AIA "withdraw[s] jurisdiction").

To the extent that this Court agrees that consideration of the AIA question is necessary, the States agree that the Court should instruct the parties in this case to brief the question. Although the federal government suggests that the Court could also grant the petition for certiorari pending in *Liberty University*, No. 11-438, and rely solely on briefs filed in that case to address the AIA question, there is no need to do so and a very good reason not to do so. The procedural postures of this case and of *Liberty University* are identical. In both cases, all parties agree that the AIA is not an obstacle.

Accordingly, if the AIA is not jurisdictional, it should not be at issue in either case. On the other hand, if the AIA is jurisdictional, the courts have an equal obligation to decide the question in both cases.

The only difference between the two cases is that the judgment in *Liberty University* rests on the AIA. But that is not a reason to grant certiorari in that case. As noted, the Court is equally capable of addressing the AIA issue in either case. If the Court is inclined to hear oral argument in defense of the proposition that the AIA is an obstacle, it can appoint an amicus for that purpose in either case. But it would be unusual to limit the briefing in the *Liberty University* case to the AIA issue, and thus granting that petition may raise the prospect of duplicative briefing and argument on the merits of the individual mandate. In short, the Court may wish to grant the petition in *Liberty University* in addition to the petitions in this case for reasons unrelated to the AIA issue, but there is no cause for the Court to grant that petition just to address the AIA issue. This case presents an equally good vehicle to address that question.

Indeed, this case presents a uniquely attractive vehicle for addressing the AIA issue because the AIA does not apply to States in the same manner as it applies to individual taxpayers. Even assuming the AIA might bar some challenges to the mandate (and the States maintain it does not), it would not bar the States' challenge. First, it is not clear that the AIA applies to the States, as its bar against suits brought "by any person" must be read against the "longstanding presumption that 'person' does not include the sovereign." *Vt. Agency of Natural Res. v.*

United States, 529 U.S. 765, 780 (2000); *see also United States v. United Mine Workers*, 330 U.S. 258, 275 (1947); *cf. Nixon v. Missouri Mun. League*, 541 U.S. 125, 132 (2004); *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543 (2002). In keeping with that presumption, when Congress intends the term "person" to include States, it says so explicitly, which it did not do in section 7421(a). *See, e.g.*, 31 U.S.C. § 3733(*l*)(4) (providing that "the term 'person' … includ[es] any State or political subdivision of a State" for purposes of certain False Claims Act provisions); *cf. Raygor*, 534 U.S. at 543 ("When Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." (internal quotation marks omitted)).

Second, even if the AIA's generic reference to "person" could be read to reach States in some circumstances, under this Court's precedent, it would not bar the States' challenge to the individual mandate. "Congress did not intend the [Anti-Injunction] Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." *South Carolina v. Regan*, 465 U.S. 367, 378 (1984). Thus, although the AIA bars pre-enforcement suits by individual taxpayers who can bring a refund suit after a tax has been assessed, it does not bar a State's suit to challenge a tax that is not imposed directly on the State, as the State would have no post-assessment means by which to challenge such a tax. *See id.* at 379–80 (AIA did not bar State's challenge to federal tax under which State "will incur no tax liability"). Accordingly, even

assuming the AIA applied to suits challenging the individual mandate, it would not bar the States' suit, as Congress "has not provided an alternative remedy" by which the States could challenge the mandate. *Id.* at 378; *see also Virginia*, 702 F. Supp. 2d at 604 (finding it "clear that the *Regan* exception applies" to State's challenge to individual mandate).

To reach the merits of the States' challenge, the Court also must satisfy itself that the States have standing to challenge the mandate. As is apparent from *Regan*, the fact that the mandate is not imposed directly on the States does not deprive the States of standing to challenge it. Quite the contrary, the States have adequately alleged standing on multiple grounds, the most obvious of which is the effect the mandate will have on States' financial obligations under Medicaid. The mandate requires all individuals to obtain and maintain a minimum level of insurance, including individuals who were previously eligible for Medicaid but declined to enroll. The Act provides no new federal funding to States for those previously eligible but unenrolled individuals forced onto the Medicaid rolls by the mandate. The mandate will therefore substantially increase the States' share of Medicaid funding by forcing enrollment of millions more individuals in Medicaid. To take one uncontested example from the record, Florida projects that, solely as a result of enrolling individuals who are currently eligible but not enrolled, Florida's share of Medicaid costs will increase by more than $500 million annually by the end of the decade. 11th Cir. Record Excerpts 523 ¶18. Surely, a $500 million financial

hit is a sufficient injury in fact for standing purposes.

That inevitable increase in enrollment is not a product of "unfettered choices made by independent actors," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.), but is a necessary and intended consequence of the mandate itself. *See* 26 U.S.C. § 5000A(f) (providing that enrollment in Medicaid satisfies the individual mandate); *see also* Richard S. Foster, Estimated Financial Effects of the "Patient Protection and Affordable Care Act," Centers for Medicare & Medicaid Servs., Apr. 22, 2010, at 6, *available at* https://www.cms.gov/ActuarialStudies/Downloads/PPACA_2010-04-22.pdf ("Of the additional 34 million people who are estimated to be insured by 2019 as a result of the [individual mandate], a little more than one-half (18 million) would receive Medicaid coverage due to the expansion of eligibility."). The States' injury is essentially no different from the injury suffered by a company with an agreement with the government to provide a product to individuals at a subsidized rate. If the government passed a law making the purchase of that product mandatory, not voluntary, the company would suffer an immediate and enormous financial hit and would clearly have standing to sue. The States suffer an analogous injury here and clearly have standing to challenge the mandate.

Because the States, like the State in *Regan*, have standing to challenge the mandate despite not being the direct taxpayer, this case is the ideal vehicle for review of the AIA issues. The Court can fully explore whether the AIA is jurisdictional and the persuasive arguments that the AIA does not bar

any party's challenge to the mandate. But, in the unlikely event that the Court decides that the AIA is an obstacle to suits by individuals, it can still reach the merits of the mandate's constitutionality by virtue of this extraordinary challenge by over half of the Nation's States.

CONCLUSION

The Court should grant the petitions.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
BANCROFT PLLC
1919 M Street, N.W.
Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

PAMELA JO BONDI
Attorney General of Florida
SCOTT D. MAKAR
Solicitor General
LOUIS F. HUBENER
TIMOTHY D. OSTERHAUS
Deputy Solicitors General
BLAINE H. WINSHIP
Special Counsel
Office of the Attorney General
The Capitol, Suite PL-01
Tallahassee, FL 32399
(850) 414-3300

KATHERINE J. SPOHN
Special Counsel to the Attorney General
Office of the Attorney General
of Nebraska
2115 State Capitol Building
Lincoln, NE 68508

BILL COBB
Deputy Attorney General for Civil Litigation
Office of the Attorney General
of Texas
P.O. Box 12548
Capitol Station
Austin, TX 78711
(512) 475-0131

October 17, 2011 *Counsel for Respondent States*