No. 11-438

IN THE SUPREME COURT OF THE UNITED STATES

LIBERTY UNIVERSITY, MICHELE G. WADDELL and JOANNE V. MERRILL,
Petitioners.

v.

TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA L. SOLIS, and ERIC H. HOLDER, JR.,
Respondents.

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

---

PETITIONERS' BRIEF IN REPLY

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Liberty Counsel
1055 Maitland Center Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
court@lc.org

Stephen M. Crampton
Mary E. McAlister
Liberty Counsel
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Petitioners' challenges to various provisions of the Patient Protection and Affordable Care Act of 2009 (the "Act") present unique issues of great constitutional importance that this Court should address. Unlike the other cases under consideration by this Court, Petitioners' case squarely presents the threshold question of whether pre-enforcement challenges to individual and employer insurance mandates are barred by the Anti-Injunction Act ("AIA"), 26 U.S.C. §7421. Respondents suggest that this Court should simply "piggyback" the AIA issue onto its Petition seeking review of *Florida v. United States Department of Health and Human Services,* 648 F.3d 1235 (11th Cir. 2011), *Department of Health & Human Services v. Florida,* No. 11-398. However, the multiplicity and complexity of issues involved in the *Florida* case (and all the cases for that matter), and the questioned standing of the state petitioners make that case particularly inappropriate for review of the AIA question.

Similarly, this Court should review Respondents' contention that the employer mandate is unquestionably constitutional. This case is the only case that squarely addresses the constitutionality of the employer mandate.

This Court should reject Respondents' request to deny review of the constitutionality of the individual mandate as a veiled attempt to avoid review of the only appellate decision to strike down the mandates.

Similarly, this Court should reject Respondents' argument that this case is an inappropriate vehicle for adjudicating the question of the severability of the insurance mandates from the remainder of the Act.

Petitioners respectfully request that its Petition be granted in its entirety.

ARGUMENT

I. THIS IS THE ONLY CASE TO FULLY ADDRESS THE QUESTION OF WHETHER THE ANTI-INJUNCTION ACT BARS THE CHALLENGES TO THE INDIVIDUAL AND EMPLOYER MANDATES.

Respondents suggest that the AIA question be addressed as an afterthought if this Court should grant its petition in *Department of Health & Human Services v. Florida,* No. 11-398. (Response Brief at 13). Even though the AIA was not squarely addressed by the Eleventh Circuit, Respondents suggest that it would be "most natural" for this Court to consider the AIA question in the course of reviewing that ruling. (Response Brief at 15).

However, this case is the only case in which the circuit panel addressed the applicability of the AIA and found it to be a bar to challenges of both the individual and employer mandates. Consequently, Petitioners are uniquely situated to address this question. Respondents admit that this case is an appropriate vehicle for addressing the applicability of the AIA to pre-enforcement challenges, but argue that it is a less-preferred alternative to having the Court decide the question in Case No. 11-398. (Response Brief at 16). Respondents' preferences aside, the parties agree that this question should be reviewed by this Court and that this case is an appropriate means to do so. Consequently, the petition should be granted.

Respondents suggest that the State respondents in case 11-398 can adequately address the question. (Response Brief at 15). According to Respondents, Case No. 11-398 "would likely prove a more effective way of considering the relevant issues surrounding the Anti-Injunction Act and pre-enforcement challenges to the minimum coverage provision." (Response Brief at 15). The State respondents go further and say that Case No. 11-398 is a "uniquely attractive" vehicle for review of the AIA. (States' Response Brief, Case No. 11-398 at 14). However, the states' argument that that "the AIA does not apply to States in the same manner as it applies to individual taxpayers…"

belies that claim and demonstrates why this case is the only case that can adequately address the AIA question. (States' Brief in Response, Case No. 11-398 at 14).The states cannot adequately represent the interests of Petitioners, who are individual taxpayers and a private employer. Furthermore, as the states correctly assert, "the judgment in *Liberty University* rests on the AIA," but the judgment in *Florida* does not. (States' Brief, Case No. 11-398, at 14). That is a critical distinction for determining which party should be tasked with addressing the AIA. The states' claims were not dismissed because of the AIA, so any discussion of it would be merely an aside. By contrast, for Petitioners, the AIA lies at the very heart of their case, and in fact was used to drive a stake through the heart of Petitioners' claims. (Petition Appx. 51a-52a). This Court cannot give plenary review to the applicability of the AIA by merely granting review in Case No. 11-398.[1]

---

[1] Even a brief look at the issues presented in Cases 11-393, 11-398 and 11-400 demonstrates how unlikely it would be for the parties in those cases to give anything but a passing mention of the AIA issue, which again belies their claims that their cases would be adequate or even preferred vehicles for addressing that issue. After briefing the questions of the states' standing, the constitutionality of the individual

As Respondents and the parties in Case No. 11-398 admit, it is this Circuit's decision that created the circuit conflict regarding the applicability of the AIA. In addition, it is this case in which the AIA became the centerpiece of discussion, and the only case in which it was determinative. Therefore it is this decision that needs to be reviewed by this Court to determine how the conflict needs to be resolved, and this Court should grant the Petition.

In trying to dissuade this Court from accepting review of the applicability of the AIA to the employer mandate, the Respondents actually illustrate the conflict that needs to be addressed by this Court. Respondents acknowledge that they did not raise the AIA as a bar to Petitioners' challenge to the employer mandate in either their opening or supplemental brief to the Fourth Circuit, but now try to retroactively qualify the arguments in their supplemental brief. (Brief in Response, p. 21 n.8).

---

mandate, the Medicaid provisions, the standing of the states and/or NFIB to challenge raise severability, and then the extent of what is severable from the Act, there will be little space available to address the AIA. Granting this Petition will ensure that the AIA will get a full analysis (as well as fuller analysis on the other issues Petitioners raise).

> In response to this Court's order of May 23, 2011, appellees respectfully submit that the Anti-Injunction Act (AIA) is not applicable **to these proceedings.**

(Appendix to Reply Brief at 6a) (emphasis added). Respondents did not specifically cite 26 U.S.C. §4980(H) in their supplemental brief, but they also did not limit their statement about the inapplicability of the AIA to the individual mandate. (Reply Appx. 1a-21a) Instead, they unequivocally stated that the AIA did not apply to "these proceedings," which necessarily included Petitioners' challenges to both the individual and employer mandates. Respondents' convenient recent argument that they were only addressing the individual mandate raises serious questions about their claim that the AIA bars the challenge to the employer mandate but not the individual mandate.

The pending Petition in *Thomas More Law Center v. Obama*, Case No. 11-117, also does not provide a good vehicle to review the AIA. There the court found that the AIA did not apply to the individual mandate and thus Petitioners in that case did not raise the matter in their Questions Presented. (Petition in Case No. 11-117, at 5). Respondents briefly

mentioned the AIA in their Response only after the Fourth Circuit had dismissed Petitioners' claims based upon the AIA. (Brief in Response, Case No. 11-117, at 20).

This case is the best vehicle to address the applicability of the AIA to the individual and employer mandates. This case is the only case that can address whether the AIA applies to bar the employer mandate claim. This Court should therefore grant review to resolve these important issues.

II. THIS COURT SHOULD GRANT THE PETITION TO ADDRESS THE QUESTION OF WHETHER THE EMPLOYER MANDATE IS A PERMISSIBLE USE OF CONGRESS' ARTICLE I POWERS.

Respondents argue that Petitioners' challenge to the employer mandate does not deserve this Court's review because there is "no conflict" that it is "plainly constitutional" under both the Commerce Clause and the Taxing and Spending Clause. (Response Brief at 23). Respondents' non-sequitur shows why this Court should grant review on the employer mandate question. If no other appellate court has considered the constitutionality of the employer mandate and the issue was not fully analyzed, but mentioned in the concurring and

dissenting opinions, then it cannot be "plainly constitutional."

Respondents assert that this Court should not grant review because "there is no conflict" among the circuits, and therefore, implicitly, nothing for this Court to resolve. While true that there is no conflict since only this case raised such a challenge, the matter was ruled upon by the district court and by the concurring and dissenting judge in the Fourth Circuit. The breadth of those opinions begs for this Court's review of the employer mandate as they clearly plowed new ground not charted by this Court.

Furthermore, as did the district court below, Respondents raise an important issue on the nature and scope of Congress' power over the terms of employment which has not been but should be addressed by this Court. *See* Sup. Ct. Rule 10(c). Respondents assert that "'fringe benefits' can readily be regarded as a form of wages," so that mandating that all employers provide health insurance falls within this Court's decisions in *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937) and *United States v. Darby*, 312 U.S. 100 (1941). (Response Brief at 23). *Jones & Laughlin* and *Darby* provide that Congress can regulate wages, hours and working conditions of businesses or portions of businesses engaging in interstate commerce.

Jones & Laughlin, 301 U.S. at 31; *Darby*, 312 U.S. at 115. However, neither case, nor any other case cited by Respondents or the district court, has defined "wages" to include fringe benefits. The district court merely surmised that "[t]he opportunity provided to an employee to enroll in an employer-sponsored health care plan is a valuable benefit offered in exchange for the employee's labor, much like a wage or salary." (Petition Appx. at 217a-218a). "Much like a wage or salary" is not a legally cognizable definition, and does not fall within the parameters set forth in *Jones & Laughlin*, *Darby* or any of this Court's other precedents regarding congressional oversight of employment agreements. Respondents' supposition that "'fringe benefits' can readily be regarded as a form of wages" goes even farther than did the district court. Respondents' assertion is not limited to health insurance coverage, but would reach any perquisite that an employer might choose to offer to its employees. (Brief in Response at 24). This Court's precedents have never been stretched that far, nor could they be if private employers are to maintain any autonomy.

Respondents' extensive discussion of Congress' purported authority to impose the employer mandate undermines their rejection of Petitioners' characterization of their claim as a challenge to the mandate as opposed to an

attempt to avoid paying taxes. (Brief in Response at 22). Respondents incorrectly analogize Petitioners' claim to the challenge this Court rejected in *Bob Jones University v. Simon*, 416 U.S. 725, 731-732 (1974). However, as Petitioners explain in their Petition, the university's claims in *Bob Jones* are dissimilar to Petitioners' challenge. (Petition at 14-15). As this Court held in *Bob Jones*, although the plaintiff described its claim as seeking to maintain income flow instead of avoid taxes, in fact "a primary purpose of this lawsuit is to prevent the [Internal Revenue] Service from assessing and collecting income taxes from petitioner," which placed it squarely within the AIA. *Id* at 738. No such characterization is possible in this case. There might not ever be collection of revenue from Petitioners (or anyone else) for non-compliance with the insurance mandates if all eligible taxpayers comply with the mandate. *See* 26 U.S.C. §5000A. Consequently, Petitioners' action does not pose a threat of judicial intervention to the assessment and collection of revenues, and the AIA is wholly inapplicable. Since Petitioners are not challenging their liability for a tax assessment, but the unconstitutionality of a statutory mandate the AIA does not apply.

Respondents claim that the employer mandate is merely "the latest example of Congress's use of its taxing power to *encourage*

employers to provide health insurance." (Brief in Response at 25, emphasis added). Respondents try to liken the mandate to the tax deductibility of health insurance premium payments and exclusion of payments from employee's income as examples of incentives given employers to provide health insurance. (Brief in Response at 25). The comparison is fatally flawed. Employers who do not provide health insurance under the present system will lose the tax deduction but will not incur financial penalties as they will under 26 U.S.C. §4980H. 26 U.S.C. §§ 106, 162. Also, the Act changed the law so that as of January 1, 2011 health insurance premiums paid by employers are included as part of the employee's income. 26 U.S.C. §6051(a).

Contrary to Respondents' assertions, Petitioners' challenge to the employer mandate not only warrants this Court's review, but requires it in order to prevent an extra-judicial expansion of Congress' power to regulate private employers.

III. THIS CASE PRESENTS THE BEST VEHICLE FOR DETERMINING THE CONSTITUTIONALITY OF THE INDIVIDUAL MANDATE.

Respondents admit that the question of the constitutionality of the individual mandate should be reviewed by this Court, but it "does

not appear necessary" to grant review in this case to answer the question. (Brief in Response at 14). However, an examination of Respondents' arguments in Case No. 11-398 reveals that this petition should be granted to ensure that the constitutionality of the individual mandate actually gets plenary review.

Respondents contend that the states do not have standing to challenge the individual mandate, and indicate that they will raise the standing issue in Case No. 11-398 (Brief in Response at 15 n.7). Should Respondents successfully challenge the states' standing, then the only appellate decision finding that the mandate is unconstitutional would be reversed and the question of the constitutionality of the individual mandate might never be addressed. Petitioners' participation in the analysis would ensure that the challenge to the individual mandate does not fall prey to dismissal for lack of standing or to inadequate attention.

Petitioners' standing is not in question, so the constitutional challenge cannot be brushed away on procedural grounds. Judges Davis and Wynn provided thorough analyses of the question, albeit from different perspectives, and provide a 2-1 majority for the (incorrect) proposition that the individual mandate

comports with Congress' enumerated powers under Article I. Therefore, the question is squarely addressed in this case with no concerns about procedural technicalities preventing resolution.

This case is the only case which squarely presents the issue without the possibility of an issue of standing. Consequently, this Court should grant this petition on the issue of the constitutionality of the individual mandate.

IV. THIS CASE PRESENTS AN APPROPRIATE VEHICLE TO REVIEW THE ISSUE OF SEVERABILITY.

Respondents also contend that this case would "present a particularly poor vehicle to review the extent to which other provisions of the Act could be severed from the minimum coverage provision if it were found to be unconstitutional." (Response Brief at 14 n.6). As an alternative, Respondents urge this Court to grant the severability questions presented in the Petitions in Cases 11-393 and 11-400. (Response Brief at 14 n.6). However, as was true with the individual mandate, Respondents' proposed alternative is a thinly veiled attempt to preclude plenary review of the question.

In their Response Brief in Cases 11-393 and 11-400, Respondents urge this Court to

accept review of the severability question in both the States' and private plaintiffs' petitions, but then argue that the petitioners will not have standing to seek severance of other provisions in the Act. (Response Brief in Cases 11-393 and 11-400 at 29). As was true with the individual mandate, Respondents' suggested approach to the severability issue would result in no party having standing to challenge the Act. Consequently, plenary review of the severability question requires that this Court grant this Petition on the severability issue.

CONCLUSION

This Court should grant this Petition as to all of the questions presented to ensure that the issues surrounding the constitutionality of this complex landmark legislation receives plenary review.

October 2011

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
LIBERTY COUNSEL
1055 Maitland Center Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
court@lc.org

Stephen M. Crampton
Mary E. McAlister
LIBERTY COUNSEL
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org

APPENDIX

No. 10-2347

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LIBERTY UNIVERSITY, et al., Plaintiffs-Appellants,
v.
TIMOTHY GEITHNER, SECRETARY OF THE TREASURY, et al., Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

SUPPLEMENTAL BRIEF FOR APPELLEES

NEAL KUMAR KATYAL Acting Solicitor General
TONY WEST Assistant Attorney General
BETH S. BRINKMANN Deputy Assistant Attorney General

TIMOTHY J. HEAPHY United States Attorney
MARK B. STERN ALISA B. KLEIN
SAMANTHA L. CHAIFETZ
(202) 514-5089
Attorneys, Appellate Staff

Civil Division, Room 7531
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

TABLE OF AUTHORITIES

Statutes:

Legislative Materials:

In response to this Court's order of May 23, 2011, appellees respectfully submit that the Anti-Injunction Act (AIA) is not applicable to these proceedings.

1. The AIA provides, with statutory exceptions not implicated here, that "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). The purpose of the AIA is to preserve the government's ability to assess and collect taxes with "a minimum of preenforcement judicial interference, and to require that the legal right to the disputed sums be determined in a suit for refund." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974) (internal quotation marks omitted). The AIA, when applicable, bars any suit seeking relief that "would necessarily preclude" the assessment or collection of taxes under the Internal Revenue Code, regardless of the plaintiff's professed motivation for the suit. *Id.* at 731-32.

a. Like other provisions that "govern[] a court's adjudicatory capacity," *Henderson ex rel.*

Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011), the AIA limits the federal courts' subject-matter jurisdiction. See Hansen v. Dep't of Treasury, 528 F.3d 597, 600-01 (9th Cir. 2007); *Gardner v. United States*, 211 F.3d 1305, 1310 (D.C. Cir. 2000). Accordingly, if the AIA applied here, it would deprive the court of jurisdiction to hear a pre-implementation challenge to the minimum coverage provision of the Affordable Care Act (ACA), 26 U.S.C.A. § 5000A.

b. In the district courts, the government argued for dismissal of these actions under the AIA. On further reflection, and on consideration of the decisions rendered thus far in the ACA litigation, the United States has concluded that the AIA does not foreclose the exercise of jurisdiction in these cases. Unique attributes of the text and structure of the ACA indicate that Congress did not intend to dictate a single pathway to judicial review of Section 5000A – i.e., failure to maintain minimum essential coverage starting more than two and a half years from now, in January 2014; payment of the tax penalty starting nearly four years from now, in April 2015; and, only then, commencement of an action seeking a tax refund.

As noted, the AIA applies to a "suit for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). Separate provisions of the Internal Revenue Code expressly provide that certain penalties will be deemed "tax[es]" for purposes of other parts of the Code, including the AIA. Thus, the second sentence of Section 6671(a) provides that, "[e]xcept as otherwise provided, any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter." 26 U.S.C. § 6671(a) (emphasis added). Thus, the AIA bars a suit to restrain assessment or collection of a "penalty" established in Subchapter B of chapter 68 (in which 26 U.S.C. § 6671(a) appears) because such penalties are deemed taxes for purposes of all of Title 26. Likewise, paragraph (2) of Section 6665(a) provides that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to . . . penalties provided by this chapter [68]." 26 U.S.C. § 6665(a)(2).

The minimum coverage provision penalty, however, appears in Chapter 48 of Subtitle D ("Miscellaneous Excise Taxes"), not Chapter 68. See 26 U.S.C.A. § 5000A. It is therefore not among the "penalties" that come within the ambit of the AIA by reason of Sections 6665(a)(2) or 6671(a).

To be sure, Congress provided in the ACA that "[t]he penalty provided by this section . . . shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." 26 U.S.C.A. § 5000A(g)(1). And the first sentence of 26 U.S.C. § 6671(a) (in subchapter B) provides that "[t]he penalties and liabilities provided by this subchapter [B] . . . shall be assessed and collected in the same manner as taxes." (The Internal Revenue Code elsewhere specifies the manner in which taxes are assessed, 26 U.S.C. §§ 6201-6255, and collected, id. §§ 6301-6344.) But Congress differentiated in Section 6671(a) itself between assessment and collection of assessable penalties (the first sentence) and other Internal Revenue Code-specific attributes applicable to assessable penalties (the second sentence). And Section 5000A(g)(1) mirrors only the former, and indeed does so without referring to Section 6671(a). The significance of that choice is illuminated by comparing the limited instruction in Section 5000A(g)(1) to other actual cross-references in the Code.

For example, several tax penalty provisions, e.g., 26 U.S.C. §§ 5114(c)(3), 5684(b) & 5761(e), expressly cross-reference to Section 6665(a), which provides that "the additions to the tax, additional amounts, and penalties provided by this chapter shall be paid upon notice and

demand and shall be assessed, collected, and paid in the same manner as taxes," 26 U.S.C. § 6665(a)(1), and, as noted, that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to . . . penalties provided by this chapter [68]," id. § 6665(a)(2). It is Section 6665(a)(2) that renders the AIA applicable to those penalties. In contrast to Section 5000A(g)(1), these cross-reference provisions also mention "taxes" and cite to (all of) Section 6665(a) – i.e., they identically provide that the penalty "shall be assessed, collected, and paid in the same manner as taxes, as provided in section 6665(a)." 26 U.S.C. §§ 5114(c)(3), 5684(b), 5761(e).

Section 5000A(g)(1), by contrast, does not specifically cross-reference Section 6671 (or Section 6665(a)). Nor does Section 5000A(g)(1) state that the penalty shall be assessed and collected in the same manner as "taxes." Instead, it provides that the penalty will be assessed and collected in the same manner as an "assessable penalty." Finally, Section 5000A(g)(1) does not provide that the penalty shall be "paid" in the same manner as an assessable penalty or (as noted above) refer to Section 6671(a), which provides that penalties and liabilities provided by subchapter B of Chapter 68 "shall be paid upon notice and demand" by the Secretary. Rather, Section

5000A(g)(1) includes its own directive that the penalty "shall be paid upon notice and demand by the Secretary."

Given that Congress in other penalty provisions had included explicit cross-references to Section 6665(a), the distinctions discussed above indicate that the absence of such a specific cross-reference to that section or to Section 6671(a), and thus derivatively to the AIA, was deliberate.[1]

The structure and legislative history of the ACA support this conclusion. First, in Section

---

[1]1 This conclusion is further reinforced by the contrast between Section 5000A(g)(1) and Section 9010 of the ACA, which establishes a penalty and provides that it "shall be subject to the provisions of subtitle F of the Internal Revenue Code . . . that apply to assessable penalties imposed under chapter 68 of such Code." See ACA § 9010(g)(3)(C), as amended by the Health Care and Education Reconciliation Act of 2010 § 1406, 26 U.S.C.A. Subt. D, note. In contrast to the limited direction in Section 5000A(g)(1), the broad cross-reference in Section 9010 incorporates all of Sections 6665(a) and 6671(a), both of which appear in Subtitle F.

5000(A)(g)(2)(B) (the provision immediately following the "assessed and collected" provision discussed above), Congress prohibited the IRS from filing a notice of lien or levying on property in order to collect the penalty.[2] Those actions are among the principal tools the federal government uses to collect unpaid taxes, and, as a practical matter, resort to those tools is what a pre-enforcement challenge to a tax statute would typically "restrain" (26 U.S.C. § 7421(a)). Because those particular tools are unavailable in the context of the minimum coverage provision, it makes sense that Congress would regard it as unnecessary to apply the AIA to bar challenges to the minimum coverage provision prior to its effective date.

Second, and as the government has acknowledged, the minimum coverage requirement is "integral" to the ACA's guaranteed-issue and community-rating provisions – i.e., Sections 2701, 2702, 2704

---

[2] The ACA also provides that "[i]n the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure." 26 U.S.C.A. § 5000A(g)(2)(A).

(with respect to adults), and 2705(a) of the Public Health Service Act, as added by Section 1201 of the ACA – which go into effect in 2014 along with that requirement and cannot be severed from it. *See* U.S. Response/Reply Brief at 47, *Virginia v. Sebelius*; see also U.S. Response/Reply Brief at 58, *Florida v. HHS,* Nos. 11-11021 & 11-11067 (11th Cir.) (filed May 18, 2011). Congress would not have wanted to wait until after these interconnected provisions were implemented (and relied upon by millions of individuals, as well as the insurance industry) for challenges to the constitutionality of the minimum coverage provision to be resolved.

Third, Congress delayed the effective date of the minimum coverage provision, thus dramatically mitigating the risk of disruption to ongoing administration of the tax code that the AIA is intended to prevent. The AIA's purpose is to prevent anyone from interfering with the federal government's administration of the Tax Code, from forcing it by judicial fiat to treat a particular taxpayer or group of taxpayers differently than others, and from compelling it to stop or alter the ongoing business of tax enforcement. This broad challenge to the constitutionality of the minimum coverage provision, which was brought nearly four years before the minimum

coverage provision is to be implemented, five years before any tax is to be paid and the IRS begins assessing and collecting those taxes, and well before the IRS has even set up the systems to administer the provision, poses no realistic threat of such disruption -- in contrast to the threat of disruption to the administration of the ACA that postponing review would raise.

Finally, the ACA's legislative history supports the conclusion that Congress did not intend the AIA to prohibit pre-enforcement challenges to the minimum coverage provision. In enacting the statute, Members of Congress reflected an awareness that constitutional challenges were "likely" to be adjudicated, but never suggested that the only way for an individual to obtain review would be to refuse in 2014 to maintain the minimum essential coverage the ACA sought to ensure, pay the tax penalty in 2015, and commence a refund action. 155 Cong. Rec. S13,823 (Dec. 23, 2009) (Sen. Hatch); see also 156 Cong. Rec. E475-02 (Mar. 21, 2010) (Rep. Bonner) (noting "there are already attempts to challenge [the provision] in court").

2. As the United States has explained (U.S. Opening Brief at 58-61, *Virginia v. Sebelius;* U.S. Opening Brief at 54-59, *Liberty v. Geithner*), the minimum coverage provision is a valid exercise of Congress's constitutional

power over taxation. But that conclusion does not mean that the AIA bars this lawsuit; the two inquiries are distinct.

In "passing on the constitutionality of a tax law," a court is "concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Nelson v. Sears, Roebuck & Co*., 312 U.S. 359, 363 (1941) (citation omitted). The minimum coverage provision easily satisfies that test. Among other things, it will be administered by the IRS; any penalty is due on April 15 with individuals' tax returns; and, in many cases, the penalty will be a percentage of income. In "practical operation," id., this is a tax for constitutional purposes. That inquiry, unlike the technical question of whether Congress intended the AIA to apply, does not depend on the particular Chapter in which the provision appears in the Internal Revenue Code or the precise language of the statutory cross-references Congress employed.

The distinction between these inquiries is illustrated by two Supreme Court cases from 1922. In *Bailey v. Drexel Furniture Co. (Child Labor Tax Case*), 259 U.S. 20 (1922), the Court upheld a claim for a tax refund, and invalidated a federal child labor tax law as a punitive sanction. Nevertheless, on the same day, the

Court ordered dismissal of a pre-enforcement suit to enjoin collection of the same tax. *Bailey v. George*, 259 U.S. 16 (1922). The Court held that "[t]he averment that a taxing statute is unconstitutional does not take this case out of" the predecessor to the AIA. Id. at 20. The Court has since reiterated that the AIA applies even where the taxpayer challenges Congress's power to enact a purported tax. *See Bob Jones Univ.*, 416 U.S. at 740-41; *Alexander v. Americans United, Inc.*, 416 U.S. 752, 759-60 (1974).

The converse is also true. For the reasons provided above, this Court may determine that, as a matter of statutory interpretation, the AIA does not apply here and that Section 5000A is an exercise of Congress's taxing power.

3. An individual plaintiff may also challenge Section 5000A in a refund suit. A taxpayer who seeks a refund of taxes that he claims were unlawfully assessed or collected may sue either in a district court or the Court of Federal Claims. 28 U.S.C. § 1346(a)(1). However, he must first comply with the tax refund scheme in the Internal Revenue Code – i.e., pay the challenged tax and file an administrative claim for a refund with the IRS before bringing suit. 26 U.S.C. § 7422(a). Having complied with these prerequisites, the taxpayer may challenge the constitutionality of the tax in his

refund suit, *see, e.g., United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 9-10 (2008), but could not do so in this context until 2015 at the earliest, after he failed to maintain minimum coverage during the 2014 tax year. In the unique circumstances of this case, we do not believe that Congress intended a refund suit to be the sole recourse for a constitutional challenge to the minimum coverage provision.

Respectfully submitted,

NEAL KUMAR KATYAL Acting Solicitor General
TONY WEST Assistant Attorney General
BETH S. BRINKMANN Deputy Assistant Attorney General
TIMOTHY J. HEAPHY United States Attorney
MARK B. STERN
ALISA B. KLEIN
/s/ SAMANTHA L. CHAIFETZ
(202) 514-5089 Attorneys,
Appellate Staff
Civil Division, Room 7531
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001