No.

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

---

PETITION FOR WRIT OF CERTIORARI

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

QUESTIONS PRESENTED

1. Whether the Anti-Injunction Act (AIA) bars courts from deciding the limits of federal power to enact a novel and unprecedented law that forces individuals into the stream of commerce and coerces employers to reorder their business to enter into a government-mandated and heavily regulated health insurance program when the challenged mandates are penalties, not taxes, where the government argues Congress never intended the AIA to apply, and where the Petitioners are currently being forced to comply with various parts of the law and thus have no other alternative remedy but the present action.

2. Whether Congress exceeded its enumerated powers by enacting a novel and unprecedented law that forces individuals who otherwise are not market participants to enter the stream of commerce and purchase a comprehensive but vaguely defined and burdensome health insurance product, and if so, to what extent can this essential part of the statutory scheme be severed.

3. Whether Congress exceeded its enumerated powers by enacting a novel and unprecedented law that forces private employers into the health insurance market

and requires them to enter into third-party contracts to provide a comprehensive but a vaguely defined health insurance product to their employees and extended beneficiaries, and if so, to what extent can this essential part of the statutory scheme be severed.

PARTIES

Petitioners are Liberty University, a Virginia non-profit corporation, Michele G. Waddell and Joanne V. Merrill.

Respondents are Timothy Geithner, Secretary of the Treasury of the United States, in his official capacity; Kathleen Sebelius, Secretary of the United States Department of Health and Human Services, in her official capacity; Hilda L. Solis, Secretary of the United States Department of Labor in her official capacity; Eric H. Holder, Jr., Attorney General of the United States, in his official capacity.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 6

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE CONFLICTS WITH PRECEDENTS FROM THIS COURT AND AMONG CIRCUIT COURTS REGARDING THE APPLICABILITY OF THE AIA TO BAR A CHALLENGE TO THE ACT. 9

A. The Finding That The Challenge To the Act's Mandates Are Efforts To Restrain The Collection Or Assessment Of A Tax Conflicts With This Court's Precedents..... 11

B. The Fourth Circuit's Ruling That The AIA Bars This Action Conflicts With Other Courts Dealing With The Same Issue..... 17

II. THIS COURT SHOULD GRANT REVIEW TO DETERINE WHETHER ESSENTIAL PROVISIONS OF THE ACT THAT FORCE INDIVIDUALS AND EMPLOYERS TO PURCHASE OR PROVIDE HEALTH INSURANCE ARE SUPPORTED BY THE TAXING AND SPENDING CLAUSE..... 22

A. The Implicit Finding That The Mandates Are Proper Exercises Of The Taxing And Spending Clause Contradicts This Court's Precedents. 24

B. The Fourth Circuit's Implicit Finding That The Mandates Are Supported Under The Taxing And Spending Power Conflicts With Other Circuits. 28

III. THIS COURT SHOULD GRANT REVIEW TO DETERINE WHETHER ESSENTIAL PROVISIONS OF THE ACT THAT FORCE INDIVIDUALS AND EMPLOYERS TO PURCHASE OR PROVIDE HEALTH INSURANCE ARE SUPPORTED BY THE COMMERCE CLAUSE. 31

A. This Court Should Grant Review To Determine Whether The Act Which Compels Individuals To Enter Into The Stream of Commerce By Forcing Them to Buy Health Insurance Exceeds The Commerce Clause. 33

B. This Court Should Grant Review To Determine Whether Compelling Employers To Provide Health Insurance For Employees Exceeds The Commerce Clause..... 38

IV. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE MANDATES CAN BE SEVERED FROM THE REMAINDER OF THE ACT. 42

CONCLUSION 47

APPENDIX

Opinion of the Fourth Circuit Court of Appeals dated September 8, 2011 ..... 1a

Opinion of the United States District Court for the Western District of Virginia dated November 30, 2010 ..... 165a

Statutory Provisions 257a

TABLE OF AUTHORITIES

Cases

Alaska Airlines, Inc. v. Brock,
480 U.S. 678 (1987)..... 46

American Insurance Assn. v. Garamendi,
539 U.S. 396 (2003)..... 41

Ayotte v. Planned Parenthood of Northern New England,
546 U.S. 321 (2006)..... 45

Bob Jones University v. Simon,
416 U.S. 725 (1974)..... 14, 15

Chevron, U.S.A., Inc. v. NRDC, Inc.,
467 U.S. 837 (1984)..... 21

Child Labor Tax Case,
259 U.S. 20 (1922)]..... 23

Dep't of Revenue v. Kurth Ranch,
511 U.S. 767 (1994)..... 23, 30

E. Enterprises v. Apfel,
524 U.S.498 (1998)..... 39

Enochs v. Williams Packing & Navigation Co.,
370 U.S. 1, 5 (1962)..... 10, 14

Florida ex. rel. Bondi,
2011 WL 3519178 .....*passim*

Florida ex.rel McCollum v. Department of Health and Human Services,
716 F.Supp.2d 1120 (N.D. Fla. 2010). ..*passim*

Gibbons v. Ogden,
9 Wheat. 1 (1824) 33

Gonzales v. Raich,
545 U.S. 1 (2005)..... 34

Goudy-Bachman v. U.S. Dep't of Health & Human Servs.,
764 F. Supp.2d 684 (M.D. Pa. 2011) .....*passim*

Helwig v. United States,
188 U.S. 605 (1903),..... 25

Hibbs v. Winn,
542 U.S. 88 (2004)..... 14

INS v. Cardoza–Fonseca,
480 U.S. 421 (1987)..... 26

Liberty Univ. v. Geithner,
753 F.Supp.2d 611 (W.D. Va. 2010) 18, 30 ,45

Linn v. Chivatero,
714 F.2d 1278 (5th Cir. 1983) 19, 20

Lipke v. Lederer,
259 U.S. 557 (1922)..... 13, 25

Marbury v. Madison,
5 U.S. 137 (1803)..... 32

Mead v. Holder,
766 F.Supp.2d 16 (D.D.C.2011)) 31

Mobile Republican Assembly v. United States,
353 F.3d 1357 (11th Cir.2003) 19, 29

NLRB v. Jones & Laughlin Steel Corp.,
301 U.S. 1 (1937)..... 38-40

Prudential Ins. Co. v. Benjamin,
328 U.S. 408 (1946)..... 42

Russello v. United States,
464 U.S. 16 (1983)..... 26

Rutherford v. United States,
702 F.2d 580 (5th Cir. 1983) 19, 20

Snyder v. Marks,
109 U.S. 189 (1883)..... 12

South Carolina v. Regan,
465 U.S. 367(1984)..... 10, 15-16

Thomas More Law Center v. Obama,
2011 WL 2556039 (6th Cir. 2011).....*passim*

U.S. Citizens Assoc. v. Sebelius,
754 F.Supp.2d 903 (N.D.Ohio 2010)..... 30

United States v. Darby,
312 U.S. 100 (1941)..... 40

United States v. LaFranca,
282 U.S. 568 (1931)..... 24, 26

United States v. Lopez,
514 U.S. 549 (1995)..... 35

United States v. Morrison,
529 U.S. 598 (2000)..... 35

United States v. Sanchez,
340 U.S. 42 (1950)..... 24

Virginia v. Sebelius,
728 F.Supp.2d 768 (E.D.Va.2010);..... 18, 43

Wickard v. Filburn,
317 U.S. 111 (1942)..... 34

Statutes

26 U.S.C. § 4980H(a)(b .....*passim*

26 U.S.C. § 5000A(b)(c),.....*passim*

26 U.S.C. §7421..... 10, 12

42 U.S.C. § 18091..... 44

Consolidated Omnibus Budget Reconciliation Act of 1985..... 41

Employee Retirement and Income Security Act of 1974 40

Health Insurance Portability and Accountability Act of 1996..... 41

Other Authorities

GAO report No. GAO-11-725R, *Private Health Insurance: Waivers of Restrictions on Annual Limits on Health Benefits* (June 14, 2011) .. 17

Laurence H. Tribe, 1 AMERICAN CONSTITUTIONAL LAW 846 23

ReasonTV, *Wheat, Weed, and Obamacare: How the Commerce Clause Made Congress All-Powerful, August 25, 2010,* 36

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals (App. 1a) is reported at 2011 WL 3962915. The opinion of the District Court granting the Motion to Dismiss (App. 165a) is reported at 753 F.Supp.2d 611 (W.D. Va. 2010).

JURISDICTION

The judgment of the Court of Appeals was filed on September 8, 2011. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case addresses Article I, §8 of the United States Constitution, the Anti-Injunction Act, 26 U.S.C. §7421(a) and sections 1501 and 1513 of the Patient Protection and Affordable Care Act of 2009, Pub. L. No. 111-148, 124 Stat. 119 (2010) (the "Act"), codified at 26 U.S.C. §5000A and 26 U.S.C. §4980H, respectively. The relevant constitutional provisions and statutes are reproduced in the Appendix.

STATEMENT OF THE CASE

This Court should accept review to determine whether a constitutional and statutory challenge to provisions that are injuring Petitioners and compelling individuals

and employers to purchase and perpetually maintain health insurance or pay a penalty is a "suit for the purpose of restraining the assessment or collection of any tax" so as to be barred by the Anti-Injunction Act, 26 U.S.C. §7421. ("AIA"). In addition, this Court should accept plenary review to determine whether the Commerce Clause or Taxing and Spending Clause give Congress authority to force individuals into the stream of commerce by purchasing a government-mandated health insurance product and compel employers to provide health insurance to employees and dependents. This case is the only challenge to the Act that squarely presents a challenge to both the individual and employer mandates of the Act, as discussed below.

Petitioners, a private university and two individuals, challenge §1501 ("individual mandate") and §1513 ("employer mandate") of the Act, which establish that individuals must purchase and employers must provide health insurance or pay a penalty. The individual mandate dictates that, with limited exceptions, all citizens obtain and maintain "minimum essential" health insurance coverage" or pay significant penalties. 26 U.S.C. §5000A. The employer mandate dictates that, with limited exceptions, employers provide employees with "minimum essential" health insurance coverage at what the government determines is

affordable, or pay significant penalties. 26 U.S.C. §4980H.

On March 23, 2010, Petitioners filed a Complaint seeking declaratory and injunctive relief under 42 U.S.C. §1983. Plaintiffs alleged, *inter alia*, that the individual and employer mandates exceed Congress' delegated powers under Article I, §8 of the Constitution, violate Petitioners' rights to free exercise of religion under the First Amendment and Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1(a)-(b) ("RFRA"), free speech and free association rights under the First Amendment, the Establishment Clause, the Fifth Amendment Equal Protection Clause, the Tenth Amendment, the Guarantee Clause, and provisions against direct or capitation taxes.

The district court found that Petitioners had standing to bring their claims, that their claims were ripe and that they were not barred by the AIA, but granted Respondents' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The court concluded that "Congress acted in accordance with its delegated powers under the Commerce Clause when it passed the employer and individual coverage provisions of the Act." (App 202a). The court adopted an unprecedented, expansive definition of the Commerce Clause and held that "*decisions* to pay for health care without insurance are

economic activities." (App. 205a) (emphasis added). The court held that the employer mandate provision was a logical extension of Congress' power to regulate the terms and conditions of employment. (App. 219a). The court reasoned that "the 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," so that it is rational for Congress to mandate that employers provide such insurance coverage to employees. (App. 218a). The court decided and dismissed the remaining claims. (App. 256a).

On appeal to the Fourth Circuit, the government abandoned its AIA defense. Following oral argument, the panel asked the parties for supplemental briefing on the AIA. (App. 20a). Both parties submitted briefs arguing that the AIA did not apply. Significantly, the government argued that Congress intended that the AIA not apply and urged the panel to reach the merits. (App. 1a-164a). Nevertheless, on September 8, 2011, the panel, by a 2-1 vote, determined that the AIA divested the court of jurisdiction, vacated the district court order and remanded with directions to dismiss the case for lack of subject matter jurisdiction. (App., 1a-164a).

Judge Wynn concurred in the opinion drafted by Judge Motz, and went on to address

the merits of Petitioners' claims, stating that he would uphold the Act under the Taxing and Spending Clause, and that this conclusion led him back to the determination that the AIA barred Petitioners' action. (App. 68a). Judge Wynn also remarked that the the Commerce Clause argument of his dissenting colleague was "persuasive." (App. 52a).

Judge Davis dissented and wrote that the AIA did not bar adjudication of the merits. (App. 70a). Judge Davis said that both the individual and insurance mandates "pass muster as legitimate exercises of Congress's commerce power." (App. 146a). Judge Davis concluded that the individual mandate fell squarely within the boundaries this Court has established for legislation based upon the Commerce Clause: "Under seventy years of well-settled law, it is enough that the behavior regulated (whether characterized as activity or inactivity) substantially affects interstate commerce." (App. 135a). He agreed with Judge Moon in the District Court that Congress could compel employers to offer health insurance under its authority to regulate the terms and conditions of employment. (App. 139a).

As the Virginia Attorney General said in his Petition for Certiorari to the Fourth Circuit, the disposition of this case on the merits is known despite the fact that it was dismissed on

procedural grounds since both the concurring and dissenting judges analyzed the merits and found that the insurance mandates were unconstitutional. Petition for Writ of Certiorari, *Commonwealth of Va. v. Sebelius*, p. 27 (No. 11-420). This Court should grant plenary review to address both the AIA and the merits of the individual and employer mandates, and to what extent, if any, are they severable from the Act.

This is the only pending challenge to the Act that presents the threshold question of the AIA, and individual and the employer mandate. No other case presents all three issues together, and no case except this one has concluded that the AIA is a bar to reaching the merits or has addressed the employer mandate, as no case but this one raised the employer mandate on appeal.

REASONS FOR GRANTING THE PETITION

As Respondents recognized in their Petition for a Writ of Certiorari to the Eleventh Circuit in *Florida ex. rel. Bondi v. Department of Health and Human Services,* this case presents issues of "grave national importance" that have split the circuit courts, created confusion among states and citizens and have even led the Fourth Circuit to disregard all other courts' and the parties' agreement that

the Anti-Injunction Act does not apply. Petition for Writ of Certiorari, *United States Dep't of Health and Human Servs. v. State of Florida et. al.,* pp. 31-32 (No. 11-398).

In their petition seeking review of *Florida ex. rel. Bondi*, the 26 State petitioners emphasized how passage of the Act represented an impermissible expansion of Congress' enumerated powers and the urgent need for this Court's review. Petition for Writ of Certiorari, *State of Florida et. al. v. Dep't of Health and Human Servs.,* p. 14 (No. 11-400). "[T]he Court should grant certiorari to confirm that all the other limits on Congress's enumerated powers–and the very process of enumeration itself–are not rendered nugatory by a limitless spending power." *Id.* As the states said, review is urgently needed since the Courts of Appeal are "deeply divided" on the constitutionality of the mandate, which represents a "wholly novel and potentially unbounded assertion of federal authority." *Id.* at p. 34.

The National Federation of Independent Business and individual plaintiffs in *Florida ex. rel. Bondi* also emphasized the critical importance of reviewing both the constitutionality of the insurance mandates and the question of whether the mandates can be severed from the Act. Petition for Writ of

Certiorari to the Eleventh Circuit, *National Fed. Of Indep. Business, et. al v. Sebelius*, p. 11 (No.11-393). "The ACA comprehensively reforms and regulates more than one-sixth of the national economy, via several hundred statutory provisions and several thousand regulations that put myriad obligations and responsibilities on individuals, employers and the states." *Id.* "Thus, until this Court decides the extent to which the ACA survives, this entire Nation will remain mired in doubt, which imposes an enormous drag on the economy." *Id.*

In the Sixth Circuit, Judge Graham wrote:

> If the exercise of power is allowed and the mandate upheld, it is difficult to see what the limits on Congress's Commerce Clause authority would be. What aspect of human activity would escape federal power? The ultimate issue in this case is this: Does the notion of federalism still have vitality? To approve the exercise of power would arm Congress with the authority to force individuals to do whatever it sees fit (within boundaries like the First Amendment and Due Process

> Clause), as long as the regulation concerns an activity or decision that, when aggregated, can be said to have some loose, but-for type of economic connection, which nearly all human activity does.

Petition for Writ of Certiorari, *Thomas More Law Center, et. al. v. Barack Hussein Obama*, p. 8 (No. 11-117) (citing *Thomas More Law Center, et. al. v. Barack Hussein Obama*, 2011 WL 2556039 at *41 (Graham, J. dissenting)).

Petitioners ask this Court to grant their Petition and to resolve the significant conflicts between the Fourth Circuit's decision, precedents in this Court and other courts of appeal and to determine the critically important constitutional issues underlying this challenge.

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE CONFLICTS WITH PRECEDENTS FROM THIS COURT AND AMONG CIRCUIT COURTS REGARDING THE APPLICABILITY OF THE AIA TO BAR A CHALLENGE TO THE ACT.

The Fourth Circuit panel's determination that the AIA divests the court of jurisdiction conflicts with precedent from this Court, with the Sixth Circuit Court of Appeals on an identical challenge to the Act, with other

Circuits that differentiate between taxes and penalties, and with the government's own interpretation of the Act and Congressional intent.

Recognizing the federal government's pre-eminent need to assess and collect tax revenues, Congress early on enacted the AIA to prevent taxpayers from using their right of access to the courts to interfere with the timely and orderly collection of taxes. *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962). The AIA's prohibition forecloses only those actions that will impede the government's ability to collect necessary revenues. 26 U.S.C. §7421. "No suit *for the purpose of restraining the assessment or collection of any tax* shall be maintained in any court by any person." *Id* (emphasis added). While this Court has protected the government's ability to assess and collect taxes, it has also recognized that the AIA cannot close the courthouse door to all actions that might tangentially involve a payment to the government. *See e.g., Enochs*, 370 U.S. at 7 (AIA does not apply if party shows that government cannot prevail and equity jurisdiction otherwise exists); *South Carolina v. Regan,* 465 U.S. 367, 378-81 (1984) (Congress did not intend the AIA to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy). The Fourth Circuit panel contravened these

limitations and the express language of the AIA when it concluded that the challenge to the mandates was actually a suit seeking to restrain the collection of a tax and was barred by the AIA. (App. 51a-52a).

A. The Finding That The Challenge To the Act's Mandates Are Efforts To Restrain The Collection Or Assessment Of A Tax Conflicts With This Court's Precedents.

The Fourth Circuit's conclusion that the AIA bars this action conflicts with this Court's precedents and is a mischaracterization of the claims. Petitioners are not challenging the assessment or collection of the non-compliance penalties, which might never be assessed against them and, if they were, would not be assessed before April 15 2015. *See* 26 U.S.C. §§ 5000A(b)(c), 4980H(a)(b). Instead, as the Eleventh Circuit found, Petitioners question "whether the federal government can issue a mandate that Americans purchase and maintain health insurance from a private company for the entirety of their lives." *Florida ex. rel. Bondi,* 2011 WL 3519178 at *44. It is the mandates and, more particularly, Congress' authority to enact such mandates that is at the heart of this case. The Fourth Circuit's failure to recognize this significant distinction resulted

in a flawed conclusion that contradicts this Court's precedents.

This Court's 1883 exposition on the nature and purpose of the predecessor to the present AIA illustrates the conflict between the Fourth Circuit's ruling and this Court's precedents. *Snyder v. Marks*, 109 U.S. 189, 193-94 (1883). The AIA applies to "all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes" and provides an exclusive remedy for challenges to tax assessments in the form of a suit to recover back the tax after it is paid. *Id.* at 193. This Court explained that the system prescribed by the AIA was intended to be an exclusive system of corrective justice "enacted under the right belonging to the government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues." *Id.* "In the exercise of that right it declares, by section 3224 [the predecessor to 26 U.S.C. §7421], that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject-matter in question, have made the assessment and claim that it is valid." *Id.* at 193-194.

This case does not fit into that scenario. Petitioners challenge Congress' authority to enact a statutory mandate to purchase government-defined health insurance from a third party. (Appx.12a). Contained within the mandate is a penalty provision that punishes non-compliance with a fine. 26 U.S.C. §§ 5000A(b)(c), 4980H(a)(b) Petitioners object to the statutory mandate in general, not to the assessment of the fine against them, which would might never occur or would only occur beginning April 15, 2015. 26 U.S.C. §§ 5000A(b)(c), 4980H(a)(b). There is not now and might never be a collection of revenue with which Petitioners would interfere. Therefore, under *Snyder*, the AIA does not apply.

The Fourth Circuit also contradicts *Lipke v. Lederer*, 259 U.S. 557, 561-62 (1922). In *Lipke*, this Court held that the AIA did not bar an action challenging an attempt to seize property to pay a criminal penalty. *Id.* This Court said that the penalty lacked the indicia of a tax, *i.e.,* providing for the support of the government. *Id.* The AIA, "which prohibits suits to restrain assessment or collection of any tax, is without application." *Id.* The noncompliance fine here lacks the indicia of a tax, and therefore the AIA does not apply.

As this Court held in *Enochs*, "[t]he manifest purpose of s 7421(a) is to permit the

United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." 370 U.S. at 7. "In this manner the United States is assured of prompt collection of its lawful revenue." *Id.* Since there might not ever be collection of revenue for non-compliance with the insurance mandates, Petitioners' action does not pose a threat of judicial intervention to the assessment and collection of revenues, and the AIA is wholly inapplicable.

In *Bob Jones University v. Simon*, 416 U.S. 725, 736-737 (1974) this Court reiterated that the principal purpose of the AIA is "the protection of the Government's need to assess and collect taxes as expeditiously as possible 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." A collateral objective of the AIA is to protect tax collectors from litigation pending a suit for refund. *Id. See also, Hibbs v. Winn,* 542 U.S. 88, 103(2004) (reiterating the twin purposes of the AIA). This Court rejected the university's attempt to escape the AIA by claiming it was trying to maintain its flow of income, not obstruct the government's collection of revenue. *Id.* at 738. This Court disagreed and held that "a primary purpose of this lawsuit is to prevent the Service from

assessing and collecting income taxes from petitioner," which placed it squarely within the AIA. *Id.*

That is not the case here. Petitioners have not and might not ever be liable for payments under the Act, so are not seeking to avoid paying taxes. The provisions being challenged are not revenue-generating measures, but are measures designed to compel conduct under the threat of possible future fines. Petitioners are challenging Congress' authority to compel conduct, not the collection of fines. Therefore, unlike the claim in *Bob Jones*, Petitioners' claim here does not fall within the parameters of the AIA, and the panel's decision thus conflicts with *Bob Jones*.

The conflict between the Fourth Circuit's ruling and this Court's precedents is most apparent in *Regan*, 465 U.S. at 378-81. "In sum, the Act's purpose and the circumstances of its enactment indicate that Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." *Id.* at 378. In *Regan*, the state could not have been liable for the disputed taxes which would have been levied against bondholders. *Id.* at 378-379. Under those circumstances, if the AIA were applied, the state would be unable to utilize any statutory procedure, including a suit for a

refund, to contest the constitutionality of the tax. *Id.* "Accordingly, the Act cannot bar this action." *Id.* Application of the AIA in that case would have deprived the state of any opportunity to have the constitutionality of the act judicially reviewed, absent convincing a third party to file a refund suit. *Id.* at 380-381. Petitioners here would be in a similar bind. The noncompliance penalties under Sections 5000A and 4980H will not be assessed unless an individual or employer fails to obtain or maintain sufficient health insurance for some period of time after January 1, 2014. 26 U.S.C. §§ 5000A(b)(c), 4980H(a)(b). It is those mandates, not merely the potential fines, that Petitioners claim violate the Constitution. As was true in *Regan*¸ in this case, barring Petitioners' claims until punitive fines are paid and a refund sought would not further the purposes of the AIA and would subject Petitioners to irreparable injury. As this Court said in *Regan*, under these circumstances the AIA cannot bar the action. *Regan*, 465 U.S. at 380-381. Moreover, Petitioners have to reorder their lives and operations now to comply with the Act. A number of provisions have already gone into effect for employers, so injury is extant not possible at some distant time when a penalty might be due.[1] The Fourth Circuit's

[1] According to the Government Accountability Office, as of April 25, 2011, HHS had granted

conflicting ruling should be reviewed by this Court.

B. The Fourth Circuit's Ruling That The AIA Bars This Action Conflicts With Other Courts Dealing With The Same Issue.

The Fourth Circuit is the only federal court to find that the AIA applies to the Act, which creates an irreconcilable conflict regarding the threshold issue of whether affected citizens can challenge the Act.

The Sixth Circuit examined this precise issue and found that the AIA did not apply. *Thomas More Law Center v. Obama*, 2011 WL 2556039 (6th Cir. 2011). Every federal court except the Fourth Circuit has found that the

---

1,347 waivers from now effective provisions in the Act setting coverage limits on employee health care plans. The waivers cover about 3.1 million people. GAO report No. GAO-11-725R, *Private Health Insurance: Waivers of Restrictions on Annual Limits on Health Benefits* (June 14, 2011) http://www.gao.gov/htext/d11725r.html (last visited October 6, 2011).

AIA does not bar a challenge to the Act. *Liberty Univ. v. Geithner*, 753 F.Supp.2d 611, 629 (W.D. Va. 2010); s*ee also, e.g., Goudy-Bachman v. U.S. Dep't of Health & Human Servs.,* 764 F. Supp.2d 684, 697 (M.D. Pa. 2011) *Virginia v. Sebelius,* 728 F.Supp.2d 768, 786-88 (E.D.Va.2010); *U.S. Citizens Assoc. v. Sebelius,* 754 F.Supp.2d 903, 909 (N.D.Ohio 2010). In *Florida ex.rel McCollum v. Department of Health and Human Services,* the district court similarly held that the AIA did not apply to the penalties for non-compliance with the insurance mandate. 716 F.Supp.2d 1120, 1142 (N.D. Fla. 2010). In language quoted in subsequent district court cases, Judge Vinson said:

> It would be inappropriate to give tax treatment under the Anti–Injunction Act to a civil penalty that, by its own terms, is not a tax; is not to be enforced as a tax; and does not bear any meaningful relationship to the revenue-generating purpose of the tax code. Merely placing a penalty (which virtually all federal statutes have) in the IRS Code, even though it otherwise bears no meaningful relationship thereto, is not enough to render the Anti–Injunction Act (which only applies to true revenue-

> raising exactions) applicable to this case.

Id. Judge Vinson, in turn relied upon an Eleventh Circuit case that held the AIA inapplicable to exactions similar to those under the insurance mandates. *Mobile Republican Assembly v. United States,* 353 F.3d 1357, 1362 n. 5 (11th Cir.2003). The *Mobile Republican* court found that the AIA does not reach penalties that are "imposed for substantive violations of laws not directly related to the tax code" and which are not good-faith efforts to enforce the technical requirements of the tax law. *Id.*

Likewise, the Fifth Circuit has refused to apply the AIA to claims in which payment of an exaction is merely ancillary to a constitutional or property rights challenge. *Linn v. Chivatero*, 714 F.2d 1278, 1283 (5th Cir. 1983); *Rutherford v. United States,* 702 F.2d 580, 583-84 (5th Cir. 1983). In *Linn*, the court refused to apply the AIA to a suit in which the plaintiff was raising a constitutional challenge to the seizure of his property. *Id.* As was true about South Carolina in *Regan*, in *Linn* the plaintiff would not be able to seek relief for the constitutional violation in a refund suit because he did not challenge the propriety of a tax that might be assessed against him, but the unlawful retention of his property. *Id.*

Similarly, in *Rutherford*, the court overturned a district court ruling that applied the AIA to bar plaintiffs' claims against a revenue officer. 702 F.2d 583. The Fifth Circuit characterized the claims as seeking recompense for deprivation of the plaintiffs' substantive due process rights rather than a refund of taxes. *Id.*

> The tax recovery proceedings available to the Rutherfords are limited strictly to a determination of the validity of the Government's demand. The statutory mechanisms for refund make no allowance for mental anguish caused by harassment, or for recovery of legal fees needlessly expended in an attempt to recover clear title to property unjustifiably claimed. . . . Because we believe that those injuries, not the lost money, are the dimensions of the Rutherfords' action against Kuntz, . . . we find that the remedy suggested by the district court is not responsive to the wrong sketched out in the Rutherfords' complaint.

Id. at 584. The same is true here. Petitioners' injuries stem not from the exaction of a penalty against them–in fact, the penalty might never be applied–but from the deprivation of

constitutional rights occasioned by Congress' enactment of the insurance mandates. Thus, as was true in *Linn* and *Rutherford*, the AIA does not apply to Petitioners' claims.

Even Respondents agree that the AIA does not apply. After initially arguing that the AIA barred Petitioners' action, Respondents abandoned that claim on appeal. More specifically, when asked to provide supplemental briefing on the matter, Respondents said that since the non-compliance penalties were not placed in the "assessable penalties" section of the IRC, then Congress did not intend that the individual mandate penalty would constitute a "tax" for purposes of the AIA. (Appx. 35a). Respondents again argued in their Petition to the Eleventh Circuit case that the AIA does not apply, and they cite to their argument in this case. Petition for Writ of Certiorari, *United States Dep't of Health and Human Servs. v. State of Florida et. al.,* pp. 31-32 (No. 11-398). Respondents press their argument based on statutory construction and Congressional intent. Their argument that the AIA does not apply should be given great deference. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837,844 (1984). This Court should review the applicability of the AIA as a threshold question prior to reaching the merits of any similar pending matter and this case presents the best

vehicle to address that issue.

In their Petition to the Eleventh Circuit, Respondents agree that the question of the applicability of the AIA should be addressed by this Court, and suggested that the Court could rely upon briefing in this case after granting Petitioners' Petition. Petition, No 11-398, at pp. 32-34 n.7.

The Fourth Circuit's ruling contradicts rulings by every other federal court to consider whether the AIA applies to challenges of the insurance mandates. It also conflicts with rulings in the Fifth and Eleventh circuits that refused to apply the act to deprive claimants of their right to redress constitutional deprivations.

II. THIS COURT SHOULD GRANT REVIEW TO DETERINE WHETHER ESSENTIAL PROVISIONS OF THE ACT THAT FORCE INDIVIDUALS AND EMPLOYERS TO PURCHASE OR PROVIDE HEALTH INSURANCE ARE SUPPORTED BY THE TAXING AND SPENDING CLAUSE.

Judge Wynn explicitly, and by implication Judge Motz in applying the AIA to the mandate penalties, wrongly declared that there is no distinction between a penalty and a tax. (App.56a), However, as Judge Sutton said

in his concurring opinion in *Thomas More Law Center*, "it is premature, and assuredly not the job of a middle-management judge, to abandon the distinction between taxes and penalties." 2011 WL 2556039 at *20 (Sutton, J., concurring). Judge Sutton noted that the early taxation cases which emphasized the distinction pre-dated this Court's expansion of the commerce power, "which largely 'rendered moot' the need to worry about the tax/penalty distinction." *Id.* (citing Laurence H. Tribe, 1 AMERICAN CONSTITUTIONAL LAW 846).

> Nonetheless, the line between 'revenue production and mere regulation,' described by Chief Justice Taft in the *Child Labor Tax Case*, 259 U.S. [20] at 38, 42 S.Ct. 449 [(1922)], retains force today. Look no further than [*Dep't of Revenue v.*] *Kurth Ranch,* [511 U.S. 767, 779-83 (1994)] a 1994 decision that post-dated *Bob Jones* and that relied on the *Child Labor Tax Case* to hold that what Congress had labeled a tax amounted to an unconstitutional penalty under the Double Jeopardy Clause.

Id. As Judge Sutton explained, this Court has consistently upheld the distinction between taxes, which are within Congress' authority

under Article I §8, and penalties, which exceed the power. The panel's dismissal of the distinction and resulting validation of the insurance mandates contradicts this precedent. As is apparent from Judge Sutton's opinion and from the district court opinion in *Florida ex. rel. Bondi*, Judge Wynn's opinion contradicts decisions in other circuits, creating a conflict on a core constitutional issue, *i.e.,* Congress' reach under the Taxing and Spending Clause.

A. The Implicit Finding That The Mandates Are Proper Exercises Of The Taxing And Spending Clause Contradicts This Court's Precedents.

As this Court held in *United States v. LaFranca*, 282 U.S. 568, 572 (1931), "[t]he two words [tax vs. penalty] are not interchangeable ....and if an exaction [is] clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." "A tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act." *Id.* A tax can have a collateral effect of regulating conduct, but its primary purpose is to raise revenue in order to support the government. *United States v. Sanchez*, 340 U.S. 42, 45 (1950). When the punitive nature of the exaction supersedes

revenue generation, then, no matter how it is labeled, it is an impermissible penalty. *Lipke v. Lederer*, 259 U.S. 557, 561-62 (1922).

This Court's explanation of the distinction between taxes and penalties in *Child Labor Tax Case* illustrates how the Fourth Circuit's determination that the noncompliance penalties are taxes contradicts established precedent. 259 U.S. at 37. "The central objective of a tax is to obtain revenue, while a penalty regulates conduct by establishing criteria of wrongdoing and imposing its principal consequence on those who transgress its standard." *Id.* The Act regulates conduct by mandating that individuals and employers obtain and maintain health insurance, with violators punished by penalties. 26 U.S.C. §§ 5000A, 4980H.

Similarly, in *Helwig v. United States*, 188 U.S. 605, 610-11, (1903), the exaction at issue was not imposed upon all goods, but only upon importers who undervalued their goods. *Id.* It was clear that the fee was not imposed in order to generate revenue, but only to punish conduct of certain importers. *Id.* The fee acted as a warning to importers to be careful and honest or face the additional penalty. *Id.* Under those circumstances the exaction was a penalty not a tax. *Id.* Similarly, here, the exactions imposed under the insurance mandates act as warnings

to American citizens to comply with the government's mandate to obtain and maintain health insurance or be penalized. As was true in *Helwig*, the exactions here are penalties, not taxes governed by Article I, §8. If an exaction [is] "clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *LaFranca*, 282 U.S. at 572. The non-compliance penalties cannot be transformed into permissible tax assessments merely by labeling them as taxes.

The Fourth Circuit's determination that the noncompliance fees are taxes also contradicts this Court's precedents which provide that, "[i]f Congress respects the distinction between the words tax and penalty, then so should the Court." *Russello v. United States,* 464 U.S. 16, 23 (1983). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza–Fonseca*, 480 U.S. 421, 442 (1987). Thus, "[w]here Congress includes [certain] language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the [omitted text] was not intended." *Russello* 464 U.S. at 23–24.

As Judge Vinson detailed in his ruling, the Act went through a number of iterations before it was signed into law on March 23, 2010. *Florida ex. rel. McCollum*, 716 F. Supp.2d at 1134. Many of the earlier versions of the bill labeled the non-compliance exactions as "taxes." *Id.* However, the final version of the bill calls the exactions "penalties." *Id.* In addition, the Act contains a number of other exactions that are labeled taxes, showing "beyond question that Congress knew how to impose a tax when it meant to do so. Therefore, the strong inference and presumption must be that Congress did not intend for the 'penalty' to be a tax." *Id.*

Congress' substitution of the word "penalty" for "tax" in the mandate provisions, coupled with its use of the term "tax" elsewhere in the Act, leads to the inescapable conclusion that the non-compliance fines are penalties, not taxes, under this Court's precedents. The Fourth Circuit's contrary conclusion should be reviewed by this Court.

B. The Fourth Circuit's Implicit Finding That The Mandates Are Supported Under The Taxing And Spending Power Conflicts With Other Circuits.

The Fourth Circuit's opinion conflicts with every federal court which has ruled on the Act, including decisions from the Sixth and Eleventh Circuits which found the mandates to be penalties. *Thomas More Law Center*, 2011 WL 2556039 at *20 (Sutton, J., concurring), *Florida ex. rel. Bondi*, 2011 WL 3519178 at *68. Since the majority of the Fourth Circuit panel adopted this view and then found that Petitioners' claims could not proceed, it is critical that the conflict be resolved.

In *Thomas More Law Center*, the Sixth Circuit majority found that the penalties for non-compliance with the insurance mandates were just that, *i.e.,* penalties, not taxes subject to the AIA. 2011 WL 2556039 at *8. In his concurrence, Judge Sutton expanded upon the majority discussion to explain why the penalties could not be justified under the Taxing and Spending Clause. *Id.* at *17-*21. The court noted that some penalties are counted as taxes, notably the penalties assessed for non-payment of taxes, because they are related to tax enforcement. *Id.* at *7. Unlike those penalties, the penalties assessed

for non-compliance with the mandates have nothing to do with tax enforcement, and Congress noted that distinction in the language of Section 5000A. *Id.* (citing *Mobile Republican Ass'y*, 353 F.3d at 1362 n. 5). In addition, Congress distinguished the non-compliance penalties from other penalties under the Internal Revenue Code by prohibiting the IRS from using the customary tools available for collecting taxes and penalties, which again pointed to Congress' intent that the penalties not be regarded as taxes. *Id.* at *8.

Judge Sutton added several other reasons why the non-compliance exactions are regulatory penalties, not revenue-raising taxes. *Id.* at *17-*21. Congress used the word penalty, "and it is fair to assume that Congress knows the difference between a tax and a penalty." *Id.* at *18. The Act's legislative findings show that Congress invoked its Commerce Clause powers, not taxing authority. *Id.* Congress showed throughout the Act that it understood the difference between taxes and penalties. *Id.* The central function of the mandate is *not* to raise revenue but to change individual behavior by requiring all qualified Americans to obtain medical insurance. *Id.* (emphasis in original). The purpose of the Act is to broaden the health-insurance risk pool by requiring that more Americans participate in it before needing medical care. *Id.* "[I]t strains credulity to say

that proponents of the Act will call it a success if the individuals affected by the mandate simply pay penalties rather than buy private insurance." *Id.* Case law also supports the conclusion that the exactions are penalties, not taxes. *Id.* at *19 (citing *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 779 (1994)). These factors, plus the factors discussed in the majority opinion lead to the inescapable conclusion that Congress did not invoke its powers under the Taxing and Spending Clause. *Id.* at *20.

The Eleventh Circuit said that it was "unpersuaded" by the government's argument that the non-compliance exactions were valid exercises of Congress' taxing power. *Florida ex. rel. Bondi,* 2011 WL 3519178 at *68. In fact, "all of the federal courts, which have otherwise reached sharply divergent conclusions on the constitutionality of the individual mandate, have spoken on this issue with clarion uniformity. Beginning with the district court in this case, all courts have found, without exception, that the individual mandate operates as a regulatory penalty, not a tax." *Id.* (citing *Florida v. HHS*, 716 F.Supp.2d at 1143–44; *U.S. Citizens Ass'n v. Sebelius*, 754 F.Supp.2d 903, 909 (N.D.Ohio 2010); *Liberty Univ., Inc. v. Geithner*, 753 F.Supp.2d 611, 629 (W.D.Va.2010); *Virginia v. Sebelius*, 728 F.Supp.2d at 782–88; *Goudy–Bachman*, 764

F.Supp.2d at 695; *Mead v. Holder*, 766 F.Supp.2d 16, 41 (D.D.C.2011)). "The plain language of the statute and well-settled principles of statutory construction overwhelmingly establish that the individual mandate is not a tax, but rather a penalty." *Id.* at *69. "The government would have us ignore all of this and instead hold that any provision found in the Internal Revenue Code that will produce revenue may be characterized as a tax. This we are unwilling to do." *Id.*

The Fourth Circuit's contrary ruling that the exactions are "taxes" under Congress' taxing power stands alone and in conflict with every other court to have considered the issue, making this case the only case to provide a clear record to resolve this conflict.

III. THIS COURT SHOULD GRANT REVIEW TO DETERINE WHETHER ESSENTIAL PROVISIONS OF THE ACT THAT FORCE INDIVIDUALS AND EMPLOYERS TO PURCHASE OR PROVIDE HEALTH INSURANCE ARE SUPPORTED BY THE COMMERCE CLAUSE.

Judge Davis' adoption of the government's expansive definition of Congress' authority under the Commerce Clause conflicts with the scope of Congress' power as this Court has defined it since the founding:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?

Marbury v. Madison, 5 U.S. 137, 176 (1803). If the courts fail to maintain the limited nature of congressional power, then they run the risk of "giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed as pleasure." *Id*. at 178. Expanding Congress' enumerated powers to encompass the insurance mandates represents just such a situation–and threatens to fundamentally change the balance of power put in place by the Founders.

A. This Court Should Grant Review To Determine Whether The Act Which Compels Individuals To Enter Into The Stream of Commerce By Forcing Them to Buy Health Insurance Exceeds The Commerce Clause.

In early decisions establishing the parameters of the Commerce Clause, this Court emphasized the definition of "commerce" as quintessentially an economic activity. *Gibbons v. Ogden*, 9 Wheat. 1, 189-190 (1824). "Commerce is commercial intercourse between nations, parts of nations and is regulated by prescribing for carrying on the intercourse. The commerce power is the power to regulate, i.e., to prescribe the rule by which commerce is to be governed." *Id.* This Court has expanded the boundaries of Congress' Commerce Clause authority, but the underlying concept of regulating "activity" and the fundamental definition of commerce remain unchanged. As the Eleventh Circuit explained, "[e]conomic mandates such as the one contained in the Act are so unprecedented, however, that the government has been unable, either in its briefs or at oral argument, to point this Court to Supreme Court precedent that addresses their constitutionality. Nor does our independent

review reveal such a precedent." *Florida ex. rel. Bondi,* 2011 WL 3519178 at *45.

Judge Davis' attempt to equate the mandates with the regulations upheld in *Wickard v. Filburn*, 317 U.S. 111 (1942) and *Gonzales v. Raich*, 545 U.S. 1 (2005) is wholly ineffective. In *Wickard* and *Raich,* the parties agreed that the overall regulatory schemes were legitimate, but sought exceptions that would evade or interfere with the orderly enforcement of those admittedly legitimate federal regulations. *Wickard*, 317 U.S. at 128-129; *Raich*, 545 U.S. at 15. In both cases, this Court rejected the proposition that individuals engaging in an activity affected by an arguably legitimate regulatory scheme could seek to erect self-serving detours to avoid having the law apply to their activities. *Wickard*, 317 U.S. at 128-129; *Raich*, 545 U.S. at 15. Here, by contrast, there is no underlying economic or even non-economic activity being carried out by the Plaintiffs. In fact, the individual Plaintiffs have intentionally chosen not to engage in the activity of purchasing health insurance, but are being coerced into participating in the health insurance market so that they can then be regulated. (Appx. **). Congress is attempting to change the underlying nature of its authority from "regulating commerce" to "creating commerce" by mandating that mere bystanders become participants subject to regulation by

purchasing a government-defined product that mandates payments for unwanted and unnecessary medical services. This goes beyond this Court's most expansive Commerce Clause cases, *Wickard* and *Raich*, and Judge Davis' contention that *Wickard* and *Raich* support the mandates contradicts precedent.

Judge Davis unsuccessfully attempts to distinguish the insurance mandates from the over-reaching regulations struck down in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison,* 529 U.S. 598 (2000). He fails to demonstrate how the attenuated inferences necessary to find that regulating commerce includes compelling market participation differ from the inferential leaps this Court found fatal in *Lopez,* 514 U.S. at 566-568, and *Morrison,* 529 U.S. at 607. Judge Davis dismisses Petitioners' claims, based upon *Lopez* and *Morrison*, that accepting Congress' definition of the Commerce Clause implicit in the mandates would remove all effective boundaries on congressional authority. (Appx. at 110a). Judge Davis dismisses Judge Vinson's observations, which were upheld by the Eleventh Circuit, that such limitless power would allow Congress to require people to buy broccoli to live healthier and reduce health cost, or to purchase a General Motors vehicle to regulate transportation costs. To prove that

such hypotheticals were realistic, Judge Vinson said:

> … I pause here to emphasize that the foregoing is not an irrelevant and fanciful "parade of horribles." Rather, these are some of the serious concerns implicated by the individual mandate that are being discussed and debated by legal scholars. For example, in the course of defending the Constitutionality of the individual mandate, and responding to the same concerns identified above, often-cited law professor and dean of the University of California Irvine School of Law Erwin Chemerinsky has opined that although "what people choose to eat well might be regarded as a personal liberty" (and thus unregulable), "Congress could use its commerce power to require people to buy cars." *See* ReasonTV, *Wheat, Weed, and Obamacare: How the Commerce Clause Made Congress All-Powerful, August 25, 2010, available at: http://reason.tv/video/show/wheat-weed-and-obamacare-how-t.* When I mentioned this to the defendants' attorney at oral argument, he

> allowed for the possibility that "maybe Dean Chemerinsky is right." *See* Tr. at 69. Therefore, the potential for this assertion of power has received at least some theoretical consideration and has not been ruled out as Constitutionally implausible.

Florida, ex. rel. Bondi, 2011 WL 285683 at *24. Judge Davis denounces these observations and says that "it is not so" that the mandate removes "cognizable, judicially administrable limiting principles" from Congress' Commerce Clause power, but does not explain what limiting principles will remain if the mandates are upheld. (Appx. at 111a). During oral argument at the Fourth Circuit the Acting Solicitor General stated that Commerce Clause power was so broad that Congress could force people to buy wheat. In that same vein, Judge Davis asserts that even if upholding the insurance mandates would lead to mandating that people purchase broccoli in order to bolster the broccoli market, that act of compulsion would not, in practical effect, be anything new. (Appx., at 134a). Judge Davis claims that governments are formed "precisely to *compel purchases of public goods,*" and that compelling all Americans to purchase health insurance from private parties produces a public good of lowering health care costs and, therefore is a

proper function of government. (Appx., at 134a) (emphasis in original). Rather than Petitioners' claims being "novel and unsupported," as Judge Davis claims, it is his conclusion that the mandates fit within this Court's Commerce Clause jurisprudence that is novel and unsupported and contradicts this Court's precedents. (Appx., at 134a).

The mandates are an unprecedented expansion of congressional power that, if permitted to stand, will create a virtually unlimited federal police power wholly antithetical to the limited powers granted to the federal government under the Constitution. This Court should grant review to clarify the limits of the Commerce Clause.

B. This Court Should Grant Review To Determine Whether Compelling Employers To Provide Health Insurance For Employees Exceeds The Commerce Clause.

Judge Davis' conclusion that compelling all employers to provide government-defined health insurance coverage to its employees a natural outgrowth of existing employment regulations is contrary to this Court's precedent that Congress does not have the power to mandate that employers provide certain

benefits to their employees. *See, e.g., E. Enterprises v. Apfel*, 524 U.S.498 (1998). (compelling companies to cover healthcare costs unrelated to any commitment that the employers made or to any injury they caused contravened the fundamental fairness underlying the Takings Clause); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) (finding that the National Labor Relations Act was constitutional because it "*does not compel* agreements between employers and employees. It *does not compel* any agreement whatever." (emphasis added)).

In *Jones & Laughlin Steel*, this Court noted that Congress was careful to define "commerce" in a way that complemented this Court's previous limitations on Congress' power. *Id.* at 31. Congress did not purport to intrude upon the relationship between all industrial employees and employers. *Id.* The act did not impose collective bargaining upon all industries regardless of the effects upon interstate or foreign commerce, but purported to reach "only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds." *Id.*

When upholding wage and hour laws, this Court noted that the challenged provisions were carefully worded to prohibit only the

shipment of goods in interstate commerce which were produced by workers who were not paid at least a minimum wage and were required to work more than a maximum number of permitted hours per week. *United States v. Darby*, 312 U.S. 100, 110 (1941). The challenged provisions in *Darby* applied only to employees who produced goods to be used in interstate commerce. *Id.* The provisions did not, as the insurance mandate does here, prescribe the terms of the employment contract. *Id.* Therefore, it was properly focused only upon preventing unfair competition in the movement of goods interstate. *Id*. at 122.

Darby and *Jones & Laughlin Steel* establish that Congress can regulate working conditions, including wages and hours, to the extent that they affect interstate commerce. However, in the employer insurance mandate Congress goes much farther, by purporting to dictate what fringe benefits employers must offer. The Act goes beyond this Court's precedent. Congress and the lower courts are attempting to redefine this Court's precedent to permit regulation of all of the "terms of employment," including what fringe benefits shall be offered, at what level and what cost. The Court has never permitted such an intrusion in to the private relationship between employer and employee under the guise of regulating interstate commerce. This Court

should grant the petition to resolve whether that intrusion can be reconciled with Congress' limited powers under the Commerce Clause.

The conflict between the employer mandate and this Court's precedents is in no way diminished by Congress' regulation of employment-related insurance benefits, including the Employee Retirement and Income Security Act of 1974 ("ERISA"), Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), and Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). None of those enactments compels an employer to offer benefits as the Employer Mandate does here. Instead, employers who have voluntarily agreed to provide insurance benefits to their employees, and therefore are participants in the health insurance industry, are governed by the acts. No employer is required to participate in the health insurance industry so that they can be regulated, and employers are free to discontinue offering the benefits and be free of the regulations. By contrast, the mandate requires employers to participate in the health insurance industry. Therefore, the mandate not only exceeds Congress' power under the Commerce Clause, but also pre-empts state regulations regarding health insurance regulation in violation of the McCarran-Ferguson Act. *American Insurance Assn. v. Garamendi*, 539 U.S. 396, 428 (2003);

Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429–430 (1946).

The significant differences between the existing employment benefit statutes and the employer mandate reveal the conflict and the need for this Court to grant review.

IV. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE MANDATES CAN BE SEVERED FROM THE REMAINDER OF THE ACT.

Since both the district court and Fourth Circuit panel found that the insurance mandates were constitutional, they did not address the issue of whether the mandates could be severed from the remainder of the Act if they were found to be unconstitutional. Nevertheless, the issue is of critical importance to this Court's review of Petitioners' challenge, which raised not only Commerce Clause and Taxing and Spending Clause claims, but also challenges based upon other constitutional and statutory claims, which extend beyond the mandates themselves to other provisions that threaten Petitioners' core liberty interests. (App. at 172a). Four federal courts have addressed the severability issues and reached four different conclusions, creating a classic

case that requires resolution by this Court. *See, Virginia,* 728 F. Supp.2d at 790; *Florida ex. rel. Bondi*, 2011 WL 285683 at *39 (N.D. Fla. 2011); *Florida ex. rel. Bondi,* 2011 WL 3519178 at *82 (11th Cir. 2011); *Goudy-Bachman,* 2011 WL 4072875 at *21. The question of how much of the Act can be enforced should this Court find the mandates unconstitutional is critical, and the irreconcilable conflict should be resolved by this Court.

Congress emphasized the centrality of the insurance mandates to the comprehensive reforms in the Act in its recitation of findings in support of the mandates:

> (H)Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), the Public Health Service Act (42 U.S.C. 201 et seq.), and this Act, the Federal Government has a significant role in regulating health insurance. *The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market.*
>
> (I) Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act),

> if there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. *The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.*

42 U.S.C. § 18091(2)(H),(I) (emphasis added). In addition, in the Florida case, Respondents conceded that without the mandates the insurance reforms incorporated into the Act would not work. *Florida ex. rel. Bondi*, 2011 WL 285683 at *36. Respondents further said that the individual mandate "is essential to Congress's overall regulatory reform of the interstate health care and health insurance markets ... is "essential" to achieving key reforms of the interstate health insurance market ... [and is] necessary to make the other regulations in the Act effective. *Id.* at *37

(citing Memorandum in Support of Defendants' Motion to Dismiss, filed June 17, 2010 (doc. 56-1), at 46-48).

As Judge Vinson said, "[i]n other words, the individual mandate is indisputably necessary to the Act's insurance market reforms, which are, in turn, indisputably necessary to the purpose of the Act" and could not be severed *Id.* Relying upon this Court's decision in *Ayotte v. Planned Parenthood of Northern New England,* 546 U.S. 321, 329-30 (2006), Judge Vinson found that the entire Act had to be invalidated. The complexity of the 2,700-page Act meant that partial invalidation would require that the court re-balance a statutory scheme by engaging in quasi-legislative "line drawing" that would be a " 'far more serious invasion of the legislative domain' "than courts should undertake." *Id.* at *38.

However, the Eleventh Circuit did not believe that such line-drawing was required or was problematic. *Florida ex. rel. Bondi,* 2011 WL 3519178 at *82. Despite agreeing with Judge Vinson that the mandate was unconstitutional, the panel disagreed about its effect on the remainder of the Act and severed the individual mandate. *Id.*

In the *Virginia* case, the district court also found that the mandate was unconstitutional, but invalidated only part of the Act. 728 F. Supp.2d 768, 790. Relying upon

this Court's decision in *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684 (1987), the Virginia district court said that it was virtually impossible to determine whether Congress would have enacted the Act without the mandate or what, if any, portion of the Act could survive without it. *Id.* at 789. The court invalidated only the portions of the Act that specifically referenced the mandate. *Id.* at 790.

The Pennsylvania district court similarly "split the difference" between total invalidation and severing only the unconstitutional provision. *Goudy-Bachman*, 2011 WL 4072875 at *21. As was true with the Virginia court, the Pennsylvania court found that attempting to discern which provisions should be excised based upon the unconstitutionality of the mandates would be speculative at best. *Id.* at *20. It invalidated only the provisions providing for "guaranteed issue" insurance policies and coverage for "pre-existing conditions," regarded as the two key components of the Act which are dependent upon the mandates. *Id.* at *21.

The utter confusion among the lower courts and the urgency to definitively establish the constitutional of the Act compel review of the severability question.

CONCLUSION

The Fourth Circuit's ruling contradicts this Court's precedents and creates a conflict with the Fifth, Sixth and Eleventh circuits. This Court should accept plenary review to resolve the conflicts presented by this case, including whether the mandates are supported by the Taxing and Spending Clause or the Commerce Clause, and to what extent, if any, the mandates may be severed from the rest of the Act.

Petitioners respectfully request that this Court grant the Petition to address the issues of great public importance.

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