No. 11-398

In the Supreme Court of the United States

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

v.

STATE OF FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF AUTHORITIES

Cases: Page

Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2006) 5
Arkansas v. *Farm Credit Servs.*, 520 U.S. 821 (1997) . . 4, 7
Block v. *North Dakota*, 461 U.S. 273 (1983) 8
Bob Jones University v. *Simon*, 416 U.S. 725 (1974) . . . 3, 4
California v. *Grace Brethren Church*, 457 U.S. 393 (1982) 4
Enochs v. *Williams Packing & Navigation Co.*, 370 U.S. 1 (1962) 3, 5
Gardner v. *United States*, 211 F.3d 1305 (D.C. Cir. 2000), cert. denied, 531 U.S. 1114 (2001) 3
Hansen v. *Department of Treasury*, 528 F.3d 597 (9th Cir. 2007) 3
Helvering v. *Davis*, 301 U.S. 619 (1937) 5, 6
Hibbs v. *Winn*, 542 U.S. 88 (2004) 3, 9
Jefferson County v. *Acker*, 527 U.S. 423 (1999) 3
Kowalski v. *Tesmer*, 543 U.S. 125 (2004) 11
LaSalle Rolling Mills, Inc., In re, 832 F.2d 390 (7th Cir. 1987) 3
Liberty University v. *Geithner*, No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011), petition for cert. pending, No. 11-438 (filed Oct. 7, 2011) 2, 3, 6, 7
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) . . . 9, 10
Massachusetts v. *EPA*, 549 U.S. 497 (2007) 11
Massachusetts v. *Mellon*, 262 U.S. 447 (1923) 11
Mathes v. *United States*, 901 F.2d 1031 (11th Cir. 1990) 3
McCarthy v. *Marshall*, 723 F.2d 1034 (1st Cir. 1983) 3

Cases—Continued: Page

Ohio v. *Helvering*, 292 U.S. 360 (1934) 8

Pagonis v. United States, 575 F.3d 809 (8th Cir. 2009) 3

Puckett v. *United States*, 556 U.S. 129 (2009) 6

Randell v. *United States*, 64 F.3d 101 (2d Cir. 1995), cert. denied, 519 U.S. 815 (1996) 3

Rosewell v. *LaSalle Nat'l Bank*, 450 U.S. 503 (1981) 4

Sherman v. *Nash*, 488 F.2d 1081 (3d Cir. 1973) 3

Sims v. *United States,* 359 U.S. 108 (1959) 8

South Carolina v. *Regan*, 465 U.S. 367 (1984) 8, 9

Sterling Consulting Corp. v. *United States*, 245 F.3d 1161 (10th Cir. 2001), cert. denied, 534 U.S. 1114 (2002) 3

Sunshine Anthractite Coal Co. v. *Adkins*, 310 U.S. 381 (1940) 6

Thomas More Law Ctr. v. *Obama*, 651 F.3d 529, petition for cert. pending, No. 11-117 (filed July 26, 2011) 1, 3

Vermont Agency of Natural Res. v. *United States*, 529 U.S. 765 (2000) 8

Warth v. *Seldin*, 422 U.S. 490 (1975) 10

Zernial v. *United States*, 714 F.2d 431 (5th Cir. 1983) 3

Constitution and statutes:

U.S. Const.:

Art. I 1

Art. III 10, 11

Amend. X 8

Statutes—Continued: Page

Anti-Injunction Act, 26 U.S.C. 7421(a) 2, 3, 5, 6

Patient Protection and Affordable Care Act,
Pub. L. No. 111-148, 124 Stat. 119 1

Tax Injunction Act, 28 U.S.C. 1341 . . . . 3, 4, 7

26 U.S.C.A. 5000A 1, 9

28 U.S.C. 1331 5

42 U.S.C. 1396a(a)(8) 10

Miscellaneous:

State of Florida, *Florida KidCare Program: Amendment to Florida's Title XXI Child Health Insurance Plan Submitted to the Centers for Medicare and Medicaid Services* (July 1, 2010), http://www.cms.gov/NationalCHIPPolicy/downloads/FLCurrentStatePlan.pdf 10

In the Supreme Court of the United States

No. 11-398

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

v.

STATE OF FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

The court of appeals in this case invalidated "a central piece of a comprehensive economic regulatory scheme enacted by Congress" to address a matter of grave national importance. App. 189a (Marcus, J., dissenting). In striking down the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 26 U.S.C.A. 5000A, the court of appeals created a direct conflict with a decision of the Sixth Circuit concluding that Congress had the power under Article I of the Constitution to enact that provision. See *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 540-549 (2011) (opinion of Martin, J.), *id.* at 554-566 (Sutton, J., concurring in the judgment), petition for cert. pending, No. 11-117 (filed July 26, 2011). The court of appeals' decision in this case is based on fundamental errors regarding the scope of Congress's

commerce and taxing powers and a striking lack of deference to Congress's empirical and policy judgments regarding the appropriate means for responding to the crisis in the national health care market. See Pet. 14-29. This Court's review is plainly warranted, as respondents agree. See State Resp. Br. 1; NFIB Resp. Br. 1.

1. This case is the best vehicle for consideration of the constitutionality of the minimum coverage provision. Unlike the Fourth Circuit in *Liberty University* v. *Geithner*, No. 10-2347, 2011 WL 3962915 (Sept. 8, 2011), petition for cert. pending, No. 11-438 (filed Oct. 7, 2011), the court below reached the merits of that question. And unlike *Thomas More Law Center*, in which the certiorari petition includes no question presented on severability, this case would permit the Court to consider severability issues if it were to invalidate the minimum coverage provision. See Fed. Gov't Resp. Br. 26-33, *National Fed'n of Indep. Bus.* v. *Sebelius*, Nos. 11-393 & 11-400 (Oct. 17, 2011).

2. The Court should address the potential applicability of the Anti-Injunction Act, 26 U.S.C. 7421(a), in the context of this case. See Pet. 32-34. The private respondents contend that there is no need for the Court to consider the Anti-Injunction Act because it is "non-jurisdictional" and, as a result, the federal government's "official position that the [Anti-Injunction Act] does not bar pre-enforcement challenges to the mandate is an express forfeiture of any defense that it may have under the statute." NFIB Resp. Br. 18. The private respondents are mistaken.

a. The Anti-Injunction Act, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," 26 U.S.C. 7421(a), is a limitation on the jurisdiction of

the courts. This Court has said that the statute, when it applies, "depriv[es] courts of jurisdiction over suits brought 'for the purpose of restraining the assessment or collection' of any federal tax." *Jefferson County* v. *Acker*, 527 U.S. 423, 434 (1999) (quoting 26 U.S.C. 7421(a)); see *Bob Jones University* v. *Simon*, 416 U.S. 725, 749 (1974) (affirming judgment "that [the Anti-Injunction Act] deprived the District Court of jurisdiction to issue the injunctive relief [the plaintiff] sought"); *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962) (*Williams Packing*) (Anti-Injunction Act "withdraw[s] jurisdiction from the state and federal courts"). The courts of appeals have likewise unanimously concluded that the Anti-Injunction Act imposes a jurisdictional bar.[1]

The jurisdictional nature of the Anti-Injunction Act is confirmed by this Court's conclusion that the cognate Tax Injunction Act, 28 U.S.C. 1341, is likewise jurisdictional. This Court has observed that "Congress modeled the Tax Injunction Act" on the Anti-Injunction Act. *Jefferson County*, 527 U.S. at 434; see *Hibbs* v. *Winn*, 542 U.S. 88, 102-103 (2004). That similarly worded statute

---

[1] See *Liberty University*, 2011 WL 3962915, at *4; *Thomas More Law Ctr.*, 651 F.3d at 539; *Pagonis* v. *United States*, 575 F.3d 809, 813-815 (8th Cir. 2009); *Hansen* v. *Department of Treasury*, 528 F.3d 597, 600-602 (9th Cir. 2007); *Sterling Consulting Corp.* v. *United States*, 245 F.3d 1161, 1167 (10th Cir. 2001), cert. denied, 534 U.S. 1114 (2002); *Gardner* v. *United States*, 211 F.3d 1305, 1310-1311 (D.C. Cir. 2000), cert. denied, 531 U.S. 1114 (2001); *Randell* v. *United States*, 64 F.3d 101, 106 (2d Cir. 1995), cert. denied, 519 U.S. 815 (1996); *Mathes* v. *United States*, 901 F.2d 1031, 1033 (11th Cir. 1990); *In re LaSalle Rolling Mills, Inc.*, 832 F.2d 390, 392 n.6 (7th Cir. 1987); *McCarthy* v. *Marshall*, 723 F.2d 1034, 1037 (1st Cir. 1983); *Zernial* v. *United States*, 714 F.2d 431, 433-434 (5th Cir. 1983); *Sherman* v. *Nash*, 488 F.2d 1081, 1083 (3d Cir. 1973).

provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. 1341. The Court has squarely held that the Tax Injunction Act is a limitation on the subject-matter jurisdiction of the federal courts. See *Arkansas* v. *Farm Credit Servs.*, 520 U.S. 821, 824, 825-826 (1997) (noting that the Tax Injunction Act is a "broad jurisdictional barrier," and directing dismissal of suit even though court of appeals had not addressed Tax Injunction Act and parties had not raised it in this Court) (citation omitted); *California* v. *Grace Brethren Church*, 457 U.S. 393, 396, 408, 417 n.38 (1982) (holding that Tax Injunction Act "deprived the District Court of jurisdiction" notwithstanding state defendant's contention that it was inapplicable); *Rosewell* v. *LaSalle Nat'l Bank*, 450 U.S. 503, 512, 522 (1981).

b. The private respondents contend that the Anti-Injunction Act cannot be jurisdictional because the Court has created an "equitable exception" to it. NFIB Resp. Br. 17. The case to which they apparently refer, *Williams Packing*, itself characterized the Anti-Injunction Act as jurisdictional, and the Court has done the same since that decision. See p. 3, *supra*. Moreover, while the Court has on occasion characterized *Williams Packing* as having recognized an "exception[]" to the Anti-Injunction Act, *e.g.*, *Bob Jones University*, 416 U.S. at 742, *Williams Packing* is best understood to have merely interpreted the language of the Act as inapplicable in a certain, very limited category of cases. The Court in *Williams Packing* explained that, when "it is clear that under no circumstances could the Government ultimately prevail" in a taxpayer suit, the challenged

"exaction is merely in 'the guise of a tax,'" 370 U.S. at 7 (citation omitted), rather than being an actual "tax," the assessment and collection of which the Anti-Injunction Act would shield. But "[o]therwise," the Court stressed, "the District Court is without jurisdiction, and the complaint must be dismissed." *Ibid.*

Williams Packing's "under no circumstances" test is analogous to the rule that a "claim invoking federal-question jurisdiction under 28 U.S.C. § 1331 * * * may be dismissed for want of subject-matter jurisdiction if it is not colorable, *i.e.*, if it is * * * 'wholly insubstantial and frivolous.'" *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006) (citation omitted). A district court's ability to examine the merits of a claim to that limited extent does not make Section 1331 any less jurisdictional.

c. The private respondents also contend that the Anti-Injunction Act cannot be jurisdictional because this Court in *Helvering* v. *Davis*, 301 U.S. 619 (1937), accepted the Solicitor General's express "waiver of a defense under" the Anti-Injunction Act's predecessor statute. NFIB Resp. Br. 17 (quoting *Davis*, 301 U.S. at 639-640). They also contend that the Court can "accept the Government's express [Anti-Injunction Act] waiver" in this case and forgo adding a question presented on the Anti-Injunction Act. *Id.* at 18. This line of argument is misconceived.

Davis involved "extraordinary features," 301 U.S. at 640, among them an express and extensively explained waiver of the predecessor to the Anti-Injunction Act by the Solicitor General in his merits brief in this Court, see Gov't Br. 22-31, *Davis*, *supra* (No. 36-910). Moreover, the Court did not explain its rationale for accepting that waiver; the opinion's author, Justice Cardozo, believed the remedy sought in that case was "ill con-

ceived," but he was in the minority on that question and thus had the task of characterizing the views of a majority of which he was not a part, see *Davis* at 639-640. He did so with minimal elaboration. See *ibid*. The portion of *Davis* involving the government's waiver does not appear to have been subsequently cited by this Court.[2]

The private respondents are incorrect when they suggest that there has been a *Davis*-type waiver in this case. Neither the federal government's statutory argument that the Anti-Injunction Act does not bar pre-enforcement challenges to the minimum coverage provision, see Pet. 33; Gov't Resp. Br. 16-21, *Liberty University*, *supra*, nor the federal government's decision not to make the contrary argument in the court of appeals constituted a waiver like that in *Davis*—*i.e.*, an express relinquishment of a concededly valid defense. Cf. *Puckett* v. *United States*, 129 S. Ct. 1423, 1430-1431 (2009) (distinguishing "waiver"—an "intentional[] relinquish[ment] or abandon[ment]" of a right—from "forfeiture," which can result from mere "failure to raise [an] argument").

Nor does the Court's acceptance of the government's waiver in *Davis* undermine the Court's subsequent characterization of the Anti-Injunction Act as jurisdictional. See p. 3, *supra*. As noted above (pp. 3-4, *supra*), the Court has held that the Anti-Injunction Act's cognate statute, the Tax Injunction Act, is jurisdictional. The Court has nonetheless concluded that the Tax Injunction

---

[2] In the government's brief in *Sunshine Anthractite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), the Solicitor General noted that "the Government expressly waived 'its objections to the equitable jurisdiction of the court and . . . its defense under Section 3224 of the Revised Statutes,'" the predecessor to the Anti-Injunction Act. Gov't Br. 9, *Sunshine Anthractite Coal Co.*, *supra* (No. 39-804) (citation omitted). The Court's opinion in that case did not discuss the issue.

Act does not bar a suit by the United States, despite the absence of a relevant textual "exception to the jurisdictional bar." *Farm Credit Servs.*, 520 U.S. at 823-824. That conclusion was based on the "well-settled understanding that the Government is not bound by its own legislative restrictions on the exercise of remedial rights unless the intent to bind it is express." *Id.* at 827. The Court in *Davis* could have acted on a comparable understanding that the Anti-Injunction Act, while jurisdictional, allows the federal government itself to expressly waive the jurisdictional bar on those rare occasions when the government formally represents that substantial countervailing interests outweigh the interest in avoiding pre-enforcement tax challenges.

3. The state respondents contend that, "[e]ven assuming the [Anti-Injunction Act] might bar some challenges" to the minimum coverage provision, "it would not bar the States' challenge" because "it is not clear that the [Anti-Injunction Act] applies to the States" and because "it does not bar a State's suit to challenge a tax that is not imposed directly on the State." State Resp. Br. 14-15. The States are incorrect on both points. The federal government nonetheless agrees with the States that it would be preferable to add a question presented on the Anti-Injunction Act in this case, rather than using *Liberty University* as the vehicle for review of that question, so that the Court can more readily consider those state-specific arguments along with other arguments concerning the applicability of the Anti-Injunction Act. See Gov't Resp. Br. 15-16, *Liberty University*, *supra*.

a. The Anti-Injunction Act's use of the word "person" does not render it inapplicable to suits by States. See Fed. Gov't Resp. Br. 20, *National Fed'n of Indep.*

Bus., *supra*. This Court has occasionally applied a presumption that the word "person" in a statute does not include a State in order to avoid an interpretation that would impose civil liability on the States equally with other defendants. See, *e.g.*, *Vermont Agency of Natural Res.* v. *United States*, 529 U.S. 765, 780-781 (2000). There is no basis for application of such a principle when a generally applicable tax provision is at stake, and this Court has thus squarely rejected the contention that the Internal Revenue Code's use of the word "person" does not include States. See *Sims* v. *United States,* 359 U.S. 108, 112 (1959); *Ohio* v. *Helvering*, 292 U.S. 360, 370-371 (1934). And the Anti-Injunction Act simply bars suits by plaintiffs against the United States; its application to bar suits by States, along with all others, works no interference with state sovereignty. Cf. *Block* v. *North Dakota*, 461 U.S. 273, 288-289 (1983).

b. The state respondents also contend that *South Carolina* v. *Regan*, 465 U.S. 367 (1984), supports the inapplicability of the Anti-Injunction Act to their suit because they are "aggrieved parties for whom [Congress] has not provided an alternative remedy" to challenge the minimum coverage provision. State Resp. Br. 15 (quoting *Regan*, 465 U.S. at 378). That contention fails because the States are not "aggrieved parties" within the meaning of *Regan*.

Regan involved a claim by South Carolina that a federal tax statute interfered with its sovereignty in violation of *the State's* Tenth Amendment rights and *the State's* rights under "the doctrine of intergovernmental tax immunity." 465 U.S. at 370; see *id.* at 372. Yet South Carolina could not file a refund action because the tax provision did not impose a tax on the State. See *id.* at 379-380. The Court held that a refund suit by an indi-

vidual taxpayer attempting to assert South Carolina's sovereign interest at issue in the case would be inadequate because "instances in which a third party may raise the constitutional rights of another are the exception rather than the rule." *Id.* at 380.

Regan's "unique" circumstances (*Hibbs*, 542 U.S. at 103 n.6) are absent here. The States do not contend that the minimum coverage provision interferes with their own sovereign functions. Instead, they claim that the provision will unconstitutionally impose burdens on their individual citizens. This case is thus the converse of *Regan*. Here, a refund action by an individual taxpayer would be based on assertion of his own constitutional rights (not those of his State), while it is the States that are attempting to assert the "constitutional rights of another," 465 U.S. at 380, *i.e.*, the individual taxpayer.

c. The state respondents correctly recognize (Br. at 16) that "[t]o reach the merits of the States' challenge, the Court also must satisfy itself that the States have standing to challenge the mandate." But the States lack standing to challenge the minimum coverage provision, which applies to individuals, not States. See 26 U.S.C.A. 5000A; see also *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish.") (citation omitted).

The state respondents contend they have standing based on their contention that the minimum coverage provision will lead "individuals who were previously eligible for Medicaid but declined to enroll" to do so. State Resp. Br. 16. That theory of standing suffers from several defects. First, if an eligible person applies for a

benefit that a State voluntarily provides (such as those available through a State's Medicaid program), the State is not injured in any legally cognizable way. See *Lujan*, 504 U.S. at 560 ("injury in fact" requires "an invasion of a *legally protected* interest") (emphasis added). The state respondents do not claim that they have policies of discouraging eligible individuals from enrolling in Medicaid; to the contrary, lead state respondent Florida last year represented to the federal government that it "has a strong historical commitment to Medicaid outreach" and that it has taken a number of steps to *encourage* eligible individuals to enroll in the program. State of Florida, *Florida KidCare Program: Amendment to Florida's Title XXI Child Health Insurance Plan Submitted to the Centers for Medicare and Medicaid Services* 17 (July 1, 2010); see 42 U.S.C. 1396a(a)(8) (States participating in Medicaid must ensure that "all individuals wishing to make application for medical assistance under the [State's Medicaid] plan shall have opportunity to do so.").

Second, even assuming *arguendo* that the States have a legally protected interest in eligible residents not enrolling in Medicaid (and that their asserted injury is sufficiently nonspeculative to support Article III standing), they lack prudential standing to challenge the minimum coverage provision. "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). The state respondents' challenge to the minimum coverage provision is an assertion of the "legal rights" of "third parties" (*ibid.*), *i.e.*, individuals who

would be subject to the allegedly unconstitutional requirement. Enforcement of the prudential rule against third-party standing is especially important in the context of tax suits; permitting parties to litigate challenges to taxes imposed on others would risk serious disruption of tax administration.

This Court has permitted third-party standing only when the plaintiff makes two showings (in addition to the requisites of Article III): demonstrating that there is "a 'close' relationship with the person who possesses the right" and proving that "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski* v. *Tesmer*, 543 U.S. 125, 130 (2004) (citation omitted). The state respondents cannot make either showing. States do not possess a *parens patriae* relationship with their citizens that would permit them to litigate on their behalf against the federal government, see *Massachusetts* v. *EPA*, 549 U.S. 497, 520 n.17 (2007); *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923), and, as the presence of respondent Mary Brown in this case demonstrates, there is no hindrance to individuals' ability to challenge the minimum coverage provision.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

OCTOBER 2011