No. 11-398

IN THE

Supreme Court of the United States

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

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

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

BRIEF IN RESPONSE FOR PRIVATE RESPONDENTS

KAREN R. HARNED
NFIB SMALL BUSINESS LEGAL CENTER
1201 F St. NW, Suite 200
Washington, DC 20004

PROF. RANDY E. BARNETT
GEORGETOWN UNIV. LAW CENTER
600 New Jersey Ave. NW
Washington, DC 20001

MICHAEL A. CARVIN
Counsel of Record
GREGORY G. KATSAS
C. KEVIN MARSHALL
HASHIM M. MOOPPAN
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Private Respondents

RULE 29.6 STATEMENT

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

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BRIEF IN RESPONSE FOR PRIVATE RESPONDENTS

NFIB, Ahlburg, and Brown are Private Respondents here and Petitioners in No. 11-393. They concur with the Government that this Court should review the Eleventh Circuit's holding that the individual mandate is unconstitutional, as they explained in their own petition seeking review of the Eleventh Circuit's additional holding that the mandate is severable from the ACA.[1]

Although Private Respondents agree that the Government's petition should be granted, they nevertheless respectfully submit this response to that petition, for three reasons.

First, the Government does not fully convey the exceptionally important nature of the question presented. As explained below, the ACA's mandate to purchase an unwanted commercial product is an unprecedented and unbounded exercise of federal authority. This Court's immediate review is thus warranted, not just to resolve the conflict between the Eleventh Circuit and the Sixth Circuit over the validity of an essential part of a significant federal law, but also to reaffirm the fundamental principle that Congress' powers are limited and enumerated.

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[1] The Government's petition does not appear to contain any factual or legal misstatements "that bear[] on what issues properly would be before the Court if certiorari were granted." S. Ct. R. 15.2. That said, the Government's petition does omit important facts about the purpose and effect of the mandate, which were relied upon by the Eleventh Circuit. Private Respondents refer this Court to the discussion in their petition. No. 11-393 Pet. 2-4. Likewise, all "Pet.App." citations in this brief refer to the appendix to Private Respondents' petition.

Second, the Government unnecessarily suggests that this Court should add a question presented on whether the Anti-Injunction Act applies and also appoint an *amicus* to argue that it does, either in this case or in the Fourth Circuit case that invoked the AIA over the Government's objection, *Liberty University v. Geithner*, No. 11-438 (U.S. Oct. 7, 2011). But the Government's agreement that the AIA is inapplicable obviates any need for this Court ever to consider the question, because *the statute is not jurisdictional*. As discussed below, the AIA does not purport to be jurisdictional and this Court has not treated it as jurisdictional, instead allowing that statutory bar to be waived as well as equitably excused. At a minimum, though, if the AIA's jurisdictional status is in doubt, then that question and (if necessary) the statute's applicability can be resolved in this case alone, without needlessly complicating matters by also granting review in *Liberty University*.

Third, the Government fails to explain the reasons why this case should not be consolidated for review with the Sixth Circuit case that upheld the mandate, *Thomas More Law Center v. Obama*, No. 11-117 (U.S. July 26, 2011). As Private Respondents explained in their petition in No. 11-393, *Thomas More* is a flawed vehicle because the petitioners there do not have undisputed standing and have not even challenged the ACA's severability from the mandate. Nor is there any countervailing benefit from granting review in that case, because the merits challenge to the mandate there is indistinguishable from the challenge here, contrary to the belated suggestion of the *Thomas More* petitioners in their recently filed reply brief.

Accordingly, this Court should simply grant review of the first question presented in the Government's petition here, along with Private Respondents' petition in No. 11-393, thereby facilitating simultaneous resolution of the mandate's constitutionality and severability, without needlessly complicating these proceedings.

I. THE MANDATE'S CONSTITUTIONALITY IS AN EXCEPTIONALLY IMPORTANT FEDERAL QUESTION THAT WARRANTS THIS COURT'S IMMEDIATE REVIEW

The profound importance of the constitutional question raised by the mandate is underscored by two basic and indisputable points: *first*, Congress has never before exercised its commerce power to conscript individuals to participate in commerce for the benefit of existing market participants; and *second*, if Congress can thus compel the purchase of health insurance, then it has the plenary power to compel any product purchase, because there is nothing constitutionally unique about health insurance. The Eleventh Circuit correctly held the mandate unconstitutional for these reasons among others, and this Court should review and then affirm that important constitutional holding.

A. The Mandate Is An Unprecedented Federal Duty Divorced From Both Traditional Commerce Regulation And American Legal Traditions

1. The mandate's unprecedented nature is beyond serious dispute. *First*, the CBO recognized it: Congress "has never required people to buy any good or service as a condition of lawful residence in the United States," instead regulating only "parties to

economic transactions." Pet.App. 109a. *Second*, the Eleventh Circuit emphasized it: "the ability to compel Americans to purchase an expensive health insurance product [that] they have elected not to buy" "represents a wholly novel … assertion of congressional authority." *Id.* 195a; *see also id.* 107a-115a. *Finally*, even the Sixth Circuit conceded it: "the lack of historical precedent" caused "the government" to "give[] analogy a bad name" by absurdly equating "drafting a citizen to join the military and forcing him to respond to a price quote from Aetna." *Thomas More Law Ctr. v. Obama*, No. 10-2388, --- F.3d ----, 2011 WL 2556039, at *26 (6th Cir. June 29, 2011) (Sutton, J., concurring in part).

Of course, "almost two centuries of apparent congressional avoidance of the practice" of mandating commercial purchases "tends to negate the existence of the congressional power asserted." *Printz v. United States*, 521 U.S. 898, 918 (1997). That "earlier Congresses avoided use of this highly attractive power" is, standing alone, good "reason to believe that the power was thought not to exist." *Id.* at 905. Thus, just as this Court reviewed and rejected Congress' relatively novel attempt to use the commerce power to impose a regulatory mandate that "commandeer[ed]" the States, *id.* at 925, 933, so too should this Court scrutinize Congress' entirely unprecedented economic mandate that commandeers "the people," U.S. Const., amend. X.

2. Moreover, it is unsurprising that Congress was far "removed from the traditional subjects of [its] commerce authority," Pet.App. 116a, when it tried for the first time to regulate "non-market participants" whom Congress merely desired "to

enter into commerce," *id.* 159a. The textual power "[t]o regulate Commerce … among the several States" and "[t]o make all Laws which shall be necessary and proper for carrying into Execution th[at] … Power[]" (U.S. Const., art. 1, § 8, cls. 3, 18) is hardly a source of authority for regulating a class of individuals whose defining feature is that they are *strangers* to commerce in health insurance. Likewise, this fundamental disconnect between the subjects of Congress' commerce power and the subjects of the mandate is reflected in this Court's precedent, which provides no support for regulating individuals who are neither engaged in commerce nor pose barriers to commerce or its regulation.

At the core of Congress' commerce power, of course, are direct regulations of interstate commerce—*i.e.*, laws that "prescrib[e] rules for carrying on" interstate "commercial intercourse." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824); *see also United States v. Lopez*, 514 U.S. 549, 553, 558 (1995). That "power to regulate commerce," however, "presupposes that something exists to regulate," yet "the regulated conduct [here] is defined by the *absence* of … commerce." Pet.App. 102a, 119a. In short, *compelling* commerce is not *regulating* commerce: Congress regulates the commerce in insurance by prescribing the terms of voluntary contracts between Aetna and its customers, *not* by forcing individuals to enter into purchase contracts with Aetna.

To be sure, Congress also has sweeping power to regulate things that are *not themselves* interstate commerce, but the regulation of which *effectuates the execution* of the enumerated power to regulate

interstate commerce. *United States v. Darby*, 312 U.S. 100, 118-20 & n.3 (1941) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)). Thus, Congress may regulate certain "intrastate activities" that, in the aggregate, are "burdens and obstructions" that adversely "[a]ffect" Congress' preferred market conditions in "interstate commerce or … the exercise of [its] power to regulate [such commerce]." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 121 (1942). Specifically, Congress can "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce," *Gonzales v. Raich*, 545 U.S. 1, 17, 23-26 (2005), and it can also regulate "noneconomic local activity" that "interfere[s] with," "obstruct[s]," or "undercut[s]" a commercial "regulatory scheme" that Congress is trying to "carry[] into Execution," *id.* at 36-37, 39 (Scalia, J., concurring in the judgment) (citing *Wrightwood Dairy*, 315 U.S. at 119; *Lopez*, 514 U.S. at 561, and *Printz*, 521 U.S. at 923-24).

But this Court's doctrine has never authorized laws where "the regulated subject matter" has no "connection to interstate commerce" *other* than Congress' mere desire *to create* a connection "by compelling non-market participants to *enter into* commerce." Pet.App. 119a, 159a. Since individuals who are *strangers* to a commercial market pose no "burdens [or] obstructions" to Congress' regulation of that commerce, *Jones & Laughlin*, 301 U.S. at 36-37, there is no basis for Congress to compel their participation in commerce simply to benefit voluntary market participants or to mitigate the costly burdens of its own federal scheme.

This Court's seminal decision in *Wickard v. Filburn*, 317 U.S. 111 (1942), illustrates this fundamental distinction. Although Congress could *restrict* Filburn's intrastate wheat production because that kind of economic activity, in the aggregate, was *obstructing* Congress' goal of raising interstate wheat prices, Congress did not impose, and this Court did not approve, a *mandate* that Filburn or his neighbors *buy* wheat, even though that more directly would have facilitated Congress' goal. *Id.* at 113-15, 127-29. That is, while Congress may regulate purely local bootleggers because of their aggregate effect on the interstate liquor market, it may not conscript teetotalers merely because conditions in the liquor market would be improved if more people imbibed.

Yet the uninsured who are regulated by the mandate are the teetotalers, not the bootleggers, of the health-insurance market. And so it is entirely unprecedented that they are Congress' "regulated subject matter" despite lacking any "nexus" to commerce other than their mere non-participation in commerce. Pet.App. 119a.

In particular, an "individual's decision not to purchase health insurance" "in no way 'burdens' or 'obstructs'" either "the insurance industry" or "Congress's ability to enforce its regulation of [that] industry." *Id.* 156a. "Congress's ability to regulate" the contracting criteria of "insurance companies" is unaffected by strangers to those contracts. *Id.* 156a-157a. Nor does the mandate regulate uncompensated care that gives rise to "cost-shifting," because it "is not tied to those who do not pay for a portion of their health care," but "[r]ather … is

unlimited[] and covers even those who do not enter the health care market at all." *Id.* 120a. In short, the mandate merely "counteract[s] the [ACA's] significant regulatory costs on insurance companies and [the] adverse consequences stemming from [its] fully executed reforms," by "forc[ing] healthy and voluntarily uninsured individuals to purchase insurance … in order to subsidize the private insurers' costs." *Id.* 134a, 157a.

3. There is an additional reason that Congress has never thought to authorize such regulatory conscription. Substantive mandates to benefit third parties are in serious tension with core tenets of Anglo-American jurisprudence.

In general, mandates to act ignore the "deeply rooted" "difference … between 'misfeasance' and 'nonfeasance'—[*i.e.*,] between [an individual's] active misconduct working positive injury to others and [his] passive inaction or … failure to take steps to protect them from harm." *Prosser & Keeton on the Law of Torts* § 56, 373 (5th ed. 1984). This distinction reflects a fundamental principle of personal liberty: unlike negative restrictions against "the commission of affirmative acts of harm"—which only marginally circumscribe an individual's freedom—affirmative "mandate[s]" directly "forc[e] men to help one another," leaving no other choices at all. *Id.*; *see also* St. George Tucker, 2 *Blackstone's Commentaries*, 124 (1803). And that infringement of liberty is particularly serious for mandates that "take[] property from A. and give[] it to B.," which have long been recognized as "against all reason and justice." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388

(1798) (opinion of Chase, J.); *see also E. Enters. v. Apfel*, 524 U.S. 498, 523 (1998) (plurality opinion).

It thus is unsurprising that Congress has never attempted to impose a purchase mandate. Unable to defend such onerous mandates under a broad "police power" akin to that which the States alone possess, *United States v. Morrison*, 529 U.S. 598, 618 (2000), Congress instead has "historically" restricted itself to a "limited set of personal mandates" that "contain clear foundations in the constitutional text" and "are in the nature of duties owed to the government attendant to citizenship," Pet.App. 113a.

In sum, the ACA's unprecedented mandate to engage in commerce poses an obvious "risk of tyranny and abuse." *Lopez*, 514 U.S. at 552. It is the precise type of law that the Framers would have *withheld* from Congress to "enhance[] freedom" by "secur[ing] to citizens the liberties that derive from the diffusion of sovereign power." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). And thus it is critical for this Court to determine whether, instead, the authority to enact this onerous mandate has been lurking unnoticed for more than two centuries within the "few and defined" "powers delegated by the … Constitution to the federal government." *Lopez*, 514 U.S. at 552.

B. The Mandate Lacks Any Cognizable Limiting Principle And Therefore Conflicts With This Court's Rejection Of A Federal Police Power

1. As with its unprecedented nature, the mandate's unbounded nature has not been credibly contested. *First*, the CBO contemplated it: "a mandate-issuing government" could lead, "[i]n the

extreme," to "a command economy[] in which the President and the Congress dictated how much each individual and family spent on all goods and services." Pet.App. 118a (n.96). *Second*, the Eleventh Circuit stressed it: "[f]rom a doctrinal standpoint, we see no way to cabin the government's theory only to decisions not to purchase *health insurance*," because "any person's decision not to purchase a good would, when aggregated, substantially affect interstate commerce in that good." *Id.* 117a-119a; *see also id.* 124a-130a. *Finally*, the Sixth Circuit all but admitted it: one "way to look at [this Court's] precedents" is that "th[is] Court either should stop saying that a meaningful limit on Congress's commerce powers exists or prove that it is so." *Thomas More*, 2011 WL 2556039, at *22 (Sutton, J., concurring in part).

Indeed, if the Rubicon were crossed to sustain this health-insurance mandate, well-established precedent holds that there would be no judicially cognizable limit on what purchases Congress could compel. If forcing individuals to purchase a product is a "specified object[]" within Congress' "power over commerce" simply due to the aggregate effect on commerce, then "the sovereignty of Congress … is plenary as to th[at] object[]," without regard to the particular effect for a particular product. *Gibbons*, 22 U.S. at 197; *see also Darby*, 312 U.S. at 115. Likewise, if forcing non-participants in a commercial market to purchase a product is "necessary and proper" merely "to counteract the significant regulatory costs" that Congress' "fully executed" scheme has imposed on the regulated seller, Pet.App. 157a, then Congress can mandate such purchases whenever it is "convenient," "useful," or "conducive"

to the "beneficial exercise" of any fully functional statute. *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (citing *McCulloch*, 17 U.S. at 413, 418).

In short, although the Government trumpets "five factual criteria" that it claims render health insurance "unique[]," Pet.App. 124a-125a, those criteria cannot constrain future Congresses bent on mandating purchases of less "unique" products. The judiciary can neither require nor second-guess the empirical satisfaction of those "*ad hoc* factors," which are not "administrab[le]" "limiting principles rooted in any constitutional understanding of the commerce power." *Id.* 124a-127a.

2. These inevitable consequences warrant this Court's immediate attention. This Court repeatedly has held that Congress lacks the power to "create a completely centralized government," *Lopez*, 514 U.S. at 557, because "the Founders denied the National Government" a "plenary police power" and "reposed [it instead] in the States," *Morrison*, 529 U.S. at 618.

Of particular relevance here, the Framers did so to "enhance[] freedom" for "the people." *Bond*, 131 S. Ct. at 2364. *First*, federalism protects against a *politically unresponsive* government, by preserving "the initiative of [individuals] who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Id.* *Second*, federalism protects against a *substantively unchecked* government, "[b]y denying any one government complete jurisdiction over all the concerns of public life." *Id.* In short, while it "may appear 'formalistic' in a given case to partisans of the measure at issue," the Constitution "divides power

among sovereigns … precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Printz*, 521 U.S. at 933.

Until the ACA's unbounded mandate, Congress' commerce power was not understood as exempt from these bedrock principles. Although "the great changes that ha[ve] occurred in the way business [is] carried on" have "greatly expanded the … authority of Congress" under its commerce power, *Lopez*, 514 U.S. at 556, this Court has strongly warned—both recently and even at the height of the New Deal—that appeals to "our complex society" can never be allowed to "effectually obliterate the distinction between what is national and what is local," *id.* at 557 (quoting *Jones & Laughlin*, 301 U.S. at 37).

But since Congress, the Executive Branch, and some judges now doubt this Court's word, this Court must "prove that it is so." *Thomas More*, 2011 WL 2556039, at *22 (Sutton, J., concurring in part).

C. The Eleventh Circuit Correctly Held That The Mandate Exceeds Congress' Authority

Given the parties' agreement that plenary review is warranted, Private Respondents will refrain from a point-by-point refutation of the merits arguments in the Government's petition. In light of the foregoing discussion, it suffices for now to summarize briefly the Eleventh Circuit's cogent analysis why the "mandate exceeds Congress's enumerated … power[s]" and cannot be upheld "without obliterating the boundaries inherent in the system of enumerated congressional powers." Pet.App. 195a.

First, whether "fram[ed]" as "inactivity or a financial decision to forego insurance," the mandate's

"regulated conduct" lacks the requisite "connection to interstate commerce." *Id.* 119a. "[A]n individual's decision not to purchase health insurance" "in no way 'burdens' or 'obstructs'" either "the insurance industry" or "Congress's ability to enforce its regulation of [that] industry." *Id.* 156a. Rather, "the regulated conduct is defined by the *absence*" of "commerce" or even "economic[]" activities—*i.e.*, "the production, distribution, and consumption of commodities [or services]." *Id.* 119a. "Although any decision not to purchase a good or service entails commercial consequences, this does not warrant the facile conclusion that Congress may therefore regulate these decisions," for otherwise there is *no* "product whose purchase Congress could not mandate." *Id.* 118a.

Second, "[f]rom a doctrinal standpoint," there is "no way to cabin the government's theory only to decisions not to purchase *health insurance*." *Id.* 117a-118a. The "five factual criteria comprising the government's 'uniqueness' argument are not limiting principles rooted in any constitutional understanding of the commerce power," but "are *ad hoc* factors" that merely describe "the health insurance and health care industries." *Id.* 125a, 127a.

Third, the mandate does not carry into "execution … the Act's [insurance] regulations," because "[a]n individual's uninsured status [neither] interferes with Congress's ability to regulate insurance companies" "no[r] prevents insurance companies' regulatory compliance with the Act's insurance reforms." *Id.* 156a-157a. Instead, the mandate merely "*counteract[s]* the [ACA]'s significant regulatory costs on insurance companies

and [the] adverse consequences stemming from [its] *fully executed* reforms." *Id.* 157a (emphasis added).

Fourth, the mandate does not regulate the economic activity of receiving uncompensated care while uninsured. "The language of the mandate is not tied to those who do not pay for a portion of their health care," but "[r]ather … is unlimited[] and covers even those who do not enter the health care market at all." *Id.* 120a. Accordingly, this is not a situation where Congress is exercising its "preventive" commerce power over a class of individuals who all have engaged in economic activity that may cause potential "future disruptions to interstate commerce." *Id.* 122a (n.100). Rather, the mandate regulates a class of individuals who lack any "connection" to economic activity and thus are beyond the reach of Congress's commerce power, notwithstanding that *some* of those individuals will *later* engage in economic activity that exposes them to federal regulation. *Id.* 122a; *but see id.* 218a-220a (dissent below erroneously arguing that whether the individuals subject to the mandate have engaged in economic activity that Congress may regulate is merely "a temporal question").

Fifth, the commercial inactivity of the uninsured also cannot be deemed "[economic] activity" within Congress' regulatory ambit simply because that inactivity later has "an economic effect" due to "cost-shifting" by some uninsured individuals. *Id.* 139a-140a (n.119). Under that improper "conflation of activity and effect," the gender-motivated violence ban in *Morrison* "[w]ould be regarded as regulating the 'consumption of health care services,' because such consumption inevitably and empirically flows

from gender-motivated violence." *Id.*; *but see Thomas More*, 2011 WL 2556039, at *24-25, 27 (Sutton, J., concurring in part) (employing such erroneous logic when applying the "substantial effects" doctrine).

Sixth, because the mandate's regulated conduct—*i.e.*, lack of the requisite insurance—exceeds Congress' commerce power, the statute is *facially* unconstitutional in all its applications. It cannot be upheld simply because *some* regulated individuals could be covered under a *different* statute regulating additional economic activity in which they happen to be engaged—*e.g.*, a mandate *conditioned* on the activity of seeking and receiving healthcare. *Lopez* forecloses such an "as-applied" defense for a statute exceeding Congress' commerce power, because this Court facially invalidated the gun-possession law at issue, even though a slightly different law could have been applied to the defendant there and in the vast majority of cases: "Lopez himself was paid $40 to traffic the [offending] gun" *and* "[a] staggering proportion of the firearms in America ha[d] been transported across state lines." Pet.App. 120a (n.97), 122a (n.100); *but see Thomas More*, 2011 WL 2556039, at *33 (Sutton, J., concurring in part) (employing an erroneous "as-applied" analysis).

Finally, the mandate is not a "tax." Rather, it is a regulatory "requirement" to buy insurance, where "compliance" is enforced through a "monetary sanction on conduct that violates that requirement." Pet.App. 168a, 176a (quoting *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) ("[A] penalty … is an exaction

imposed by statute as punishment for an unlawful act," whereas "a tax is an enforced contribution to provide for the support of government.")).

II. THE ANTI-INJUNCTION ACT HAS BEEN FORFEITED BY THE GOVERNMENT, AND, IF NOT, ITS APPLICABILITY CAN BE DECIDED HERE WITHOUT CONSOLIDATING *LIBERTY UNIVERSITY*

The Government has taken the position that the Anti-Injunction Act does *not* apply to pre-enforcement challenges to the mandate, No. 11-398 Pet. 33, and Private Respondents agree, No. 11-393 Pet. 17-19. For precisely that reason though, the Government errs in its suggestion that this Court should add a question presented on the AIA and appoint an *amicus* to argue that the statute applies, either in this case or in *Liberty University*. *First*, the AIA is not jurisdictional, and thus the Government has forfeited any available defense under it. *Second*, if the AIA is deemed jurisdictional (or its non-jurisdictional status is in doubt), then this Court can and must decide in this case whether the statute applies, thereby rendering it unnecessary to grant review in *Liberty University* as well.

A. The Anti-Injunction Act is not jurisdictional. As a threshold matter, its text does not speak in jurisdictional terms. Rather, it merely provides, with a few exceptions, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." 26 U.S.C. § 7421. Thus, "Congress d[id] not rank [this] statutory limitation on [relief] as jurisdictional," *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006), nor is there "any 'clear' indication that Congress wanted the [bar]

to be 'jurisdictional,'" *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011). Absent such "bright line" proof of jurisdictional status, this Court's recent cases strongly suggest that the AIA should not be deemed jurisdictional. *See id.*

More importantly, whenever the distinction between jurisdictional and non-jurisdictional rules has been implicated, this Court has treated the AIA as non-jurisdictional. For example, jurisdictional objections "can never be forfeited or waived." *Arbaugh*, 546 U.S. at 514. Yet, as the Government recognizes (No. 11-398 Pet. 33), this Court has accepted the Government's express "waiver of a defense under" the AIA's predecessor statute. *Helvering v. Davis*, 301 U.S. 619, 639-40 (1937). Likewise, "this Court has no authority to create equitable exceptions to jurisdictional requirements." *Bowles v. Russell*, 551 U.S. 205, 214 (2007). Yet there is at least one "extraordinary and exceptional circumstance[]" where this Court has adopted a "judicially created exception[]" to the AIA—*i.e.*, "where the [IRS] ha[s] no chance of success on the merits"—and this Court previously felt free to adopt other such exceptions (though it has since repudiated them on textualist grounds). *Bob Jones Univ. v. Simon*, 416 U.S. 725, 742-46 (1974).

Consequently, it is immaterial that this Court occasionally has described the AIA in passing as "jurisdiction[al]." *See* No. 11-398 Pet. at 33 (citing cases). That is just another example of the familiar proposition that "[t]his Court, no less than other courts, has sometimes been profligate in its use of the term." *Arbaugh*, 546 U.S. at 510. As this Court has explained, such "less than meticulous"

statements are "'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." *Id.* at 511. Otherwise, this Court might have *to overrule* its AIA cases that have created equitable exceptions and accepted express waivers. *See Bowles*, 551 U.S. at 214.

In sum, under both text and precedent, the AIA is properly characterized as non-jurisdictional. Accordingly, the Government's official position that the AIA does not bar pre-enforcement challenges to the mandate is an express forfeiture of any defense that it may have under the statute. Indeed, whether or not the AIA is technically "jurisdictional," this Court should adhere to *Helvering v. Davis* and accept the Government's express AIA waiver. Thus, there is no need to add a question presented about the AIA or appoint an *amicus* for argument.

B. At a minimum, however, it is unnecessary to grant review in *Liberty University*, because any questions about the AIA's applicability can be resolved in this case alone. If the AIA is deemed jurisdictional, then this Court must decide whether it applies in this case even though the Eleventh Circuit did not consider the question below. And it would needlessly complicate these proceedings to grant review in *Liberty University* as well, given that this Court can simply consider the Fourth Circuit's application of the AIA in the context of its review here, if necessary.

III. *THOMAS MORE* SHOULD NOT BE CONSOLIDATED WITH THIS CASE

Like Private Respondents, the Government believes that consolidating *Thomas More* with this

case "could complicate the briefing and presentation of the arguments to the Court, without a sufficient corresponding benefit." No. 11-117 Resp. Br. 20 (Sept. 28, 2011). But because the Government does not explain the reasons why this is true, Private Respondents will briefly do so.

As previously explained, the *Thomas More* petitioners do not have undisputed standing and have not challenged the ACA's severability. No. 11-393 Pet. 13-15. Notably, their subsequently filed reply brief completely ignores this serious defect. No. 11-117 Reply Br. (Oct. 6, 2011). Nor is there any merit to their claim that they present a unique "as-applied" challenge to the mandate that is not presented here, simply because they are uninsured and thus do not fall within Judge Sutton's various categories of individuals who are facially regulated by the mandate but "active" in the insurance market. *Id.* 2-4. The Sixth Circuit viewed the *Thomas More* petitioners as bringing only a facial challenge. 2011 WL 2556039, at *5; *id.* at *11 & n.4 (opinion of Martin, J.); *id.* at *23 (Sutton, J., concurring in part). And, more importantly, Private Respondents here are likewise uninsured, Pet.App. 302a-305a, and so they equally present whatever "as-applied" issues are presented in *Thomas More*.

CONCLUSION

Accordingly, this Court should grant review of the first question presented in the Government's certiorari petition here, along with Private Respondents' petition in No. 11-393.

Respectfully submitted,

KAREN R. HARNED
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F St. NW, Suite 200
Washington, DC 20004

PROF. RANDY E. BARNETT
GEORGETOWN UNIV.
LAW CENTER
600 New Jersey Ave. NW
Washington, DC 20001

MICHAEL A. CARVIN
Counsel of Record
GREGORY G. KATSAS
C. KEVIN MARSHALL
HASHIM M. MOOPPAN
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Private Respondents