No. 13-306

# In the Supreme Court of the United States

LIBERTY UNIVERSITY, ET AL., PETITIONERS

*v.*

JACOB J. LEW, SECRETARY OF THE TREASURY, ET AL.

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

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

DONALD B. VERRILLI, JR.
*Solicitor General*
*Counsel of Record*
STUART F. DELERY
*Assistant Attorney General*
MARK B. STERN
ALISA B. KLEIN
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTIONS PRESENTED

The employer responsibility provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, will require that, under certain circumstances, an assessable payment will be imposed on a large employer that does not offer adequate health insurance coverage to its full-time employees. 26 U.S.C. 4980H (Supp. V 2011). The minimum coverage provision of the Act will require that non-exempted individuals maintain a minimum level of health insurance or pay a tax penalty. 26 U.S.C. 5000A (Supp. V 2011). The questions presented are:

1. Whether the court of appeals had jurisdiction to consider petitioners' claims.

2. Whether the employer responsibility provision is authorized by Congress's taxing power and, independently, by Congress's commerce power.

3. Whether the employer responsibility and minimum coverage provisions violate petitioners' rights under the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*

4. Whether the court of appeals acted within its discretion when it declined to consider challenges to preventive-services coverage regulations that petitioners attempted to raise for the first time in the court of appeals after a remand from this Court.

**TABLE OF CONTENTS**



**TABLE OF AUTHORITIES**

Cases:

Constitution, statutes and regulations:

Statutes and regulations—Continued: Page

# In the Supreme Court of the United States

No. 13-306

LIBERTY UNIVERSITY, ET AL., PETITIONERS

*v.*

JACOB J. LEW, SECRETARY OF THE TREASURY, ET AL.

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

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-75a) is not yet reported but is available at 2013 WL 3470532. The opinion of the district court is reported at 753 F. Supp. 2d 611. An earlier opinion of the court of appeals is reported at 671 F.3d 391. An order of this Court vacating that earlier court of appeals decision and remanding to the court of appeals is reported at 133 S. Ct. 679.

## JURISDICTION

The judgment of the court of appeals was entered on July 11, 2013. The petition for a writ of certiorari was filed on September 5, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. As relevant here, the Patient Protection and Affordable Care Act (Act), Pub. L. No. 111-148, 124 Stat. 119,[1] provides that, beginning in 2014, a non-exempted individual who fails to maintain minimum essential health coverage must make a specified payment to the Internal Revenue Service (IRS). See 26 U.S.C. 5000A (minimum coverage provision).[2] In *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566 (2012) (*NFIB*), this Court held that the Anti-Injunction Act, 26 U.S.C. 7421(a), does not bar a pre-enforcement challenge to Section 5000A. See 132 S. Ct. at 2582-2584. The Court also held that individuals have the "lawful choice" to make payment to the IRS under Section 5000A "in lieu of buying health insurance," *id.* at 2597, 2600, and upheld the minimum coverage provision as a valid exercise of Congress's taxing power. See *id.* at 2593-2600.

The Act also amended the Internal Revenue Code to provide that employers with 50 or more full-time-equivalent employees must make a payment to the IRS in specified circumstances. See 26 U.S.C. 4980H (employer responsibility provision).[3] The amount of

---

[1] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

[2] All citations in this brief to provisions of the Act codified in the United States Code are to Supplement V 2011.

[3] As a transitional measure, the Department of the Treasury announced in July that the employer responsibility provision will not apply until 2015. See I.R.S. Notice 2013-45, 2013-31 I.R.B. 116. The Department explained that this transitional period would "provide additional time for input from employers and other reporting entities in an effort to simplify information reporting consistent with effective implementation of the law" and "provide employers, insurers, and other providers of minimum essential

the large-employer tax depends on whether the tax is imposed under subparagraph (a) or subparagraph (b) of Section 4980H. Subparagraph (a) imposes a tax on a large employer that does not offer its full-time employees and their dependents minimum essential coverage under an eligible employer-sponsored plan, if one or more of the full-time employees receive a federal premium tax credit or cost-sharing reduction for health coverage purchased by the employees on a health insurance exchange. Subparagraph (a) defines "minimum essential coverage under an eligible employer-sponsored plan" to include coverage under any employer-sponsored plan, with certain exceptions that are not relevant here. See 26 U.S.C. 4980H(a) (cross-referencing the definition of "minimum essential coverage" under an "eligible employer-sponsored plan" in 26 U.S.C. 5000A(f)(2) and referencing the exceptions in 26 U.S.C. 5000A(f)(3)). If a tax is imposed under subparagraph (a), the employer's monthly tax liability is calculated by multiplying the number of full-time employees (less 30) by $167. See 26 U.S.C. 4980H(a), (c)(1) and (2)(D).

Subparagraph (b) of Section 4980H imposes a tax on a large employer that offers its full-time employees and their dependents health coverage under an eligible employer-sponsored plan, if that coverage is not affordable or does not provide minimum value, and if one or more full-time employees receive a premium tax credit or cost-sharing reduction for health coverage purchased on an exchange. See 26 U.S.C. 36B(c)(2)(C) (affordability and minimum value criteria) and 26 U.S.C. 4980H(b). If a tax is imposed under

---

coverage time to adapt their health coverage and reporting systems." *Ibid.*

subparagraph (b), the employer's monthly tax liability is calculated by multiplying $250 by the number of full-time employees who receive a premium tax credit or cost-sharing reduction for health coverage purchased on an exchange. See 26 U.S.C. 4980H(b)(1). This tax liability is capped so that the "aggregate amount of tax" cannot exceed the amount a large employer would owe under subparagraph (a) if it did not offer its full-time employees and their dependents any health coverage at all. See 26 U.S.C. 4980H(b)(2).

2. a. Petitioner Liberty University brought this suit in its capacity as a large employer that "offers healthcare coverage to its full-time employees." 2d Am. Compl. ¶ 62. The University alleged that the employer responsibility provision exceeds Congress's Article I authority and violates the University's rights under the Free Exercise Clause, the Equal Protection Clause, and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* The two individual petitioners, Michele Waddell and Joanne Merrill, alleged that the minimum coverage provision exceeds Congress's Article I authority and violates their rights under the Free Exercise Clause, the Equal Protection Clause, and RFRA. They also alleged that certain exemptions in the minimum coverage provision violate the Establishment Clause. 2d Am. Compl. ¶¶ 102-113, 126-170.

The district court rejected all of petitioners' claims on the merits and dismissed the complaint for failure to state a claim. See 753 F. Supp. 2d 611.

b. On petitioners' appeal, the court of appeals held that the Anti-Injunction Act bars pre-enforcement challenges to the minimum coverage provision and the employer responsibility provision. The court of ap-

peals thus vacated the district court's judgment and remanded with instructions to dismiss the complaint for lack of jurisdiction. See 671 F.3d 391, 397-398.

c. Petitioners filed a petition for a writ of certiorari, which this Court held pending its decision in *NFIB*. The day after the Court decided *NFIB*, it denied the petition for a writ of certiorari in this case. See 133 S. Ct. 60 (2012).

d. Petitioners filed a petition for rehearing of the order denying their petition for a writ of certiorari. Their rehearing petition asked that this Court instead grant the certiorari petition, vacate the court of appeals' decision, and remand the case for further consideration in light of *NFIB*. See No. 11-438, 2012 WL 3027174 (pet. for reh'g). Petitioners' rehearing petition explained that such a remand would allow the court of appeals to address their challenges to the employer responsibility provision and their claim that the minimum coverage provision violates their rights under the First Amendment's Free Exercise and Establishment Clauses and the equal protection component of the Fifth Amendment. See *id.* at *1. The government did not oppose petitioners' request. See No. 11-438, 2012 WL 5361525 (resp. to pet. for reh'g). The government informed this Court that, in its view, the Anti-Injunction Act bars petitioners' challenge to the employer responsibility provision (but not the minimum coverage provision), and that petitioners' claims also failed on the merits. See *id.* at *3-*4. But the government agreed that the court of appeals should address those questions in the first instance. See *id.* at *4-*5.

This Court subsequently reconsidered its denial of certiorari, granted the petition, vacated the court of

appeals' decision, and remanded for further consideration in light of *NFIB*. See 133 S. Ct. 679 (2012).

3. On remand from this Court, the court of appeals affirmed the judgment of the district court. Pet. App. 1a-75a.

a. As a threshold matter, the court of appeals rejected the government's contention that Liberty University's pre-enforcement challenge to the employer responsibility provision is barred by the Anti-Injunction Act. See Pet. App. 25a-30a. That statute provides, with exceptions inapplicable here, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. 7421(a). The court recognized that (in contrast to the minimum coverage provision) Congress expressly described the assessment in Section 4980H as a "tax," but nonetheless held that the Anti-Injunction Act is inapplicable because Congress also referred to the assessment by other terms such as "assessable payment." Pet. App. 27a-29a.

b. The court of appeals also rejected the government's contention that none of the petitioners established the certainly impending injury that is necessary for Article III standing. See Pet. App. 30a-35a.

The court of appeals acknowledged that the government "may well be correct" that "it is speculative whether Liberty will be subject to an assessable payment under 26 U.S.C. § 4980H." Pet. App. 31a; see *id.* at 31a n.5 (noting that Liberty's employer-provided health plan "by definition * * * appears to meet the 'minimum essential coverage' requirement" and that it was speculative whether the plan would be

deemed not to provide "affordable coverage"). The court of appeals nonetheless concluded that Liberty has standing because it alleged that the employer responsibility provision will "increase the cost of care and directly and negatively affect [Liberty] by increasing the cost of providing health insurance coverage." *Id.* at 32a (internal quotation marks omitted). The court also concluded that this alleged injury "is imminent even though the employer mandate will not go into effect until January 1, 2015, as Liberty must take measures to ensure compliance in advance of that date." *Id.* at 33a.

The court of appeals similarly concluded that the individual petitioners have standing. Pet. App. 35a. The government had argued that those individuals "lack standing because they may be exempt from the individual mandate penalty, either because their income is below the mandate's threshold level or because they qualify for a proposed hardship exemption." *Id.* at 34a. The court, however, thought it sufficient that the individuals "allege the individual mandate will obligate them to buy insurance or pay a penalty, and their alleged lack of insurance provides sufficient support for that allegation at this stage of the proceedings." *Id.* at 34a-35a.

c. After resolving those threshold questions, the court of appeals rejected petitioners' claims on the merits. Pet. App. 35a-75a.

i. The court of appeals held that Congress had two independent bases of authority under Article I of the Constitution to enact the employer responsibility provision: its commerce power and its taxing power. Pet. App. 35a-57a.

With respect to the commerce power, the court of appeals concluded that the employer responsibility provision "is simply another example of Congress's longstanding authority to regulate employee compensation offered and paid for by employers in interstate commerce." Pet. App. 42a. The court rejected petitioners' attempt to liken the employer responsibility provision to the minimum coverage provision at issue in *NFIB*, reasoning that, "[i]n contrast to individuals, all employers are, by their very nature, engaged in economic activity." *Id.* at 43a. Because the employer responsibility provision "regulates existing economic activity (employee compensation)," the court concluded that it "stands on quite a different footing from" the minimum coverage provision. *Id.* at 44a. The court further held that, like other forms of employee compensation, employer-provided health coverage substantially affects interstate commerce. *Id.* at 44a-48a.

With respect to the taxing power, the court of appeals concluded that the "*NFIB* taxing power analysis inevitably leads to the conclusion that the employer mandate exaction, too, is a constitutional tax." Pet. App. 49a. The court determined that "it is clear from the provision's face that it possesses the 'essential feature' of any tax: 'it produces at least some revenue for the Government.'" *Id.* at 54a (quoting *NFIB*, 132 S. Ct. at 2594). The court noted in this regard that the Congressional Budget Office had estimated that payments by employers to the government would come to $11 billion annually by 2019. *Ibid.*

Turning to the "'functional' characteristics" of the employer responsibility provision, the court of appeals determined that it "looks like a tax in many respects."

Pet. App. 54a (quoting *NFIB*, 132 S. Ct. at 2594-2595) (internal quotation marks omitted). The court noted that "[t]he exaction is paid into the Treasury, 'found in the Internal Revenue Code[,] and enforced by the IRS,' which 'must assess and collect it in the same manner as' a tax." *Ibid.* (quoting *NFIB*, 132 S. Ct. at 2594). The court further explained that the employer responsibility provision has none of the characteristics of the exaction that this Court invalidated as a penalty in *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20 (1922). See Pet. App. 55a-56a. The court explained that the employer responsibility provision "lacks a scienter requirement, does not punish unlawful conduct, and leaves large employers with a choice for complying with the law—provide adequate, affordable health coverage to employees or pay a tax." *Id.* at 55a. "Moreover," the court concluded, the amount of the exaction "is proportionate rather than punitive." *Id.* at 56a.

ii. The court of appeals also rejected petitioners' religion-based challenges to the employer responsibility provision and the minimum coverage provision. Both were premised on petitioners' objection to "facilitating, subsidizing, easing, funding, or supporting . . . abortions." Pet. App. 58a; see *id.* at 57a-68a.

The court of appeals concluded that petitioners' contention that both provisions violated the Free Exercise Clause lacked merit. Pet. App. 58a-59a. The court noted that "the Clause does not compel Congress to exempt religious practices from a 'valid and neutral law of general applicability.'" *Id.* at 59a (quoting *Employment Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 879 (1990)). The court explained that the

Act is a "neutral law of general applicability" and does not "set apart any particular religious group." *Ibid.*

The court of appeals also rejected petitioners' challenges to the employer responsibility and minimum coverage provisions under RFRA. See Pet. App. 59a-63a. The court explained that RFRA "directs application of strict scrutiny only if the Government 'substantially burden[s]' religious practice." *Id.* at 60a (quoting 42 U.S.C. 2000bb-1(a) and (b)). Here, the court concluded that petitioners "present no plausible claim that the Act substantially burdens their free exercise of religion, by forcing them to facilitate or support abortion or otherwise." *Ibid.*

The court of appeals pointed out that "[t]he Act specifically provides individuals the option to purchase a plan that covers no abortion services except those for cases of rape or incest, or where the life of the mother would be endangered." Pet. App. 60a-61a (citing 42 U.S.C. 18054(a)(6) (requiring that at least one plan on each exchange exclude non-excepted abortions from coverage)). The court noted that the "Act also does nothing to prevent employers from providing such a plan." *Id.* at 61a. It further explained that "the Act allows an individual to obtain, and an employer to offer, a plan that covers no abortion services at all, not even excepted services." *Ibid.* (citing 42 U.S.C. 18023(b)(1)(A)(i)).

The court of appeals noted petitioners' claim that the Act requires "that individuals and employers pay at least one dollar per person per month directly into an account to cover elective abortions[.]" Pet. App. 61a n.9 (citation omitted). But the court explained that petitioners were factually mistaken: the provision petitioners cited "applies only if individuals

*choose* to enroll in a plan through a health insurance exchange that elects to cover abortions, for which federal funding may not be used." *Ibid.* (emphasis added) (citing 42 U.S.C. 18023(b)(1)(B)(i) and (2)(A)-(B)).

The court of appeals rejected petitioners' contention that the two religious exemptions in the minimum coverage provision violate the First Amendment's Free Exercise and Establishment Clauses and the equal protection component of the Fifth Amendment's Due Process Clause. See Pet. App. 63a-68a. It explained that the exemptions accommodate religious practices to the extent consistent with the Congress's objectives and do not target religion for disfavored treatment or differentiate between religious sects. *Ibid.*

Finally, the court of appeals declined to address petitioners' challenges to preventive-services coverage regulations that implement a different provision of the Act, 42 U.S.C. 300gg-13. See Pet. App. 68a-75a. The court noted that petitioners did not present that challenge in their second amended complaint, their district court briefs, their first appeal, or their previous filings in this Court. See *id.* at 69a-70a. Instead, petitioners attempted to assert this claim "for the first time in their post-remand briefs." *Id.* at 70a. The court explained that, as a general matter, "a federal appellate court does not consider an issue not passed upon below." *Id.* at 70a-71a (quoting *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976)). Although the court recognized that it had "discretion" to make an exception to that default rule under "limited circumstances," it explained that petitioners had not "contend[ed]

that any of these 'limited circumstances'" apply here. *Id.* at 71a.

The court of appeals observed that the regulations containing the contraceptive-coverage requirement that petitioners sought to challenge had not been issued at the time petitioners filed their complaint. Pet. App. 72a. But, the court reasoned, "a new implementing regulation cannot 'become a vehicle for converting plaintiffs' lawsuit into a challenge to the new regulation' when a 'challenge to th[at] regulation would raise substantially different legal issues from the . . . arguments [already] propounded in th[e] lawsuit." *Ibid.*

The court of appeals also noted several additional "compelling reasons" against considering petitioner's belated argument. Pet. App. 72a. First, adjudicating petitioners' challenge to the contraceptive-coverage requirement "would require [the court] not only to resolve a claim not considered below, but also to do this in a second appeal three years after the initiation of this lawsuit." *Ibid.* It would also require interpretation of regulations "implementing a provision of the Act never challenged" in petitioners' complaint, at the same time that other circuits were considering that issue "in cases in which plaintiffs have properly pled the issue and a district court has addressed it." *Id.* at 72a, 74a (citing cases).

**ARGUMENT**

Petitioners renew their myriad enumerated-power and religion-based challenges to various provisions of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119. The court of appeals correctly rejected (or properly exercised its discretion not to address) those claims. Its decision does not

conflict with any decision of this Court or another court of appeals. In addition, there are threshold jurisdictional defects that would prevent this Court from reaching petitioners' claims even if they otherwise merited consideration. Further review is not warranted.

1. The court of appeals correctly held that the employer responsibility provision, 26 U.S.C. 4980H, is authorized by both Congress's taxing power and its commerce power. Neither independent ground for the court's decision conflicts with any decision of another court of appeals. Indeed, the decision below is the only one by a court of appeals even addressing an enumerated-power challenge to Section 4980H.

a. Section 4980H is a proper exercise of Congress's taxing power. In *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566 (2012), this Court explained that, "[i]n distinguishing penalties from taxes" for purposes of determining whether an exaction is a proper exercise of the taxing power, the relevant question is whether the exaction imposes "punishment for an unlawful act or omission." *Id.* at 2596 (quoting *United States* v. *Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996)); see *ibid.* ("[A] penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act.") (quoting *United States* v. *La Franca*, 282 U.S. 568, 572 (1931)).

The Court held that the assessment provided in Section 5000A is not punishment for an unlawful act or omission, even though Congress described the assessment "as a 'penalty,' not a 'tax,'" *NFIB*, 132 S. Ct. at 2594, and even though Section 5000A states that an individual "'shall' maintain health insurance," *id.* at

2593 (quoting 26 U.S.C. 5000A(a)). The Court explained that, although Section 5000A "clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful." *Id.* at 2596-2597. The Court emphasized that "[n]either the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS." *Id.* at 2597. And the Court explained that "[t]his process yields the essential feature of any tax: it produces at least some revenue for the Government." *Id.* at 2594 (citation omitted) (noting estimate of the Congressional Budget Office (CBO) that the Section 5000A payment is expected to raise about $4 billion per year by 2017).

The constitutionality of Section 4980H as a proper exercise of Congress's taxing power follows a fortiori from *NFIB*. Congress described the exaction in Section 5000A "as a 'penalty,' not a 'tax,'" but the Court held that the choice of "label" "does not determine whether the payment may be viewed as an exercise of Congress's taxing power." *NFIB*, 132 S. Ct. at 2594. Here, reliance on that principle is not necessary because Congress referred to the payment in Section 4980H as a "tax," see 26 U.S.C. 4980H(b)(2) (capping the "aggregate amount of tax"); 26 U.S.C. 4980H(c)(7) (providing that the "tax imposed by" Section 4980H is "nondeductible").

Section 5000A states that an individual "shall" maintain a minimum level of health coverage, see *NFIB*, 132 S. Ct. at 2593, but the Court held that, "[g]ranting * * * the full measure of deference owed to federal statutes," the provision could reasonably be read to "establish[] a condition—not owning health insurance—that triggers a tax," *id.* at 2594.

Here, no such deference is required because Section 4980H includes no comparable "shall" provision. There is thus no doubt that Section 4980H does not make a large employer's failure to offer coverage "unlawful." *Id.* at 2597. Moreover, like Section 5000A, Section 4980H has "the essential feature of any tax: it produces at least some revenue for the Government." *Id.* at 2594. The CBO projected that the large-employer tax will raise $11 billion per year by 2019. See Pet. App. 54a.

Contrary to petitioners' assertion (Pet. 25-28), Section 4980H has none of the "three practical characteristics of the so-called tax on employing child laborers" that convinced the Court that "the 'tax' was actually a penalty" in *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20 (1922). See *NFIB*, 132 S. Ct. at 2595. First, the statute at issue in *Drexel Furniture* "imposed an exceedingly heavy burden—10 percent of a company's net income—on those who employed children, no matter how small their infraction." *Ibid.* Second, it "imposed that exaction only on those who knowingly employed underage laborers," and this Court noted that "[s]uch scienter requirements are typical of punitive statutes, because Congress often wishes to punish only those who intentionally break the law." *Ibid.* Third, "this 'tax' was enforced in part by the Department of Labor, an agency responsible for punishing violations of labor laws, not collecting revenue." *Ibid.*

By contrast, the taxes in Section 4980H are assessed and collected exclusively by the IRS. Pet. App. 54a.[4] Section 4980H has no scienter requirement. *Id.*

---

[4] Petitioners incorrectly state (Pet. 28) that Section 4980H is incorporated by reference into the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, and thus can

at 56a.[5] And the amount of the tax in Section 4980H is proportionate and not punitive. *Ibid.* If Liberty University "offers adequate health coverage, but that coverage fails to satisfy" the Act's "affordability and minimum value requirements, Liberty will be taxed $3000 times the number of employees who receive" a premium tax credit or cost sharing reduction for health coverage purchased on an exchange, "prorated on a monthly basis and subject to a cap." *Ibid.* (citing 26 U.S.C. 4980H(b)(1)-(2). "And if Liberty fails to offer adequate health coverage to its full-time employees, it will be taxed $2000 times thirty less than its number of full-time employees—presumably all of whom are being deprived of coverage—prorated over the number of months for which Liberty is liable." *Ibid.* (citing 26 U.S.C. 4980H(a), (c)(1) and (2)(D)(i)).

b. The employer responsibility provision is also independently authorized by Congress's commerce power. Section 4980H addresses the health coverage benefits that large employers offer their full-time employees and their dependents. Health coverage benefits form part of an employee's compensation package, and it is well established that the commerce power permits Congress to regulate the terms and conditions of employment. See, *e.g.*, *United States* v. *Darby*, 312 U.S. 100, 117-124 (1941) (Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*); *NLRB* v.

---

be enforced by the Department of Labor. Although certain provisions of the Act are incorporated by reference into ERISA, see 29 U.S.C. 1185d, Section 4980H is not among them.

[5] Petitioners contend (Pet. 27) that Section 4980H does in fact "include a scienter requirement," but they cite no provision of the statute embodying such a requirement (and there is none).

*Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-43 (1937) (National Labor Relations Act, 29 U.S.C. 151 *et seq.*).

Congress has long regulated employee benefits such as health care benefits, pensions, disability benefits, and life insurance benefits through the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, and other statutes. Other federal laws, such as the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, bar discrimination in the context of employment. Petitioners do not question the validity of these longstanding federal statutes. Yet Section 4980H is "simply another example of Congress's longstanding authority to regulate employee compensation offered and paid for by employers in interstate commerce." Pet. App. 42a. The provision of health coverage substantially affects commerce, just as other forms of compensation and terms of employment do, and the businesses run by large employers likewise substantially affect commerce. See *id.* at 44a-47a (noting various ways in which employment-based health coverage substantially affects interstate commerce).

Petitioners rely (Pet. 17) on *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), but, in those cases, the noneconomic nature of the regulated conduct was crucial to the Court's decisions. See *Gonzales* v. *Raich*, 545 U.S. 1, 25 (2005). In *Lopez*, the Court addressed a federal statute that banned gun possession near schools, and found that the statute was beyond Congress's commerce power because it had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at

561; see *Morrison*, 529 U.S. at 610 ("[T]he noneconomic, criminal nature of the conduct at issue [in *Lopez*] was central to our decision in that case.").

In *Morrison*, the Court invalidated a statute that created a civil damages remedy for victims of gender-motivated violence, stressing that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." 529 U.S. at 613; see *id.* at 601-602. Similarly, in *NFIB*, Chief Justice Roberts concluded that Section 5000A could not be upheld under the commerce power because the affected individuals are not necessarily engaged in any commercial activity. See 132 S. Ct. at 2587 (reasoning that the commerce power does not permit Congress to require individuals who are "doing nothing" to purchase health insurance). By contrast, large employers are, "by their very nature, engaged in economic activity." Pet. App. 43a. Section 4980H addresses "existing economic activity (employee compensation), and therefore stands on quite a different footing from" Section 5000A. *Id.* at 44a.

2. a. The court of appeals correctly rejected petitioners' religion-based challenges to the employer responsibility provision and minimum coverage provision. Its decision does not conflict with any decision of another court of appeals or of this Court.

The premise of petitioners' religion-based claims is that the minimum coverage and employer responsibility provisions require petitioners to subsidize or facilitate abortion. See Pet. App. 58a. However, as the court of appeals explained, "[t]he Act specifically provides individuals the option to purchase a plan that covers no abortion services except those for cases of rape or incest, or where the life of the mother would

be endangered." *Id.* at 60a-61a (citing 42 U.S.C. 18054(a)(6) (requiring that at least one plan on each exchange exclude non-excepted abortions from coverage)). In addition, the Act "does nothing to prevent employers from providing such a plan." *Id.* at 61a. "Furthermore, the Act allows an individual to obtain, and an employer to offer, a plan that covers no abortion services at all, not even excepted services." *Ibid.* (citing 42 U.S.C. 18023(b)(1)(A)(i)). Finally, the Act provides that "[a] State may elect to prohibit abortion coverage in qualified health plans offered through an Exchange in such State if such State enacts a law to provide for such prohibition." 42 U.S.C. 18023(a)(1).

Contrary to petitioners' assertion, the Act does not require "that individuals and employers pay at least one dollar per person per month directly into an account to cover elective abortions[.]" Pet. App. 61a n.9; see Pet. 36-37. The provision on which petitioners rely "applies only if individuals *choose* to enroll in a plan through a health insurance exchange that elects to cover abortions, for which federal funding may not be used." Pet. App. 61a n.9 (emphasis added) (citing 42 U.S.C. 18023(b)(1)(B)(i) and (2)(A)-(B)). Moreover, as petitioners acknowledge (Pet. 36), insurers that elect to cover such abortions must give notice of that coverage in the summary of benefits provided at initial enrollment.

For these reasons, the employer responsibility and minimum coverage provisions of the Act do not substantially burden petitioners' exercise of religion, and their challenges under RFRA and the Free Exercise Clause fail.

b. Petitioners' contention (Pet. 29-33) that the two religious exemptions in the minimum coverage provi-

sion cause that provision to violate the Free Exercise Clause is equally meritless. A law violates the Free Exercise Clause if it has "the unconstitutional object of targeting religious beliefs and practices" for disfavored treatment. *City of Boerne* v. *Flores*, 521 U.S. 507, 529 (1997) (citing *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520, 533 (1993)). That "Clause does not compel Congress to exempt religious practices from a 'valid and neutral law of general applicability.'" Pet. App. 59a (quoting *Employment Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 879 (1990)). Here, however, Congress has created two exemptions in Section 5000A as a matter of religious accommodation. Contrary to petitioners' suggestion (Pet. 30-32), those two accommodations do not suggest that Section 5000A, in its general operation, targets religious practices for disfavored treatment.

The "health care sharing ministry" exemption applies to members of tax exempt organizations that, among other things, have since 1999 shared a common set of ethical or religious beliefs; shared medical expenses among their members in accordance with those beliefs; and allowed individuals to retain membership even after they develop a medical condition. See 26 U.S.C. 5000A(d)(2)(B). The "religious conscience" exemption incorporates a longstanding provision of the Internal Revenue Code that applies to individuals who adhere to established tenets or teachings of religious sects in existence since 1950 that are conscientiously opposed to acceptance of the benefits of any private or public insurance. See 26 U.S.C. 5000A(d)(2)(A) (incorporating the definition of "religious sect" in 26 U.S.C. 1402(g)(1)).

This Court addressed Section 1402(g) in *United States* v. *Lee*, 455 U.S. 252 (1982), and the Court's reasoning applies equally to the religious exemptions in Section 5000A. The Court explained in *Lee* that, in Section 1402(g), "Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system." 455 U.S. at 260. "Congress granted an exemption, on religious grounds, to self-employed Amish and others," and thus confined the exemption to "a narrow category which was readily identifiable." *Id.* at 260-261. Like the religious exemption in Section 1402(g), the religious exemptions in Section 5000A do not differentiate among religious sects. Far from burdening religion, they accommodate religious exercise to the extent consistent with Congress's overall objectives.

3. There are threshold jurisdictional problems that would prevent this Court from reaching the merits of petitioners' challenges to Sections 4980H and 5000A, even if those claims otherwise warranted further review.

First, notwithstanding the court of appeals' contrary conclusion (Pet. App. 25a-30a), Liberty's pre-enforcement challenge to Section 4980H, the employer responsibility provision, is barred by 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 by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. 7421(a). In determining that the Anti-Injunction Act did not bar pre-enforcement challenges to Section 5000A, the

minimum coverage provision, this Court in *NFIB* "found it most significant that Congress chose to describe the shared responsibility payment as a 'penalty' rather than a 'tax.'" Pet. App. 26a-27a (quoting *NFIB*, 132 S. Ct. at 2583).

Here, by contrast, Congress described the assessment in Section 4980H, the employer responsibility provision, as a "tax." Section 4980H(b)(2) places a cap on the "aggregate amount of tax" that an employer may owe under that provision. Section 4980H(c)(7) provides that the "tax imposed by" Section 4980H is "nondeductible." And Section 4980H(c)(7) cross-references Section 275(a)(6) of the Internal Revenue Code, which provides that no tax deduction is allowed for "[t]axes imposed by chapters 41, 42, 43, 44, 45, 46, and 54." The "tax" imposed by the employer responsibility provision is nondeductible because it is one of the "[t]axes imposed by" chapter 43. *Ibid.*; see 26 U.S.C. 4980H. And in a separate provision, codified in Title 42, Congress also referred to the "tax imposed by [S]ection 4980H." 42 U.S.C. 18081(f)(2)(A). Because the exaction imposed by Section 4980H is a "tax," this challenge is barred by the plain terms of the Anti-Injunction Act, regardless of the fact that in other portions of Section 4980H Congress also referred to the "tax" as an "assessable payment" and once as an "assessable penalt[y]." Pet. App. 27a (brackets in original).

Moreover, Liberty University and the two individual petitioners failed to establish standing to bring pre-enforcement challenges to Section 4980H and Section 5000A, respectively. Cf. Pet. App. 30a-35a. To establish standing, petitioners must demonstrate that those provisions will cause them "*certainly* im-

pending" injury. *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (citation omitted). Liberty University currently "offers healthcare coverage to its full-time employees." 2d Am. Compl. ¶ 62. Thus, as the court of appeals acknowledged, it is speculative whether Liberty University will owe any tax under Section 4980H. Pet. App. 31a-32a & n.5.[6] The court noted that Liberty University alleged that Section 4980H and its "attendant burdensome regulations will . . . increase the cost of care" and "directly and negatively affect [it] by increasing the cost of providing health insurance coverage." *Id.* at 32a. These allegations, however, are premised on Liberty University's incorrect assertion that the coverage it offers its full-time employees will not qualify as "minimum essential coverage" unless the plan covers a defined set of "essential health benefits." Pet. 7. As the court of appeals recognized elsewhere in its opinion, the term "essential health benefits" refers to the benefits that must be provided by plans in the individual and small group markets and does not apply to plans offered by large employers such as Liberty University. Pet. App. 72a n.12.

The individual petitioners (Michele Waddell and Joanne Merrill) failed to establish standing to chal-

---

[6] As the court of appeals explained, "minimum essential coverage" includes coverage under any employer-sponsored plan, unless that plan covers only excepted benefits (such as dental benefits). Pet. App. 31a n.5 (citing 26 U.S.C. 4980H(a) (cross-referencing the definition of "minimum essential coverage" in 26 U.S.C. 5000A(f)(2)-(3)). Liberty University does not claim to offer only excepted benefits. See *ibid.* Moreover, Liberty University alleged only that its coverage "could" fail to meet the statute's affordability criteria but did not allege any facts to support that hypothetical possibility. *Ibid.*

lenge Section 5000A because their allegations do not show that either individual will be injured by that provision. In *NFIB*, this Court held that individuals may choose to make the shared responsibility payment in Section 5000A "in lieu of buying health insurance." 132 S. Ct. at 2597. Individuals with income below a certain threshold are exempt from that payment. See *id.* at 2580. Moreover, individuals may be exempt under various hardship exemptions. See 78 Fed. Reg. 39,525 (July 1, 2013) (to be codified at 45 C.F.R. 155.605(g)). Petitioners' allegations do not address those exemptions or show that either individual petitioner will be required to make a payment if she does not have health coverage when Section 5000A takes effect in 2014. The second amended complaint alleged that Ms. Waddell was "not presently employed" and did not provide any information with respect to Ms. Merrill's income or employment. 2d Am. Compl. ¶¶ 34, 38. The allegations thus did not show that Section 5000A will cause either individual certainly impending injury.

4. Finally, the court of appeals acted well within its discretion when it declined to consider petitioners' challenges to preventive-services coverage regulations that implement 42 U.S.C. 300gg-13. No such claims were alleged in the second amended complaint, considered by the district court, raised on petitioners' first appeal, or asserted before this Court. See Pet. App. 68a-74a. "Finding no circumstance justifying a premature resolution of [petitioners'] new arguments and compelling reasons for refusing to do so in this case," the court of appeals reasonably declined to address petitioners' new claim raised for the first time on appeal—and even then only after the remand by

this Court in response to their certiorari petition raising *other* claims. *Id.* at 75a. That case-specific and discretionary procedural ruling does not warrant this Court's review.

Moreover, after the court of appeals issued the decision below, new regulations were published that allow non-profit religious organizations with religious objections to contraceptive coverage to obtain a religious accommodation, under which the organization is not required to contract, arrange, pay, or refer anyone for contraceptive coverage or services. See 78 Fed. Reg. 39,870 (July 2, 2013). The petition does not even mention those regulations, much less claim that Liberty would not be eligible for an accommodation under them. To the extent Liberty believes that application of the contraceptive-coverage requirement to it violates RFRA or the Free Exercise Clause, notwithstanding this accommodation, the place to assert that claim for the first time is in the district court, not here.

The contraceptive-coverage cases that petitioners cite (Pet. 34-35, 40-44) were brought by *for-profit* corporations that are not eligible for the accommodation just discussed. Moreover, the government has filed a petition for a writ of certiorari seeking review in one of those cases. See *Sebelius* v. *Hobby Lobby Stores, Inc.*, petition for cert. pending, No. 13-354 (filed Sept. 19, 2013); see also *Autocam Corp.* v. *Sebelius*, petition for cert. pending, No. 13-482 (filed Oct. 15, 2013) (also involving challenge by for-profit corporation to contraceptive-coverage requirement); *Conestoga Wood Specialties Corp.* v. *Sebelius*, petition for cert. pending, No. 13-356 (filed Sept. 19, 2013) (same). That petition, not this one, presents the proper vehicle

to address the current circuit conflict about RFRA challenges to the contraceptive-coverage requirement brought by for-profit employers.[7]

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
*Solicitor General*
STUART F. DELERY
*Assistant Attorney General*
MARK B. STERN
ALISA B. KLEIN
*Attorneys*

OCTOBER 2013

[7] Because Liberty University is not similarly situated to the for-profit employers in *Hobby Lobby*, *Conestoga Wood*, and *Autocam*, and because petitioners did not adequately raise their contraceptive-coverage claim below (thus leading the court of appeals not to address it), there is no reason to hold this petition for the final disposition of those cases.