No. 11-679

In The Supreme Court of the United States

SUSAN SEVEN-SKY, *et al.*,

Petitioners,

v.

ERIC H. HOLDER, JR., *et al.*,

Respondents.

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

REPLY BRIEF OF PETITIONERS

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Respondents agree with Petitioners' alternative request for relief – that this Court hold this petition pending its review of the Eleventh Circuit's decision (Nos. 11-393, 11-398, 11-400), which also raises a challenge to the constitutionality of the individual mandate. Resp. Br. 9, 14. Respondents, however, disagree with Petitioners' request that this Court accept this case in tandem with the Eleventh Circuit's decision because this case presents this Court with a RFRA claim that is separate from the constitutionality of the individual mandate and is not duplicative of the claims addressed in the Eleventh Circuit's decision. This Court should grant this petition, as Petitioners' RFRA claim provides this Court with an additional vehicle by which to consider the impact of the individual mandate upon those American citizens who, like Petitioners Seven-Sky and Lee, believe in faith-healing and hold religious beliefs that are substantially burdened by forced participation in the health insurance system.[1]

Notably, Respondents avoid any response to Petitioners' contention that the D.C. Circuit's dismissal of their RFRA claim directly conflicts with *Sherbert v. Verner,* 374 U.S. 398 (1963), the case upon which RFRA was modeled. Pet. 17-19. Consistent with the

[1] Respondents' reference to automatic entitlement to Medicare Part A, Resp. Br. 11, is a red herring; Petitioner Seven-Sky will not reach age 65 for roughly a decade. Pet. App. 238.

holding in *Sherbert*, Seven-Sky and Lee alleged that the individual mandate "forces [them] to choose between following the precepts of [their] religion and [paying annual penalties], on the one hand, and abandoning one of the precepts of [their] religion . . . on the other hand." Pet. 18-19 (citing *Sherbert*, 374 U.S. at 404). In direct conflict with *Sherbert*, the district court – affirmed by the D.C. Circuit – reasoned that "it is unclear how § 1501 [now 26 U.S.C. § 5000A] puts substantial pressure on Plaintiffs to modify their behavior and to violate their beliefs, as *it permits them to pay a shared responsibility payment in lieu of actually obtaining health insurance*." Pet. App. 189 (emphasis added); *see also* Pet. App. 8, n.4. This is not merely a misapplication of correct law to the facts of this case, but rather stems from prior D.C. Circuit cases that have significantly elevated the standard for showing that one's religious exercise has been substantially burdened beyond the standard set forth in *Sherbert*. *See, e.g.*, Resp. Br. 11 (citing cases imposing, in effect, a heightened pleading standard for RFRA claims). *Sherbert* is dispositive and compels the reversal of the D.C. Circuit's judgment.

Rather than address the stark conflict between the D.C. Circuit's judgment and *Sherbert*, Respondents argue that Petitioners' RFRA arguments apply only to them and, therefore, this Court should not grant review. Resp. Br. 10-12. This is a baffling contention by Respondents because RFRA claims, by their nature, *do* apply only to those who bring the claims. According to RFRA, the Federal Government

"shall not substantially burden *a person's* exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a) (emphasis added), unless the Federal Government "demonstrates that application of the *burden to the person* . . . 1) is in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b) (emphasis added). As such, RFRA requires the federal government to demonstrate that forcing Seven-Sky and Lee to buy and indefinitely maintain health insurance is the least restrictive means of achieving a compelling government interest. A holding by this Court regarding the continued viability of *Sherbert* as the governing standard for RFRA claims would apply equally to others who have similar religious objections to forced participation in the health insurance system – and would be controlling, relevant authority in all future RFRA cases unrelated to the PPACA – making this question worthy of review.

Moreover, Respondents fail to show – as RFRA requires them to – that applying the individual mandate *to Seven-Sky and Lee* is the least restrictive means of achieving a compelling governmental interest. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006); *Kaemmerling v. Lappin*, 553 F.3d 669, 682 (D.C. Cir. 2008). Respondents can only say that "Congress was not required" to exempt Seven-Sky or Lee since they

do not fit within the narrow religious exemptions Congress included in Section 5000A. Resp. Br. 13.

RFRA, however, does not require Seven-Sky and Lee (or anyone else) to change their religious beliefs and practices to conform to what Congress has approved in the PPACA – for example, to join the Amish faith or a health care sharing ministry – in order to receive RFRA's protections. Instead, RFRA requires Respondents to show that Congress's imposition of the individual mandate on Seven-Sky and Lee is the least restrictive means available. Respondents have not made that showing. The best Respondents have done in this case is to imply that Seven-Sky and Lee have the *option* of buying health insurance and not using it, which is the equivalent of Congress compelling a religious person to buy pornography to help the economy because he has the *option* of not looking at it, even though the purchase violates his religion. Seven-Sky and Lee object to being forced by the Federal Government to join a health insurance system against their will, regardless of whether that system is run by a government body, a private company, or a religious organization to which they do not belong. Section 5000A's narrow religious exemptions are not a one-size-fits-all means of relieving any and all substantial burdens imposed by Section 5000A, or of relieving the Federal Government from its obligation to comply with RFRA.

Instead of meeting their obligation of showing that there are no less restrictive means of furthering a compelling governmental interest, Respondents

incorrectly try to *shift* their burden onto Petitioners, where it does not belong. In so doing, Respondents make the incorrect claim that Petitioners were unable to identify in the district court a less restrictive means than requiring Seven-Sky and Lee to purchase health insurance contrary to their religious beliefs. Resp. Br. 12. Petitioners proposed several times to the district court that a less restrictive means was available: imposing a fee upon anyone who uses health care services without having health insurance at the point of sale. D.C. Cir. Joint App. 215, 236. That less restrictive means would protect the religious rights of Seven-Sky and Lee and any other religious objector who believes that participating in the health insurance system is sinful because it indicates to God that they do not have enough faith in Him. *E.g.*, Pet. App. 235 (As alleged in the Amended Complaint, Petitioner Lee "believes in trusting in God to protect him from illness or injury, and to heal him of any afflictions, no matter the severity of the health issue. . . . Being forced to buy health insurance conflicts with Lee's religious faith because he believes that he would be indicating that he needs a backup plan and is not really sure whether God will, in fact, provide for his needs.").

In addition, while Respondents baldly assert that increasing health insurance coverage is a *compelling* interest for purposes of RFRA, that is highly questionable as applied to individuals, such as Petitioners Seven-Sky and Lee, who rely on faith healing. Respondents' arguments are similar to those that this

Court rejected in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), in which this Court unanimously held that the Federal Government failed to meet its burden of demonstrating a compelling interest in applying the Controlled Substances Act to prevent a church from using communion tea containing a regulated hallucinogen. As in the present case, the Federal Government offered general interests as "compelling" in nature, but this Court noted that, in *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), it "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431; *see also id.* at 438 ("We do not doubt the validity of these interests, any more than we doubt the general interest in promoting public health and safety by enforcing the Controlled Substances Act, but under RFRA invocation of such general interests, standing alone, is not enough."). Also, as in the present case, the Federal Government argued that it had created a closed regulatory system that would be undercut by the recognition of RFRA claims, despite the existence of narrow religious exemptions applying to certain individuals, but this Court concluded that it was difficult to understand how providing a similar exemption for RFRA claimants would harm the government's interests. *Id.* at 433-35. This Court's discussion of the Federal Government's arguments in

Gonzales is equally applicable to Respondents' arguments in the present case:

> Here the Government's argument for uniformity . . . rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law. The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rule[s] of general applicability." 42 U.S.C. § 2000bb-1(a).

Id. at 435-36.

Lastly, Respondents attempt to distort Seven-Sky and Lee's religious objection to the individual mandate by characterizing it as similar to an objection to the payment of Social Security taxes. Resp. Br. 12-13. Seven-Sky and Lee's objection to the individual mandate, however, is *fundamentally different* from a hypothetical objection to being required to pay a general tax that the Federal Government uses to make payments to persons who are elderly, disabled, or poor, or spends in a manner that the religious claimant objects to (supporting war, subsidizing abortion, etc.). The Federal Government's interest in ensuring that Americans who cannot provide for themselves receive public support of some kind is much stronger than its

purported interest in forcing Seven-Sky and Lee to join the health insurance system.[2] *See generally United States v. Lee*, 455 U.S. 252 (1982).

In sum, permitting Seven-Sky and Lee to adhere to their religious beliefs and not purchase health insurance will not topple the comprehensive health insurance scheme Congress has crafted through the PPACA, as Respondents' suggest; countless millions of Americans are already exempted from the individual mandate for various reasons, and the Secretary has the authority to grant individual hardship exemptions. Granting review and reversing the D.C. Circuit's decision will simply uphold the protections RFRA has afforded Seven-Sky and Lee and those who are similarly situated.

[2] Respondents claim that Seven-Sky and Lee "routinely contribute to other forms of insurance." Resp. Br. 11. To the extent this is an attempt to make Seven-Sky and Lee's religious beliefs seem inconsistent or illogical, this Court has repeatedly held that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993) (quoting *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 714 (1981)). The fact remains that Seven-Sky and Lee have sincerely held religious beliefs concerning God's protection of their health that are substantially burdened by the individual mandate.

CONCLUSION

This Court should grant this petition and review the D.C. Circuit's decision in tandem with the conflicting Eleventh Circuit decision, especially because this case raises a RFRA claim that is unique among the health care cases pending with this Court. In the alternative, Petitioners suggest that this Court hold this petition pending the disposition of the Eleventh Circuit's decision (Nos. 11-393, 11-398, & 11-400), and then grant certiorari, vacate the decision below, and remand for further proceedings in light of this Court's decision therein.

Respectfully submitted,

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