No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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November 30, 2011

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QUESTIONS PRESENTED

In upholding Section 1501 of the Patient Protection and Affordable Care Act, commonly known as the "individual mandate," which compels most American citizens to buy and indefinitely maintain health insurance coverage or pay annual penalties, the D.C. Circuit "acknowledge[d] some discomfort with the Government's failure to advance any clear doctrinal principles limiting congressional mandates that any American purchase any product or service in interstate commerce." Pet. App. 40-41. The D.C. Circuit nevertheless held that the Commerce Clause authorizes Congress to compel American citizens to buy products from a private company, even though Congress has never done so in the history of the country until last year.

The questions presented are:

1. Whether the D.C. Circuit, in conflict with the Eleventh Circuit, erred in concluding that the Commerce and Necessary and Proper Clauses grant Congress virtually unlimited power to compel American citizens to purchase products from a private company, such as a health insurance policy, for the remainder of their lives or be penalized annually.

2. Whether the D.C. Circuit, in conflict with *Sherbert v. Verner*, 374 U.S. 398 (1963), erred in concluding that Petitioners Seven-Sky and Lee have not stated a plausible claim that their religious exercise is substantially burdened when they allege

QUESTIONS PRESENTED – Continued

that the individual mandate compels them to either violate their religious beliefs by participating in a health insurance system or pay annual penalties for adhering to their religious beliefs.

PARTIES TO THE PROCEEDING

Petitioners, who were plaintiffs-appellants below, are Susan Seven-Sky, Charles Edward Lee, Kenneth Ruffo, and Gina Rodriguez.

Respondents, who were defendants-appellees below, are Eric H. Holder, Jr., Attorney General of the United States, in his official capacity; United States Department of Health and Human Services; Kathleen Sebelius, Secretary of the United States Department of Health and Human Services, in her official capacity; United States Department of the Treasury; and Timothy F. Geithner, Secretary of the United States Department of the Treasury, in his official capacity.

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PETITION FOR A WRIT OF CERTIORARI

Susan Seven-Sky, Charles Edward Lee, Kenneth Ruffo, and Gina Rodriguez respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. The D.C. Circuit held that Section 1501 of the Patient Protection and Affordable Care Act,[1] commonly known as the "individual mandate," which compels most American citizens to buy and indefinitely maintain health insurance coverage or pay annual penalties, is constitutional.

The D.C. Circuit's decision squarely conflicts with the Eleventh Circuit's decision in *Florida v. United States Department of Health & Human Services*, 648 F.3d 1235 (11th Cir. 2011), which held that the individual mandate is unconstitutional because it exceeds Congress's Article I power. The D.C. Circuit's breathtakingly broad reading of the Commerce Clause, which Judge Kavanaugh observed in his dissent is one that lacks a "real limiting principle" and "green-light[s] a significant expansion of congressional authority – and thus also a potentially significant infringement of individual liberty," Pet. App. 120, 122, also conflicts with numerous decisions of this Court recognizing that federal power is not unlimited. *See, e.g.*, *Bond v. United States*, 131 S. Ct. 2355 (2011); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*,

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[1] Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029.

514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

As this Court has granted review of the Eleventh Circuit's decision,[2] Petitioners believe that review of the D.C. Circuit's decision in tandem with the Florida decision is appropriate. In the alternative, Petitioners suggest that this Court hold this petition pending the disposition of the Florida cases (Nos. 11-393, 11-398, and 11-400), and then grant certiorari, vacate the decision below, and remand for further proceedings in light of this Court's decision in the Florida cases.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, Pet. App. 1, is not yet reported in the Federal Reporter but is available at 2011 U.S. App. LEXIS 22566. The district court's opinion on the federal government's motion to dismiss, Pet. App. 128, is reported at 766 F. Supp. 2d 16.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1346. The United States Court of

[2] *NFIB v. Sebelius*, No. 11-393; *Department of Health & Human Servs. v. Florida*, No. 11-398; *Florida v. Department of Health & Human Servs.*, No. 11-400.

Appeals for the District of Columbia Circuit had jurisdiction under 28 U.S.C. § 1291, and rendered its decision on November 8, 2011. Pet. App. 1, 126. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of Article I, Section 8 of the United States Constitution are reproduced in the Appendix, Pet. App. 195, along with relevant provisions of the Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111-148, 124 Stat. 119 (as amended by the Health Care and Education Reconciliation Act ("HCERA"), Pub. L. No. 111-152, 124 Stat. 1029, Pet. App. 195-217, 222-25, and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*, Pet. App. 217-21.

STATEMENT OF THE CASE

I. Key Statutory Provisions

This case involves a facial challenge to the PPACA's individual mandate, codified at 26 U.S.C. § 5000A and 42 U.S.C. § 18091. Pet. App. 195, 222. The individual mandate compels most Americans, including Petitioners, to buy and indefinitely maintain federal government-approved health insurance or pay annual penalties. The section begins with a series of findings invoking the purported Commerce Clause

authority to impose the "individual responsibility requirement," that is, the requirement that every person buy and indefinitely maintain health insurance. 42 U.S.C. § 18091; Pet. App. 222-25.

The first substantive provision of the individual mandate states that "[a]n applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month." 26 U.S.C. § 5000A(a); Pet. App. 195. Under the heading of "shared responsibility payment," a separate subsection of the individual mandate imposes a "penalty" upon a taxpayer for each applicable individual within his or her household who lacks health insurance coverage. 26 U.S.C. § 5000A(b); Pet. App. 196.

The "administration and procedure" subsection of the individual mandate creates "special rules" to ensure that key traditional methods of tax enforcement are not available to collect the individual mandate penalty. 26 U.S.C. § 5000A(g); Pet. App. 208-09. The individual mandate sets a flat dollar amount of the penalty per uninsured person per year – $95 in 2014, $325 in 2015, and $695 in 2016 and later years (increased in 2017 and later years in relation to cost-of-living adjustments) – although the amount may be raised or lowered in certain circumstances. 26 U.S.C. § 5000A(c); Pet. App. 196-200. The individual mandate excludes certain persons from the definition of "applicable individual" and provides a few exemptions. 26 U.S.C. § 5000A(d), (e); Pet. App. 200-05. None of these provisions excuse Petitioners from having to comply

with the individual mandate. *See id.* Also, the PPACA does not include a severability provision. *See Florida*, 648 F.3d at 1322.

II. Procedural History

Petitioners are United States citizens who do not currently have health insurance and do not want or need such insurance. Pet. App. 234-46. It is highly likely that each Petitioner will be compelled to either buy and indefinitely maintain health insurance or pay annual penalties beginning in 2014. *Id.* For example, it is highly likely that Petitioner Rodriguez will be compelled to pay, at a minimum, $11,685 in penalties on behalf of herself and her household through 2020. Pet. App. 228-29, 246. As a direct result of the individual mandate's inevitable impact upon Petitioners' finances and lifestyle, they are compelled to adjust their finances now, by setting aside money, and will continue to do so to pay the annual penalties. Pet. App. 236-37, 240, 242-43, 246-47. As a result, Petitioners will be unable to use or set aside that money for other purposes now, directly limiting their ability to plan for the future prudently. *Id.*

Petitioners allege in their Amended Complaint that the individual mandate is unconstitutional because it exceeds Congress's power under Article I of the United States Constitution, and that the entire PPACA is invalid because the individual mandate is not severable. Pet. App. 253-57, 259-60. Petitioners Seven-Sky and Lee also allege that the individual mandate violates their rights protected by RFRA.

Pet. App. 257-59. For example, paragraph 29 of the Amended Complaint states that Petitioner Lee "has a sincerely held religious belief that God will provide for his physical, spiritual, and financial well-being. 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." Pet. App. 235.

The district court held that Petitioners have standing to bring their claims, which are ripe for review, because they have alleged a substantial probability that they will be subject to the individual mandate in 2014 and beyond, which directly impacts their present spending and financial planning.[3] Pet. App. 139-53. Respondents declined to press their jurisdictional arguments (including that the Anti-Injunction Act, 26 U.S.C. § 7421(a), bars this lawsuit) in a notice filed with the district court, Pet. App. 130 n.1, and the court did not address the Anti-Injunction Act. Pet. App. 130-31 n.1.

Regarding the merits, the district court concluded that the individual mandate is a valid exercise of Article I power based primarily upon four determinations: 1) Congress can regulate an individual's "mental activity" of deciding not to buy health insurance, which substantially affects interstate commerce; 2)

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[3] The district court concluded that Plaintiff Peggy Lee Mead lacked standing because she would likely be covered under Medicare, Pet. App. 142-44, but Mead is not a party to this appeal.

inevitably, all individuals will take part in the health care market, which Congress can regulate; 3) some uninsured individuals will receive health care services that they cannot pay for, the costs of which are shifted to others; and 4) the individual mandate is necessary to prevent the PPACA's other sections from causing negative consequences. Pet. App. 153-83. The court also held that the taxing power does not authorize the individual mandate, noting that "Congress did not intend the mandatory payment . . . to act as a revenue-raising tax, but rather as a punitive measure." Pet. App. 185.

In addition, the district court rejected the RFRA claim, holding that the ability to pay annual penalties in lieu of maintaining health insurance negates the existence of any substantial burden upon Petitioners Seven-Sky and Lee's religious exercise, and also holding that the individual mandate is the least restrictive means of achieving the compelling government interests of safeguarding public health and increasing health insurance coverage. Pet. App. 187-91.

The United States Court of Appeals for the District of Columbia Circuit affirmed. Judges Silberman and Edwards held that the Anti-Injunction Act did not bar Petitioners' lawsuit, Pet. App. 9-30, and affirmed the dismissal of Petitioners Seven-Sky and Lee's RFRA claim, concluding that they had failed to allege facts illustrating a substantial burden on their religious exercise. Pet. App. 8-9 n.4.

The court also held that the individual mandate is constitutional, concluding that neither the text of the

Commerce Clause nor this Court's cases concerning the Clause prevent Congress from compelling all American citizens to buy products from a private company. Pet. App. 30-46. The court interpreted this Court's decision in *Wickard v. Filburn*, 317 U.S. 111 (1942), as "com[ing] very close to authorizing a mandate similar to ours" and authorizing Congress to directly compel all farmers to buy wheat in the open market simply because they own a farm. Pet. App. 38. Although the court "acknowledge[d] some discomfort with the Government's failure to advance any clear doctrinal principles limiting congressional mandates that any American purchase any product or service in interstate commerce," Pet. App. 40-41, the court concluded that Congress can impose purchase mandates based upon individuals' mental decisions not to buy a product or their anticipated future conduct. Pet. App. 42-46.

Judge Kavanaugh dissented regarding jurisdiction, concluding that the Anti-Injunction Act applied and deprived the court of subject matter jurisdiction. Pet. App. 47-125. He stated that courts should be wary of ruling on the individual mandate's validity given its unprecedented nature and the significant implications of upholding it under the Commerce Clause. Pet. App. 118-23. Judge Kavanaugh considered the fact that the Government could impose imprisonment for failing to comply with the individual mandate under its view of the Commerce Clause "a rather jarring prospect." Pet. App. 119. He added, "the majority opinion here is quite candid – and accurate – in admitting that there is no real limiting principle to its

Commerce Clause holding. . . . [T]he majority opinion has green-lighted a significant expansion of congressional authority – and thus also a potentially significant infringement of individual liberty." Pet. App. 120, 122.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW AND DECIDE WHETHER THE INDIVIDUAL MANDATE EXCEEDS CONGRESS'S ARTICLE I POWER.

A split now exists in the circuit courts of appeals regarding the constitutionality of the individual mandate, and the resolution of the issue is a matter of national importance.

The D.C. Circuit here, along with the United States Court of Appeals for the Sixth Circuit, wrongly held the individual mandate constitutional. Pet. App. 30-47; *TMLC v. Obama*, 651 F.3d 529 (6th Cir. 2011). In contrast, the United States Court of Appeals for the Eleventh Circuit correctly held that the individual mandate is unconstitutional, properly concluding that the Commerce Clause does not give Congress the power to compel American citizens to purchase a product from a private company for the remainder of their lives or be penalized annually. *Florida*, 648 F.3d at 1311-13. The court also properly noted that there would be no judicially-administrable limits to Congress's power that would prevent Congress from

mandating numerous other purchases from private companies if the Act's individual mandate were upheld. *Id.*

Unlike the D.C. Circuit, the Eleventh Circuit followed this Court's instruction that the text and structure of the Constitution illustrate that Congress's power under the Commerce Clause is limited. This Court has emphasized the need to identify clear limiting principles when assessing a purported exercise of the Commerce Clause power to prevent the conversion of that power into "a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567; *see also id.* at 578 (Kennedy, J., concurring) (stating that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far"). The Constitution's creation of a system of dual sovereignty is based upon the premise that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458; *see also Morrison*, 529 U.S. at 616, n.7 (characterizing the principle of dual sovereignty as a "central principle of our constitutional system. . . . crafted . . . so that the people's rights would be secured by the division of power").

The D.C. Circuit's novel theory of virtually unlimited Commerce Clause power is at odds with the Constitution's delegation of a few, limited powers to

the federal government. As James Madison noted in *Federalist No. 45*,

> [t]he powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 241 (James Madison) (George Carey & James McClellan eds., 2001).

The D.C. Circuit's reading of the Commerce Clause bestows upon Congress "numerous and indefinite" powers to regulate "the lives, liberties, and properties of the people," while leaving the States to regulate only that which Congress declines, for the moment, to regulate. *See id.* In addition, the D.C. Circuit's decision conflicts with this Court's acknowledgment, more than two centuries ago, that "[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

The D.C. Circuit majority acknowledged that its decision grants Congress unlimited power:

> *The Government concedes the novelty of the mandate and the lack of any doctrinal limiting principles; indeed, at oral argument, the Government could not identify any mandate to purchase a product or service in interstate commerce that would be unconstitutional, at least under the Commerce Clause*.
>
> . . . .
>
> We acknowledge some discomfort with the Government's failure to advance any clear doctrinal principles limiting congressional mandates that any American purchase any product or service in interstate commerce. But to tell the truth, those limits are not apparent to us, either because the power to require the entry into commerce is symmetrical with the power to prohibit or condition commercial behavior, or because we have not yet perceived a qualitative limitation. That difficulty is troubling, but not fatal, not least because we are interpreting the scope of a long-established constitutional power, not recognizing a new constitutional right. . . . It suffices for this case to recognize, as noted earlier, that the health insurance market is a rather unique one, both because virtually everyone will enter or affect it, and because the uninsured inflict a disproportionate harm on the rest of the market as a result of their later consumption of health care services.

Pet. App. at 32, 40-41 (emphasis added) (citation omitted).

In contrast, the Eleventh Circuit stated:

> We are at a loss as to how [the Government's] fact-based criteria can serve as the sort of "judicially enforceable" limitations on the commerce power that the Supreme Court has repeatedly emphasized as necessary to that *enumerated* power. *Lopez*, 514 U.S. at 566, 115 S. Ct. at 1633; *see also Morrison*, 529 U.S. at 608 n.3, 120 S. Ct. at 1749 n.3 (rejecting dissent's "remarkable theory that the commerce power is without judicially enforceable boundaries"). . . .
>
> If Congress may compel individuals to purchase health insurance from a private company, it may similarly compel the purchase of other products from private industry, regardless of the "unique conditions" the government cites as warrant for Congress's regulation here. . . .
>
> *Ultimately, the government's struggle to articulate cognizable, judicially administrable limiting principles only reiterates the conclusion we reach today: there are none*.

Florida, 648 F.3d at 1296-98 (emphasis added).

In his dissenting opinion, Judge Kavanaugh noted the unprecedented expansion of Congressional power ushered in by the D.C. Circuit's decision:

> [D]espite the Government's effort to cabin its Commerce Clause argument to mandatory purchases of health insurance, there seems no good reason its theory would not ultimately

> extend as well to mandatory purchases of retirement accounts, housing accounts, college savings accounts, disaster insurance, disability insurance, and life insurance, for example. . . .
>
> Unlike some other courts that have upheld the mandate on Commerce Clause grounds and disclaimed the implications, the majority opinion here is quite candid – and accurate – in admitting that there is no real limiting principle to its Commerce Clause holding. The majority opinion's holding means, for example, that a law replacing Social Security with a system of *mandatory* private retirement accounts would be constitutional. So would a law *mandating* that parents purchase private college savings accounts. I credit the majority opinion for its refreshing candor. But its acknowledgement of the extraordinary ramifications of its decision expanding Congress's authority to impose mandatory-purchase requirements underscores why I think we should be cautious about barreling through jurisdictional limits to reach the merits, as the majority opinion does here.

Pet. App. at 120-21 (citation omitted).[4]

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[4] The Anti-Injunction Act does not apply to this case for the reasons stated in the D.C. Circuit majority opinion, Pet. App. 9-30, and the opinion of the United States District Court for the Middle District of Pennsylvania. *Goudy-Bachman v. United States Dep't of Health & Human Servs.*, 764 F. Supp. 2d 684, 694-97 (M.D. Pa. 2011).

Owing to the circuit court split on the constitutionality of the individual mandate, and the D.C. Circuit's departure from this Court's Commerce Clause jurisprudence, Petitioners urge this Court to grant the petition.

II. THIS COURT SHOULD GRANT REVIEW TO EXAMINE THE LOWER COURTS' FLAWED ANALYSIS OF WHETHER A SUBSTANTIAL BURDEN EXISTS FOR RFRA CLAIMS, WHICH CONFLICTS WITH *SHERBERT v. VERNER*.

As alleged in Petitioners' Amended Complaint, the individual mandate substantially burdens Petitioners Seven-Sky and Lee's religious exercise by compelling them either to take action contrary to their religious faith (participate in the health insurance system) or to pay annual penalties. Pet. App. 234-41, 257-60. The lower courts erred in holding that allegations explaining that a law compels a religious adherent to choose between either taking action in violation of the tenets of his or her religious faith or suffering a financial loss for complying with his or her faith do not sufficiently state that the adherent's religious exercise has been substantially burdened for purposes of RFRA. If compelling an individual to take action that he or she considers to be sinful (or forbidding conduct that one's faith requires) in order to avoid financial loss does not substantially burden the exercise of religion, it is difficult to envision what does.

RFRA states that 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); Pet. App. 219, unless the 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); Pet. App. 219. RFRA "restore[s] the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b)(1); Pet. App. 218.

The religious exercise protected by RFRA "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (referenced by 42 U.S.C. § 2000bb-2(4)); Pet. App. 221. A substantial burden is present when the government puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981).

Petitioners' Amended Complaint alleges that Petitioner Lee "has a sincerely held religious belief that God will provide for his physical, spiritual, and financial well-being. 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." Pet. App. 235. The Amended Complaint states that "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," *id.*, and states that Lee "views being forced to pay the annual shared responsibility payment as the lesser of two evils from a religious and financial standpoint," Pet. App. 236. There are similar allegations with respect to the substantial burden that the individual mandate imposes upon Petitioner Seven-Sky's religious exercise. Pet. App. 238-41.

The district court, affirmed by the D.C. Circuit, concluded that Petitioners' religious exercise is not substantially burdened because the individual mandate "permits them to pay a shared responsibility payment in lieu of actually obtaining health insurance." Pet. App. 189. In other words, even assuming that forced participation in the health insurance system *would* violate Petitioners' religious beliefs, as is clearly alleged in the Amended Complaint, the fact that Petitioners can pay annual penalties for avoiding such participation means that their religious exercise is not substantially burdened. This holding squarely conflicts with *Sherbert v. Verner*, 374 U.S. 398 (1963), the case upon which RFRA is modeled.

In *Sherbert*, the State of South Carolina denied a Seventh-Day Adventist's application for unemployment benefits because she was fired for refusing to work on Saturdays, even though Saturday was the Sabbath Day of her faith, and she was unable to obtain another job due to her religious objection. *Id.* at 399-401. Similar to the district court's ruling here,

the South Carolina Supreme Court concluded that the law did not substantially burden her religious exercise because she was not forced to work on her Sabbath. *Id.* at 401.

This Court reversed, stating,

> We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. . . . [N]ot only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. *The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship*.

Id. at 403-04 (emphasis added).

Similarly, the individual mandate "forces [Petitioners Seven-Sky and Lee] 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." *See id.* It is especially telling that the *Sherbert* Court compared the loss of unemployment benefits to "a fine

imposed against appellant for her Saturday worship" because the individual mandate authorizes annual penalties to be imposed against Seven-Sky and Lee for failing to maintain health insurance.

In addition, the district court clearly erred in concluding that Petitioners Seven-Sky and Lee's objection to compelled participation in the health insurance system is indistinguishable from an objection to the government's use of tax dollars to fund programs such as Medicare and Social Security (which is not at issue here). Pet. App. 190. As this Court has observed, there is a key difference between the government compelling an individual to act in a manner that is inconsistent with his or her religious beliefs, as is the case here, and the government itself taking action that a person disagrees with on religious grounds. *See, e.g.*, *Bowen v. Roy*, 476 U.S. 693, 699-700 (1986).

The Amended Complaint sets forth a plausible claim that the religious exercise of Petitioners Seven-Sky and Lee has been substantially burdened. The lower courts erred in dismissing their RFRA claim on the ground that no substantial burden has been alleged, in conflict with the holding in *Sherbert*. Accordingly, review of this matter is warranted.

CONCLUSION

Petitioners believe that review of the D.C. Circuit's decision in tandem with the conflicting Eleventh Circuit decision is appropriate. In the alternative,

Petitioners suggest that the Court hold this petition pending the disposition of the Florida cases (Nos. 11-393, 11-398, and 11-400), and then grant certiorari, vacate the decision below, and remand for further proceedings in light of this Court's decision in the Florida cases.

Respectfully submitted,

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