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Kinder v. Geithner - SEIU and Change to Win Amicus Brief

Service Employees International Union

Change to Win

No. 11-1973

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETER KINDER, et al.,
Plaintiffs-Appellants,

v.

TIMOTHY F. GEITHNER, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AND CHANGE TO WIN AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* Service Employees International Union ("SEIU") and Change to Win state that they are not affiliated with any publicly owned corporation, nor do they have stock owned by a publicly owned company.

Dated: August 18, 2011

/s/ Jonathan Weissglass
Jonathan Weissglass

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INTEREST OF *AMICI CURIAE*

Amicus curiae Service Employees International Union ("SEIU") is the nation's largest healthcare union, with more than half its 2.2 million members in the healthcare field. SEIU supports the Patient Protection and Affordable Healthcare Act of 2010 ("PPACA") because it helps ensure accessible, quality healthcare for all Americans, including SEIU members and their families.

Amicus curiae Change to Win is a federation of four labor unions – the International Brotherhood of Teamsters, United Farm Workers of America, United Food and Commercial Workers International Union, and SEIU – which collectively represent 5.5 million working men and women. Change to Win is committed to achieving affordable healthcare for all workers and their families.

The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

Plaintiffs' lawsuit was properly dismissed for lack of jurisdiction. Should this Court address the merits, however, it should hold that the minimum coverage provision of the PPACA, 26 U.S.C. §5000A, is a proper exercise of Congress' "complete and all-embracing taxing power." *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 12-13 (1916). The provision simply taxes the income of individuals whose income exceeds the income tax filing thresholds, while exempting those who purchase health insurance coverage. The financial obligation only applies to those with taxable income; represents no more than a small portion of any individual's income; is measured as a percentage of income (subject to a floor and ceiling); and is administered through the income tax collection system. The exaction generates substantial revenue that the government can use to address the cost of providing healthcare for taxpayers without adequate insurance, while creating an incentive for taxpayers to purchase affordable coverage, reducing future government costs. In every operational aspect this is a constitutionally valid tax.

Plaintiffs nonetheless argue that the minimum coverage provision cannot be upheld as a tax because Congress used the label "penalty," evincing an intent to regulate. This misconceives the proper analysis.

First, whether an exaction is a valid exercise of the taxing power turns on its operation, not on Congress' "intent," motive, or choice of label. *See, e.g.*,

Hampton & Co. v. United States, 276 U.S. 394 (1928); *License Tax Cases*, 72 U.S. 462 (1866). Because the minimum coverage provision simply operates to tax income, and lacks any "penalizing features" inconsistent with its characterization as a tax, *Dep't. of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 779 (1994), it is within Congress' powers of taxation – no matter what powers Congress believed validated the provision or what label Congress used.

Second, valid taxes often have regulatory purposes. It is clearly established law that the presence (or even predominance) of a regulatory purpose is fully consistent with an exaction's validity as an exercise of Congress' taxing power. *See United States v. Sanchez*, 340 U.S. 42, 44 (1950).

Finally, Congress has in fact used the label "penalty" before, even when all understood the measure to be a tax. *E.g.*, 26 U.S.C. §1(f) (labeling certain income tax provisions "marriage penalty").

According to Plaintiffs and those courts that have supported them, one of the most significant pieces of legislation in the last 50 years must be overturned entirely for want of the word "tax," even though its substantive operations fall entirely within congressional tax power. This kind of "magic words" jurisprudence is not the law. *Quill Corp. v. North Dakota*, 504 U.S. 298, 310

(1992). The courts are charged with policing (and protecting) the substance of Congress' authority, not invalidating legislation based on mere matters of form.

There is no serious argument that the PPACA's minimum coverage provision could not be accomplished through a differently labeled but operationally indistinguishable exercise of the taxing power. *See Steward Machine Co. v. Davis*, 301 U.S. 548, 581 (1937) ("*Steward*"); *and Helvering v. Davis*, 301 U.S. 619, 640 (1937) (upholding similarly structured Social Security Act provisions as exercises of taxing power and rational responses to national problems caused by lack of unemployment and old age insurance). The exaction is thus squarely within Congress' authority.

The PPACA's opponents rely on the purportedly insufficient evidence that Congress *intended* that the provision be understood as an exercise of taxing authority, but this is both wrong on the facts and not the way congressional authority is analyzed. Congress has ample tax authority to impose an exaction on the income of those who decline to purchase health insurance. That is all that the PPACA does. It is beyond question that Congress intended that its enactment be given effect. It should therefore be upheld.

ARGUMENT

I. The Minimum Coverage Provision Operates As An Income Tax That Generates Revenue To Offset Healthcare Costs While Encouraging Taxpayers To Purchase Coverage, Further Safeguarding The Treasury

The minimum coverage provision is part of a comprehensive reform package designed to improve the nation's health and reduce the federal deficit. The provision requires "applicable individual[s]" to ensure that they and their dependents have "minimum essential coverage," or pay an assessment. 26 U.S.C. §5000A(a)-(b).

Congress specifically noted that healthcare costs, including the costs of caring for the uninsured, significantly burden the federal budget. *See, e.g.*, H.R. Rep. No. 111-443, pt. 1, at 1 (2010); *id.*, pt. 2, at 983. The minimum coverage provision addresses this fiscal burden by generating annual revenue of more than $4 billion, Congressional Budget Office ("CBO"), "Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act," Apr. 30, 2010, at 3; and by encouraging individuals with income to purchase health insurance for themselves and their families. Covered individuals have the choice to either purchase minimum essential coverage or pay a tax – promoting the PPACA's fiscal goals without requiring those who purchase coverage to pay twice.

1. In any challenge to a federal statute, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *DeBartolo*

Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988) (citation omitted). This rule "recognizes that Congress … is bound by and swears an oath to uphold the Constitution," and that courts may "not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Id.* When the constitutionality of a congressional act is questioned, "th[e] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (citation omitted).

Turning this principle on its head, Plaintiffs strain to give the law an unconstitutional construction. Plaintiffs treat §5000A(a), the so-called "Individual Mandate," as a regulatory provision that, standing alone, cannot be an exercise of the taxing power, then argue that the "penalty" provision, §5000A(b)(1), cannot be construed as a tax because its purpose is to "forc[e] individuals to comply with the Individual Mandate." Brief of Appellants at 64-66.

The Supreme Court rejected this exact approach in *New York v. United States*, 505 U.S. 144 (1992). The statute at issue there provided that the States "*shall* be responsible for providing … for the disposal of … radioactive waste," *id.* at 169-70 (citation omitted), and was challenged as an impermissible "direct command" on the States. The Court rejected the challenge, holding that the

"mandate" could not be analyzed on its own, but instead had to be read together with subsequent sections creating "incentives" for compliance. So read, the "mandate" afforded the States "choices," rather than imposing an impermissible "command." *Id.*

The minimum coverage provision is no different. Its "mandate" must be analyzed together with the tax-based mechanism through which Congress encouraged minimum coverage. Properly viewed *as a whole*, the minimum coverage provision is a valid taxing measure that affords individuals the choice of either meeting a prescribed condition or paying a modest tax. *See Thomas More Law Center v. Obama*, 2011 WL 2556039, at *30 (6th Cir. June 29, 2011) (Sutton, J., concurring) ("*TMLC*") (the PPACA "does not compel individuals to buy insurance").

2. Deference to a co-equal branch of government similarly requires that a monetary exaction's constitutionality be determined by its "practical impact, not [its] name tag." *Jefferson Cty. v. Acker*, 527 U.S. 423, 439-42 (1999) (ordinance "declar[ing] it 'unlawful … to engage in' a covered occupation … without paying [a] license fee" established "income tax"); *see also Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 508 (1937); *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1, 27 (1910); *License Tax Cases*, 72 U.S. at 470-71. Courts must look past

"the formal language of the tax statute [to] its practical effect." *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 275-79 (1977); *see also In re Juvenile Shoe Corp.*, 99 F.3d 898, 900 (8th Cir. 1996) (same).

In its practical operation, the minimum coverage provision is an income tax.

First, payment of the tax is conditioned upon receipt of income. *See Acker*, 527 U.S. at 437-39 (exaction is income tax for purposes of Buck Act if "'levied on, with respect to, or measured by, net income, gross income, or gross receipts'") (citing 4 U.S.C. §110(c)). Only individuals who receive income in excess of the filing threshold are subject to the tax. 26 U.S.C. §5000A(e)(2).

Second, the amount paid is always a small fraction of a taxpayer's annual income.[1] Thus, no sources of wealth other than income are taxed. Indeed, many individuals with moderate incomes will be exempted from the tax. *See, e.g.*, 26 U.S.C. §5000A(e)(1) (affordability exemption).

Third, the tax is "measured" as a percentage of income, subject to a floor and ceiling (with both always far below total income), and remains an income tax

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[1] In 2016, for example, the payment by a taxpayer without coverage cannot be greater than (1) 2.5% of household income above the filing threshold, or (2) a flat dollar amount ranging from $695 to $2085, depending on family size. 26 U.S.C. §5000A(c)(2)-(3). The tax will always be a small portion of total income under either method.

notwithstanding its ceiling and floor. The Social Security tax is also capped, *see* 26 U.S.C. §3121(a)(1); 42 U.S.C. §430; and the "alternative minimum tax," 26 U.S.C. §55, similarly ensures that taxpayers pay a minimum amount of federal income tax.[2]

Fourth, the tax is collected entirely through the income tax system and its self-reporting mechanisms. 26 U.S.C. §5000A(b)(2). Payments must be "assessed and collected in the same manner as taxes," and are included by law in "any reference in [the Internal Revenue Code] to 'tax.'" *Id.* §§5000A(g)(1), 6671(a). The PPACA also treats family relationships in the same manner as the general income tax code. *Id.* §5000A(b)(3) (individuals liable for payments required by dependents or spouse); *id.* §5000A(c)(4) (household income and family size defined by dependents reported on income tax return) (citing 26 U.S.C. §151). These features further demonstrate that the minimum coverage provision operates – and will be understood – as an income tax.[3]

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[2] In 2016, the payment will be calculated as a percentage of income for single individuals with incomes from less than $40,000 to more than $200,000. This range is calculated using 2010 filing thresholds and a conservatively estimated average premium of $5,000 for individual coverage.

[3] Plaintiffs assert that the minimum coverage provision cannot be an income tax because income is not the *sole* factor that determines its applicability and amount. Brief of Appellants at 64-65. This has never been the legal test. Indeed, many of

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3. In the text of the PPACA, Congress made Commerce Clause findings but did not invoke its taxing power. There is no requirement, however, that Congress expressly invoke its taxing power, and the courts have never required congressional "findings" regarding exercises of the taxing power. "[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). The question is simply "whether Congress could have enacted the legislation at issue pursuant to a constitutional provision granting it the power to [act]." *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997). "As long as Congress had such authority as an objective matter, whether it also had the specific intent to legislate pursuant to that authority is irrelevant." *Id.*

Moreover, the assertion here (relevant or not) that Congress had no intent to tax is simply wrong. Congress expressly enacted the PPACA and the minimum coverage provision for revenue purposes. *See, e.g.*, PPACA, Pub. L. No. 111-148, §1563(a)(1), 124 Stat. 119, 270 (2010) ("[T]his Act will reduce the Federal deficit

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the factors that determine the minimum coverage tax's applicability and amount also determine a taxpayer's other income tax obligations. *E.g.*, 26 U.S.C. §151 (income tax determined by number of people within taxpayer's household). And, because income taxes and other excise taxes are subject to the same constitutional requirements, the minimum coverage provision is constitutional even if it is construed as a form of excise tax other than an income tax.

….”); Letter from CBO to Chairman Baucus (Sept. 16, 2009) (estimating revenues generated by “penalty”); Joint Committee on Taxation, JCX-43-09 (Oct. 29, 2009) (estimating revenue effects of “revenue provisions” including “Tax on Individual Without Acceptable Health Care Coverage”). Congress may exercise its regulatory and taxation powers simultaneously. *See, e.g.*, *McGoldrick v. Gulf Oil Corp*., 309 U.S. 414, 428 (1940) (finding import duty exercise of both taxing power and power to regulate foreign commerce); *Hampton*, 276 U.S. at 412.

Indeed, many in Congress recognized the minimum coverage provision as a tax. Proponents expressly invoked Congress’ taxing power. *See, e.g.*, 155 Cong. Rec. S13581 (Dec. 20, 2009) (Sen. Baucus); 155 Cong. Rec. S13751-52 (Dec. 22, 2009) (Sen. Leahy); 156 Cong. Rec. H1882 (Mar. 21, 2010) (Rep. Miller); 156 Cong. Rec. H1826 (Mar. 21, 2010) (Rep. Slaughter). Others described the measure as a tax. *See, e.g.*, H.R. Rep. No. 111-443, pt. 1, at 265 (2010) (discussing “tax on individuals who opt not to purchase health insurance”); 156 Cong. Rec. E506 (Mar. 21, 2010) (Rep. Waxman) (“The individual responsibility requirement requires individuals to pay a tax on their individual tax filings ….”); 155 Cong. Rec. S10877 (Oct. 29, 2009) (Sen. Hatch) (“Some may say this is simply a penalty for not doing what Uncle Sam wants you to do, but let us face it, it is nothing more than a new tax.”). And, the label “penalty” is consistent with Congress’ intent to

tax: All taxes penalize, and throughout the legislative record, Congress used terms like "tax," "assessable payment," "assessable penalty," "tax penalty," and "penalty" interchangeably.[4] Accordingly, no constitutional significance can be attributed to Congress' decision to replace "tax" with "penalty" in the final version of the PPACA.

4. Notwithstanding these clear and undisputed legal principles, Plaintiffs largely ignore the minimum coverage provision's *operation*, and instead focus on its *label*, insisting that the provision's "penalty" label precludes a finding that the assessment is a tax. Brief of Appellants at 66. The Eleventh Circuit committed this same error, holding that the provision cannot be upheld as a tax because

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[4] *See, e.g.*, Brief for Appellees at 53-54 (citing materials); 156 Cong. Rec. H1917 (Mar. 21, 2010) (Rep. Kirk) ("Among the new taxes is a new 'Individual Mandate Tax ….'"); 155 Cong. Rec. S12768 (Dec. 9, 2009) (Sen. Grassley) ("The … individual mandate penalty …. can be called a penalty, but it is a tax."); 155 Cong. Rec. S11454 (Nov.18, 2009) (Sen. McCain) ("Taxes on individuals who fail to maintain government-approved health insurance coverage will pay $4 billion in new penalties …."); 155 Cong. Rec. H12576 (Nov. 6, 2009) (Rep. Franks) ("It would impose a 2.5 percent penalty tax on those who do not acquire healthcare insurance."); 155 Cong. Rec. S11143 (Nov. 5, 2009) (Sen. Johanns) (discussing "penalty tax on individuals without insurance"); 155 Cong. Rec. S10746 (Oct. 27, 2009) (Sen. Enzi) ("Most young people will probably do the math and decide … I can pay the $750-a year tax penalty rather than pay $5,000 a year more for health insurance."); 155 Cong. Rec. S8644 (Aug. 3, 2009) (Sen. Kyl) ("There would be a penalty if they refused to [buy health insurance] that would go directly to their income tax.").

Congress used the label "penalty." *See, e.g.*, *Florida v. HHS*, Nos. 11-11021, 11-11067 (11th Cir. Aug. 12, 2011), at *186 (provision is "not 'on its face' a tax, but rather a penalty"). Yet years of precedent teach that a monetary exaction's constitutionality is determined by its "practical effect," rather than by its name tag, and that "magic words or labels" cannot "disable an otherwise constitutional levy." *Quill*, 504 U.S. at 310 (citation omitted); *Complete Auto*, 430 U.S. at 285 (rejecting "rule[s] of draftsmanship" that "distract the courts and parties from their inquiry into whether the challenged [provision] produced [unconstitutional] results"); *Penn Mut. Indem. Co. v. C.I.R.*, 277 F.2d 16, 20 (3d Cir. 1960) ("It is not necessary to uphold the validity of [a] tax imposed by the United States that the tax itself bear an accurate label"); *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 583 (4th Cir. 1996) ("*Leckie*") (Congress exercised taxing power in requiring mine operators to pay insurance "premiums").

Indeed, under unquestioned Supreme Court precedents dating back well over a century, a monetary exaction may be an exercise of the taxing power even if Congress gives it a label that is unambiguously *regulatory*. In 1866, the *License Tax Cases* recognized that a fee imposed on gambling and liquor businesses was a constitutional exercise of Congress' taxing power even though Congress labeled the fee a "license" and worded the "license" requirement as a prohibition on

unlicensed activity, 72 U.S. at 468-69, 471; legislatures generally use "licenses" to regulate, *id.* at 470-71; and the "license" requirement discouraged businesses widely considered to be immoral, *id.* at 473. *See also Acker*, 527 U.S. at 439-42.

The result in *License Tax Cases* is irreconcilable with any argument that the "penalty" label is determinative here. Indeed, "penalty" is far more consistent with the characterization of an assessment as a tax than "license." Congress explicitly required that this "penalty" be construed as a tax for purposes of the Internal Revenue Code, *see* 26 U.S.C. §§5000A(g)(1), 6671(a); and has long used the term "penalty" when referring to taxes. *E.g.*, Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107–16, §§301-303; 26 U.S.C. §1(f) (repeatedly referring to the income-tax differential paid by certain married couples as the "marriage penalty"). The use of "penalty" to describe a tax is also common among courts, lawyers, and economists.[5]

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[5] *E.g.*, *Rousey v. Jacoway*, 544 U.S. 320, 327 (2005) (describing tax on early withdrawals from IRA accounts as "tax penalty"); *United States v. Sotelo*, 436 U.S. 268, 275 (1978) (funds labeled "penalty" by Congress retained "essential character as taxes"); *Hemingway v. United States*, 81 F.Supp.2d 1163, 1164 (D. Utah 1999) (describing tax on "golden parachute payments" as "tax penalty"); Dan Dhaliwal, Oliver Zhen Li, Robert Trezevant, *Is a Dividend Tax Penalty Incorporated into the Return on a Firm's Common Stock?*, 35 Journal of Accounting and Economics 155 (2003).

At all stages of the PPACA's consideration, legislators referred to the minimum coverage provision as a "tax" and used the terms "tax" and "penalty" interchangeably. *Supra* Part I.3. To strike down major legislation because Congress used the word "penalty" rather than "tax" would ignore the statute's actual operation, the understanding of Congress, the relevant precedent on the tax authority, including *License Tax Cases*, and the Court's duty to uphold statutes that are, *in substance*, entirely constitutional.

5. It is similarly irrelevant whether Congress was in some sense "motivated" by regulatory goals. *Sozinsky*, 300 U.S. at 513-14. Congress may exercise its taxing power for regulatory purposes, including to deter or promote particular activities. *Sanchez*, 340 U.S. at 44 ("[A] tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed."); *Kurth Ranch*, 511 U.S. at 782 (discussing "mixed-motive taxes that governments impose both to deter a disfavored activity and to raise money"); *Hampton*, 276 U.S. at 412 ("[O]ther motives in the selection of the subjects of taxes cannot invalidate congressional action.").

Indeed, a revenue raising measure can be a valid exercise of the taxing power even if Congress' *primary* purpose is regulatory. *See, e.g.*, *Sanchez*, 340 U.S. at 44 ("[T]he revenue purpose of the tax may be secondary."); *Sipes v. United*

States, 321 F.2d 174, 176-77 (8th Cir. 1963) (same). *Hampton*, for example, held that a protectionist tariff expressly enacted "to regulate the foreign commerce" was a valid exercise of Congress' taxing power. 276 U.S. at 401. The Court noted that the first Congress imposed tariffs for protectionist purposes, and emphatically rejected the argument "that it is unconstitutional to frame [monetary exactions] with any other view than that of revenue raising." *Id.* at 411-12. The text and history here demonstrate that the minimum coverage provision was intended to, and will, generate significant revenue. *See supra* Part I.3. That is enough.

Moreover, the revenue and regulatory purposes here are interrelated: Congress' goal of lessening the Treasury's healthcare burden is served whether individuals choose to pay the tax or purchase essential coverage. As the Supreme Court recognized in upholding the similarly structured unemployment insurance system, an exaction does not lose its character as a tax simply because it can be avoided through an act that Congress wishes to encourage and that will itself reduce the nation's fiscal burden. *Steward*, 301 U.S. at 590-592.

As numerous cases – including *Steward*, *Sanchez*, and *Hampton* – demonstrate, the Supreme Court has "abandoned" the *Lochner*-era "distinction[] between regulatory and revenue-raising taxes." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974). Exactions with regulatory purposes or effects that lack

uniquely "penalizing" features remain taxes enacted pursuant to Congress' taxing authority. *Kurth Ranch*, 511 U.S. at 779.[6]

6. Tacitly admitting that more than the label "penalty" is needed, Plaintiffs assert that the minimum coverage tax has punitive features, but the only such feature they identify is the assessment itself. Brief of Appellants at 66. This misses the point: As *Kurth Ranch* recognized, all taxes are punitive and "oppressive" inasmuch as they "deter" the behaviors that are taxed, but *more* is needed before a tax becomes a penalty. 511 U.S. at 778-79. There is no "difference between being fined and being taxed a certain sum for doing a certain thing" in the absence of "some *further* disadvantages." Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897) (emphasis added). Many taxes discourage (or induce) behavior that is subject to (or exempt from) the tax, but far more is needed before the exaction ceases to be a tax. *United States v. Kahriger*, 345 U.S. 22, 28 (1953) (wagering tax not penalty "regardless of its regulatory effect");

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[6] Judge Sutton cited *Kurth Ranch* in claiming that the distinction "retains force today." *TMLC* at *20. *Kurth Ranch*, however, cautioned "*against* invalidating" a monetary exaction because "oppressive or because the legislature's motive was somehow suspect," for both taxes and penalties "deter certain behavior." 511 U.S. at 778-79 (emphasis added). *Kurth Ranch* simply recognized that "the extension of the penalizing features" of a monetary exaction may eventually cause it to "lose[] its character" as a tax. *Id.* at 779. The minimum coverage provision does not operate in this manner, as we demonstrate immediately below.

Sonzinsky v. United States, 300 U.S. 506, 513 (1937) ("Every tax is in some measure regulatory.").

Although "the extension of [an exaction's] penalizing features" may be so substantial that "it loses its character" as a tax, *Kurth Ranch*, 511 U.S. at 779, the provision here exhibits no extended penalizing features at all. Indeed, no plaintiff or court has ever pointed to any aspect of the financial obligations here imposed that is in any way more punitive than that which is inherent in any tax obligation. It is thus at the furthest remove from an exaction whose extraordinary penalizing features preclude its treatment as a tax for constitutional purposes.

First, the minimum coverage provision gives taxpayers the *option* of purchasing insurance *or* paying the tax. Had Congress intended *to ensure* compliance with a regulatory "mandate," it could have structured the "penalty" so that payment would *not* relieve individuals of the underlying obligation. *Cf. United States v. Reorganized CF & I Fabricators of Utah*, 518 U.S. 213, 225-226 (1996).

Second, the amount of the tax is *at most* the approximate equivalent of the cost of insurance, not an excessively "high rate" "consistent with a punitive character." *Cf. Kurth Ranch*, 511 U.S. at 780 (punitive drug tax was eight times drug's market value). Congress' non-punitive approach is evident in the modest

overall amount of the tax, which is pro-rated if the taxpayer obtains insurance for part of the tax year. *See* 26 U.S.C. §5000A(b); *cf. Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36 (1922), *entitled* "*The Child Labor Tax Case*" (improper "penalty" not pro-rated).

Third, payment of the tax is not conditioned on illegal conduct. *Compare Kurth Ranch*, 511 U.S. at 781-82 (conditioning tax on crime "is 'significant of penal and prohibitory intent rather than the gathering of revenue'") (quoting *United States v. Constantine*, 296 U.S. 287, 295 (1935)); *with In re Juvenile Shoe Corp.*, 99 F.3d at 902 (penalty for reversion of pension funds to employer was tax because reversions not unlawful). One faces no consequence other than the tax for opting not to purchase insurance, and the PPACA specifically bars the government from resorting to criminal prosecution, penalties, liens, or levies for failure to pay the tax. *Id.* §5000A(g)(2); *Florida* at *47 ("All the IRS, practically speaking, can do is offset any tax refund owed to the uninsured taxpayer.").[7]

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[7] That Congress took pains to make enforcement of the minimum coverage tax *less* punitive than other taxes demonstrates that there has been no "extension of the penalizing features" that might take the exaction outside of Congress' taxing authority. *Kurth Ranch*, 511 U.S. at 779. Nor does Congress' reliance on *less* intrusive collection measures undermine the conclusion that this is a tax. *Acker*, 527 U.S. at 440-41 (exaction was income tax where enforcement was limited to suit for collection).

Finally, the minimum coverage provision is located in the Internal Revenue Code, collected through the tax system, and enforced by the tax authorities, further evidencing an exercise of the taxing power. *See Leckie*, 99 F.3d at 583 n.12; *cf. Child Labor Tax Case*, 259 U.S. at 35 (noting that improper "penalty" was enforced by Secretary of Labor).

In sum, the minimum coverage provision operates as an income tax and has no uniquely "penalizing" features. It is an income tax for constitutional purposes.

II. The Minimum Coverage Provision Is Within Congress' Plenary Power To Tax Income

As an income tax, the minimum coverage provision is well within Congress' taxing power. The Constitution affords Congress broad and comprehensive power to tax, independent of the other enumerated congressional powers, and subject only to narrow limitations. *Pacific Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433, 443-46 (1868); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 174 (1796) (Chase, J.) ("A general power is given to Congress, to lay and collect taxes, of every kind or nature, without any restraint, except only on exports."). Congress' power to tax *income* is especially broad. *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88, 99 (1936) ("When it is [income], it may be taxed ….").

A. The Constitution's Taxation Provisions

"The great object of the Constitution was, to give Congress a power to lay taxes, adequate to the exigencies of government…." *Hylton*, 3 U.S. at 173. "[N]othing is clearer … than the purpose to give this power to Congress, as to the taxation of everything except exports, in its fullest extent." *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 540 (1869). This "complete and all-embracing taxing power" "is exhaustive and embraces every conceivable power of taxation." *Brushaber*, 240 U.S. at 12-13.

The power is subject to meaningful but narrow limitations, none of which apply here.

1. Foremost, as explained above, while all constitutional taxes are monetary "penalties," not all monetary penalties are constitutional taxes. *See supra* Part I.6. A legislative exaction's penalizing features may take it outside Congress' taxing power. But the minimum coverage provision has no such features. *Id.*

2. An exercise of Congress' taxation power must produce "some revenue." *Sonzinsky*, 300 U.S. at 514; *United States v. Doremus*, 249 U.S. 86, 94 (1919) (requiring "relation to the raising of revenue"). The minimum coverage provision easily satisfies this requirement. The PPACA was prompted in part by

Congress' concern about the fiscal strain of rising healthcare costs, and the minimum coverage provision will generate $4 billion in revenue, far exceeding the revenue generated by other valid taxes. *Cf. Kahriger*, 345 U.S. at 28 n.4 (noting valid taxes generating $3,501 and $28,911).

3. Congress must use its taxation power to promote the "general welfare." U.S. Const. art. I, §8. The scope of the "general welfare" "is quite expansive." *Buckley v. Valeo*, 424 U.S. 1, 90 (1976). The discretion to determine whether a tax serves the general welfare "belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Helvering*, 301 U.S. at 640.

The minimum coverage tax is part of a programmatic response to the national problems caused by the number of Americans without adequate health insurance. *See, e.g.*, 42 U.S.C. §18091(a)(2). This readily satisfies the general welfare requirement.

4. The Constitution imposes two additional limits on the means by which Congress taxes: "direct taxes, including the capitation tax, shall be apportioned; [and] duties, imposts, and excises shall be uniform." *Soule*, 74 U.S. at 446. Plaintiffs assert that the minimum coverage provision, if a tax, is a direct tax requiring apportionment. Brief of Appellants at 64-65. This characterization is

simply wrong, because payment of the tax is conditioned upon numerous factors. *Hylton*, 3 U.S. at 175 (Chase, J.) (direct taxes are those imposed without regard to "any other circumstance") (emphasis added). But in any case, in taxing income Congress acts with the specific authorization of the Sixteenth Amendment, which gives Congress "power to lay and collect taxes on incomes, from whatever source derived, *without apportionment* …." U.S. Const. amend. XVI (emphasis added). The Amendment grants Congress plenary authority to tax any "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *C.I.R. v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). Although Congress may not use this power to pass taxes that plainly operate as property taxes, *see Eisner v. Macomber*, 252 U.S. 189, 219 (1920), the Supreme Court has emphasized the narrowness of this holding, *Glenshaw Glass*, 348 U.S. at 430-31, and recognized that "income" should be construed liberally, *see Merchants' Loan & Trust Co. v. Smietanka*, 255 U.S. 509, 521 (1921).

Under the Sixteenth Amendment, income taxes, and other excise taxes, need only be uniform. *Brushaber*, 240 U.S. at 18-19. A tax satisfies this requirement if it exhibits no "undue preference" for certain states. *United States v. Ptasynski*, 462 U.S. 74, 86 (1983). The minimum coverage tax readily satisfies this test because it applies the same non-discriminatory formula throughout the nation. *See id.* (tax

exemption for "Alaskan oil" consistent with uniformity requirement because it reflected "climactic and geographic conditions").

5. Finally, an exercise of Congress' plenary taxation power must not offend the Constitution's individual rights provisions, such as constitutional prohibitions on double jeopardy or self-incrimination. *See Kurth Ranch*, 511 U.S. 767; *Marchetti v. United States*, 390 U.S. 39 (1968). There is no reasonable argument that the minimum coverage provision offends any provision of the Bill of Rights.

B. Contrary Arguments Rely Upon Discredited Restrictions On The Taxing Power

Those challenging the PPACA's constitutionality have relied on discredited *Lochner*-era cases – specifically, *Child Labor Tax Case*, 259 U.S. 20 (1922); and *United States v. Butler*, 297 U.S. 1 (1936) – to contend that the PPACA's regulatory purpose takes it outside the scope of Congress' taxing power. *See also TMLC* at *17-*20 (discussing *Child Labor Tax Case*). This reliance is both revealing and misplaced.

First, both cases involved exactions with numerous penalizing features, absent here, demonstrating their overwhelmingly regulatory nature. This is the point for which the two cases are occasionally cited. *See, e.g.*, *Kurth Ranch*, 511 at 779; *see also supra* Part I.6 (noting that exaction at issue in *Child Labor Tax Case*

was quite substantial, not pro-rated, and enforced by Labor Secretary); *Steward*, 301 U.S. at 590-93 (limiting *Butler* and *Child Labor Tax Case* to their facts).

Second, neither case can be reconciled with the many pre- and post-*Lochner* era precedents establishing that federal taxes may be enacted for regulatory purposes, *see supra* Part I.5 (discussing *Hampton*, *Sanchez*, and *License Tax Cases*), including purposes and subjects outside Congress' other enumerated powers. "From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were *beyond* the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment." *Sanchez*, 340 U.S. at 45 (quotation omitted, emphasis added). Courts have long held that Congress may impose conditional taxes or place conditions on the receipt of government funds to achieve "objectives not thought to be within Article I's enumerated legislative fields." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citation omitted) (collecting cases); *see also Regan v. Taxation Without Representation*, 461 U.S. 540 (1983) (Congress cannot prohibit lobbying but can tax contributions to organizations that lobby while exempting contributions to those that do not). Put simply, the taxing power "reaches every subject." *License Tax Cases*, 72 U.S. at 470-71.

The contrary decisions in *Butler* and *Child Labor Tax Case* (and other similar cases of that era) turned on the view that the Tenth Amendment bars Congress from seeking to impact, directly *or* indirectly, areas of policy deemed "matters of state concern" and thus "within power reserved to the States" – even through otherwise valid exercises of its General Welfare Clause powers. *Compare Butler*, 297 U.S. at 69-70; *Child Labor Tax Case*, 259 U.S. at 36; *with, e.g.*, *Fernandez v. Wiener*, 326 U.S. 340, 362 (1945) ("The Tenth Amendment does not operate as a limitation upon the powers, express or implied, delegated to the national government."). That view is now thoroughly discredited: The Tenth Amendment simply does not prohibit Congress from using its taxing and spending power to create financial incentives for conduct that serves the general welfare. *New York*, 505 U.S. at 166-67, 171-73.

C. The Minimum Coverage Provision Is Constitutionally Indistinguishable From The Social Security Act

The Supreme Court has already directly rejected the claim that *Child Labor Tax Case* and *Butler* prohibit Congress from exercising its taxing authority to increase participation in insurance programs meeting minimum standards. From the perspective of Congress' taxation authority, the minimum coverage tax is no different from the unemployment and old age insurance taxes Congress established through the Social Security Act. *See Helvering*, 301 U.S. 619; *Steward*, 301 U.S.

548. The constitutional propriety of that exercise of Congress' taxation power is beyond dispute; there is no substantive basis to treat this income tax any differently.

1. The Social Security Act established comprehensive insurance programs to address the financial insecurity stemming from economic retrenchment and "old age." *Helvering*, 301 U.S. at 641. To fund the "Federal Old-Age Benefits," Congress "la[id] two different types of tax, an 'income tax on employees,' and 'an excise tax on employers.'" *Id.* at 635-36. To promote the development of unemployment insurance programs, Congress paired its tax on employers with a credit for contributing to state insurance funds satisfying certain criteria. *Steward*, 301 U.S. at 574.

In *Helvering* and *Steward*, the Supreme Court rejected constitutional challenges to these provisions. *Helvering* rejected claims that the tax on employers "was not an excise as excises were understood when the Constitution was adopted" and that the Act was "an invasion of powers reserved by the Tenth Amendment to the states or to the people." 301 U.S. at 638. *Steward* rejected the argument that Congress' tax and credit system was a regulatory mandate on employers to make particular insurance contributions and on states to create particular programs, such that the "so-called tax was not a true one." 301 U.S. at 592. *Steward* instead

concluded that the conditional tax credit was a reasonable way to structure a tax, as it "promoted … relief through local units" while "in all fairness" ensuring that employers making contributions that helped alleviate the problem would not "pay a second time." *Id.* at 589.

Taxpayers have continued to resist payment of the taxes by complaining (like opponents of the PPACA) that Congress cannot use its taxing power to establish "compulsory benefits" that they do not want or will not use. Those claims have been universally rejected. *See, e.g.*, *United States v. Lee*, 455 U.S. 252 (1982); *Carmichael*, 301 U.S. at 521, 525 ("It is irrelevant … that some pay the tax who have not occasioned its expenditure, or that in the course of the use of its proceeds … the legislature has benefited individuals, who may or may not be related to those who are taxed.").

2. Instead of mandating participation in a single national insurance program, or taxing everyone and then providing a credit to those with insurance, the PPACA gives taxpayers the choice of purchasing adequate insurance or paying a tax. This approach generates revenue and provides an incentive for taxpayers to purchase health insurance, while imposing no additional obligations upon those who have purchased coverage.

This minor difference from the Social Security Act in form does not render the PPACA's conditional tax unconstitutional. Payment of the minimum coverage tax is, as in *Steward*, "dependent upon the conduct of the taxpayers." 301 U.S. at 591. *Steward* established that Congress may use its taxing power to stimulate activity, including the purchase of insurance, where the failure to act contributes to a costly national problem. *Id.* *Steward* recognized that many states, to avoid occupying "a position of economic disadvantage as compared with neighbors or competitors," would not independently enact unemployment compensation programs. *Id*. at 588. The Social Security Act addressed this problem through a tax that generated revenues "used and needed by the nation as long as states [were] unwilling … to do what can be done at home," while "crediting the taxpayer … to the extent that his contributions [to a state program] … simplified or diminished the problem of relief and the probable demand upon the resources of the fisc." *Id.* at 588-89.

The minimum coverage provision is indistinguishable, in substance and effect, from the conditional tax in *Steward*. Providing healthcare to the uninsured imposes an immense burden on the state and federal fiscs. *E.g.*, H.R. Rep. No. 111-443, pt. 2, at 983 (2010) ("In 2008, total government spending to reimburse uncompensated care costs … was approximately $42.9 billion."). Most states have

not gone beyond providing care to the indigent, children, and elderly – leaving many Americans with no health coverage. Meanwhile, employer-provided health benefits are declining because of the rising costs of healthcare. High Healthcare Costs: A State Perspective: Hearing Before S. Comm. On Finance, 110th Cong. S2 (2008) (Sarah Collins, The Commonwealth Fund). Many individuals who wish to purchase insurance cannot do so. 155 Cong. Rec. S13568-69 (Dec. 20, 2009) (Sen. Baucus). Now, as in 1935, Congress has "many reasons – fiscal and economic as well as social and moral – for planning to mitigate disasters that bring these burdens in their train." *Steward*, 301 U.S. at 587.

The PPACA addresses the obstacles to comprehensive health insurance coverage, in part by barring practices (such as denying coverage for pre-existing conditions) that make affordable coverage unavailable to many, and in part by providing tax incentives for individuals to purchase insurance. Here, no less than with Social Security, "[t]he purpose of [Congress'] intervention … is to safeguard its own treasury and as an incident to that protection to place the [taxpayers] upon a footing of equal opportunity. Drains upon its own resources are to be checked; obstructions to the freedom of the [taxpayers] are to be leveled." *Id.* at 590-91. By giving taxpayers the choice to purchase insurance or pay a tax that is at most the "approximate equivalent[]," *id.* at 591, the minimum coverage provision is

designed, like the Social Security Act, to prevent taxpayers who have otherwise paid for coverage from having "to pay a second time." *Id.* at 589.

It is meaningless formalism to argue that Congress could have passed the minimum coverage provision as an increased income tax on all taxpayers accompanied by a credit for those with qualifying health insurance, but that it could not adopt the more direct course of a conditional tax imposing the same net cost. *See, e.g., TMLC* at *17-*18. The Supreme Court has explicitly rejected this approach to a tax's constitutionality. *Complete Auto*, 430 U.S. at 288 ("[F]ormalism merely obscures the question whether the tax produces a forbidden effect."). Both methods afford the taxpayer the same choice with the same net tax effect. *See United States v. New York*, 315 U.S. 510, 517 (1942).

The Constitution gives Congress the "useful and necessary right … to select … means" "which, in its judgment, would most advantageously effect the object to be accomplished." *McCulloch v. Maryland*, 17 U.S. 316, 419 (1819). Here, the means Congress chose – directly imposing an income tax upon those who have not purchased health insurance – is simpler and less administratively onerous than a functionally identical tax and credit system, especially since the majority of income earners already have health coverage. Nothing in the Constitution requires Congress to refrain from using the most efficient means to accomplish its

permitted ends. *See id.* at 421 (Congress may use all "appropriate" and "plainly adapted" means).

In substance and effect the minimum coverage provision is an income tax well within Congress' enumerated powers. Matters of mere form cannot render unconstitutional this proper exercise of the taxation power.

CONCLUSION

This Court should affirm the dismissal of Plaintiffs' case.

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Respectfully submitted,

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I hereby certify that on August 19, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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