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Goudy-Bachman v. HHS - U.S Reply Brief

United States Department of Health and Human Services

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BARBARA GOUDY-BACHMAN; and GREGORY BACHMAN, Plaintiffs, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; and TIMOTHY F. GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury, Defendants.	)	Civil Action No. 1:10-cv-00763-CCC (Judge Christopher C. Conner)

DEFENDANTS' REPLY IN SUPPORT OF MOTION, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The minimum coverage provision of the Affordable Care Act, 26 U.S.C. § 5000A, requires all individuals who are not exempt to maintain a minimum level of health insurance beginning in 2014, at the same time that guaranteed issue and community rating insurance industry reforms will also go into effect. The provision is a valid exercise of Congress's power to regulate commerce in the vast interstate health care market and is reasonably adapted to Congress's legitimate regulatory goals. Courts that have examined how the health care market operates, as a practical matter, and how the means of payment for health care services affects the market as a whole, have properly recognized the rational basis underlying the provision.

Most recently, although unmentioned by plaintiffs, the Sixth Circuit – the only Court of Appeals to rule on this issue – has sustained defendants' position that the minimum coverage provision falls within Congress's commerce power. *Thomas More Law Center v. Obama*, No. 10-2388, 2011 WL 2556039, at *11 (6th Cir. June 29, 2011) (opinion of Martin, J.); *id.* at *23 (Sutton, J., concurring in the judgment). The majority rejected the plaintiffs' "pre-enforcement facial attack," recognizing that the "demanding standard" for a facial challenge – that the challenged law be invalid in all its applications – could not possibly be met here. *Id.* at *23, 33 (Sutton, J., concurring in judgment); *see id.* at *11 (opinion of Martin, J.).

As the majority recognized, the minimum coverage provision constitutes "a regulation on the activity of participating in the national market for health care delivery, and specifically the activity of self-insuring" – i.e., forgoing insurance in favor of attempting to pay health care costs out of pocket. *Id.* at *10; *see id.* at *24 (Sutton, J.). "Health care and the means of paying for it are 'quintessentially economic,'" *Id.*; *accord id.* at *11 (Martin, J.) ("[T]he financing of health

care services, and specifically the practice of self-insuring, is economic activity."). Moreover, "[n]o one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk" – the risk, which everyone faces, of requiring unexpected and expensive medical care. *Id.* at *29 (Sutton, J.). The majority agreed that the provision must be upheld on its face because Congress had a rational basis to conclude that "the practice of self-insuring substantially affects interstate commerce by driving up the cost of health care as well as by shifting costs to third parties." *Id.* at *12 (Martin, J.); *id.* at *24 (Sutton, J.) ("Faced with $43 billion in uncompensated care, Congress reasonably could require *all* covered individuals to pay for health care now so that money would be available later to pay for *all* care as the need arises."). Judge Martin also recognized an independent ground for upholding the provision – the rational basis for Congress's conclusion that "leaving those individuals who self-insure for the cost of health care outside federal control would undercut [the] overlying economic regulatory scheme" because, "without the minimum coverage provision, the guaranteed issue and community rating provisions [of the Affordable Care Act] would increase existing incentives for individuals to delay purchasing health insurance until they need care." *Id.* at *14.

In their challenge to the minimum coverage provision, plaintiffs offer arguments that, they recognize, have not been advanced – and have in fact been conceded – by plaintiffs in other cases challenging the provision. In particular, plaintiffs assert that Congress lacks authority to regulate the means of payment for services plaintiffs have used and undoubtedly will use again in the future because the commerce power does not extend to consumption of goods and services but only to their production. Given that the Supreme Court abandoned this type of formalistic

pigeonholing under the Commerce Clause more than 70 years ago, plaintiffs lack legal authority for their anachronistic approach. As the Court has long understood, such a limitation on Congress's authority ignores the realities of a commercial market, where all parties in a commercial market, from "producers" to "consumers," are interrelated parts of the same economic chain of supply and demand. Market participants at any point in the chain can affect the market's operation. Here, Congress found that those who participate in the health care market without insurance receive health care but, on the whole, do not pay the costs of that care. Similar to the failure to pay child support obligations at issue in *United States v. Kukafka*, 478 F.3d 531 (3d Cir.), *cert. denied*, 552 U.S. 866 (2007), the failure of the uninsured, as a class, to satisfy their financial obligations in the health care market has a substantial economic effect - in this case by shifting costs elsewhere, increasing health care costs for all, and insurance costs as well.

That the uninsured as a class have a substantial impact on the health care market, through their receipt of health care services for which they do not pay, also belies any notion that they are passive non-actors. Indeed, all three Sixth Circuit judges in *Thomas More*, including the dissenting judge, recognized the fallacy of the activity/inactivity dichotomy. *Thomas More*, 2011 WL 2556039, at *15 (Martin, J.); *id.* at *28 (Sutton, J.); *id.* at *36 (Graham, J., dissenting). As Judge Sutton concluded, the timing of the provision's requirement to obtain insurance did not affect its constitutionality. *Id.* at *30 (Sutton, J.). A practical understanding of how health insurance operates as a financial instrument necessarily entails the recognition that insurance is a means of payment that must be secured in advance, while a particular individual's risk of incurring sudden, significant medical expenses remains unrealized. These specific market realities must be taken into account in a proper Commerce Clause analysis, and compel the

conclusion here that the minimum coverage provision satisfies applicable standards.

The third judge in *Thomas More* dissented only because he failed to acknowledge those realities, instead focusing on the health insurance market *in isolation*, as if it had no connection to health care services, the underlying good for which health insurance serves as payment. But that connection is undeniable. After all, health insurance is a means of financing one's health care costs, and of managing the unpredictable risks every participant in the health care market faces. While those with health insurance utilize a financial instrument expressly designed to address these risks, those without insurance are "addressing the same risk" through self-insurance. *Thomas More*, 2011 WL 2556039, at *29 (Sutton, J.).

But because uninsured individuals may be unable to pay for the health care services they need and receive – given the high costs of medical services, as well as existing laws that require that some care be given without regard to ability to pay – self-insurance does not cover the entire risk. Rather, a significant percentage of the costs that the self-insured, as a class, incur are shifted to others in the health care market. Indeed, plaintiffs themselves face a clear risk of incurring medical expenses beyond their means, given their net income of less than $39,000 last year and the uncertainty of their future health care needs. This risk is present even if until now, as plaintiffs allege, they have been able to pay their medical bills without insurance. In any event, as the Court recognized in *Gonzales v. Raich*, 545 U.S. 1 (2005), and *Wickard v. Filburn*, 317 U.S. 111 (1942), Congress is entitled to rely on the aggregate impact of a class of conduct, without regard to whether any specific individual will contribute to that impact or not. The record before the Court establishes a rational basis for Congress's conclusions. Moreover, even if there were a possibility that the provision might be invalid in a specific instance (though there is no genuine

suggestion that this might be so), plaintiffs have certainly failed to show that the provision is invalid in all of its applications. Accordingly, plaintiffs' facial challenge must fail.

In sum, Congress enacted the minimum coverage provision in conjunction with other reforms designed to lower health care costs and eliminate barriers to using insurance as the means of payment for health care services. Congress intended these reforms to stem a crisis in the interstate health care market in which health insurance had become increasingly difficult to maintain, yet paying for health care without insurance had become, on the whole, impossible, with the uninsured shifting ever greater costs onto other market participants. As one element within a broader regulatory scheme, in an interstate market that comprises 17% of the national economy, the minimum coverage provision does not come close to crossing the line between what is local and what is national. The provision fits well within Congress's commerce power. At the very least, plaintiffs "have not shown that the [provision] exceeds that power in all of its applications." *Thomas More*, 2011 WL 2556039, at *33 (Sutton, J., concurring in judgment).

Finally, the provision is valid under Congress's taxing power as well. While plaintiffs rely on a supposed linguistic distinction between a "tax" and a "penalty," they do not deny that the minimum coverage provision will raise revenue. Moreover, the payments made pursuant to the minimum coverage provision, which is located within the Tax Code at 26 U.S.C. § 5000A, are calculated in part based on a taxpayer's household income and collected together with annual income taxes. These payments look and operate like taxes, and Congress was not required to call the provision a tax in order to exercise its taxing power. Indeed, given the strong presumption that legislation enacted by Congress is constitutional, the task of this Court is to determine whether it can identify constitutional authority for the statute, not whether Congress identified

that authority. For all these reasons, plaintiffs' cross-motion for summary judgment should be denied, and the Court should dismiss plaintiffs' claims or, in the alternative, enter summary judgment in favor of defendants.

ARGUMENT

I. THE MINIMUM COVERAGE PROVISION IS A VALID EXERCISE OF CONGRESS'S POWERS UNDER THE COMMERCE CLAUSE AND NECESSARY AND PROPER CLAUSE

A. The Minimum Coverage Provision Satisfies Established Commerce Clause Requirements

1. Congress Had a Rational Basis to Conclude that Attempting to Pay for Health Care Without Insurance Substantially Affects Interstate Commerce

Defendants established in their opening summary judgment brief that Congress had more than a rational basis to conclude that attempting to pay for health care services out of pocket has a substantial effect, in the aggregate, on interstate commerce. Def. Br. (dkt. #44) at 10-13. As defendants explained, because people cannot predict with accuracy the timing or extent of their health care needs, and because health care expenses can rapidly surpass the average person's budget, individuals who go without health insurance are likely to incur health care costs that they will not pay. The aggregate effect of that failure to pay for care received runs in the tens of billions of dollars annually – rising to $43 billion in 2008 alone – and these costs are shifted to other participants in the interstate health care market. 42 U.S.C. § 18091(a)(2)(F). Applying the principles set forth in *Raich* and *Wickard*, Congress's rational recognition of this substantial effect was a sufficient basis for Congress to enact the minimum coverage provision pursuant to its commerce power. *See, e.g.*, *Thomas More*, 2011 WL 2556039, at *12; *Mead v. Holder*, 766 F.

Supp. 2d 16, 34 n.10 (D.D.C. 2011), *appeal pending*, No. 11-5047 (D.C. Cir.); *Liberty Univ. Inc. v. Geithner*, 753 F. Supp. 2d 611, 634 (W.D. Va. 2010), *appeal pending*, No. 10-2347 (4th Cir.).

In challenging that conclusion, plaintiffs advance an argument that they themselves acknowledge has not been made in any other challenge to the minimum coverage provision. Pl. Br. (dkt. #47-1) at 9. Specifically, they focus on the notion that Congress can regulate commerce only "on the supply side of the economic supply and demand equation." *Id.* In plaintiffs' view, "consumers," such as those who utilize health care services without insurance, are by definition beyond Congress's regulatory reach.

But other plaintiffs in these Affordable Care Act challenges have eschewed such an argument – and for good reason. Namely, the Supreme Court has already expressly rejected the dichotomy between "producers," on the one hand, and "consumers," on the other. The Court in *Wickard* held that "[w]hether the subject of the regulation in question was 'production,' 'consumption,' or 'marketing' is . . . not material for purposes of deciding" whether the regulation fell within Congress's commerce power. *Wickard*, 317 U.S. at 124.[1] Indeed, the law at issue in *Wickard* regulated the plaintiff there as a consumer of his own wheat as well as its producer – it was the potential that wheat consumers who relied on their own supplies might not

[1]Indeed, in dormant Commerce Clause jurisprudence, courts have commonly recognized that Congress's commerce power includes the power to protect consumers, as well as producers. *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564, 578 (1997) (dormant Commerce Clause was "designed to prevent" state regulations that "give local consumers an advantage over consumers in other States" (internal quotation omitted)); *accord Cloverland-Green Spring Dairies, Inc. v. Penn. Milk Mktg. Bd.*, 462 F.3d 249, 261 (3d Cir. 2006). This recognition reflects the economic reality that consumption and production are inextricably linked. By its plain terms, the Commerce Clause does not distinguish between the two. The limiting principle in Commerce Clause analysis is thus not whether the object of regulation is "consumption," rather than "production," but whether it is sufficiently related to *interstate* commerce.

purchase wheat in the interstate market that, in the aggregate, had a substantial effect on commerce – and the Court made no distinction between the two. *See id.* at 127. In *Raich*, the Court similarly upheld the application of the Controlled Substances Act to both plaintiffs, where one of them cultivated her own marijuana but the other was merely a consumer of the drug, who obtained her supply from others. *Raich*, 545 U.S. at 7 (recognizing that the law at issue prohibited "possessing" or "obtaining" marijuana as well as manufacturing it); *id.* at 40 (Scalia, J., concurring) ("That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation.").

The radical nature of plaintiffs' "consumer" theory is further demonstrated by their claim that consumers "do not submit themselves to congressional regulation" by virtue of a purchase. Pl. Br. at 19. Thus, under their position, even those who have purchased health insurance already could not be regulated under Congress's commerce power. However, this notion is flatly contradicted by the existence of flood insurance requirements for those who purchase property in a flood hazard area, 42 U.S.C. § 4012a(e), and by the potential that any property owner may be required, as a by-product of Congress's authority to regulate the channels of interstate commerce, to give up the property they have purchased in return for just compensation when their land is needed for the construction of railroad tracks, *e.g.*, *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992). The federal prohibition on possession of controlled substances also comes into effect when an individual purchases an illegal drug. Plaintiffs' attempt to distinguish *Raich* on the basis that Congress can prohibit possession but cannot regulate "legal purchase, possession and consumption," Pl. Br. at 19, makes no sense because the activity regulated in both instances is the same. Imposing criminal sanctions on an individual for

illegal possession of a controlled substance – which may include imprisonment – is just as much (if not more) a regulation of "the person of the consumer," *id.*, as a requirement to maintain minimum essential health insurance coverage. Indeed, the Court in *Raich* relied on *Wickard*, which did not "prohibit" the possession of wheat but regulated the consumption of home-grown wheat versus wheat bought in the commercial market. *See Raich*, 545 U.S. at 17-18 (describing the effect of the regulation at issue in *Wickard* as preventing a wheat farmer from "consuming [excess wheat] on his own farm").

Given this authority, other plaintiffs in Affordable Care Act challenges have readily – and necessarily – conceded that Congress can constitutionally require individuals who are currently uninsured to purchase insurance at the "point of sale" – i.e., at the time when they actually face an immediate need for health care services. *E.g.*, *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, No. 10-91, 2011 WL 285683, at *26 (N.D. Fla. Jan. 31, 2011) ("Congress plainly has the power to regulate [consumers of health care services] . . . at the time that they initially seek medical care[], a fact with which the plaintiffs agree."). Judge Sutton in *Thomas More* also recognized as uncontroversial the principle that Congress can constitutionally "impose a federal condition (ability to pay) on the consumption of a service bound up in federal commerce (medical care)" by requiring individuals at the point that they seek medical care to "either pay for the care or buy medical insurance from then on." *Thomas More*, 2011 WL 2556039, at *30 (Sutton, J., concurring in the judgment).

Plaintiffs' supposedly novel objection to the minimum coverage provision, therefore, turns out to be a non-starter. Congress's power to regulate interstate commerce is not limited by artificial labels. Rather,"'broad principles of economic practicality'" inform Congress's authority

in this area. *Id.* at *24 (quoting *United States v. Lopez*, 514 U.S. 549, 571 (1995) (Kennedy, J., concurring)); *see also Swift Co. v. United States*, 196 U.S. 375, 398 (1905). Congress can take a "pragmatic, factual approach" to regulating interstate commerce, *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962), without regard to "'any formula which would give controlling force to nomenclature.'" *Thomas More*, 2011 WL 2556039, at *24 (Sutton, J.) (quoting *Wickard*, 317 U.S. at 120). That includes the regulation of "consumers" when their conduct, in the aggregate, has a substantial effect on interstate commerce.

Aside from their ineffective "consumer"-based objection, plaintiffs rely on the standard "inactivity" fallacy that other plaintiffs in these challenges have invoked. But that, too, is a non-starter when one reflects on a single, obvious fact: If individuals who chose not to have health insurance were truly passive in the relevant market, they could not be engaging in conduct that, in the aggregate, shifts billions of dollars annually to other market participants. Yet that is exactly what Congress found was occurring, 42 U.S.C. § 18091(a)(2)(F), and there is more than a rational basis for that conclusion.

This is not a situation where individuals are simply choosing not to spend money on a particular product, and Congress is insisting that, instead, they must buy that product, either "for their own good" or in order to "do their part" for the economy as a whole. Rather, the situation here is that uninsured people are not paying for health care services that they receive. And not only are they failing to pay, but their means of payment – out of pocket rather than through insurance – makes it substantially likely at the outset that they will not be able to afford any significant health care expenses that arise, and that other market participants will bear those costs. In other words, understanding the economic realities of the interstate health care market

requires an understanding of the financial risks involved in that market. In particular, Judge Sutton points out that "inaction *is* action . . . when it comes to financial risk." *Id.* at *28. Everyone in the health care market faces the financial risk of incurring completely unexpected, extremely high medical expenses, and health insurance is simply a means of managing that risk. As Judge Sutton explains, "[n]o one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk." *Id.* at *29.[2]

The majority in *Thomas More* recognized that Congress acted within its Commerce Clause authority in light of these economic realities. *Thomas More*, 2011 WL 2556039, at *12 ("Congress had a rational basis to believe that the practice of self-insuring for the cost of health care, in the aggregate, substantially affects interstate commerce.") (Martin, J.); *id.* at *24 ("Congress could reasonably conclude that the decisions and actions of the self-insured substantially affect interstate commerce.") (Sutton, J.). As the majority understood, the class of individuals who address the "risk of not having the assets to pay for health care" when one needs

[2]Even the dissent in *Thomas More* made short shift of the supposed activity/inactivity distinction that the plaintiffs in these cases have proposed. *Id.* at *36 (Graham, J., dissenting) ("I do not interpret [Commerce Clause jurisprudence] as drawing a constitutional line between activity and inactivity."). Where the dissent in *Thomas More* erred was in holding that those without insurance were not "participants" in the relevant market, which the dissent identified as the market in health insurance. *Id.* at *37. But to view the health insurance market as a stand-alone market for a consumer good is to ignore Congress's intent as well as economic reality. Congress's goal in enacting the Affordable Care Act was to increase the availability of health care; its insurance regulations are merely a means of achieving that goal. In addition, the economic relationship between health insurance and the health care market is clear simply from the description of the substantial effects that Congress identified. Those effects are a direct result of participation in the health care market by those who do not have health insurance. If the uninsured were truly outside the relevant market, they could not incur debt or shift costs as a result of their participation in that market. The minimum coverage provision regulates payment for health care services, and health insurance is the means of payment that the provision requires, based on Congress's finding that the *other* means of payment – attempting to pay out of pocket, or "self-insurance" – is ineffective and shifts burdensome costs to others.

it, through self-insurance, rather than insurance, incur costs beyond their means and shifts those costs to others. *Id.*; FAMILIES USA FOUND., HIDDEN HEALTH TAX: AMERICANS PAY A PREMIUM 2 (2009) ("FAMILIES USA, HIDDEN HEALTH TAX") 2. Congress therefore determined that self-insurance is ineffective as a means of addressing the risks that we all face in the interstate health care market, leading people to incur financial obligations that, in the aggregate, they fail to meet.

In this Circuit, there is already clear precedent for upholding Congress's power to regulate in this context. In *Kukafka*, the Third Circuit demonstrated its understanding that a failure to pay money that one owes (in that case, to satisfy child support obligations) can have a substantial impact on interstate commerce and can therefore properly fall within the scope of Congress's regulation of interstate commerce. *Kukafka*, 478 F.3d at 536. The court observed that the "failure to fulfill a financial obligation 'gives rise to a debt which implicates economic activity.'" *Id.* (quoting *United States v. Parker*, 108 F.3d 28, 31 (3d Cir. 1997)). Indeed, the legislative history underlying the Deadbeat Parents Act indicated that the unpaid obligations to which the Act would apply in a single year "total billions of dollars." *Parker*, 108 F.3d at 31.

Similar to the failure to pay child support obligations, as described by the Third Circuit, the failure to pay for health care services imposes a billions-of-dollars cost, annually, on the interstate market. This debt, too, implicates economic activity, and the shifted costs that result from this failure to pay reverberate throughout the interstate health care market, ultimately increasing health care costs for all, and insurance premiums for those who do have insurance. 42 U.S.C. § 18091(a)(2)(F); H.R. Rep. No. 111-443, pt. II, at 985 (2010); FAMILIES USA, HIDDEN HEALTH TAX, at 2; COUNCIL OF ECONOMIC ADVISORS ("CEA"), ECONOMIC REPORT OF THE PRESIDENT 187 (2010). Congress could rationally conclude that these impacts are substantial. Its

enactment of the minimum coverage provision to address those effects therefore falls squarely within its commerce power.[3]

Moreover, Congress's decision to impose the minimum essential coverage requirement *before* individuals face an urgent need for expensive medical care is inconsequential. "It cannot be maintained that the exertion of federal power must await the disruption of . .. commerce." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 222 (1938). To the contrary, Congress may adopt "reasonable preventive measures" to avoid disruptions to interstate commerce before they occur. *Id.* Congress did not need to wait until each uninsured individual shifts costs to others, or is on the verge of doing so.

Indeed, in this context, the timing of the provision is simply a reflection of how insurance – and self-insurance – function as means of payment within the health care market. Because health insurance is a means of managing financial risk, it must be acquired at a point where the risk remains uncertain. Health insurance could not operate as an effective instrument of payment "if people could simply buy their insurance on the way to the hospital." *47 Million and Counting: Why the Health Care Marketplace Is Broken: Hearing Before the S. Comm. on Fin.*, 110th Cong. 14 (2008) (statement of Prof. Hall). If an individual self-insures, the odds are that that individual will be unable to pay for significant medical expenses that arise. Yet even when health care providers can predict, based on method of payment alone, that the prospects of receiving payment from a patient are slim, our society is not prepared to turn individuals away when they present a need for emergency care but lack insurance. CONGRESSIONAL BUDGET OFFICE ("CBO"), KEY ISSUES IN ANALYZING MAJOR HEALTH INSURANCE PROPOSALS 13 (2008)

[3] *See* Statement of Material Facts ("SMF") ¶¶ 12-15, 19-24, and materials cited therein.

("KEY ISSUES"). Indeed, the Emergency Medical Treatment and Labor Act ("EMTALA") requires all hospitals that participate in Medicare and require emergency services to stabilize any patient who arrives with an emergency condition, without regard to ability to pay. 42 U.S.C. § 1395dd; *see also* 35 Pa. Cons. Stat. Ann. § 449.8(a). As explained in defendants' opening brief, this reality is one factor underlying Congress's finding that the failure to maintain health insurance has an aggregate substantial impact on interstate commerce. Def. Br. at 19-20; SMF ¶¶ 13-15. Thus, while requiring insurance at the "point of sale" is constitutionally permissible, it is economically and ethically unworkable. A conclusion that the Constitution permits the inconceivable prospect of conditioning emergency care on insurance, but prohibits placing the insurance requirement at the point where, economically and reasonably, it belongs – where the sole distinction is one of timing – makes no sense. Rather, "[r]equiring insurance today and requiring it at a future point of sale amount to policy differences in degree, not kind." *Thomas More*, 2011 WL 2556039, at *30 (Sutton, J.).

Plaintiffs also characterize the minimum coverage provision as an improper exercise of a federal police power because the provision imposes an affirmative obligation. *See* Pl. Br. at 21. However, contrary to plaintiffs' strained reading, the concern in Commerce Clause jurisprudence to distinguish "between what is national and what is local," *Lopez*, 514 U.S. at 557, does not turn on whether the regulation at issue imposes an affirmative obligation rather than a prohibition. Indeed, the laws that the Court struck down in *Lopez* and in *United States v. Morrison*, 529 U.S. 598 (2000), were themselves prohibitory, designed to deter or punish the possession of a gun in a school zone, in *Lopez*, and violent crimes against women, in *Morrison*. The distinction between positive and negative obligations, in the regulatory context, is often merely a matter of phrasing

and does not control whether the object of regulation is "interstate" in character. Simply put, "[t]he power to regulate includes the power to prescribe and proscribe." *Thomas More*, 2011 WL 2556039, at *28 (Sutton, J.). Indeed, as the specificity of any prohibition increases, the distinction from a mandate blurs. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-262 (1964) (upholding prohibition on racial discrimination by motels – in effect, compelling them to accept guests regardless of race). The mere fact that the minimum coverage provision affirmatively requires individuals to maintain health insurance in order to pay their health care costs – rather than, for example, prohibiting them from failing to pay the costs they incur – does not transform this regulation into an attempt to exercise a federal police power.

Nor is it correct to view the fact that not everyone will fail to pay their health care costs in any given year, if left free to forgo health insurance, as a question of piling inference upon inference as the Supreme Court described that problem in *Lopez*. Again, the issue is purely one of understanding market realities, and the timing of the obligation imposed by the minimum coverage provision cannot change the constitutional analysis. In *Raich*, there was no certainty that the marijuana grown for use by the two plaintiffs in that case would be diverted to the illegal drug market. Yet the Court did not view that lack of certainty as detracting from Congress's power to regulate activities that, *in the aggregate*, substantially affect interstate commerce. The link between the regulated activity – possession of marijuana for medical use – and interstate commerce did not depend on an attenuated series of inferences because that activity itself created a "*likelihood* that the high demand in the interstate market will draw" homegrown marijuana into the market for illegal drugs. *Raich*, 545 U.S. at 19 (emphasis added); *see id.* at 40 (Scalia, J., concurring) (recognizing that, given market realities, homegrown marijuana was always "an

instant from the interstate market"). Whether any given individual's medical marijuana was diverted was immaterial; accordingly, whether the series of steps that would be required for homegrown marijuana to reach the drug market actually occurred in any given instance was likewise irrelevant. The relevant point was that Congress had a rational basis to conclude that, in the aggregate, homegrown marijuana originally intended for medical use would be drawn into the market. The *aggregate* impact – given the odds that *some* individuals' ostensibly medical marijuana would be diverted – was rationally deemed substantial. *Raich*, 545 U.S. at 31-32. Similarly in *Wickard*, it was entirely possible that a given individual seeking to consume homegrown wheat would, if deprived of that source of wheat, not turn to the market to fill that need, but would simply eat something else. Yet the Court recognized that market realities made it inevitable that homegrown wheat would in general affect supply and demand in the interstate wheat market, and that one individual's "contribution [to the impact on interstate commerce], taken together with that of many others similarly situated, is far from trivial." *Wickard*, 317 U.S. at 127-28.

Significantly in both *Raich* and *Wickard*, the Court analyzed the "aggregate impact" of the class of activities at issue at a point *before* the plaintiffs in those cases had (as far as we know) done anything themselves to contribute to that impact. The Court's analysis was based on how the markets at issue operated. The situation here is no different. The record before the Court provides ample basis to understand that, given how the health care market operates, the aggregate impact of attempting to pay for health care out of pocket, rather than through insurance, is substantial, and that there is a rational basis for Congress's conclusions. Unlike the laws at issue in *Lopez* or *Morrison*, the minimum coverage provision addresses conduct that, by itself, is a

means of responding to already-present financial risks. Individuals who do not have health insurance are instead managing the risks of future health care costs by self-insuring. *Id.* at *29 (Sutton, J.) ("self-insurance and private insurance are two forms of action for addressing the same risk"). However, as explained above, Congress found that this means of managing financial risk, by itself, creates a likelihood that self-insured individuals will be unable to pay for medical expenses they incur and will, as a result, shift those costs to others. The link is "not at all attenuated" because, by "attempting to fulfill their own demand for a commodity rather than resort to the market," the self-insured "are thereby thwarting Congress's efforts to stabilize prices." *Thomas More*, 2011 WL 2556039, at *12 (Martin, J.).

There is undeniably a rational basis for Congress's conclusion that self-insurance, as a form of risk management and payment for health care services, leads directly to cost-shifting, given that even modest health care needs can quickly lead to bills in the thousands of dollars. *See* INTERNATIONAL FEDERATION OF HEALTH PLANS, 2010 COMPARATIVE PRICE REPORT: MEDICAL AND HOSPITAL FEES BY COUNTRY; U.S. DEP'T OF HEALTH & HUMAN SERVS., ASPE RESEARCH BRIEF, THE VALUE OF HEALTH INSURANCE: FEW OF THE UNINSURED HAVE ADEQUATE RESOURCES TO PAY POTENTIAL HOSPITAL BILLS 8 (2011). Certainly a family of four, such as plaintiffs', with an income of less than $39,000 in 2010,[4] may incur costs beyond their ability to pay from an unexpected serious injury or illness, regardless of whether they have been able to pay their expenses in the past, and plaintiffs do not deny that this is so.[5] In the aggregate, this

[4] *See* Decl. of Pl. Barbara Goudy-Bachman (dkt. #47-2) ¶ 9.

[5] Plaintiffs state in passing that "the vast majority of those who are not otherwise covered by a federal program, pay for the services they receive – including those who have ordered their lives in such a manner as to pay for medical services as they come due." Pl. Br. at 23. However,

class of conduct has a substantial effect on interstate commerce, as evidenced by the finding that $43 billion in uncompensated costs were imposed on the market in 2008 alone. The minimum coverage provision can be upheld as a valid exercise of Congress's commerce power on this basis.

2. Congress Had a Rational Basis to Conclude that the Minimum Coverage Provision Is Essential to its Guaranteed Issue and Community Rating Reforms of the Health Insurance Market

Further, and independently, defendants have also established that the minimum coverage provision is a valid exercise of Congress's commerce power because it is an essential component within the broader regulatory scheme of guaranteed issue and community rating insurance reforms that Congress enacted in the Affordable Care Act. Def. Br. at 13-17. Congress may properly regulate when it has a rational basis to conclude that "failure to regulate [a] class of activity would undercut [a broader] regulation of the interstate market." *Raich*, 545 U.S. at 22; *see also id.* at 37-38 (Scalia, J., concurring in the judgment). Again, based on its understanding of how the health care and health insurance markets function, Congress determined that certain aspects of the current system have resulted in untenable barriers to individuals' ability to obtain

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plaintiffs offer no evidentiary support for this claim. Given studies that document the opposite – showing that those without insurance continue to use health care, FAMILIES USA, HIDDEN HEALTH TAX, at 2 (uninsured used $116 billion worth of health care in 2008), but often cannot afford to pay for the health care they receive, *see, e.g.*, HHS, ASPE RESEARCH BR., at 1; that 62% of personal bankruptcies are caused in part by medical expenses, 42 U.S.C. § 18091(a)(2)(G); and that the premiums of insured families are over $1000 higher each year due to cost-shifting, 42 U.S.C. § 18091(a)(2)(F) – plaintiffs' unsupported assertion in no way undermines the rational basis for Congress's contrary conclusion. Indeed, the documented costs of specific medical procedures – averaging $60,000 for bypass surgery, $13,000 for an appendectomy, $29,000 for an angioplasty, INTERNATIONAL FEDERATION OF HEALTH PLANS, 2010 COMPARATIVE PRICE REPORT 13, 15, 16 – by themselves call into question plaintiffs' assertion, particularly for families that, like plaintiffs' have a net income of less than $39,000 in one year.

health insurance (and correspondingly, their ability to obtain health care services). Specifically, many people could not obtain or maintain health insurance because insurers could deny insurance altogether or charge higher, often unaffordable premiums due to pre-existing conditions or medical history. That, in turn, has meant that many individuals most in need of health care services have been unable to obtain them.

In the Affordable Care Act, Congress therefore establishes guaranteed issue and community rating requirements, which prohibit insurers from denying coverage or charging higher rates based on individuals' medical conditions or histories. 42 U.S.C. §§ 300gg, 300gg-1, 300gg-3, 300gg-4(a). These reforms, set to go into effect for all individuals in 2014, are designed to increase the availability and affordability of health insurance, and, as a result, to enable more individuals to obtain needed health care services. Yet, Congress recognized that these reforms could also encourage individuals to forgo insurance until they required care, which would fundamentally alter the nature of health insurance as a means of managing risk and impair the insurance market's ability to function. 42 U.S.C. § 18091(a)(2)(H), (I). Congress's enactment of the minimum coverage provision was designed to counteract the incentives to forgo insurance that these reforms might create. The status of the minimum coverage provision as an essential element within a broad regulatory scheme is another basis for upholding Congress's authority to enact the provision under the Commerce Clause.

Plaintiffs incorrectly disregard this aspect of Congress's commerce power. Their citation of the Court's observation in *Lopez* that the law in issue in that case was not "an essential part of a larger regulation of economic activity," Pl. Br. at 28 (quoting *Lopez*, 514 U.S. at 561), only reinforces the distinction between *Lopez* and the case at hand. By making that distinction in

Lopez, the Court clearly signaled that Congress *may* regulate an interstate activity in a context where there is a rational basis to conclude that doing so is essential to a comprehensive regulatory scheme.[6] *See Raich*, 545 U.S. at 24-25; *see also id.* at 36 (Scalia, J., concurring in the judgment) ("Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'"). This is just such a context. Upholding the minimum coverage provision on this basis does not qualify as "bootstrap[ping]." Pl. Br. at 17. Rather, the analysis is a well established part of Commerce Clause jurisprudence.

Rather than acknowledging this fact and squarely addressing defendants' analysis (and that of other courts that have upheld the provision), plaintiffs instead make broad pronouncements of the importance of individual liberty and dire predictions of how "radical environmental constituencies" could require all Americans to install solar panels in their homes. *Id.* at 22-23. It should be noted, first of all, that plaintiffs' opinion of Congress's "pedestrian policy goal of providing health insurance to the uninsured . . . or health care coverage to those with pre-existing medical conditions," *id.* at 20, is not a proper basis for a constitutional challenge. Whether plaintiffs approve of Congress's regulatory goals is an issue for a political, not a judicial, forum. Moreover, although the limitations on federal action under the Commerce Clause are one protection of individual liberty, that does not mean that an allegation relating to

[6]The intrastate activity itself need not be economic, though as explained above, the choice of an ineffective means of financial risk management (i.e., attempted but often unsuccessful self-insurance that ends up shifting the substantial costs of uncompensated health care services to others in the health care market) is inherently economic.

individual liberty is properly framed as a Commerce Clause challenge, where the judicial standard has focused on substantial effects on interstate commerce and a provision's importance to a regulatory scheme. A challenge to the minimum coverage provision that is grounded in the notion that individual rights have been violated would properly arise under the Fifth Amendment rather than through a Commerce Clause challenge. Yet, for all their repeated invocations of "individual liberty," plaintiffs have raised no substantive due process challenge to the minimum coverage provision. Had they raised such a claim, it is well established that purely economic regulations of the kind at issue here need survive only rational basis scrutiny in order to satisfy due process requirements. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (recognizing Congress's presumptive authority to enact legislation "adjusting the burdens and benefits of economic life"). The minimum coverage provision easily satisfies such scrutiny.

The Court also need not be detained by plaintiffs' fears of being forced to install solar panels. The distinguishing features of the minimum coverage provision, and the operation of the health care and health insurance markets, have already been detailed. Whatever limits that Congress faces in exercising its commerce power are not threatened by the minimum coverage provision, which regulates the means of payment for services that virtually everyone, including plaintiffs, receive. As in any Commerce Clause case, Congress's regulation can be tested against those limits only within the context of the particular markets at issue. Time after time, whether in *Lopez*, *Morrison*, *Wickard*, or *Raich*, the Supreme Court has engaged in this practical, context-based analysis – and in *Lopez* and *Morrison*, did recognize that the bounds of Congress's commerce power were exceeded – without relying on the formulaic distinctions, between "consumer" and "producer," "activity" and "inactivity," that plaintiffs propose. Unlike the stand-

alone laws struck down in *Lopez* and *Morrison*, Congress included the minimum coverage provision as one component within a broader regulatory scheme. Moreover, the regulated conduct – financing the costs of health care – is "decidedly economic." *Thomas More*, 2011 WL 2556039, at *11. To the extent plaintiffs wish to raise the specter of Congress compelling passive individuals to make an unwanted purchase of a product that has no relationship to their current participation in any market, the minimum coverage provision does not meet that description.

B. The Minimum Coverage Provision Is a Necessary and Proper Means of Regulating Interstate Commerce

Defendants have explained that the minimum coverage provision is not only essential to achieving the guaranteed issue and community rating reforms that Congress implemented in the Affordable Care Act, but also a means reasonably adapted to that legitimate end. Congress plainly has the authority to regulate the health care market. *United States v. Whited*, 311 F.3d 259, 269 (3d Cir. 2002) (recognizing that the health care market is plainly interstate and that "[t]he relationships among patients, providers, and insurers are extraordinarily complex"). It may also regulate payment for health care, including the use of health insurance for that purpose. *United States v. S.-E. Underwriters Ass'n*, 322 U.S. 533, 553 (1944).[7] The Affordable Care Act's guaranteed issue and community rating reforms are therefore undeniably a "legitimate end"

[7]Plaintiffs make the extraordinary claim that "the history of federal involvement in regulating the health care insurance market is nonexistent." Pl. Br. at 27-28. This claim is plainly false. Such laws as the Employee Retirement Income Security Act, Pub L. No. 93-406, 88 Stat. 829 ("ERISA") (1974); the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 ("COBRA"); the Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 ("HIPAA") (1996); and the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, Pub. L. No. 110-343, § 512, 122 Stat. 3765, 3881 ("MHPAEA"), not to mention the Medicare and Medicaid programs, plainly document Congress's extensive involvement in this area.

within the meaning of the Necessary and Proper Clause. *United States v. Pendleton*, 636 F.3d 78, 87 (3d Cir. 2011). The minimum coverage provision is plainly adapted to effectuate that end, again taking into account the unique features of the health care market.

Plaintiffs dispute the application of the Necessary and Proper Clause, first of all, because, they contend, Congress may not regulate noneconomic activity. Pl. Br. at 26. However, to the extent there is a requirement that regulated conduct qualify as economic, *but see Raich*, 545 U.S. at 18, it is plainly met here. *Thomas More*, 2011 WL 2556039, at *11 (opinion of Martin, J.). As the Third Circuit recognized in *Kukafka*, the failure to pay an amount owed is quintessentially economic. *See Kukafka*, 478 F.3d at 536.

Plaintiffs also argue that the "five considerations" listed by the Supreme Court in *United States v. Comstock*, 130 S. Ct. 1949, 1965 (2010), weigh against the provision's validity under the Necessary and Proper Clause. However, the Court in *Comstock* did not list these considerations as a "test" that must in every instance be satisfied. *See id.* To the contrary, far from purporting to overrule nearly 200 years of jurisprudence, *Comstock* affirmed the Court's long-standing application of "means-end" rationality review in the Necessary and Proper Clause context. *Id.* at 1956-57. The Third Circuit's recent opinion in *Pendleton* confirms that, under *Comstock*, the "relevant inquiry" is the same as it has been since *McCulloch v. Maryland*, 17 U.S. 316 (1819) – namely, "whether the means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power or under other powers that the Constitution grants Congress the authority to implement." *Pendleton*, 636 F.3d at 87 (internal quotation omitted). As already explained, the minimum coverage provision passes this rational basis review.

The final argument that plaintiffs mount against Congress's authority under the

Commerce Clause and Necessary and Proper Clause is their assertion that, in fact, the minimum coverage provision will not be effective in preventing individuals from forgoing health insurance until they require medical care. Pl. Br. at 29-31. Plaintiffs assert that individuals will still face economic incentives to "just pay a small fine and wait to secure health care insurance after they become ill – and then drop such coverage when they are healed." *Id.* at 31. However, the Congressional Budget Office has projected that, by 2019, the Act will reduce the number of uninsured by about 32 or 33 million, including 24 million who would purchase insurance through the new Exchanges. Letter from Douglas W. Elmendorf, Director, CBO, to House Speaker John Boehner, table 3 (Feb. 18, 2011) (attached hereto as Exhibit A); Letter from Douglas W. Elmendorf, Director, CBO, to the Hon. Nancy Pelosi, Speaker, U.S. House of Representatives ("CBO Letter to Speaker Pelosi") 9 (Mar. 20, 2010). Congress is entitled to rely on these findings. Plaintiffs' objection to the provision amounts to a policy dispute, not a claim for the Court to address. *Heart of Atlanta Motel, Inc.*, 379 U.S. at 261-62 (whether Congress "could have pursued other methods to eliminate the obstructions found in interstate commerce . . . . is a matter of policy that rests entirely with the Congress not with the courts")

Again, the question under the Necessary and Proper Clause is whether the provision is "rationally related" to the end that Congress sought to achieve. *Comstock*, 130 S. Ct. at 1956. Plaintiffs' mere disagreement with the provision, or with expert views on its effectiveness, do not undermine the rational relationship here. The relationship of the minimum coverage provision to Congress's legitimate goal of implementing guaranteed issue and community rating reforms is not merely rational. It is compelling. As previously explained, the varying experiences of states that have adopted similar insurance reforms, and the correlation between the success of those

state reforms with the inclusion of a minimum coverage provision, are by themselves sufficient justification to find a rational basis for Congress's conclusion that the minimum coverage provision would not only help, but is "essential" to make those reforms effective. *See* 42 U.S.C. § 18091(a)(2)(I); Def. Br. at 15-17 (describing reform efforts in New Jersey, New York, and Massachusetts).

Even without regard to the deferential standard under which Congress's enactments must be reviewed, plaintiffs' reasoning is inherently flawed. For one thing, plaintiffs themselves assert that they intend to comply with the minimum coverage provision because they are law-abiding citizens. In addition, while Congress reasonably recognized that, without the minimum coverage provision, some will be encouraged to forgo insurance until they fall ill or have an accident, the decision to forgo insurance, even with Congress's guaranteed issue and community rating insurance reforms, is not necessarily economically sound. For those who would continue to forgo insurance even after the provision takes effect, there remains a significant chance that a sudden accident or illness could result in significant expenses before an individual has a chance to buy insurance. In sum, nothing in plaintiffs' arguments overcomes the deference to which Congress's legislative judgments are entitled, nor do plaintiffs meet the standard for mounting a pre-enforcement facial challenge by showing that "no set of circumstances exists" under which the minimum coverage provision would be a valid exercise of Congress's authority under the Commerce Clause and Necessary and Proper Clause. *See United States v. Barton*, 633 F.3d 168, 172 (3d Cir. 2011). "If Congress has the power to regulate the national healthcare market, as all seem to agree, it is difficult to see why it lacks authority to regulate a unique feature of that market by requiring all to pay now in affordable premiums for what virtually none can pay later

in the form of, say, $100,000 (or more) of medical bills prompted by a medical emergency." *Thomas More*, 2011 WL 2556039, at *30 (Sutton, J., concurring in judgment). There is not even a reasonable question that this is true for those who have already purchased insurance, nor, one might think, for those like plaintiffs who, in their current uninsured status, with an annual income of $39,000 and reaching the time of life when, they concede, health care needs typically increase, present a plain risk of incurring significant costs they cannot afford to pay. Plaintiffs' facial challenge must be rejected, and summary judgment entered in defendants' favor.

II. THE MINIMUM COVERAGE PROVISION IS ALSO A VALID EXERCISE OF CONGRESS'S POWER UNDER THE GENERAL WELFARE CLAUSE

As discussed in defendants' opening brief, the minimum coverage provision is also authorized as an exercise of Congress's power under the General Welfare Clause. Def. Br. at 29-33. Plaintiffs claim that their counsel's "survey of the published and available tax codes of the English speaking nations" failed to locate a law similar to the minimum coverage provision that was "incorporated into that nation's tax code." Pl. Br. at 31. However, the minimum coverage provision *is* a part of the United States' tax code. *See* 26 U.S.C. § 5000A. Plaintiffs' attempt to discount Congress's authority to enact the provision pursuant to its taxing power boils down to the claim that the provision "is simply not a tax." Pl. Br. at 32. Their reliance on the notion that the § 5000A penalty is not "label[ed]" a tax misses the mark. A tax is determined by how it operates, and regardless of whether Congress expressly invokes its taxing power, "for Congress is not required to discuss or explain explicitly the constitutional basis for laws that it enacts." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 358 (3d Cir. 1997). Applying the presumption of constitutionality, a court's task is "to determine whether

Congress had the authority to adopt the legislation, not whether it correctly guessed the source of that power." *Usery v. Charleston Co. Sch. Dist.*, 558 F. 2d 1169, 1171 (4th Cir. 1977).

If Congress had the affirmative intention that the minimum coverage payment not be considered a "tax," it would be odd to require taxpayers to make the payment with their annual tax returns; to calculate it, in part, as a percentage of income; to make those filing joint returns jointly liable for the payment; to charge the Secretary of the Treasury with administering it; and to exempt individuals who do not file tax returns. In light of these glaring attributes of taxation, one would expect some indication clearer than the use of the word "penalty," applicable to other tried and true taxes, of Congress's contrary intent. Yet, there is not a whisper in the legislative history that Congress wished to eschew invocation of its taxing power. To the contrary, congressional leaders specifically defended the provision as an exercise of the taxing power. For example, the Senate explicitly invoked the taxing power when the provision was challenged in constitutional points of order. 155 Cong. Rec. S13,830, S13,832 (Dec. 23, 2009). Members of Congress also invoked the taxing power at other points during legislative debates on the provision. *E.g.*, 156 Cong. Rec. H1854, H1882 (Mar. 21, 2010) (Rep. Miller); *id.* at H1824, H1826 (Mar. 21, 2010) (Rep. Slaughter); 155 Cong. Rec. S13,751, S13,753 (Dec. 22, 2009) (Sen. Leahy); *id.* at S13,558, S13,581-82 (Dec. 20, 2009) (Sen. Baucus).

Plaintiffs also call the § 5000A penalty a "punishment," and the *Thomas More* court as well described the minimum coverage provision as "regulat[ing] conduct by establishing 'criteria of wrongdoing and imposing its principal consequence on those who transgress its standard.'" *Thomas More*, 2011 WL 2556039, at *17 (quoting *The Child Labor Tax Case*, 259 U.S. 20, 36-37 (1922)). But it is precisely the *nonpunitive* character of the minimum coverage provision that

distinguishes it from criminal penalties and other assessments that courts have found not to qualify as "taxes." Cf. *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 778-79 (1994) (describing distinction between "punitive," as opposed to "remedial," assessments); *Child Labor Tax Case*, 259 U.S. at 38 (recognizing that a "mere penalty" – one that cannot qualify as a tax – is one that includes "penalizing features"). Application of the penalty does not turn on the taxpayer's scienter – a characteristic of a punitive measure, as recognized in *The Child Labor Tax Case*, 259 U.S. at 36-37. Nor will it result in the assessment of "highly exorbitant" obligations that might show an intent to "punish rather than to tax." *United States v. Constantine*, 296 U.S. 287, 294, 295 (1935). Indeed, the penalty under the minimum coverage provision is capped at the lower of the cost of qualifying insurance, 26 U.S.C. § 5000A(c)(1)(B), or 1 percent (in 2014) of the taxpayer's household income, § 5000A(c)(2)(B), and may be less than that, *see id.*§ 5000A(c)(2)(A), (3). *Cf. United States v. Sanchez*, 340 U.S. 42, 45 (1950) ("rational foundation" for tax rate showed it was not a punitive sanction in disguise). Moreover, payment of the penalty relieves the taxpayer of the obligation to purchase insurance, in contrast with punitive provisions that require an individual who violates a statute to pay a penalty while still requiring that they satisfy the underlying obligation. *See United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224-25 (1996). Thus, the minimum coverage provision cannot be deemed to fall outside Congress's taxing power on the ground that it is punitive in nature.

Plaintiffs also reference the regulatory nature of the penalty as if that were decisive proof that it is not a tax. It is settled, however, that, as long as it is *not* punitive in character, a tax "does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed." *Sanchez*, 340 U.S. at 44. "Every tax is in some measure regulatory" in that "it

interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937). As long as a statute is "productive of some revenue," Congress may exercise its taxing powers irrespective of any "collateral inquiry as to the measure of the regulatory effect of a tax." *Id*. at 514; *id.* at 512 (rejecting the argument that a tax on firearms dealers was "not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms"); *see also United States v. Doremus*, 249 U.S. 86, 93-94 (1919) (only requirement for an exercise of the taxing power is that there be "some reasonable relation" to the "raising of revenue").

Significantly, plaintiffs do not deny that the minimum coverage provision will generate revenue. Indeed, that fact is not subject to dispute. Under the provision's plain design, it is projected that some taxpayers will undoubtedly be required to add the § 5000A penalty to the amount they owe when paying their annual income taxes, and the amount paid pursuant to § 5000A will commingle with the rest of the amount paid, and together these amounts will contribute revenue to the public fisc. The Congressional Budget Office estimated that the minimum coverage provision will yield approximately $4 million a year. *See* CBO Letter to Speaker Pelosi 2 tbl. 4. Because the revenue-raising requirement is met here, the provision is a valid exercise of Congress's taxing power.

CONCLUSION

For the reasons set forth above and in defendants' opening brief, even if this Court denies defendants' Motion to Dismiss, defendants are, in the alternative, entitled to judgment as a matter of law, and summary judgment should therefore be entered in their favor.

DATED this 18th day of July, 2011. Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Local Rule 4.1, I hereby certify that the foregoing Motion was served via ECF on counsel of record for plaintiffs in the above-captioned case.

Dated: July 18, 2011

/s/ Kathryn L. Wyer
Kathryn L. Wyer