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Sissel v. HHS - U.S. Reply Brief

United States Department of Health and Human Services

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MATT SISSEL, Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	Civil Action No. 1:10-cv-01263 (RJL)

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Dated: January 18, 2011.

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INTRODUCTION

Plaintiff bases his entire opposition on a flawed understanding of the burden he must carry in this case. Plaintiff believes that, to defeat a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), his arguments need only be "non-frivolous" and based on "a plausible legal theory," because "this is not the time for their adjudication on the merits." Pl.'s Opp'n 28. But that is incorrect. Resolving disputes of law is precisely the purpose of a Rule 12(b)(6) motion, and if the plaintiff fails to state a claim under the governing law, the court must dismiss the complaint, "without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989).

Here, Plaintiff's legal argument is without merit. Plaintiff asks this Court to devise sweeping new constitutional rules to strike down a provision of the Patient Protection and Affordable Care Act ("ACA"). The established tests under the Commerce Clause and Necessary and Proper Clause defer to Congress's judgment that a provision regulates matters substantially affecting interstate commerce, or is integral to a larger regulation of interstate commerce. Plaintiff asks the Court to ignore Congress's judgment on these matters in favor of his own policy views. As Plaintiff himself recognizes, the minimum coverage provision regulates the economic "decision" of how to purchase services in the health care market. Pl.'s Opp'n 30. And while the well-worn touchstone of congressional taxing power under the General Welfare Clause is whether the provision produces revenue, Plaintiff's brief resorts to the revival of a distinction between regulatory and revenue-raising taxes that the Supreme Court used in the 1920's and that it has long since "abandoned." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974). Plaintiff's complaint should be dismissed, and judgment should be entered for Defendants.[1]

[1] Defendants do not, for purposes of this Motion to Dismiss, intend to pursue the arguments in Part II of their opening brief, in which Defendants contended that the Court lacks jurisdiction. In

ARGUMENT

I. Plaintiff Misunderstands and Misapplies the Legal Standards Applicable to Defendants' Motion and His Commerce Clause Challenge

Defendants' motion explained that the enactment of the minimum coverage provision was well within Congress's authority under the Commerce Clause, and, independently, the General Welfare Clause. In response, Plaintiff submits that courts "are split" on the question, which "presents a novel issue for judicial review." Pl.'s Opp'n 28-29. Plaintiff believes that to defeat a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, he need only offer "a plausible legal theory." *Id.* at 28. He contends that it is sufficient that his arguments are "non-frivolous," because "this is not the time for their adjudication on the merits." *Id.* But that is wrong. Resolving disputes of law is precisely the purpose of a Rule 12(b)(6) motion, and if the plaintiff fails to state a claim under the governing law, the court must dismiss the complaint, "without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one." *Neitzke*, 490 U.S. at 327. Insofar as Rule 12(b)(6) carries a "relatively undemanding standard of review" in requiring that allegations be plausible, Pl.'s Opp'n 29, it is with respect to allegations and issues of fact, not law.

Plaintiff's misunderstanding of the applicable legal standards extends to his presentation of his Commerce Clause challenge. As another court recognized in granting a Rule 12(b)(6) motion to dismiss a similar challenge to the minimum coverage provision, "[t]he burden is on Plaintiff[] to make a 'plain showing that Congress has exceeded its constitutional bounds.'" *Liberty Univ. v. Geithner*, Civ. No. 10-15, __ F. Supp. 2d __, 2010 WL 4860299, at *11 (W.D. Va. Nov. 30, 2010) (quoting *United States v. Morrison*, 529 U.S. 598, 607 (2000)). Thus, in accordance with the proper allocation of authority in our democratic system, "federal statutes

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the event the Court denies Defendants' motion, Defendants reserve the right to challenge the factual basis for Plaintiff's allegations regarding his current and future injuries.

enjoy a presumption of constitutionality, especially where, as here, Congress explicitly considered constitutional questions." *Littlewolf v. Lujan*, 877 F.2d 1058, 1063 (D.C. Cir. 1989); *see Morrison*, 529 U.S. at 607.

In his brief, Plaintiff seeks to disregard, or even invert, the strong presumption that legislation adopted by the democratically elected branches of government is constitutional. He does so based on the assertion that the minimum coverage provision is an "unprecedented exercise of congressional power" and a "novel issue for judicial review." Pls.' Opp'n 29. But any new law is by definition to some degree novel. As discussed in Defendants' motion and below, however, clear precursors of the minimum coverage provision can be found in, *inter alia*, federal regulation of health care, of insurance, and of health care insurance specifically. But even if it were otherwise, the novelty of a law does not diminish the presumption of constitutionality. Necessarily, regulation under the Commerce Clause adapts to the changing nature of the commerce being regulated. A century after the framing, for example, the Supreme Court explained:

> The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress [of] the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances.

Pensacola Tel. Co. v. W. Union Tel. Co., 96 U.S. 1, 9 (1877). While the ACA is in fact consistent with prior exercises of authority under the Commerce Clause, the point is that it is the job of Congress, not the courts, to determine the appropriate response to an unprecedented economic crisis in the health care market that accounts for one-sixth of the American economy.

Once Congress has made that determination, be it novel or not, the Court must accord it substantial deference.

Accordingly, Plaintiff cannot defeat Defendants' Rule 12(b)(6) motion merely by demonstrating that he has a "plausible" legal theory, or that the law at issue is in some way "unprecedented" or a "novel issue for judicial review." When considered under the appropriate legal standards, Plaintiff's complaint fails to state a claim upon which relief can be granted, and this case should be dismissed.

II. The Minimum Coverage Provision Is a Valid Exercise of Congress's Commerce Power

Congress acted within its broad power under the Commerce Clause in including the minimum coverage provision as part of comprehensive health reform legislation. In the ACA, Congress addressed critical problems in the $2.5 trillion interstate health care market and the $854 billion private health insurance market that it encompasses. ACA §§ 1501(a)(2)(B), 10106(a). As part of its regulation of these markets, the ACA requires non-exempted individuals to obtain a minimum level of health insurance coverage. Congress expressly found that this "requirement regulates activity that is commercial and economic in nature – economic and financial decisions about how and when health care is paid for, and when health insurance is purchased." *Id.* §§ 1501(a)(2)(A) , 10106(a). Those who "choos[e] to forgo insurance . . . are making an economic decision to try to pay for health care services later, out of pocket, rather than now through the purchase of insurance." *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 894 (E.D. Mich. 2010).

For more than 70 years, the Supreme Court has recognized congressional authority under the Commerce Clause to address conduct that substantially affects interstate commerce. *E.g.*, *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). Here, Congress specifically found that economic

decisions about how to pay for health care in the aggregate shift tens of billions of dollars in health care costs each year, from the uninsured, who frequently are unable to pay for the medical services they receive, onto other participants in the health care market. ACA §§ 1501(a)(2)(F), 10106(a). That, as Congress found, is a substantial effect on interstate commerce. *Id*. §§ 1501(a)(1), (2)(F), 10106(a). It takes no "metaphysical gymnastics," but rather a straightforward application of the long-accepted constitutional standard, to determine that Congress has the power to regulate this economic activity. *Thomas More*, 720 F. Supp. 2d at 894; *accord Liberty Univ.*, 2010 WL 4860299, at *14-15.

Any assessment of Plaintiff's challenge to this regulation must also consider it in context, with other key reforms in the ACA that it enables. As discussed in Defendants' opening brief, Congress determined that the minimum coverage provision is essential to the ACA's guaranteed issue and community rating insurance market reforms, which bar insurance companies from refusing to cover, or charging higher premiums to, individuals because of pre-existing medical conditions. ACA § 1201. Those reforms are intended to regulate interstate markets by eliminating practices that unfairly burden consumers and restrict the availability and affordability of health insurance and, as a result, health care. Yet, without the minimum coverage provision, Congress determined, these reforms would not work. Instead, they would amplify incentives of individuals to forgo insurance until they become sick or injured. *Id.* §§ 1501(a)(2)(I), 10106(a). This would result in a smaller insurance risk pool, which would accelerate the current upward spiral of health care and health insurance costs. *Health Reform in the 21st Century: Insurance Market Reforms: Hearing Before the H. Comm. on Ways and Means*, 111th Cong. 118-19 (Apr. 22, 2009) (Am. Academy of Actuaries). Thus, Congress found the minimum coverage provision

"essential" to its broader effort through the ACA to increase the availability and affordability of health care. ACA §§ 1501(a)(2)(C), (F), (G), (H), (I), (J), 10106(a).

In addition, Congress determined that individual decisions to pay for health care services out-of-pocket, rather than through insurance, have an aggregate effect of shifting billions of dollars in costs to governments, health care providers, insurance companies, and insured individuals. Congress found that, in 2008, the cost of providing uncompensated health care to the uninsured – *i.e.*, care not paid for by the patient or a third party – was $43 billion, and that health care providers pass on a significant portion of these costs to "private insurers, which pass on the cost to families," increasing premiums paid by families who carry insurance by an average of over $1,000 a year. *See id.* §§ 1501(a)(2)(F), 10106(a). Congress found that such individual decision-making, when considered against the backdrop of federal laws effectively guaranteeing emergency screening and stabilization regardless of ability to pay, not only "increases financial risks to households and medical providers" on an individual basis, *id.* §§ 1501(a)(2)(A), 10106(a), but also on the whole substantially affects the interstate markets in health care and health insurance, *id.* §§ 1501(a)(2)(E)-(G), 10106(a).

Plaintiff's entire Commerce Clause argument relies on the assertion that the minimum coverage provision does not regulate "activity." Pl.'s Opp'n 26-32. This argument disregards his participation in the health care market and the teachings of the Supreme Court, which focus on whether Congress seeks to regulate interstate commerce, and, if so, what it may do in furtherance of that regulation.

In *Raich*, the Supreme Court upheld the application of the Controlled Substances Act to the possession of marijuana that was grown at home for personal use. The Court reversed a court of appeals ruling that held that the plaintiffs were outside the scope of the commerce power

because they had not entered the marijuana market. The court of appeals had incorrectly reasoned that "[t]he cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity." *Raich v. Ashcroft*, 352 F.3d 1222, 1229 (9th Cir. 2005). In reversing, the Supreme Court found it irrelevant that the plaintiffs were not engaged in commercial activity and that they did not buy, sell, or distribute any portion of the marijuana that they possessed. The regulation was proper, the Court held, because "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would . . . affect price and market conditions." *Raich*, 545 U.S. at 19. The failure to regulate such consumption would, in the aggregate, have a "substantial effect on supply and demand in the national market for that commodity." *Id.*

Raich reflected principles established more than half a century earlier in *Wickard v. Filburn*, 317 U.S. 111 (1942), which upheld the federal regulation of wheat that was grown and consumed on a family farm as part of a program to control the volume and price of wheat moving in interstate commerce. The Supreme Court sustained that exercise of the commerce power even though the wheat at issue was not "sold or intended to be sold," *id.* at 119, even though the home consumption of wheat by any individual "may be trivial by itself," *id.* at 127, and even though the regulation "forc[ed] some farmers into the market to buy what they could provide for themselves," *id.* at 129.

Plaintiff seeks to distinguish these cases by asserting that they concerned laws that "targeted" activity, whereas the minimum coverage provision constitutes regulation "based merely on one's lawful presence in the country." Pl.'s Opp'n 1, 30. But Plaintiff is not inactive in the health care market. Instead, he readily concedes that he has had health insurance in the past, and currently chooses to pay for medical expenses out-of-pocket. Compl. ¶ 5. And

Plaintiff does not dispute what Congress understood – that participation in the market for health care services is virtually universal. "[N]early everyone will require health care services at some point in their lifetimes, and it is not always possible to predict when one will be afflicted by illness or injury or require care." *Liberty Univ.*, 2010 WL 4860299, at *15; *accord Thomas More*, 720 F. Supp. 2d at 894. Indeed, a substantial majority of those without insurance coverage at any point in time in fact move in and out of coverage, and have had coverage at some point within the same year. Congressional Budget Office [CBO], *How Many People Lack Health Insurance and For How Long?*, at 4, 9 (May 2003); *see also* CBO, *2008 Key Issues in Analyzing Major Health Proposals* 11 (Dec. 2008) [CBO, *Key Issues*]. As the court explained in *Thomas More*:

> The plaintiffs have not opted out of the health care services market because, as living, breathing beings, who do not oppose medical services on religious grounds, they cannot opt out of this market. As inseparable and integral members of the health care services market, plaintiffs have made a choice regarding the method of payment for the services they expect to receive. The government makes the apropos analogy of paying by credit card rather than by check. How participants in the health care services market pay for such services has a documented impact on interstate commerce. Obviously, this market reality forms the rational basis for Congressional action designed to reduce the number of uninsureds.

720 F. Supp. 2d at 894.

By contending that he is inactive by virtue of his failure to purchase health insurance, Plaintiff focuses on the wrong market and ignores what Congress sought to regulate. Even if he does not currently participate in the insurance market, he indisputably participates in the market for health care services. Nothing required Congress to focus exclusively on the market that Plaintiff defines, and nothing barred Congress from focusing on economic conduct in the health care market. Requirements to obtain insurance are not imposed because of participation in the insurance market itself; they are imposed because of concerns that individuals or corporations

may be unable to meet costs resulting from activities in other markets. Under Plaintiff's logic, Congress would be constitutionally precluded from applying any insurance requirement to anyone who is not already insured, on the theory that such people are not "active" in the insurance market – a proposition without support in precedent, practice, or common sense. Plaintiff's position disregards the "broad principles of economic practicality" that underlie the commerce power. *United States v. Lopez*, 514 U.S. 549, 571 (1995) (Kennedy, J., concurring); *see also Wickard*, 317 U.S. at 120 ("questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce."); *Swift Co. v. United States*, 196 U.S. 375, 398 (1905) ("commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business"); *cf. Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962) (Congress chose in the Clayton Act to "prescribe[] a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one").

Plaintiff's attempt to draw an impermeable line separating participation in the health market from the maintenance of insurance coverage ignores the fundamental feature of health insurance – its function as the principal means of payment for health care services in the United States. Buying insurance reflects a choice of one method of dealing with the cost of potential medical expenses, in preference to other options. That decision is quintessentially economic, and within the traditional scope of the Commerce Clause. As Congress recognized, "decisions about how and when health care is paid for, and when health insurance is purchased" are "economic and financial" and thus "commercial and economic in nature." ACA §§ 1501(a)(2)(A), 10106(a). "Regardless of whether one relies on an insurance policy, one's savings, or the

backstop of free or reduced-cost emergency room services, one has made a choice regarding the method of payment for health care services one expects to receive." *Liberty Univ.*, 2010 WL 4860299, at *15 (quoting *Thomas More*, 720 F. Supp. 2d at 894). "Far from 'inactivity,' by choosing to forgo insurance, plaintiffs are making an economic decision to try to pay for health care services later, out of pocket, rather than now, through the purchase of insurance." *Id*.; *accord Thomas More*, 720 F. Supp. 2d at 893-94. And, as Congress observed, ACA §§ 1501(a)(2)(F), 10106(a), that economic choice is often unavailing and leads to uncompensated care, the costs of which are borne by others. *Liberty Univ.*, 2010 WL 4860299, at *14; *Thomas More*, 720 F. Supp. 2d at 894. These decisions thus have substantial effects on interstate commerce, as it is undisputed that uncompensated care for uninsured individuals cost $43 billion in 2008. ACA §§ 1501(a)(2)(F), 10106(a); *see also* CBO, *Key Issues* at 114.

In light of these authorities, the uninsured – whose conduct, in the aggregate, substantially affects interstate commerce by shifting the cost of their care to other parties – cannot avoid Commerce Clause regulation by characterizing their conduct as a decision to remain outside of interstate channels. The courts, for example, have rejected challenges to the Child Support Recovery Act, 18 U.S.C. § 228(a), which affirmatively requires child support payments in interstate commerce. Conduct that substantially affects interstate commerce is subject to congressional regulation, even if it may be characterized as a failure to act. *See United States v. Ambert*, 561 F.3d 1202, 1210-12 (11th Cir. 2009) (under Commerce and Necessary and Proper Clauses Congress may regulate failure to register as a sex offender). Congress also has the power to require private parties to enter into insurance contracts where the failure to do so would impose costs on other market participants.[2]

[2] Examples of federal mandates that market participants buy insurance abound. *See, e.g.*, 6 U.S.C. § 443(a)(1) (sellers of anti-terrorism technology); 16 U.S.C. § 1441(c)(4) (entities

The Congressional authority to protect interstate commerce, both by prohibiting and by requiring conduct, is also central to modern environmental regulation. Under the Superfund Act, or CERCLA, 42 U.S.C. §§ 9601, *et seq.*, "covered persons," including property owners (whether or not they are engaged in commercial activity), are deemed by the statute to be responsible for environmental damage from the release of hazardous substances. Such persons are subject to monetary liability and may be ordered to engage in remediation efforts. 42 U.S.C. §§ 9606-07. The statute imposes a strict liability regime. A current property owner is subject to CERCLA as a "covered person," and may therefore be subject to a remediation order, without any showing that he caused the contamination. 42 U.S.C. § 9607(a). Even a former property owner may be subject to CERCLA as a "covered person," even if he only permitted hazardous waste to leak on his property "without any active human participation." *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845 (4th Cir. 1992). The property owner's characterization of his own behavior as "active" or "passive" is irrelevant; otherwise, "an owner could insulate himself from liability by virtue of his passivity," defeating the remedial purposes of the Superfund Act. *Id.* Congress's authority to enact the Superfund Act – including its authority to regulate behavior that a creative defendant could characterize as "passivity" – is well-established, because, in the aggregate, releases of hazardous substances have a substantial effect on interstate commerce. *See United States v. Olin Corp.*, 107 F.3d 1506, 1510-11 (11th Cir. 1997).

The minimum coverage provision similarly effectuates Congress's Commerce Clause authority. The ACA regulates a class of individuals who almost certainly have participated, and will participate, in the health care market, who have decided to finance that participation in one,

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operating in national marine sanctuary); 30 U.S.C. § 1257(f) (surface coal mining and reclamation operators); 42 U.S.C. § 2210(a) (operators of nuclear power plants); 42 U.S.C. § 2243(d)(1) (uranium enrichment facility operators); 42 U.S.C. § 2458c(b)(2)(A) (aerospace vehicle developers); 45 U.S.C. § 358(a) (railroad unemployment insurance).

frequently unsuccessful way, and whose economic activities impose substantial costs on other participants in that market. The economic actions of individuals who participate in the health care market without insurance have a substantial effect – an undisputed tens billion of dollars in costs shifted to other market participants annually – on the larger market for health care services. That empowers Congress to regulate.

Plaintiff's reliance on "slippery slope" arguments, *see* Pl.'s Opp'n 30, ignores the factors unique to the health care market that distinguish the exercise of Congress's commerce power in that context. Plaintiff suggests that, if the minimum coverage provision were deemed constitutional, Congress could mandate that "vegetarians purchase and consume meat." *Id.* at 32. Putting aside the obvious questions of whether that hypothetical is plausible or implicates other constitutional provisions, such a policy, unlike the minimum coverage provision, would not merely regulate the method of payment for services that necessarily will be rendered. Moreover, Congress found here that the effects of being uninsured are direct – people who do not have insurance incur billions in health care costs for which they do not pay. Vegetarians will not inevitably consume meat, but individuals will inevitably avail themselves of health care services. Additionally, vegetarians are not entitled to free meat (or vegetables) from vendors without having to pay for those products. The situation with health care services is quite different, because everyone will need them at some point, and no one can predict the extent of that need in advance. Indeed, that is why health insurance exists. And as a society, we are not prepared to have seriously injured or ill people show up at the emergency room and then turn them away when they are uninsured and cannot otherwise pay for their care. Instead, the cost of their care is borne by others, causing significant distortion in the health care market. Congress did not need to "pile inference upon inference" to link the regulated activity and interstate commerce. *Lopez*,

514 U.S. at 567. The limitations here derive from the unique combination of features that characterize the health care market. The near universal participation in that market, the unpredictable risks of incurring enormous medical expenses at unpredictable times, the general requirement that hospitals provide emergency care regardless of ability to pay, and the prevalence and enormous impact of cost shifting, yield an airtight connection between the minimum coverage provision and interstate commerce, a connection replicated in no other market.

III. The Minimum Coverage Provision Is Valid Under the Necessary and Proper Clause

As explained in Defendants' opening brief, the minimum coverage provision is also a valid exercise of Congress's authority under the Necessary and Proper Clause. Defs.' Mot. 22-24. Indeed, Congress made express findings that the minimum coverage provision is in various ways "essential to creating [the] effective health insurance markets" that the ACA's insurance market reforms are intended to achieve. ACA §§ 1501(a)(2)(H)-(J), 10106(a).

In response, Plaintiff offers a single paragraph that argues, in sum, that the Necessary and Proper Clause adds nothing to Congress's authority. Pl.'s Opp'n 31. But the Clause is an enlargement of, rather than a limitation on, the other powers conferred on Congress under Article I: "[T]he Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'"[3] *United States v. Comstock*,

[3] The eminent domain cases illustrate why Plaintiff's proposed limitation is incompatible with the jurisprudence regarding the Necessary and Proper Clause. Eminent domain is not itself an enumerated power. *E.g., Kelo v. City of New London*, 545 U.S. 469, 511 (2005) (Thomas, J., dissenting). It is, however, a power that pertains to the United States as sovereign and is thus one of the means or "agencies for exerting [the enumerated powers] which are appropriate or necessary, and which are not forbidden by the law of its being." *Kohl v. United States*, 91 U.S. 367, 372 (1875). And Congress can exercise the power of eminent domain where necessary and

130 S. Ct. 1949, 1956 (2010) (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413, 418 (1819)). So long as Congress does not violate affirmative constitutional limitations, such as the Fourth and Fifth Amendments, the Clause affords the power to employ any "means that is rationally related to the implementation of a constitutionally enumerated power." *Id.* at 1956-57 (citing *Sabri v. United States*, 541 U.S. 600, 605 (2004)).

The ACA's reforms are intended to increase the availability and affordability of health care and health insurance by, for example, preventing insurance companies from charging more or denying coverage based on pre-existing medical conditions. The law also protects consumers from unfair insurance industry practices, for example, by prohibiting insurance companies from canceling coverage absent fraud or intentional misrepresentation of material fact. *See* ACA § 1001. These goals are indisputably within Congress's commerce power, and Plaintiff does not contend otherwise. Under the Necessary and Proper Clause, the question is therefore whether the minimum coverage provision is "reasonably adapted" to further these legitimate ends. *Sabri*, 541 U.S. at 605; *M'Culloch*, 17 U.S. (4 Wheat.) at 356. As discussed in Defendants' opening brief, Congress deemed the minimum coverage provision not only reasonably adapted but "essential" to achieving the key reforms that it adopted in the ACA because without the provision, the limitations that other parts of the Act place on insurance companies would create new incentives for healthy individuals to forgo insurance coverage until after they require health care, knowing that, because of those other reforms, they could not be denied coverage or charged higher rates once their health care needs arise. Def.'s Mot. 22-24.

As set forth in Defendants' opening brief, Congress in the ACA pursued the same goals – health care affordability and availability – that it had previously pursued for decades through

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proper to effectuate an enumerated power, without regard to whether the property owner is engaged in economic activity.

legislation such as Medicare, Medicaid, ERISA, COBRA, HIPAA, and numerous other measures. *See id.* at 20 n.8. Congress had "sound reasons" for doing so, *Comstock*, 130 S. Ct. at 1965, and for including the minimum coverage provision as an essential part of its insurance market reforms. Thus, the provision is reasonably adapted in furtherance of a legitimate legislative end, and is therefore valid under the Necessary and Proper Clause.

IV. The Minimum Coverage Provision Is Independently Justified Under the General Welfare Clause

In addition to its authority under the Commerce and Necessary and Proper Clauses, Congress's passage of the minimum coverage provision is independently justified by its authority under the General Welfare Clause. *See* Def.'s Mot. 29-33. Plaintiff's reasons for why the penalty associated with the minimum coverage provision is not a tax are each wrong as a matter of law.

First, Plaintiff asserts that the minimum coverage provision cannot be considered a "tax" because it is referred to as a "penalty" in the ACA. Pl.'s Opp'n 22-24. This argument is plainly without merit, as the Supreme Court has recognized that, "in passing on the constitutionality of a tax law [the Court is] concerned *only* with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941).[4] Indeed, as Plaintiff himself recognizes at page 33 of his brief, whether a statutory provision is a tax is not determined by the label assigned to the provision.

Second, Plaintiff notes that Congress "expressly relied on its Commerce Clause power, and not its taxing power," as authority for the minimum coverage provision. Pl.'s Opp'n 22.

[4] In fact, before the passage of the ACA, members of Congress repeatedly and explicitly defended the minimum coverage provision as an exercise of the taxing power as well as an exercise of the commerce power. *See, e.g.*, 156 Cong. Rec. H1854, H1882 (daily ed. Mar. 21, 2010) (Rep. Miller); 156 Cong. Rec. H1824, H1826 (daily ed. Mar. 21, 2010) (Rep. Slaughter); 155 Cong. Rec. S13,751, S13,753 (daily ed. Dec. 22, 2009) (Sen. Leahy); 155 Cong. Rec. S13,558, S13,581-82 (daily ed. Dec. 20, 2009) (Sen. Baucus).

Plaintiff's assertion rests on a flawed premise, that Congress had an obligation to invoke particular authority in enacting the provision, because "[t]he question of the 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). Indeed, it is not surprising that Congress would make findings relating to the Commerce Clause, but not the General Welfare Clause, in enacting the minimum coverage provision. The effect of a statute on interstate commerce is partly an empirical determination, as to which legislative findings may be helpful. *See Raich*, 545 U.S. at 21. Whether the statute furthers the general welfare, by contrast, is a policy judgment committed to Congress, as to which findings, particularly in this instance, are unnecessary.

Third, Plaintiff contends that, in establishing how the minimum coverage provision would be enforced, Congress did not rely on "traditional tax enforcement methods." Pl.'s Opp'n 22-25. But contrary to Plaintiff's assertion, Congress repeatedly treated the minimum coverage provision as a tax. It is in the Internal Revenue Code.[5] Its penalty operates as an addition to an individual's income tax liability on his annual tax return, which is calculated by reference to income. It is enforced by the Internal Revenue Service. And it will raise a projected $4 billion annually for general revenues when it is fully in effect. *See* Letter from Douglas W. Elmendorf, Director, CBO, to the Hon. Nancy Pelosi, Speaker, U.S. House of Representatives, tbl. 4 at 2 (Mar. 20, 2010).

Plaintiff next contends that the minimum coverage provision is regulatory in nature and that it thus falls outside Congress's authority under the General Welfare Clause. Pl.'s Opp'n 33-

[5] As noted by the bipartisan Joint Committee on Taxation, the penalty under the minimum coverage provision is "assessed through the Code and accounted for as an additional amount of Federal tax owed," JCX-18-10, at 33, pursuant to "IRS authority to assess and collect taxes . . . generally provided in subtitle F, 'Procedure and Administration' in the Code." *Id.* at 33 n.68.

34. Relying on *Child Labor Tax Case*, 259 U.S. 20 (1922) and *United States v. Constantine*, 296 U.S. 287 (1935), Plaintiff would have this Court return to pre-New Deal case law which turned on whether a tax was regulatory or revenue-raising in nature. But the Supreme Court has long since "abandoned" its earlier "distinctions between regulatory and revenue-raising taxes" that it used to invalidate child labor laws. *Bob Jones Univ.*, 416 U.S. at 741 n.12; *see, e.g., City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 375 (1974) ("[E]ven if the revenue collected had been insubstantial, or the revenue purpose only secondary, we would not necessarily treat this exaction as anything but a tax.") (internal citations omitted); *Minor v. United States*, 396 U.S. 87, 98 n.13 (1969) ("A statute does not cease to be a valid tax measure because it deters the activity taxed, because the revenue obtained is negligible, or because the activity is otherwise illegal."); *United States v. Sanchez*, 340 U.S. 42, 44 (1950) ("It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed.").

Even if the earlier cases cited by Plaintiff had any lingering validity, they would not bring the constitutionality of the minimum coverage provision into question. At most, they suggested that a court may invalidate punitive or coercive penalties, and even then, only those penalties that coerce the taxpayer into a separate administrative scheme with detailed enforcement mechanisms not allowable under the Commerce Clause. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 289 (1936); *Hill v. Wallace*, 259 U.S. 44, 68-69 (1922); *Child Labor Tax Case*, 259 U.S. at 38. Here, the minimum coverage provision is neither punitive nor coercive; the maximum penalty is no greater than the cost of obtaining insurance. Moreover, the penalty under the minimum coverage provision does not operate coercively to force individuals into a separate regulatory regime. The regulatory effect is from the operation of the provision itself.

Finally, Plaintiff argues that the General Welfare Clause cannot authorize the minimum coverage provision because the provision is outside the scope of Congress's Commerce Clause authority. Pl.'s Opp'n 34. This argument, under which the General Welfare Clause adds nothing to Congress's power, is wrong. Congress's power under the General Welfare Clause is "extensive." *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1867); *see also Steward Mach. Co. v. Davis*, 301 U.S. 548, 581 (1937); *United States v. Doremus*, 249 U.S. 86, 93 (1919); *McCray v. United States*, 195 U.S. 27, 56-59 (1904). And Congress may use its authority under this Clause even for purposes beyond its powers under the other provisions of Article I, including the Commerce Clause. *See Sanchez*, 340 U.S. at 44 ("Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate."); *United States v. Butler*, 297 U.S. 1, 66 (1936). Plaintiff's contention that the General Welfare Clause does not authorize Congress to act in ways not separately authorized by the Commerce Clause is plainly wrong. *See Knowlton v. Moore*, 178 U.S. 41, 59-60 (1900) (holding that Congress can tax inheritances, even if it cannot regulate them under the Commerce Clause). To be sure, Congress must use its power under Article I, Section 8, Clause 1 to "provide for the . . . general Welfare." But as the Supreme Court held 75 years ago with regard to the Social Security Act, decisions of how best to provide for the general welfare are for the representative branches, not for the courts. *Helvering v. Davis*, 301 U.S. 619, 640, 645 & n.10 (1937); *see South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

CONCLUSION

For the reasons stated herein, and in Defendants' motion, the Court should dismiss Plaintiff's complaint.

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