

Case No. 11-5047

**THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SUSAN SEVEN-SKY, *ET AL.*,

Plaintiffs-Appellants,

v.

ERIC H. HOLDER, JR., *ET AL.*,

Defendants-Appellees.

On Appeal from the United States District Court
for District of Columbia
Honorable Gladys Kessler
Civil Case No. 10-950

BRIEF OF STEVEN J. WILLIS, URGING REVERSAL

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Steven J. Willis affirms that neither he nor anyone associated with him is or controls a subsidiary or affiliate of a publicly owned corporation. To the best of his knowledge, no public corporation not a party to this action has a financial interest in the outcome.

Steven J. Willis is a private individual and has himself no financial interest in the outcome of this matter other than in his capacity as a taxpayer.

TABLE OF CONTENTS

Table of Authorities. iii

Summary of Argument. 1

Argument. 3

I. THE INDIVIDUAL MANDATE IS NOT AUTHORIZED BY THE COMMERCE CLAUSE. 3

II. THE INDIVIDUAL MANDATE IS NOT AUTHORIZED BY THE TAXING POWER. . . 4

III. THE INDIVIDUAL PENALTY IS CONTRARY TO THE NECESSARY AND PROPER
CLAUSE. 9

IV. THE INDIVIDUAL PENALTY IS CONTRARY TO THE LIMITED TAXING POWER. 16

A. The Constitution Does Not Allow a Sixth Type of Tax. 16

B. The Penalty is Neither a Duty Nor an Impost. 17

C. The Penalty is Not an Excise. 17

D. The Penalty is Not an Income Tax Under the 16th Amendment. . . 19

a. The Penalty Does Not Have a Proper Trigger. 19

b. The Penalty Does Not Tax Income. 20

c. The Wealth Allegedly Taxed Has Not Been Derived. 21

d. The Alleged Wealth Did Not Derive “From” Anywhere. . . 22

e. The “Source” of the Alleged Wealth is the Individual’s Own
Personal Actions, Which is Insufficient. 22

E. The Penalty is Not an Apportioned Direct Tax or Capitation. . . . 23

V. THE PENALTY, IF IT IS NOT A TAX, VIOLATES PROCEDURAL DUE PROCESS. 24

TABLE OF AUTHORITIES

Federal Cases

<u>Bob Jones Univ. v. Simon</u> , 460 U.S. 370 (1983).	5
* <u>Commissioner v. Glenshaw Glass Co.</u> , 348 U.S. 426 (1955).	8, 14, 19, 23
* <u>Commissioner v. Indianapolis Power and Light</u> , 493 U.S. 203 (1990).	21
<u>Commissioner v. Shapiro</u> , 424 U.S. 614 (1976).	28
* <u>Eisner v. Macomber</u> , 252 U.S. 189 (1920).	19, 21
<u>Florida v. U.S. Dep’t Health & Human Servs.</u> , 716 F. Supp. 2d 1120 (N.D. Fla. 2011).	4, 26
<u>Hampton & Co. v. United States</u> , 276 U.S. 394 (1928).	4, 5
<u>Helvering v. Independent Life Insurance Company</u> , 292 U.S. 371 (1934).	22
<u>Hylton v. United States</u> , 3 U.S. 1 (3 Dall.) 171, 176 (1796) (Patterson, J.).	18
<u>Kahn v. United States</u> , 753 F.2d 1208 (3d Cir. 1985).	29
<u>Liberty Univ. v. Geithner</u> , U.S. Dist. LEXIS 125922 (W. D. Va. 2010).	26
<u>Magnano v. Hamilton</u> , 292 U.S. 40 (1934).	5, 25, 27
Authorities upon which we chiefly rely are marked with asterisks.	

Mathews v. Eldridge,
424 U.S. 319 (1976). 27, 28

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819). 11, 12, 13

Mead v. Holder,
Civil Action No. 10-950 (GK) (Memorandum Opinion Filed 2/21/2011)
. 7, 10, 17, 20, 26

*Murphy v. Commissioner,
493 F.3d 170 (D.C. Cir. 2007). 18, 19, 23, 24

Nicol v. Ames,
173 U.S. 509 (1899). 12

Sonzinsky v. United States,
300 U.S. 506 (1937). 4, 5

Thomas More Law Center v. Obama,
720 F. Supp. 2d 882 (E. D. Mich. 2010) 26

United States. v. Butler,
297 U.S. 1(1936). 13, 16

United States v. Comstock,
130 S.Ct. 1949 (2010). 9, 11, 12, 13

United States v. Sanchez,
340 U.S. 42 (1950). 5

Virginia ex rel. Cuccinelli v. Sebelius,
728 F. Supp. 2d 768 (E.D. Va. 2010). 4, 26

Federal Statutes

26 U.S.C. §61. 7, 21

26 U.S.C. §509. 8

26 U.S.C. §3101.	6
26 U.S.C. §4071.	6
26 U.S.C. §4943.	8, 18
26 U.S.C. §4945.	14
*26 U.S.C. §5000A	1, 2, 3, 5, 6, 8, 18, 19, 24, 25, 26, 27, 28
26 U.S.C. §6212.	25
26 U.S.C. §6303.	27
26 U.S.C. §6320.	27
26 U.S.C. §6402.	26
26 U.S.C. §6511.	25
26 U.S.C. §6601.	27
26 U.S.C. §6671.	24
26 U.S.C. §7806.	17
31 U.S.C. §3721.	26
42 U.S.C. §401.	6
Pub. L. No. 111-148, 124 Stat. 119 (2010).	vii
*U.S. Const. amend. V.	10, 25, 28
*U.S. Const. amend. XVI.	2, 7, 11, 16, 19, 21, 22
*U.S. Const., art. I, §2, cl. 3.	1, 5, 11, 23
*U.S. Const., art. I, §8, cl. 1.	1, 4, 11, 13, 14

*U.S. Const., art. I, §8, cl. 3. 5, 11

*U.S. Const., art. I, §8, cl. 18. 9

*U.S. Const., art. I, §9, cl. 4. 1, 5, 11, 14, 23

Legislative Materials

JCT, “Technical Explanation of the Revenue Provisions of the ‘Reconciliation Act of 2010,’ as Amended, in Combination with the ‘Patient Protection and Affordable Care Act,’” 33 (Mar. 21, 2010), Doc 2010-6147, 2010 TNT 55-23. 15

Miscellaneous

James A. Madison *VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES*. THE PAPERS OF JAMES MADISON. (1787) (Ed. by William T. Hutchinson, *et al.* University of Chicago Press 1977). 11

Kleinbard, “*Constitutional Kreplach*,” 128 TAX NOTES 755 (Aug. 16, 2010). . . 19

Letter, *George Washington to John Jay* (Aug. 1, 1786). 12

Letter, *Thomas Jefferson to Edward Carrington* (Aug. 4, 1787). 12

Letter, *Alexander Hamilton to James Duane* (Sept. 13, 1780). 12

Mellor, “*The Individual Mandate Tax: Healthcare’s Toothless Watchdog*,” 130 TAX NOTES 105 (Jan. 3, 2011). 25, 26, 27

Willis & Chung, “*Of Constitutional Decapitation and Healthcare*,” 128 TAX NOTES 169 (July 12, 2010). 18, 19, 22, 25

Willis & Chung, “*Oy Yes, the Healthcare Penalty is Unconstitutional*,” 129 TAX NOTES 725 (Nov. 8, 2010). 18, 19, 22

Willis & Chung, “*Credits vs. Taxes: the Constitutional Effects on the Health Care Reform Debate*,” Washington Legal Foundation Critical Legal Studies WORKING PAPER SERIES, No. 176 (May 2011). 13, 22

INTERESTS OF *AMICUS CURIAE*¹

The *amicus* is a Professor of Law who believes strongly that Section 1501 of the Patient Protection and Affordable Care Act, §1501(b), 10106, Pub. L. No. 111-148, 124 Stat. 119 (2010) [PPACA], exceeds the bounds of Congress's constitutional authority by seeking to regulate individual *inactivity*—the decision *not* to purchase health insurance—which far exceeds the limited enumerated powers granted the federal government by Article I of the Constitution. In addition, the *amicus* believes strongly that subsection 5000A(b) of the Internal Revenue Code of 1986 violates the procedural due process provisions of the Fifth Amendment to the United States Constitution.

¹ Pursuant to Federal Rule of Appellate Procedure 29(c), *amicus* states that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than *amicus*, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The District Court's dismissal of this action was in error and must be reversed. Incorporated into Internal Revenue Code (IRC) §5000A, PPACA §1501 does two separate things:

1. Mandates the purchase of health insurance by individuals.
2. Imposes a "penalty" upon individuals who violate the Mandate.

The District Court's order, which upholds both the mandate and penalty under the Commerce Clause, amounts to an unlimited extension of federal power to regulate inactivity. In addition, it approves a virtually unlimited federal power to exact money from individuals, ignoring the most important limited enumerated power: the power to tax. Article I Sections 2, 8 and 9 sharply limit that power, as does the Sixteenth Amendment.

This Court should find the Mandate unconstitutional under the Commerce Clause because it forces individuals to engage in commerce, something heretofore never approved. Even if this Court were to approve the Mandate, however, it should find the penalty unconstitutional as exceeding Congress's limited power to exact money from individuals. The Commerce Clause does not itself provide for enforcement; instead, Congress must resort to the Necessary and Proper Clause. For an enforcement provision to be constitutional, it must be *consistent with* the remainder of the Constitution and must not violate other provisions or prohibitions

– particularly the limited Taxing Power (the primary motivation for the Constitution) as well as the procedural Fifth Amendment due process limitations.

The §5000A (b) Penalty is not a duty, impost, or excise. It is not a tax on derived income permitted by the 16th Amendment. If it is a tax it is an un-apportioned Direct Tax on individuals. It is thus unconstitutional. In the alternative, if the Penalty is not a tax, it grants the Treasury Secretary authority to assess and to collect monies without any mechanism for prior administrative hearings or judicial review. It thus violates procedural due process.

Thus the government has *two* heavy burdens. *First*, it must justify the Mandate under the Commerce Clause because the Taxing Power authorizes no such Mandates. *Second*, it must justify the Penalty as *consistent with* the Taxing Power: if the Penalty is *not consistent* with the Taxing Power, it fails the procedural Due Process requirements of the Fifth Amendment. Because the government cannot carry either burden, let alone both of them, this Court must find IRC §5000A unconstitutional.

ARGUMENT

This court faces five issues:

1. Whether the Mandate violates the Commerce Clause.
2. Whether the Mandate violates the Taxing Power
3. Whether the Penalty violates the Necessary and Proper Clause.
4. Whether the Penalty, if it is a tax, violates the Taxing Power.
5. Whether the Penalty, if it is *not* a tax, violates Due Process.

To consider these issues, the Court should separate the Mandate from the Penalty. IRC §5000A includes both aspects of the law; however, the subsections implicate different constitutional provisions. Subsection 5000A(a) imposes the Mandate without regard to income or activity. It is not itself a tax. Subsection 5000A(b) imposes the Penalty on persons who violate the Mandate. It is not limited to persons who are otherwise wage earners or producers of income; instead, it applies – with exceptions – to all persons who exist in the natural state of being uninsured.

I. THE INDIVIDUAL MANDATE IS NOT AUTHORIZED BY THE COMMERCE CLAUSE.

Others have adequately explained how the Mandate violates the Commerce Clause. This Brief will not repeat that issue other than to state the Court should strike the Mandate, if not the entire statute, on those grounds: the Mandate unconstitutionally regulates individual inactivity, contrary to its limited power to regulate actual commerce. *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d

59, (E.D. Va. 2010; *Florida v. U.S. Dep't Health & Human Servs.*, 716 F. Supp. 2d 1120 (N. D. Fla. 2011)).

II. THE INDIVIDUAL MANDATE IS NOT AUTHORIZED BY THE TAXING POWER

The District Court found the Mandate not to be an exercise of Congress' taxing power; nevertheless, the government has consistently argued otherwise, particularly in relation to the penalty. Critically, this Court should – for purposes of constitutional analysis – separate the Mandate from the Penalty in analyzing their separate constitutional bases. Congress has various powers to *regulate behavior*, such as the Commerce Clause. Separately, Congress has various powers to *enforce regulations*, e.g., taxing, spending, limited police power, moral suasion, raising and supporting armies, and eminent domain. Even if a regulation is constitutional, its enforcement may not be. The opposite is also true: an enforcement method may be constitutional, while the underlying regulation is not. Hence, the Court must examine them separately.

Article I, §8, Clause 1 grants Congress the power to levy and collect taxes. Uses of the taxing power may have regulatory aims, so long as they also raise revenue. *Sonzinsky v. United States*, 300 U.S. 506, 513-514 (1937); *Hampton & Co. v. United States*, 276 U.S. 394, 413_(1928). No court, however, has found the initial prong of a Taxing Power use to be regulatory. Indeed, for all “regulatory” taxes, the tax effectively precedes the regulatory effect, unlike the Mandate of

§5000A(a). More precisely, all regulatory taxes apply to some activity or transaction of the taxpayer – they do not first mandate the activity or transaction. Consistent with the Article I, section 8 and section 9 limitations, all previously existing¹ “regulatory taxes” tax the pre-existing activity. In so doing, they may discourage, encourage, or “regulate” aspects of the activity or transaction involved. They may even discourage the taxpayer from entering the activity. But critically, the activity or transaction comes first; then the tax applies, and only then does the regulatory effect ensue; or, the taxpayer is dissuaded by the potential tax, does not engage in the activity and no tax applies. *Cf.*, *U.S. v. Sanchez*, 340 U.S. 42 (1950) (taxing the possession of marihuana); *Sonzinsky, supra* (taxing firearms dealing); *Hampton, supra* (taxing various products importation); *Magnano v. Hamilton*, 292 U.S. 40 (1934) (taxing oleomargarine differently from butter); *Bob Jones Univ. v. Simon*, 460 U.S. 370 (1983) (taxing racially discriminatory schools). Section 5000A differs dramatically. It first imposes the Mandate and then imposes a penalty on the failure to comply. No other regulatory use of the Taxing Power operates in this manner.

For example, IRC §4071 imposes an excise on tires, presumably to raise revenue and also to regulate the purchase of tires. Rationally, tire users should pay

¹ Congress may exact a direct tax, which could have regulatory effects, but which would tax an individual’s mere existence or possession of property such as land. Such a tax need not involve a pre-existing activity. It would, however, need to be apportioned.

a portion of the cost of highways or other government services. The tax applies only if they engage in the *activity* of purchasing tires (it applies to the sale rather than to the purchase, but as is typical of excises, it is indirect and passed-on to the consumer). Because of the tax's regulatory effect, ultimate users may purchase particular tires or some other product taxed differently; or, they may decide not to purchase tires, rely on public transportation, and thus escape the tax. Similarly, §3101 imposes a tax on wages; in return, it implicitly promises the taxpayer participation in the Social Security program through 42 U.S.C. §401. The section raises revenue, but also regulates the underlying *activity* of how wage earners provide for retirement or disability – specifically by providing the retirement or disability insurance. The tax does not mandate the earning of wages. Some taxpayers may be encouraged to work more because of the related benefits. Others may be discouraged from working for wages because of the tax. In any event, the underlying activity/choice occurs (which may involve choosing not to work or choosing not to purchase tires), the tax applies (or not) and the regulatory effect ensues.

The §5000A(b) penalty taxes – or penalizes – no event, transaction, property use, privilege exercise, or income derived; instead, it exacts a penalty or tax without any of those traditional predicates. Indeed, the Mandate imposes the predicate. That is unlike all regulatory taxes, which apply to taxpayers' choices *to*

do something as opposed to not to do something. The District Court below specifically found the decision *not to purchase* health insurance an *activity* for purposes of the commerce clause. *Mead v. Holder* (Opinion Filed 2/21/2011) [MEMO OPINION] at 43. The Court did not, however, discuss whether the *mental decision* not to purchase insurance and the “arrangement of one’s affairs” as a consequence constitutes sufficient activity for the imposition of a tax. Indeed nothing in the power to lay and collect taxes authorizes the mandate of anything other than the maintenance of records, preparation of forms and transmission of funds.

Congress might have imposed an excise on persons who self-pay for medical services. That would be a constitutional excise so long as it was uniform. Or, Congress could have taxed persons who fail to pay for medical services. Such a tax could be styled as a uniform excise on the *activity* of receiving health care without paying for it; or, it could be a Sixteenth Amendment income tax on the accession to wealth created by the passing-on of costs to others: obtaining services without paying. But very limited authority exists for Congress to tax something which has neither occurred nor accrued, which involves no “undeniable accession to wealth clearly realized”² and which involves no event, transaction, property use, or privilege exercise other than the taxpayer simply being alive. That limited

² The Supreme Court’s 16th Amendment (and §61) test of income. *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431, 433 n. 11 (1955).

authority is the power to exact a Direct or Capitation tax – a tax which must be apportioned – a constitutional requirement failed by §5000A.

Most importantly, no authority exists under the Taxing Power to mandate activity by an individual. Some tax provisions appear – at first blush – to tax specific failures to act. All, however, are distinguishable. Section 4943 imposes a tax on Private Foundations which fail to distribute income within specified parameters. The provision, however, is a valid excise on the activity and privilege of being a Private Foundation, a disfavored form of charity – hence, the harsh regulatory effect. It does not apply to individuals (humans); instead, it applies to entities which have affirmatively chosen to exist as Private Foundations under §509, as opposed to public charities. Thus, it is *not* a failure-to-act-tax; instead, it is a tax on the affirmative accumulation of income in a chosen format. An individual's lack of insurance – whether by *choice* or happenstance – is different in that it involves no affirmative action, no specific accumulation, and no overt election (*e.g.*, private foundation status rather than public charity status). Hence, if the Court were to find the Mandate unconstitutional under the Commerce Clause, it could not appropriately, in the alternative, find it constitutional under the Taxing Power, which does not permit the Mandate of activity.

III. THE INDIVIDUAL PENALTY IS CONTRARY TO THE NECESSARY AND PROPER CLAUSE.

Even if this Court were to find the Mandate consistent with the Commerce Clause, it must nevertheless strike the Penalty as unconstitutional under the Necessary and Proper Clause. U.S. Constitution Article I, Section 8, Clause 18. The Commerce Clause provides no enforcement mechanism; instead, Congress must use the Necessary and Proper Clause to enforce commercial regulations. Hence, enforcement measures must be both necessary and proper.

To be proper, an enforcement provision must be *consistent* with the remainder of the Constitution; otherwise, the power to do what is “proper” to enforce one enumerated power could eviscerate the limited nature of other specifically enumerated powers granted Congress. *See, United States v. Comstock*, 130 S.Ct. 1949, 1956 (2010) (“Let the end be legitimate, let it be within *the scope of the constitution*, and all means which are *appropriate*, which are plainly adapted to that end, *which are not prohibited*, but ***consist with*** the *letter and spirit* of the constitution, are constitutional.”)(emphasis added); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). Possible enforcement mechanisms are many. For example, Congress may exercise limited police powers to criminalize regulated commercial behaviors, to provide for incarceration, for the mental health of prisoners, and for civil commitment in fulfillment of those powers. The executive may seize property for public use, consistent with the Fifth Amendment just

compensation obligation. Congress, through the executive, may use militia powers to force or to impede actions violative of commercial regulations. Congress – generally through the executive – may enter commerce by selling a product: specifically, it may do so with postage and impliedly it may do so with other products and services, such as those involving museums, parks, or flood insurance. Or, as is common, Congress may use its Spending Power to entice commercial behaviors. Critically, Congress chose *none* of those enforcement mechanisms; instead, Congress chose to penalize individuals who violate its Mandate. Hence, whether some other form of Mandate enforcement mechanism would be “proper” is irrelevant. Even if this Court approves the Mandate, this Court must decide the limits of Congress’ power to command individuals to pay money.

Much has been written regarding whether the penalty is regulatory or whether it is a tax. The District Court found the penalty *not* to be a tax. MEMO OPINION at 59. The Taxing Power, however, is the *only* enumerated power to exact money from individuals (putting aside the “proper” powers to exact criminal fines or to charge a price in the actual conduct of commerce by the government, issues not involved in this matter because Congress *expressly* chose for them not to be involved). Even if the Penalty is not a tax, it must be consistent with and within the “letter and spirit” of the Taxing Power limitations and *prohibitions*; otherwise, it would not be “*appropriate*” or proper, as required as early as *McCullough* in

1819 and as recently as *Comstock* in 2010. Hence, the Mandate must satisfy the Commerce Clause and the Penalty must satisfy the Commerce Clause, the Necessary and Proper Clause, the limited Taxing Power, as well as the Fifth Amendment procedural due process requirements.

Of all the Constitutional provisions, the Taxing Power was the primary goal of the Convention: without money, the weak government under the Articles of Confederation could not provide for defense, regulate commerce or do much of anything. The Constitution mentions the limited Taxing Power four times (Article I, §2, Clause 3; Article I, §8, Clause 1; Article I, §9, Clause 4; and the Sixteenth Amendment), while it mentions the regulation of Commerce merely once (Article I, §8, Clause 3). Indeed the Taxing Power limitations bracket the Commerce Clause.

Our nation's founders were particularly concerned about taxes. That was a primary prompt for the Revolution: unfair taxes. Central to the Constitutional debate was how to treat exactions of money from the people. James Madison listed eleven Deficiencies of the Confederation. James A. Madison *VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES, THE PAPERS OF JAMES MADISON* (1787) (Ed. by William T. Hutchinson, *et al.* University of Chicago Press 1977). First on his list was the lack of a Taxing Power:

1. Failure of the States to comply with the Constitutional requisitions.

This evil has been so fully experienced both during the war and since the peace, results so naturally from the number and independent authority of the States and has been so uniformly exemplified in every similar Confederacy, that it may be considered as not less radically and permanently inherent in, than it is fatal to the object of, the present System.

Similarly, Washington, *Letter, George Washington to John Jay (Aug. 1, 1786)*, Jefferson, *Letter, Thomas Jefferson to Edward Carrington (Aug. 4, 1787)*, and Hamilton, *Letter, Alexander Hamilton to James Duane (Sept. 13, 1780)*, each described the Taxing Power as either central to the Constitution or as a defect in the Confederation. The Supreme Court poetically described the Taxing Power as the most essential: “The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.” *Nicol v. Ames*, 173 U.S. 509, 515 (1899). Because the power to tax is the power to destroy, the Constitution sharply limits that power. Congress cannot legitimately, consistent with *Comstock* and *McCullough*, evade those limitations by asserting the power to exact money from individuals under an un-enumerated power when the sole enumerated power for exacting money is so clearly limited by uniformity, apportionment, and derived requirements; hence, to be constitutional the Penalty must be consistent with the Taxing Power, *even if* it does not directly arise from that power. *Comstock, supra*; *McCullough, supra* (Although the famous *McCullough* language quoted in

Comstock used the prepositional phrase “consist with the letter and spirit of the constitution,” (emphasis added) the Court clearly also used the term “consistently” at 431, as did counsel for each side, 1819 U.S. LEXIS 320, at 16, 31, 56, 56, 84, and 115 (interchanging consistent and consistently and once “inconsistently”).

Under Article I, §8, Congress can levy and collect taxes for the general welfare; however, the “general welfare” limitation is the least important of the Taxing Power limitations. Indeed, the “general welfare” language primarily exists to limit what Congress may do with monies raised: it may use them to “pay the Debts and provide for the common Defense and general Welfare of the United States” Grammatically, the phrase does not specifically limit the Taxing Power; instead, it creates and limits the Spending Power. *See, Willis & Chung, Credits vs. Taxes: The Constitutional Effects on The Health Care Reform Debate, WORKING PAPER* (Washington Legal Foundation), No. 176 (May 2011), at 4-6 [WILLIS & CHUNG III]. The Supreme Court consistently explained: “The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare.” *United States v. Butler*, 297 U.S. 1, 11 (1936).

Article I, §8, Clause 1 creates and limits the Taxing Power. Article I, §9, Clause 4 further limits the power, and the Sixteenth Amendment expands the power with further limitations. Per these provisions, taxes must be Direct or

Indirect. Indirect taxes must be uniform. Article I, §8, Clause 1. Direct taxes must be apportioned. Article I, §9, Clause 4. Congress may levy excises, duties, imposts, direct taxes (including Capitations) and income taxes on “gross income” “derived” “from” a “source,” the last four limitations appearing in the Sixteenth Amendment.³ These many restrictions are not trifles. Indeed, they are powerful limitations on the Taxing Power, as recognized by the D.C. Circuit in *Murphy*, *supra* at 180-85.

If Congress can evade those limitations by imposing non-criminal “penalties” exacting money directly from individuals, those essential limitations lose all meaning. Any exaction now considered a “tax” could be re-labeled a commercial regulation enforcement penalty. Other than a capitation or other Direct Tax, almost all taxes involve commerce: income, transfers (such as gifts and descent), imports, the use of property, or the conduct of business. The few exceptions involve questionable issues extraneous to this case. *E.g.*, IRC §4945 (The section imposes an excise on private foundations’ political and lobbying *activities*. While much lobbying and political activity involves commerce, arguably some has no commercial impact. Whether this and similar provisions implicate the

³ “[W]e cannot but ascribe content to the catchall provision of § 22 (a), ‘gains or profits and income derived from any source whatever.’ The importance of that phrase has been too frequently recognized since its first appearance in the Revenue Act of 1913 to say now that it adds nothing to the meaning of ‘gross income.’” *Glenshaw Glass*, *supra* at 430 (footnote omitted).

First Amendment is a powerful issue, not relevant here). If a non-criminal “penalty” were exempt from the alternative requirements of “uniformity,” “apportionment,” or “gross income derived from a source,” those important words would essentially be repealed. That cannot be the proper result for this important case. How the Constitution limits criminal penalties is irrelevant to this matter, as the Act penalty is non-criminal. *See*, JCT, “Technical Explanation of the Revenue Provisions of the ‘Reconciliation Act of 2010,’ as Amended, in Combination with the ‘Patient Protection and Affordable Care Act,’” 33 (Mar. 21, 2010), *Doc 2010-6147, 2010 TNT 55-23*.

Regardless whether the Court denominates the enforcement Penalty a “penalty” or a “tax,” it must subject it to the powerful limitations imposed upon the collection of monies from people, in addition to whatever limitations exist under the Commerce Clause. Anything else would not be proper. As the Court explained in *Butler*, “The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible.” *Butler, supra*, at 18.

“*Necessary and Proper*” must not eviscerate other important Constitutional limitations; indeed, it must not eviscerate the most important Constitutional

limitations – those on Congress’ power to exact money from individuals. As explained below, if this Court finds the “penalty” is a tax, it must find it unconstitutional. Similarly, if this Court finds the “penalty” is merely a “penalty,” it should nevertheless find it subject to the Taxing Power limitations. If, instead, the Court finds the penalty not to be a tax and also not subject to the Taxing Power limitations, it must then find it subject to the procedural due process limitations, which it fails. In any event, it must find the penalty unconstitutional.

IV. THE INDIVIDUAL PENALTY IS CONTRARY TO THE LIMITED TAXING POWER.

To satisfy the Taxing Power, the penalty must fit one of five groups:

1. Duty
2. Impost
3. Excise
4. Direct Tax (including a Capitation)
5. Income Tax under the 16th Amendment

A. The Constitution Does Not Allow a Sixth Type of Tax

Although some have occasionally argued another form of money exaction power exists, no one has ever discovered it, let alone explained it. No Court has recognized it. This would be a strange case to find such a power never before discovered in 225 years

B. The Penalty is Neither a Duty Nor an Impost

No one claims the enforcement penalty is either a duty or an impost. The issue is appropriately not before the Court.

C. The Penalty is Not an Excise

The penalty is not an excise, albeit listed within the excise provisions of the Internal Revenue Code. As the Code itself provides, the placement of a provision within Title 26 has no independent significance. IRC §7806. Excises apply to:

1. Property Use.
2. Services
3. Privilege Exercises.
4. Entity Behavior.

Never has a United States excise applied to an individual's *inactivity*. Much has been argued regarding whether Congress' power to regulate commerce can reach *inactivity*. The District Court partially finessed this issue by labeling the matter being regulated as involving "economic decisions" and thereby partially avoided the activity versus inactivity issue. MEMO OPINION at 38. While that is questionable Commerce Clause analysis, the denomination is irrelevant for analyzing the penalty under the Necessary and Proper Clause, inter-twined with the limited Taxing Power. Whatever the reach of the Commerce Clause to regulate *inactivity* or *mere decisions*, no Court or commentator has ever argued the power

to impose an excise reaches individuals' mere economic decisions, let alone inaction. Excises – particularly those on individuals – apply to actions: services, property use, and privilege exercises. If this Court were to define an individual's inactivity as the permissible subject of a uniform excise, it would eliminate an important distinction between taxes required to be uniform and those required to be apportioned. The *Hylton* Court made this point, if not in the most artful manner. See the discussion of historical excises in WILLIS & CHUNG I, at 181-85. See also, this Court's *Murphy* opinion, *supra* at 180-85. While some entity excises have applied to the accumulation of monies, *e.g.*, IRC §4943, the legitimacy of such indirect taxes is irrelevant to this matter, as all such examples apply to entities rather than to individuals (human beings). Excises on entities apply at least in part because entities have chosen to be entities, which involves activity. Excises on humans do not apply to mere decisions not to do something. If they did, they would be direct taxes, which must be apportioned. Apportionment is a critical limitation on Direct Taxes – a limitation which can indeed be failed, as it is by §5000A. See, WILLIS & CHUNG II at 727-28 (discussing the common misunderstanding of *Hylton v. United States*, 3 U.S. 1 (3 Dall.) 171, 176 (1796) (Patterson, J.)).

D. The Penalty is Not an Income Tax Under the 16th Amendment

The 16th Amendment authorizes, without apportionment, a tax on “incomes, from whatever source derived.” That phrase includes several limitations:

1. The item taxes must be income.
2. The income must be derived.
3. It must be “from” somewhere.
4. The somewhere must be a “source.”

Many cases elucidate the meaning of these provisions. *Glenshaw Glass, supra* at 429-31; *Eisner v. Macomber*, 252 U.S. 189, 225-27, 237 (1920); *Murphy, supra* at 172, 203,206.

a. The Penalty Does Not Have a Proper Trigger

Some have argued the Penalty is an income tax because it is a percentage of income. Kleinbard, “*Constitutional Kreplach*,” 128 TAX NOTES 755 (Aug. 16, 2010). That alone, however, does not cause §5000A to tax income; instead, it merely measures the amount of the penalty. A proper trigger for an income tax would involve an “accession to wealth clearly realized over which the taxpayer has complete dominion.” *Glenshaw Glass, supra* at 431. Not having health insurance is not a proper trigger for a taxpayer’s income from other sources. For a fuller explanation, *see*, WILLIS & CHUNG II at 729-30; WILLIS & CHUNG I at 191, 193.

b. The Penalty Does Not Tax Income

The District Court spoke of cost-shifting as a “significant” cause for the penalty. MEMO OPINION at 39-40, 43, n.11, 47, and 51. Indeed, the shifting of costs to another would produce taxable income; however, the cost-shifting the government decries – and the penalty attempts to reach – will not have occurred with regard to anyone at the time the penalty accrues. It is merely *potential*, as noted by the District Court:

In choosing not to purchase health insurance, Plaintiffs are actively arranging their circumstances (whether to save for their children’s education or buy a new car) so that they must, **in the future**, rely on **either their own resources** or on federal law requiring medical providers to care for the sick and injured.

MEMO OPINION at 49 (emphasis added). Because at the point of penalty imposition, the cost-shifting will not have occurred, it cannot be the subject of an excise, nor can it be the subject of an income tax.

If the Act is upheld, some individuals may indeed purchase health insurance with pre-existing conditions and thereby shift costs to others, or they may seek medical services without the ability to pay for them. They may game the system and deliberately plan to do so. But that potential is not the proper subject of an excise and it does not produce any income because it is not inevitable. Some individuals will die without ever benefitting from the pre-existing conditions provision. Others will move to another country, and still others will be neglectful

and never obtain care or insurance. As the Supreme Court explained, the mere *possibility* of an accession to wealth is insufficient to produce income which can be taxed under IRC §61 (which follows the 16th Amendment verbatim in all important aspects). *Commissioner v. Indianapolis Power and Light*, 493 U.S. 203, 210-12 (1990). For an item to involve “gross income,” it must be certain – and the alleged wealth allegedly taxed by the penalty is not. Although the District Court described plaintiffs as “inevitable” participants in the health care market, it was mistaken for two reasons. First, some such persons will not participate for reasons mentioned above: death, travel abroad, and personal choice. Second, many such persons will not participate within a given month – the time period chosen for application of the penalty. For the penalty to tax income within a given month, the taxpayer would have to receive or accrue the income being taxed within that month – something which is not remotely inevitable.

c. The Wealth Allegedly Taxed Has Not Been Derived

Being derived is an essential aspect of income under the 16th Amendment. *Eisner v. Macomber*, 252 U.S. 189, 207 (1920). Although *Macomber* has been severely limited, it nevertheless continues to be relevant on this important issue. Even if some individuals are currently wealthier because they *plan* to defer purchasing insurance until they become ill, they have nevertheless not yet “derived” that income in a constitutional sense. For a fuller explanation, *see*

WILLIS & CHUNG III at 8, 11, 20; WILLIS & CHUNG II at 728; WILLIS & CHUNG I at 172-174, 186-192.

d. The Alleged Wealth Did Not Derive “From” Anywhere.

To be income constitutionally subject to tax, an item must not only amount to an accession to wealth which has been “derived,” but it also must have been derived “from” somewhere. The mere performance of tasks for oneself – such as mowing the lawn or living in one’s own home – do not derive from anywhere other than oneself. They do not produce income in a constitutional sense. *Helvering v. Independent Life Insurance Company*, 292 U.S. 371, 379 (1934). (“The rental value of the building used by the owner does not constitute income within the meaning of the Sixteenth Amendment.”) Similarly, the “economic decisions” and “self-insurance” spoken about in the District Court are not items of income derived “from” anywhere but the individual’s own mind. Even if such economic decisions amount to sufficient Commerce Clause activity, they do not amount to sufficient Taxing Power activity. Such decisions are not properly the subject a 16th Amendment income tax, just as they are not the proper subject of an excise.

e. The “Source” of the Alleged Wealth Is the Individual’s Own Personal Actions, Which is Insufficient.

The “source” test essentially re-enforces the “from” test of income taxation. To be “derived,” the item must come “from” a “source.” Never has a Court approved an income tax on wealth produced by an individual’s decisions or actions for

himself. A common example is well-known to tax students: if a person mows his lawn, he has no income despite having an accession to wealth, a nicer lawn. However, if that person mows the neighbor's lawn in exchange for the neighbor mowing his lawn, they each have *Glenshaw Glass* income: an undeniable accession to wealth, clearly realized, over which the taxpayer has complete dominion and control. Self-insurance – not the self-payment of expenses incurred, but the *mere acceptance of future risks* – is not the proper subject of an income tax, just as it is not the proper subject of an excise. It is simply what people do throughout their lives: they accept the risk of living. At most, a tax or levy on such a thing is a Direct Tax on an individual. Any other view would render the concept of a Direct Tax meaningless.

A. The Penalty is Not an Apportioned Direct Tax or Capitation

Apportionment of Direct taxes is required by both Sections 2 and 9 of Article I. The “penalty” is not, however, apportioned by population, as the amount paid per State *per capita* will not be the same. Because it cannot satisfy any other of the limited Taxing Powers, the penalty is, at best, a Direct Tax. Because it is not properly apportioned, it is unconstitutional. *Murphy, supra* at 180-185 (D.C. Circuit upholding a tax on non-physical personal injury awards as a uniform excise rather than striking it as an un-apportioned direct tax, but also rejecting common attacks on the apportionment requirement). Of note, *Murphy* refused to accept the

government's contention that direct taxes include only those which may be fairly apportioned:

[N]either need we adopt the Government's position that direct taxes are only those capable of satisfying the constraint of apportionment. In the abstract, such a constraint is no constraint at all; virtually any tax may be apportioned by establishing different rates in different states. *See Pollock II*, 158 U.S. at 632-33. If the Government's position is instead that by "capable of apportionment" it means "capable of apportionment in a manner that does not unfairly tax some individuals more than others," then it is difficult to see how a land tax, which is widely understood to be a direct tax, could be apportioned by population without similarly imposing significantly non-uniform rates.

Murphy, supra at 184.

V. THE PENALTY, IF IT IS NOT A TAX, VIOLATES PROCEDURAL DUE PROCESS.

IRC §5000A(b) imposes the penalty for failure to have adequate health insurance. Subsection (g) provides enforcement *procedures*, mostly by cross reference to IRC Subchapter 68B (applying to "assessable penalties") with significant limitations: the health care penalty is not subject to criminal sanctions, levy, or notice of lien filing. Per §6671(a), the penalty shall be paid upon the Secretary's notice and demand and shall be assessed in the same manner as "taxes." Also per §6671, "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter."

In tax law parlance, "assessment" is the equivalent of a court judgment. Although typical procedures require a §6212 notice of deficiency (commonly

known as a 90-day-letter) prior to assessment, the §5000A(b) penalty does not.⁴ The common 90-day-letter is a taxpayer's traditional "ticket to Tax Court" which provides judicial pre-judgment relief opportunities; however, per §6212, the notice of deficiency – and thus the Tax Court opportunity – is unavailable for the §5000A(b) penalty. Mellor, "*The Individual Mandate Tax: Healthcare's Toothless Watchdog*," 130 TAX NOTES 105 (Jan. 3, 2011) (opining that the penalty is a constitutional tax, but also noting its limited enforceability) [MELLOR]. The Service may simply assess the penalty and demand and collect payment without a court judgment or any administrative opportunity for the obligor to be heard.

Such process is not unheard of for taxes: although most taxes require the notice of deficiency procedure, some do not. This lack of traditional process is acceptable because, generally, due process and equal protection requirements do not fully limit the Taxing Power. *Magnano, supra* at 44 ("Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power. . .") (footnote omitted). In addition, IRC §6330 provides a CDC ("collection due process") administrative hearing opportunity prior to a levy to collect a tax. A taxpayer dissatisfied with the

⁴ In discussing the sometimes confusing procedural provisions of the Health Care Act, *Amicus* mistakenly opined that a notice of deficiency would be available if the penalty were a tax. WILLIS & CHUNG I at 194 (also incorrectly citing §6511 rather than §6212) (*but see* note 136 which explains some of the confusion). However, a §6330 CDC proceeding could result in Tax Court jurisdiction if the penalty is indeed a tax, though not if it is not a tax.

outcome of the hearing has a *pre*-levy opportunity to a Tax Court hearing. Similarly, IRC §6320 provides an administrative hearing opportunity prior to a notice of lien filing. However, under §5000A(g)(2)(B)(ii), the levy process does *not* apply to the §5000A penalty, effectively eliminating the possibility of the CDC hearing, and under §5000A(g)(2)(B)(i), the notice of lien process does not apply, eliminating the possibility of a lien hearing. The §6330 CDC hearing and the §6320 lien hearing, however, exist precisely to satisfy due process. Congress eliminated the levy and lien procedures from the Health Care Penalty, ostensibly to make it more palatable to voters; however, the actual effect is to eliminate the meager due process opportunities otherwise available in relation to “assessable penalties.”

If the Penalty is *not* a tax, as all five District Courts have held,⁵ its enforcement procedures do not provide due process. The government may assess the Penalty without notice. It will have an automatic “silent” lien on the individual’s property. MELLOR at 110. This lien will have priority in insolvency proceeding under 31 U.S.C. §3721. It will be perpetual. Per §6402(d), the

⁵ *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 788 (N.D. Va. 2010); *Florida v. U.S.*, 716 F. Supp. 2d 1120, 1139 (N. D. Fla. 2011); *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882, 895 (E. D. Mich. 2010) (finding the authority for the penalty under the Commerce Clause and not under the Taxing Power); *Mead v. Holder*, ___ F. Supp. 2d ___ 2011 U.S. Dist. LEXIS 18592 *50 (D. D.C. 2011) MEMO OPINION at 58; *Liberty Univ. v. Geithner*, ___ F. Supp. 2d ___ 2010 U.S. Dist. LEXIS 125922 *32-33 (W. D. Va. 2010).

Treasury may seize any tax refund otherwise due, without notice to the taxpayer or an opportunity to be heard prior to seizure. The government arguably may issue regulations prioritizing tax payments to satisfy the penalty, thus collecting it even earlier without prior notice, let alone an administrative or judicial hearing.

MELLOR at 111, n. 101 (citing and agreeing with other authority suggesting such regulations). Per §6722, the government may assert an additional “assessable penalty” for the individual’s failure to pay the §5000A Penalty. It may also accrue interest on the obligation per IRC §6601. Whether the §5000A(g) limitations against lien notices and levy apply only to the §5000A penalty, or whether they also restrict the §6722 penalty and the §6601 interest is unclear. *See*, MELLOR at 109 (arguing the additional penalties and interest would be subject to the lien and levy restrictions).

Whatever the due process limitations on Congress’ Taxing Power, non-tax takings are subject to due process. *Magnano, supra* at 45; *Commissioner v. Shapiro*, 424 U.S. 614, 629 (1976) (giving special weight to the need for revenues in analyzing procedural due process limitations on pre-hearing takings); *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (“[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or

substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”) The lack of pre-taking judicial process *or even* administrative hearing opportunities cannot satisfy these procedural due process tests. Individuals may be subject to thousands of dollars of Health Care Penalties plus interest and additional “failure to pay” penalties. Collection of such amounts through set-off or redirection of tax payments involves the actual taking of property, unlike *Mathews*, which involved the less significant denial of future benefits. Many individuals will lack the resources to sue for a refund, creating irreparable harm. An administrative opportunity to be heard would not over-burden the government, nor would it interfere with the need for a continued flow of revenue because, under the assumption the Penalty is *not* a tax, revenues are not involved.

Article I, §8 provides Congress the plenary power to levy and collect taxes arguably without the full constraints of the 5th Amendment; however, it does not grant the summary power to assess and collect *non-tax penalties*: those require at least minimal due process opportunities to be heard. Even the *Mathews* case, which involved the denial of continued social security benefits, involved significant administrative opportunities to be heard prior to the denial. Courts have consistently given greater leeway for takings involving taxes; however, if the

Penalty is not a tax, that consideration is irrelevant. *Kahn v. United States*, 753 F.2d 1208, 1217-20 (3d Cir. 1985). Hence, the §5000A(a) Penalty – *if it is not a tax* – cannot be constitutional as it procedurally fails to satisfy even minimal due process.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the Court reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As counsel for *amicus curiae*, I hereby certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c) that the foregoing brief is in 14-point, proportionately spaced Times New Roman font. According to the word processing software used to prepare this brief (Microsoft Word), the word count of the brief is no more than 7,000 words, excluding the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

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CERTIFICATE OF SERVICE

As counsel for *amicus curiae*, I hereby certify that on this 23d day of May, 2011, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. The ECF system will automatically generate and send by e-mail a Notice of Docket Activity (NDA) to all registered attorneys participating in the case, which notice constitutes service on those registered attorneys.

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