IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
RICHMOND DIVISION

COMMONWEALTH OF VIRGINIA, ex rel. Kenneth T. Cuccinelli, II, in his official capacity as Attorney General of Virginia, Plaintiff, v. KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, in her official capacity, Defendant.	)	Civil Action No. 3:10-cv-00188-HEH

AMICUS CURIAE BRIEF OF CONSTITUTIONAL LAW PROFESSORS
IN SUPPORT OF MOTION TO DISMISS

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INTEREST OF AMICI CURIAE

Amici are professors of law who teach and write about constitutional law. They have substantial expertise in the text, history, and structure of the Constitution as well as constitutional law doctrine as developed by the Supreme Court, including as it relates to the legislative authority of the federal government. Their legal expertise thus bears directly on the constitutional issues before the Court in this case. In cases presenting constitutional issues such as those before this Court, it is common for courts to accept amicus briefs from legal academics with relevant expertise.

Amici include (institutional affiliations listed for identification purposes only):

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INTRODUCTION AND SUMMARY OF ARGUMENT

The recently enacted Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), is landmark federal legislation dramatically expanding nationwide access to health insurance and health care. Among its many interrelated reforms, the ACA creates new health benefits exchanges, expands Medicaid, provides tax credits and other incentives to subsidize the purchase of health insurance, prohibits certain coverage exclusions such as discrimination based on pre-existing conditions, and requires many employers to provide insurance. In the provision challenged in this litigation, the ACA also generally requires individuals to obtain health insurance. *See id*. §§ 1501(b), 10106, amended by Pub. L. No. 111-152 §1002, 124 Stat. 1029, 1032 (2010). This Minimum Coverage Fee Provision mandates (subject to several

exemptions, including lack of income and inability to pay) that individuals either purchase a minimally adequate health insurance plan for themselves and their families or pay an annual penalty, calculated as a percentage of their income and subject to upper and lower caps. The Minimum Coverage Fee Provision is a key component in the ACA's comprehensive statutory scheme, and plays an essential role in reducing the cost of health insurance for all Americans.

Amici have no doubt that the Minimum Coverage Fee Provision is a permissible exercise of Congress's power under the Interstate Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and anticipate that Defendant will present ample arguments on those grounds. But the Minimum Coverage Fee Provision also falls well within the Constitution's grant to Congress of an extensive and comprehensive "Power To lay and collect Taxes, Duties, Imposts and Excises." *Id.* art. I, § 8, cl. 1. As the jurisprudence and constitutional history underlying this Clause are generally less familiar than that relating to the Commerce Clause, Amici confine themselves here to explaining the constitutionality of the Minimum Coverage Fee Provision on this alternative ground.

Congress's taxing power is exceedingly broad. The Supreme Court has repeatedly reaffirmed the taxing power's reach, and held that a tax is valid if it serves the general welfare, is reasonably related to revenue raising and does not violate any independent constitutional prohibition. The Court has specifically and repeatedly affirmed that the taxing power is not limited to subjects within Congress's other enumerated powers and that a tax is not invalid simply because it has a regulatory purpose or effect. The Minimum Coverage Fee Provision plainly satisfies the standard for legitimate exercises of the taxing power.

The Constitution does impose one express limit[1] on the taxing power: it states that "No Capitation, or other direct, Tax, shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken," U.S. Const. art. I, §9, cl. 4. That limitation is not applicable here, because the Supreme Court has long restricted the set of taxes subject to the Direct Tax Clause to taxes upon real property, taxes upon personal property, and capitation taxes (which are imposed on a per-person basis without regard to property, income or other circumstance). Because the Minimum Coverage Fee Provision is not one of these taxes, it is not governed by the Direct Tax Clause.

ARGUMENT

I. The Minimum Coverage Fee Provision Is A Permissible Exercise Of Congress's Taxing Power.

The Constitution's grant of taxing authority is strikingly broad. Congress has "Power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I., § 8, cl. 1. "More comprehensive words could not have been used." *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 540 (1869).[2]

A. The Taxing Power Constitutes A Broad And Independent Grant Of Authority To Congress.

The breadth of the Constitution's grant of taxing power is no accident. A fundamental problem under the pre-existing Articles of Confederation was that the

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[1] A second constitutional limit on the taxing power—the requirement that "all Duties, Imposts and Excises shall be uniform throughout the United States," U.S. Const. art. I., § 8, cl. 1—is not implicated here.

[2] Only one subject—exports—is removed from the otherwise plenary scope of Congress's taxing authority. *See* U.S. Const. art. I, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State."). Nothing about that exclusion is implicated in this case.

Continental Congress had no power to tax individuals directly. Instead, the Congress would send the states "requisitions" for funds with the amount per state set "in proportion to the value of all land within each State." Articles of Confed. art. VIII (1781). It was then up to the states to levy and collect taxes to provide the requisitioned amount within the time stipulated. States often failed to do so, and Congress had few means by which to force them to comply. *See generally* Roger H. Brown, Redeeming the Republic: Federalists, Taxation, and the Origins of the Constitution (1993) (detailing the breakdown of requisitions).

The failure of the requisitions system, which ultimately "reduced the United States to bankruptcy[,] * * * demonstrated the need of a central government that should possess the power of taxation." Charles J. Bullock, *The Origin, Purpose and Effect of the Direct-Tax Clause of the Federal Constitution I*, 15 Pol. Sci. Q. 217, 218 (1900). Creating a federal government with a more robust taxing power and adequate revenue for that reason became a major goal behind adoption of the Constitution. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 388 (1821); *see also The Federalist No. 30* (Alexander Hamilton) *in* The Federalist Papers 188-90 (Clinton Rossiter ed., 1961); Brown, *supra*, at 3-8. As the Supreme Court has explained, "nothing is clearer, from the discussions in the Convention and the discussions which preceded final ratification by the necessary number of States, than the purpose to give this power to Congress, as to the taxation of everything except exports, in its fullest extent." *Veazie Bank*, 75 U.S. at 540.

Based on the Constitution's broad language, and this clear history, the Supreme Court has upheld measures as valid exercises of the taxing power so long as they serve the general welfare, raise revenue, and do not violate any independent constitutional

prohibition. And the Court has squarely rejected arguments that the taxing power is limited to subjects that Congress can reach under the Commerce Clause or other grants of authority, as well as claims that a regulatory purpose or effect renders a tax invalid.

1. Congress's exercise of its taxing power is valid as long as the tax serves the general welfare, is reasonably related to revenue raising, and does not violate a constitutional limitation on Congress's authority.

The Court has long emphasized the wide scope of Congress's taxing power, describing it as "extensive," *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1867), "exhaustive," *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 12 (1916), and "virtually without limitation," *United States v. Ptasynski*, 462 U.S. 74, 79 (1983). "As is well known, the constitutional restraints on taxing are few. * * * The remedy for excessive taxation is in the hands of Congress, not the courts." *United States v. Kahriger*, 345 U.S. 22, 28 (1953), *overruled in part on other grounds, Marchetti v. United States*, 390 U.S. 39 (1968); *see also Veazie Bank*, 75 U.S. at 548 ("The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.").

Despite its breadth, the scope of the taxing power is not unlimited. The Court has identified three tests that a valid tax must satisfy.

The first constraint is evident from the text of the Constitution: To be valid, a tax measure must seek to "pay the Debts and provide for the common Defence and general Welfare." U.S. Const. art. I, § 8, cl. 1; 1 Joseph Story, Commentaries on the Constitution of the United States 663 (Melville M. Bigelow ed., 5th ed. 1891). Congress enjoys wide discretion to determine whether a tax measure serves the general welfare. *Helvering v. Davis*, 301 U.S. 619, 641 (1937); *see also South Dakota v. Dole*, 483 U.S. 203, 207

(1987); *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976). But that the general welfare constraint on the tax power is enforced primarily through the political process does not make the requirement any less real. *See Kahriger*, 345 U.S. at 28; *McCray v. United States*, 195 U.S. 27, 55-56 (1904).

Second, to fall within the tax power a measure must bear "some reasonable relation" to the "raising of revenue," *United States v. Doremus*, 249 U.S. 86, 93-94 (1919), even if the revenue actually produced is "negligible," *United States v. Sanchez*, 340 U.S. 42, 44 (1950). *Accord Kahriger*, 345 U.S. at 28 (noting tax at issue "produces revenue"); *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937) (sustaining tax "productive of some revenue"); *Hampton v. United States*, 276 U.S. 394, 412 (1928) (requiring only a "motive * * * [and] effect * * * to secure revenue"); *see also Nigro v. United States*, 276 U.S. 332, 353 (1928) (concluding any "doubt as to the character" of a tax measure was removed when "what was a nominal tax before was made a substantial one").

Third, the Court has also rejected tax measures that violate independent constitutional prohibitions, such as the Fifth Amendment's prohibition on double jeopardy. *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 778-79, 784 (1994); *accord Marchetti*, 390 U.S. at 50-52 (invalidating wagering tax as violating Fifth Amendment privilege against self-incrimination).

2. The Supreme Court has rejected other limitations on the taxing power.

The Court has squarely and repeatedly rejected arguments that Congress's taxing authority is limited by the scope of its other enumerated powers. Moreover, Congress does not exceed its broad taxing power simply because a particular tax has regulatory

purpose or effects.

a. ***Congress may tax activities not subject to regulation under Congress's other enumerated powers***.

"[T]he Constitution, art. 1, § 8, cl. 1, delegates a power separate and distinct from those later enumerated, and one not restricted by them." *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950). The Supreme Court confirmed the independent status of the taxing power early in the Nation's history, in its 1867 decision in the *License Tax Cases*, 72 U.S. (5 Wall.) 462 (1867). There, the Court sustained a congressional statute requiring purchase of a license before engaging in certain trades and businesses, including selling lottery tickets or liquor. It noted that "Congress has no power of regulation nor any direct control" over "the internal commerce or domestic trade of the States," yet nonetheless upheld the measure under the tax power. *Id.* at 470-71; *see Sanchez*, 340 U.S. at 44 ("Nor does a tax statute necessarily fail because it touches on activities which Congress might not otherwise regulate.") .

This recognition that Congress may tax activities that fall beyond its regulatory authority accords with the Court's approach to the spending power, a power derived from the very same clause of Article I. *See Dole*, 483 U.S. at 206. In *Dole*, the Court expressly stated that the spending power extends to "objectives not thought to be within Article I's enumerated legislative fields." *Id*. at 207 (internal quotations omitted). Given their grounding in the same portion of the Constitution's text, it would be anomalous to say the least if the taxing power did not similarly extend beyond Congress's enumerated areas of regulatory authority.

b. ***A regulatory purpose or effect does not disqualify a measure under the tax power.***

The Court also has made clear that the fact that a tax has a regulatory purpose or effect does not remove a measure from the scope of the tax power. "Every tax is in some measure regulatory. * * * But a tax is not any less a tax because it has a regulatory effect." *Sonzinsky*, 300 U.S. at 513. The Court made the point even more forcefully in its subsequent decision in *Sanchez*, insisting that "[i]t 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." 340 U.S. at 44; *see also Kahriger*, 345 U.S. at 27 (noting numerous instances in which the Court upheld taxes notwithstanding a manifest "intent to curtail and hinder, as well as tax"); *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. One Ford Coupe Auto.*, 272 U.S. 321, 328 (1926) ("A tax on intoxicating liquor does not cease to be such because the sovereign has declared that none shall be manufactured, and because the main purpose in retaining the tax is to make lawbreaking less profitable.").

"[F]rom an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize courts to inquire into that subject." *Doremus*, 249 U.S. at 93. As long as "the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it." *Id.*; *Sonzinsky*, 300 U.S. at 513-14 ("Inquiry into the hidden motives which may move (a legislature) to exercise a power constitutionally conferred upon it is beyond the competency of courts.");

A Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934) ("Collateral purposes or motives of a Legislature in levying a tax of a kind within reach of its lawful power are matters beyond the scope of judicial inquiry."); *McCray*, 195 U.S. at 59 (insisting that the "motive or purpose of Congress in adopting the [tax] acts in question may not be inquired into"); *United States v. Aiken*, 974 F.2d 446, 448 (4th Cir. 1992) (upholding constitutionality of National Firearms Act against claim that it was an impermissible regulation on the ground that the Act's regulatory provisions "need only bear a 'reasonable relation' to the statute's taxing purpose"); *United States v. Spoerke*, 568 F.3d 1236, 1245-46 (11th Cir. 2009) (upholding National Firearms Act as permissible exercise of the taxing power even though Act had regulatory effect and revenue raised was negligible); *Zwak v. United* States, 848 F.2d 1179, 1182-83 (11th Cir. 1988) (relying on *Sonzinsky* and *Kahriger* to sustain National Firearms Act against claim that it was unconstitutionally punitive); *United States v. Ross*, 458 F.2d 1144, 1145 (5th Cir. 1972) (rejecting constitutional challenge to National Firearms Act based on alleged confiscatory nature of tax: "every tax is regulatory to some extent. The test of validity is whether on its face the tax operates as a revenue generating measure and the attendant regulations are in aid of a revenue purpose").

To be sure, during the 1920s and 1930s, the Supreme Court did invalidate some federal taxes on the ground that they had been adopted primarily to enforce compliance with a regulatory program that fell outside of Congress's enumerated powers under the then-prevailing interpretation of the Commerce Clause. *See, e.g., United States v. Butler*, 297 U.S. 1, 58-59 (1936); *United States v. Constantine*, 296 U.S. 287, 295 (1935); *Hill v.*

Wallace, 259 U.S. 44, 66-68 (1922); *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20, 37-38 (1922).

For example, the tax on goods manufactured using child labor at issue in *Bailey* was enacted after the Court held that Congress could not regulate child labor under its commerce power. *See Hammer v. Dagenhart*, 247 U.S. 251, 276-77 (1918). Congress adopted a virtually identical set of restrictions on the use of child labor and "provide[] a heavy exaction for a departure from [that] detailed and specified course of conduct." *Bailey*, 259 U.S. at 36. The Court's decision holding the measure beyond Congress's Taxing Power rested completely on the fact that the tax was being used to impose an entire regulatory program that was beyond Congress's power under the Commerce Clause:

> Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states.

Id. at 38. The other decisions from this period rested on the same rationale. *See Butler*, 297 U.S. at 59 ("The tax plays an indispensable part in the plan of regulation * * * [and] by its operation shows the exaction laid upon processors to be the necessary means for the intended control of agricultural production."); *Constantine*, 296 U.S. at 296 ("[I]n the present instance, under the guise of a taxing act the purpose is to usurp the police powers of the state."); *Hill*, 259 U.S. at 68-69 ("Congress sought to use the taxing power to give validity to the act. It did not have the exercise of its power under the commerce clause in

mind, and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause.").

Although these decisions have not been explicitly overruled, their continued validity is doubtful. To begin with, they are products of the *Lochner* era, the heyday of the Supreme Court's hostility to economic regulation, including a highly restrictive view of Congress's commerce and spending powers. Those doctrines have been repudiated. Indeed, in rejecting the narrow view of the Commerce Clause, the Court expressly overruled *Hammer* and holding that "[t]he motive and purpose of a regulation of interstate commerce are matters of legislative judgment upon the exercise of which the Constitution places no restriction." *United States v. Darby*, 312 U.S. 100, 115-16 (1941) (citing the tax power decisions of *McCray*, *Sonzinsky*, and *Veazie Bank* in support); *see Kahriger*, 345 U.S. at 29-31 & n.6 (noting *Darby*'s reversal of *Hammer* and stating it is "hard to understand why the power to tax should raise more doubts because of indirect effects than other federal powers"); *cf. New York v. United States*, 505 U.S. 144, 158 (1992) (stating that "[a]s conventional notions of the proper objects of government spending have changed over the years, so has the ability of Congress to 'fix the terms on which it shall disburse federal money to the States'" and citing the contrast between *Dole* and *Butler* as an example).

The Supreme Court itself has discredited these decisions, noting that it had abandoned its earlier "distinctions between regulatory and revenue-raising taxes." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974). *Sanchez* expressly rejects the earlier decisions' suggestion that a regulatory purpose is only acceptable if "incidental," *Bailey*, 259 U.S. at 38, insisting instead that a tax remains valid "even though * * * the

revenue purpose of the tax may be secondary." *Sanchez*, 340 U.S. at 44; *cf. 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).

Today, any scrutiny the Court devotes to the purposes underlying a tax measure focuses on ensuring it is not a criminal imposition in disguise. *See Kurth Ranch*, 511 U.S. at 779-83 (concluding that tax on drugs constituted criminal punishment and therefore violated the Double Jeopardy Clause).

To the extent the *Lochner* era precedents remain valid, the Court might also conceivably invalidate as pretextual a levy so high as to amount to a coercive penalty that is being used to compel compliance with an entire regulatory scheme that falls wholly outside Congress's authority under the Court's precedents. That is the situation its *Lochner* era precedents addressed, and that is how the Court has interpreted them since then. *Kahriger*, 345 U.S. at 31 ("Penalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation have caused this Court to declare the enactments invalid.") (citing *Bailey* and similar decisions). Absent such extreme circumstances, however, even the *Lochner* era decisions do not license judicial second guessing of Congress's intentions in enacting what appears "on its face" to be a valid tax. *See Sonzinsky*, 300 U.S. at 513. "Inquiry into the hidden motives which may move (a legislature) to exercise a power constitutionally conferred upon it is beyond the competency of courts." *Id.* at 513-14.

B. The Minimum Coverage Fee Provision Is A Valid Exercise Of The Tax Power.

The Minimum Coverage Fee Provision easily satisfies the requirements for a valid tax.

First, in determining whether a congressional enactment furthers the general welfare, "courts should defer substantially to the judgment of Congress." *Dole*, 483 U.S. at 207. Providing uncompensated care to the uninsured cost $43 billion in 2008—a cost that was passed on to private insurers, *see* Pub. L. No. 111-148, §§ 1501(a)(2)(F), 10106(a), and substantially subsidized by the government, *see* Jack Hadley et al., *Covering the Uninsured in 2008: Current Costs, Sources of Payment, and Incremental Costs*, Health Affairs W403-W406 (Aug. 25, 2008), *cited in* H.R. Rep. No. 111-443, pt. 2, 111th Cong., 2d Sess., at 983 (2010). Healthy individuals' failure to purchase insurance leads to increased premium rates for those who do purchase insurance—and some aspects of the ACA, such as the ban on denying coverage based on preexisting conditions, *see* Pub. L. No. 111-148, §§ 1501(a)(2), 10106(a)(I), could increase healthy individuals' incentives not to obtain insurance.

By encouraging individuals to purchase health insurance, the Minimum Coverage Fee Provision alleviates these and other costs and lowers health insurance premiums. *See id*. Pub. L. No. 111-148, §§ 1501(a)(2)(C), (G), 10106(I), (J). Such cost reductions and expansions in access to health insurance surely constitute contributions to the general welfare.

Second, it is also clear that the provision constitutes a genuine revenue-raising device. Although Congress itself did not make findings of the provision's revenue-raising impact, the Congressional Budget Office estimated that it would produce

approximately $4 billion annually by 2017. *See* Letter from Douglas W. Elmendorf, Director, Cong. Budget Office, to the Honorable Nancy Pelosi, Speaker, U.S. House of Representatives (Mar. 18, 2010), at tbl.4 at 2. Over the course of the period 2010-2019, the provision will generate approximately $17 billion in revenue. *See id*. No more is needed to satisfy the revenue requirement. *See Sonzinsky*, 300 U.S. at 514 n.1 (upholding tax that raised $5400 in revenue in 1934—$88,000 in today's dollars).

Moreover, the provision "on its face purports to be an exercise of the taxing power." *Sonzinsky*, 300 U.S. at 513.[3] It amends the Internal Revenue Code and references taxpayers and tax returns, requiring taxpayers to list information about their health insurance coverage on their annual returns. *See* Pub. L. No. 111-148, §§ 1501(b), 1502 (amending the Internal Revenue Code to include 26 U.S.C. §§ 5000A, 6055). Any amount due from the taxpayer under the provision is included with the taxpayer's return and thus paid into general revenues, along with any other tax that is due. *See id.* § 1502(b) (adding 26 U.S.C. § 5000A(b)(2)). That Congress listed other revenue raising provisions elsewhere in the ACA, *see* Pub. L. No. 111-148, Title IX, does not undermine the evident tax focus of the Minimum Coverage Fee Provision itself.

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[3] Although Congress did not specifically invoke the tax power in support of the minimum coverage provision, it did so with regard to the ACA as a whole. *See* H.R. Rep. No. 111-443, pt. 1, at 543. In any event, the Court has not required such "express articulat[ion]" for a legislative measure to be upheld as coming within a particular congressional authority, stating in regard to Congress's authority under § 5 of the Fourteenth Amendment that it is sufficient if the Court can "discern some legislative purpose or factual predicate that supports the exercise of that power." *EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18 (1983). Here, the revenue raising impact of the minimum coverage provision and its express references to the Internal Revenue Code and taxpayer returns more than provide such a basis. In addition, that the provision refers to imposition of a penalty rather than a tax does not preclude its being deemed a tax, as the Court focuses on how a tax provision operates in practice, not how it is described. *See Kurth Ranch*, 511 U.S. at 779, 784 (determining that measure denominated a tax was actually a criminal penalty).

The legislative history also demonstrates that Congress understood the provision to function in part as a tax. *See* H.R. Rep. No. 111-443, pt. 1, at 265 (referring to the Minimum Coverage Fee Provision as imposing "[a] tax on individuals who opt not to purchase health insurance"); *see also* J. Comm. on Taxation, 111th Cong., T*echnical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," As Amended, in Combination with the "Patient Protection and Affordable Care Act"* (Mar. 21, 2010) (including Minimum Coverage Fee Provision in its explanation of the revenue provisions of the ACA in combination with the Reconciliation Act).

To be sure, the Minimum Coverage Fee Provision also serves a regulatory purpose in encouraging individuals to purchase health insurance. But the governing precedents make plain that a regulatory purpose cannot disable a measure that raises some revenue and on its face represents a tax. *See Kahriger*, 345 U.S. at 30-32; *Sanchez*, 340 U.S. at 44-45; *Sonzinsky*, 300 U.S. at 513-14; *Doremus*, 249 U.S. at 93; *McCray*, 195 U.S. at 59.

The Minimum Coverage Fee Provision is not a secret criminal penalty in disguise. The amount of tax imposed is not disproportionate or a "heavy exaction." *Bailey*, 259 U.S. at 36. It cannot exceed the national average premium for the lowest level of qualified health plans for the taxpayer's family size on the newly created health exchanges and contains exemptions based on low income and inability to pay. *See* Pub. L. No. 111-148, § 1501(b) (adding 26 U.S.C. §§ 5000A(c)(1), (2), 5000A(e)(1), (2)) (as amended by Pub. L. No. 111-152, § 1002). The tax is in no way tied to criminal action, and the Secretary of Treasury's enforcement powers are strictly limited by statute so that the government cannot bring a criminal prosecution or file a notice of federal tax lien to

secure the government's interest in collecting the tax. *See id.* § 1501(b) (adding 26 U.S.C. §5000A(g)(2)); *cf. Kurth Ranch*, 511 U.S. at 780-83 (emphasizing high tax rate, deterrent purpose, and criminal prohibition on underlying taxed activity in concluding tax represented a criminal penalty).

Even if, contrary to our submission (see page 12, *supra*), the *Lochner*-era decisions retain some vitality, they would not provide any basis for invalidating the tax here. As just discussed, the Minimum Coverage Fee Provision is not a coercive disproportionate levy, nor is it the sole basis on which the entire ACA is made operative. Instead, the ACA's detailed regulatory requirements are separately laid out and are easily sustainable in their own right under Congress's commerce and spending powers. All that the fee provision requires is that those who forego health insurance, and thereby impose costs on the federal government and on their fellow citizens, pay a tax. The fee does not enforce any of the other elements of the ACA.

Just as the courts have consistently upheld the National Firearms Act against claims that it was beyond the taxing power, *see Sonzinsky*, 300 U.S. at 514, so too here the Minimum Coverage Fee Provision is well within the taxing power because its requirements relating to minimum insurance "bear a 'reasonable relation' to the statute's taxing purpose." *Aiken*, 974 F.2d at 448.

Third, the Minimum Coverage Fee Provision does not violate any fundamental rights. No one has a right to be free from taxation, and Congress's decision to target individuals who decide to forego insurance is indisputably rational, given the impact of their decision on the government and society as a whole. *See Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983) ("Legislatures have especially broad latitude in

creating classifications and distinctions in tax statutes."). Since the New Deal the Court has made clear that Congress and state legislatures may prevent individuals from imposing costs on others through their economic activities. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399-400 (1937) (emphasizing, in upholding minimum wage law against due process challenge, that refusal to pay employees a living wage "casts a direct burden for their support on the community" and "[t]he community is not bound to provide what is in effect a subsidy for unconscionable employers").

Plaintiffs may prefer a statute that imposed a general tax on all citizens to pay for health care reform and then provided a deduction or tax credit for citizens who purchase health insurance. But there is no difference for purposes of constitutional analysis between that approach and the tax targeting only citizens who do not purchase health insurance—both fall squarely within Congress's taxing power. The choice of which type of tax to enact is a policy determination left to the elected branches, not to the courts.

II. The Minimum Coverage Fee Provision Is Not a Direct Tax Subject to the Constitutional Requirement of Apportionment.

The Minimum Coverage Provision is not among the narrow class of taxes subject to the constitutional requirement of apportionment.

A. The Apportionment Requirement Has Been, And Should Continue To Be, Construed Narrowly To Cover Only Capitation Taxes And Taxes On Property.

Under Article I, Section 9, "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." U.S. Const. art. I, § 9, cl. 4. The apportionment requirement is the direct result of a compromise over slavery. Article I, Section 2 of the 1787 Constitution subjected

representation in the House of Representatives and direct taxes to the same rule, which counted slaves as three-fifths of a person:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

Id. art. I, § 2, cl. 3.

At the Constitutional Convention of 1787, the delegates generally favored apportioning representation in the House according to each state's population. But they were deeply divided over whether and how to count slaves for these purposes. Some southern delegates wanted slaves to be counted in full for representation purposes (thus inflating southern states' populations and, hence, their representation in the House) while some northerners wanted to exclude slaves altogether. James Madison, Debates in the Federal Convention of 1787, in 5 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, As Recommended by the General Convention at Philadelphia in 1787, at 296-302 (Jonathan Elliot ed., 1881) (hereinafter 5 Elliot's Debates). A proposal was made to count slaves as three-fifths of a person, but at first it did not attract consensus.

Then on July 12, Gouverneur Morris proposed that the same rule of apportionment be extended to taxation as well. 5 Elliot's Debates at 302.[4] This "worked as a compromise because the increased representation attributable to slaves came at a cost to a state, an increased direct-tax liability for the state's inhabitants." Erik M. Jensen,

[4] Morris's initial proposal, like the initial proposal for representation, contemplated that apportionment would be on the basis of wealth and population. 5 Elliot's Debates at 302. It was not until July 13 that the word "wealth" was struck, leaving population as the sole basis. *Id.* at 309.

The Taxing Power: A Reference Guide to the United States Constitution 27 (2005); *see* 5 Elliot's Debates at 363 n.* (Madison observing in his notes on the Convention that "[t]he object was to lessen the eagerness on one side for, and the opposition on the other to, the share of representation claimed by the Southern States on account of the negroes").

But the idea of apportioning all federal taxes in this manner provoked concerns at the Convention that it might result in the same failed system of state-specific requisitions that had proven inadequate under the Articles of Confederation. *See* 5 Elliot's Debates at 302. "This criticism was regarded as a serious one, for no member manifested a desire to restrict the taxing power in such a way as to cripple its effectiveness * * *." Bullock, *supra*, at 234. To address this concern, Morris immediately proposed "restraining the [apportionment] rule to *direct* taxation. With regard to indirect taxes on *exports* and imports, and on consumption, the rule would be inapplicable." 5 Elliot's Debates at 302. That amendment was adopted, leading ultimately to the direct tax apportionment requirement as it now appears in Article I.

The critical points from this very clear history are (1) the apportionment requirement was extended to taxation only to help secure the compromise over the treatment of slaves for purposes of representation, *see* Edwin R.A. Seligman, The Income Tax 552 (1914) ("[T]he introduction of the words 'direct taxes' had no reference to any dispute over tax matters, but was designed solely to solve the difficulty connected with representation * * *."); and (2) the apportionment requirement was limited to direct taxation precisely to ensure it would not interfere substantially with the broad taxing authority the framers intended to grant to the federal government, *see* Bullock, *supra*, at

222 (the apportionment requirement was "not designed to injure * * * the taxing power of the new government").[5]

Recognizing these points, Justice Paterson made clear in the Supreme Court's first Direct Tax Clause case that, in light of its specific and narrow purposes, the rule of apportionment for direct taxes "ought not to be extended by construction." *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 178 (1796). Thus, although the precise meaning of "direct tax" was obscure even at the Founding, the Court has consistently understood the class of taxes subject to the apportionment requirement to be quite narrow. [6]

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[5] During the Constitutional Convention, Rufus King of Massachusetts asked for "the precise meaning of *direct* taxation," but no one replied. 5 Elliot's Debates at 451. Contemporary scholarship reflects ongoing disagreement about the best understanding of the Constitution's treatment of direct taxes. *See, e.g.*, Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 Colum. L. Rev. 2334 (1997) (arguing that any tax not capable of being shifted or avoided is a direct tax subject to apportionment); Bruce Ackerman, *Taxation and the Constitution*, 99 Colum. L. Rev. 1 (1999) (disagreeing with Jensen and arguing that the Thirteenth and Fourteenth Amendments should be understood to have effectively repealed the apportionment requirement); Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?* 11 J. Const'l L. 839, 842-83 (2009) (taking a middle position in which "apportionment is still alive, but (apart from requisitions and capitation taxes) is confined to federal taxes on real estate and personal property). None of those accounts focuses on taxes of the sort at issue here, and none of them provides a basis for treating the Minimum Coverage Fee Provision as a direct tax. And in any event, as demonstrated in the balance of the brief, under the Supreme Court's cases the Minimum Coverage Fee Provision clearly does not constitute a direct tax.

[6] Justice Paterson also suggested that to the extent the taxation apportionment requirement itself served any particular interest above and beyond the compromise over representation, it too was confined to a narrow class of taxes properly deemed direct:

> The provision was made in favor of the southern States. They possessed a large number of slaves; they had extensive tracts of territory, thinly settled, and not very productive. A majority of the states had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The southern states, if no provision had been introduced in the Constitution, would have been wholly at the mercy of the other states. Congress in such case, might tax slaves, at discretion or arbitrarily, and land in every part of the Union after the same rate or measure: so much a head in the first instance, and so much an acre in the second. To guard them against

In *Hylton*, the Court held that a tax on carriages was not a direct tax. Writing seriatim, the Justices suggested that only two kinds of taxes—capitation taxes and taxes on land—clearly constituted direct taxes, and they expressed serious doubt that any other types of taxes fell within that category. *See* 3 U.S. at 175 (opinion of Chase, J.) ("I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on LAND. I doubt whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax."); *id.* at 177 (opinion of Paterson, J.) ("Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point."); *id.* at 183 (opinion of Iredell, J.) ("Perhaps a direct tax in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil * * *. A land or a poll tax may be considered of this description.").

For the century that followed, the Supreme Court adhered to the narrow view of direct taxes favored by the *Hylton* Justices. Tracing its precedents since *Hylton*, the Court in 1881 concluded that "direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate." *Springer v. United States*, 102 U.S. 586, 602 (1881). Accordingly, the Court in the nineteenth

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> imposition in these particulars, was the reason of introducing the clause in the Constitution, which directs that representatives and direct taxes shall be apportioned among the states, according to their respective numbers.

Hylton, 3 U.S. at 177 (opinion of Paterson, J.). One indication of the protections the Direct Tax Clause conferred is that after the Constitution's ratification, "slaves were taxed only as part of a general apportioned federal real estate tax. Without the apportionment requirement, a selective tax on slaves would have been quite feasible." Dodge, *supra*, at 892.

century sustained unapportioned taxes on a variety of forms of income and property on the ground that they qualified as excises, including taxes on insurance premiums, *Pacific Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433 (1869), state bank notes, *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869), inheritances, *Scholey v. Rew*, 90 U.S. (23 Wall.) 331 (1875), and income, *Springer*, 102 U.S. at 586. *See* Bruce Ackerman, *Taxation and the Constitution*, 99 Colum. L. Rev. 1, 25 (1999).

In *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895)—a case subsequently overruled by the Sixteenth Amendment—the Supreme Court struck down the federal income tax on the ground that it was an unapportioned direct tax. *Pollock* was a departure from an unbroken string of decisions, yet even that case did not hold that all income taxes are direct taxes—it was limited to taxes on income derived from real and personal property. *Pollock* struck down the entire income tax because the absence of a severance clause made it impossible save the other parts of the tax. *See id.* at 635-37; *Brushaber*, 240 U.S. at 16-17.

Pollock was an aberration that did not produce any longstanding expansion in the apportionment requirement. The Court immediately cut back on the decision, upholding a wide range of unapportioned taxes. *See Knowlton v. Moore*, 178 U.S. 41 (1900) (federal estate tax); *Patton v. Brady*, 184 U.S. 608 (1902) (tax on manufacturing of tobacco); *Thomas v. United States*, 192 U.S. 363 (1904) (stamp tax on memorandum or contracts of sale of stock certificates); *Spreckels Sugar Ref. Co. v. McClain*, 192 U.S. 397 (1904) (tax on sugar refining); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 177 (1911) (corporate income tax).

More significantly, the Nation responded to *Pollock* by adopting the Sixteenth Amendment, providing that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. amend. XVI. As the Court later explained, "the Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock* Case was decided" by making clear that all taxes on income are exempt from the apportionment requirement. *Brushaber*, 240 U.S. at 18.[7]

Since the ratification of the Sixteenth Amendment, the Direct Tax Clause has continued to be understood narrowly. In addition to capitation and land taxes, the Court has stated that certain taxes upon personal property may also constitute direct taxes. The Court has *never* invalidated a tax on the ground that it is an unapportioned capitation tax. As for property taxes, the critical distinction between direct and indirect taxes on property is that the former are imposed upon the "general ownership of property," whereas a tax on "a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned." *Bromley v. McCaughn*, 280 U.S. 124, 136 (1929). On the basis of that understanding, the Court has upheld a wide range of unapportioned taxes on the ground that they are not imposed on property itself.

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[7] In *Eisner v. Macomber*, 252 U.S. 189 (1920), the Court held that an unapportioned tax on unrealized stock dividends was unconstitutional. But that case has been largely confined to its facts. *See Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) (suggesting that *Macomber* "was not meant to provide a touchstone to all future gross income questions"); *Union Elec. Co. v. United States*, 363 F.3d 1292, 1302 n.11 (Fed. Cir. 2004) ("[I]n light of other Supreme Court decisions * * * upholding taxes on particular property, *Eisner v. Macomber* must be viewed as invalidating only unapportioned taxes on the particular broad class of property (corporate stock) involved in that case."); *see also* Michael J. Graetz, The Decline (and Fall?) of the Income Tax 285 (1997) (describing *Macomber* as "now archaic").

See, e.g., *Fernandez v. Wiener*, 326 U.S. 340, 362 (1945) (upholding an estate tax collected upon community property); *Bromley*, 280 U.S. at 138 (upholding a gift tax); *New York Trust Co. v. Eisner*, 256 U.S. 345 (1921) (upholding an estate tax); *Stanton v. Baltic Mining Co.*, 240 U.S. 103 (1916) (upholding a tax on the annual production of mines); *Billings v. United States*, 232 U.S. 261 (1914) (upholding a tax on foreign built yachts).

In sum, the Supreme Court's cases embrace a consistently narrow understanding of the taxes subject to the Direct Tax Clause. As the D.C. Circuit recently concluded, "[o]nly three taxes are definitely known to be direct: (1) a capitation * * *, (2) a tax upon real property, and (3) a tax upon personal property." *Murphy v. I.R.S.*, 493 F.3d 170, 181 (D.C. Cir. 2007). That is indeed as expansively as the Constitution's reference to direct taxes can plausibly be construed. Any broader construction would not only depart from the Supreme Court's cases and disregard Justice Paterson's admonition "not to * * * extend[] [the rule] by construction," *Hylton*, 3 U.S. at 178, it could also jeopardize any number of aspects of the current tax laws. Relying on the Court's consistently narrow understanding of what taxes are subject to apportionment, Congress has not apportioned a tax law since 1861. *See* Jensen, *supra*, at 93. There is no call for potentially jeopardizing the federal tax laws by expanding the sweep of the Direct Tax Clause beyond its historical understanding.

B. The Minimum Coverage Fee Provision Is Not Subject To The Apportionment Requirement.

The Minimum Coverage Fee Provision is not among the taxes covered by the Direct Tax Clause, and is instead among the wide range of indirect taxes not subject to the constitutional requirement of apportionment.

The Minimum Coverage Fee Provision plainly is not a tax on the "general ownership of property," *Bromley*, 280 U.S. at 136, and thus is not the sort of property tax covered by the Clause. Neither is it a capitation tax. As Story explained in his *Commentaries on the Constitution*, "capitation taxes, or, as they are more commonly called, poll taxes, [are] taxes upon the polls, heads, or persons, of the contributors." Story, *supra*, § 476. Such a tax is imposed on the person "without regard to property, profession, or any other circumstance." *Hylton*, 3 U.S. at 175 (opinion of Chase, J.). It is a tax on a person "because of the person's existence." Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?* 11 J. Const'l L. 839, 841 (2009); *see* Black's Law Dictionary 1222 (8th ed. 2005) (defining a poll tax or capitation tax as "a fixed tax levied on each person within a jurisdiction").[8]

The Supreme Court has never struck down a federal tax on the ground that it is a capitation, and there is no basis for concluding that the Minimum Coverage Fee Provision is the first such tax. Far from being imposed "without regard to * * * any * * * circumstance," *Hylton*, 3 U.S. at 175 (opinion of Chase, J.), it is instead based on a very specific circumstance: the taxpayer's failure to pay premiums into a qualified health care plan in a given month. Taxpayers can easily remove themselves from the tax by purchasing health insurance; this ability to exit the tax is not true of poll taxes or any other capitation tax. The tax therefore is not imposed "because of the person's existence," Dodge, *supra*, at 841; it is imposed because of the person's decision not to

[8] Although federal law imposes no capitation taxes, some states provide for them. The Delaware Constitution, for example, provides that its "General Assembly shall provide for levying and collecting a capitation tax from every citizen of the State of the age of twenty-one years or upwards." Del. Const. art. VIII § 5.

purchase insurance. The tax thus does not operate directly on any person or property, but only indirectly as a function of the person's particular actions. *See Tyler v. United States*, 281 U.S. 497, 502 (1930) ("A tax laid upon the happening of an event, as distinguished from its tangible fruits, is an indirect tax * * *."). As Justice Paterson said of indirect taxes in *Hylton*, the individual by his particular actions "may be said to tax himself." 3 U.S. at 180 (opinion of Paterson, J.). There is no precedent for treating such a tax as a capitation under the Constitution.

Having concluded that the Minimum Coverage Fee Provision is not a capitation or other direct tax, this Court need not identify precisely what kind of tax it is—whether duty, impost, excise, or income.[9] It suffices for purposes of the Direct Tax Clause that the provision does not impose a tax that must be apportioned under the Constitution.

[9] The Minimum Coverage Fee Provision could be deemed an income tax, in which case the Sixteenth Amendment would immunize it from any apportionment requirement. The tax for failing to purchase health insurance is calculated in part on the basis of the taxpayer's income, subject to certain caps. *See* Pub. L. No. 111-148, § 1501(b) (adding 26 U.S.C. § 5000A(c)(1) & (2)) (as amended by Pub. L. No. 111-152, § 1002). It also exempts some individuals from its requirements altogether if they satisfy criteria establishing their inability to pay or if their household income is below the threshold for filing a federal tax return. *See id.* (also adding 26 U.S.C. § 5000A(e)(1) & (2)). Thus, any particular individual's tax liability for failing to purchase health insurance depends in part on his or her household income. *See* Brian Galle, *Conditional Taxation and the Constitutionality of Health Care Reform*, 120 Yale L.J. Online 27, 31 (2010).

CONCLUSION

The motion to dismiss should be granted.

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Respectfully submitted,

/s/

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I hereby certify that on the 18th day of June, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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