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Liberty University v. Geithner - Amicus Brief of Constitutional Law Professors

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No. 10-2347

IN THE

United States Court of Appeals for the Fourth Circuit

LIBERTY UNIVERSITY, *et al.*,

Plaintiffs-Appellants,

vs.

TIMOTHY GEITNER, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District Of Virginia

Case No. 10-cv-15

The Honorable Norman K. Moon

BRIEF OF CONSTITUTIONAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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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 Supreme Court decisions relating to the legislative authority of the federal government. Their legal expertise thus bears directly on the constitutional issues before the Court in this case.[1]

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INTRODUCTION

The Affordable Care Act ("ACA") establishes a comprehensive regime to address a growing crisis in uncompensated health care services in the United States. Prior to passage of the ACA, uninsured individuals frequently obtained healthcare services without fully paying for them—a widespread practice that imposed systemic burdens and cost-shifting. Pro-

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

viding these uncompensated services to the uninsured cost the American healthcare system $43 billion in 2008—a cost that was substantially subsidized by the government; the remainder of that cost was passed on to private insurers, insured families, and employers. *See* Pub. L. No. 111-148, §§ 1501(a)(2)(F), 10106(a) (2010); 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 health insurance also produces increased premium rates for those who do purchase insurance, as well as increased costs to the government. Moreover, because 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, enacting those provisions without providing an incentive for all Americans to purchase insurance would likely have increased the economic burden on those who buy insurance and on the government.

The Minimum Coverage Fee Provision challenged in this litigation addresses this critical problem by mandating that individuals either purchase a minimally adequate health insurance plan for themselves and

their families or pay an annual tax. *See* ACA §§ 1501(b), 10106, amended by Pub. L. No. 111-152 § 1002 (2010), *codified at* 26 U.S.C. § 5000A.

Amici are confident 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. But the Provision also falls squarely within the Constitution's grant to Congress of the "Power To lay and collect Taxes, Duties, Imposts and Excises." *Id.* art. I, § 8, cl. 1.[2]

Congress's taxing power is exceedingly broad. The Supreme Court has repeatedly reaffirmed the taxing power's reach and has consistently held that a tax is valid so long as it serves the general welfare, is reasonably related to revenue raising, and does not violate any independent constitutional prohibition. The Court has also 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.

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[2] In the proceedings below, the district court determined that the Minimum Coverage Fee Provision was a valid exercise of Congress's Commerce Clause Power and did not reach the question of Congress's power under the Taxing and Spending Clause. *See* Slip. Op. at 17.

Moreover, the Supreme Court has repeatedly rejected the contention that an enactment may be sustained under the taxing power only if Congress expressly invoked that authority or used the term "tax" in creating the provision. If the enactment functions as a tax—that is, if it is a "pecuniary burden laid upon individuals or property for the purpose of supporting the government," *United States v. New York*, 315 U.S. 510, 515-16 (1942) (quotation omitted)—it may be sustained under the taxing power regardless of the label Congress employed.

The taxing power is not without limits. The Constitution provides, in relevant part, 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. But that limitation is not implicated here. The Supreme Court has long restricted the Direct Tax Clause to taxes upon real property, taxes upon personal property, and capitation taxes—none of which describes the Minimum Coverage Fee Provision.

ARGUMENT

I. THE TAXING POWER IS A BROAD AND INDEPENDENT GRANT OF LEGISLATIVE POWER.

The Supreme 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). It is thus well-settled that "the constitutional restraints on taxing are few," and that "[t]he 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 unrelated grounds by Marchetti v. United States*, 390 U.S. 39 (1968).

The taxing power's breadth is no accident. The fundamental problem that doomed the Articles of Confederation was the Continental Congress's lack of taxing authority. Rather than levying taxes itself, the federal government was required to 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). The states were then expected to levy and collect taxes to provide the requisitioned amount. They often failed to do so, however, and Congress had few means by which to enforce compliance. *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 requisition 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 thus became a major motivation for adoption of the Constitution. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 388 (1821); *see also The Federalist* No. 30 (Alexander Hamilton) (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 v. Fenno*, 75 U.S. (8 Wall.) 533, 540 (1869).

Against this recognized historical backdrop, the Court has rejected arguments that the taxing power is limited to subjects that Congress can reach under the Commerce Clause or other grants of legislative authority, as well as claims that a regulatory purpose or effect renders a tax invalid. Instead, the Supreme Court has upheld measures as valid exercises of the taxing power so long as they (1) serve the general welfare, (2) raise revenue, and (3) do not infringe any of the individual rights protected elsewhere in the Constitution.

A. Congress may enact taxes that have the effect of regulating activities not subject to regulation under Congress's other enumerated powers.

The Taxation Clause "delegates a power separate and distinct from those later enumerated" in Article I, Section 8, and therefore stands apart from those enumerated powers and is "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). Noting that "Congress has no power of regulation nor any direct control" over "the internal commerce or domestic trade of the States," it nonetheless sustained under the tax power a federal statute requiring purchase of a license before engaging in certain trades and businesses, even intrastate. *Id.* at 470-71. *See also United States v. Sanchez*, 340 U.S. 42, 44 (1950) ("Nor does a tax statute necessarily fail because it touches on activities which Congress might not otherwise regulate.").

The Supreme Court has also made clear that a tax is not rendered invalid by the existence of a regulatory purpose underlying it, or a regulatory effect flowing from it. The Court long ago declared it "beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed." *Sanchez*, 340

U.S. at 44. *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); *United States v. One Ford Coupe Auto.*, 272 U.S. 321, 328 (1926). Similarly, it has affirmed that "a tax is not any the less a tax because it has a regulatory effect." *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937). Indeed, "[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." *Sanchez,* 340 U.S. at 44.

For precisely this reason, the Court has long "held that the fact that other motives may impel the exercise of federal taxing power does not authorize courts to inquire into that subject." *United States v. Doremus*, 249 U.S. 86, 93 (1919). 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.*; *see also 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) (substantially the same); *McCray v. United States*, 195 U.S. 27, 59 (1904) (substantially the same).

This Court, too, has long recognized that an act may "come within the scope of the taxing power of Congress" even when "the reason and purpose of Congress, and the real effect of the act" is "for a moral end, wholly different from the mere collection of revenue." *Barbot v. United States*, 273 F. 919, 921 (4th Cir. 1921). That is to say, "in a revenue statute the Congress may make any rule or regulation which is not in itself unreasonable, although its effect on the revenue be only remote or incidental, and its effect on the public health or morals direct and obvious." *Foreman v. United States*, 255 F. 621, 623 (4th Cir. 1918).

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). *See also* Opening Br. 40. But the Court has since discredited those decisions, explaining 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), and in-

sisting that a tax remains valid "even though * * * the revenue purpose of the tax may be secondary." *Sanchez*, 340 U.S. at 44. This Court has likewise recently noted that a statute's "regulatory provisions need only bear a 'reasonable relation' to the statute's taxing purpose." *United States v. Aiken*, 974 F.2d 446, 448 (4th Cir. 1992) (quoting *Doremus*, 249 U.S. at 93).

Of course, even if the Supreme Court's *Lochner*-era decisions retained some force today, they would merely support invalidating as pretextual a levy so high as to amount to a coercive penalty to compel compliance with a regulatory scheme that falls wholly outside Congress's enumerated powers. That was the situation addressed by those decisions, and that is how the Court has interpreted them since. *See, e.g.*, *Kahriger*, 345 U.S. at 29-32. Absent such extreme circumstances, however, those cases do not license judicial second-guessing of Congress's intentions in enacting legitimate taxes.

Instead, any scrutiny the Court today devotes to the purposes of a tax focuses on ensuring it is not a criminal sanction in disguise. *See Mont. Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 779-83 (1994) (concluding that tax on drugs constituted criminal punishment and therefore violated the Double Jeopardy Clause).

B. A tax is constitutional if it (1) serves the general welfare, (2) is reasonably related to revenue raising, and (3) does not infringe any constitutionally-protected individual right.

Though broad, the taxing power is not unlimited. The Court has identified three criteria that a levy must satisfy to be upheld as a tax.

The first criterion is evident from the text of the Constitution: to be valid, a tax measure must raise funds that specifically "pay the Debts and provide for the common Defence and general Welfare." U.S. Const. art. I, § 8, cl. 1; 1 Joseph L. 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).

Second, to fall within the tax power a measure must bear "some reasonable relation" to the "raising of revenue," *Doremus*, 249 U.S. at 93-94, even if the revenue actually produced is "negligible," *Sanchez*, 340 U.S. at 44; *accord Kahriger*, 345 U.S. at 28 (noting tax at issue "produces revenue"); *Sonzinsky*, 300 U.S. at 514 (sustaining tax "productive of some revenue"); *J.W. Hampton, Jr. & Co. 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" because it raised $1 million per year).

Finally, the Supreme Court has also rejected tax measures that run afoul of constitutional protections of individual rights, such as the Fifth Amendment's prohibition on double jeopardy. *Kurth Ranch*, 511 U.S. at 778-79, 784; *see also United States v. Alkhafaji*, 754 F.2d 641 (6th Cir. 1985) (invalidating wagering tax as violating Fifth Amendment privilege against self-incrimination).

II. THE MINIMUM COVERAGE FEE PROVISION IS A VALID EXERCISE OF THE TAX POWER.

A. The Minimum Coverage Fee Provision satisfies the requirements for an exercise of the taxation power.

1. The Minimum Coverage Fee Provision satisfies the requirements for a valid exercise of the tax power because it (1) provides for the general welfare, (2) raises revenue, and (3) does not run afoul of any constitutionally-protected individual right.

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. By encouraging individuals to purchase health insurance the Minimum Coverage Fee Provision alleviates the costs

associated with providing uncompensated care to the uninsured and lowers health insurance premiums. Such cost reductions and expansions in access to health insurance assuredly constitute contributions to the general welfare.

Second, it is also clear that the provision constitutes a genuine revenue-raising measure. The Congressional Budget Office estimated that the Minimum Coverage Fee Provision will 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 2, tbl.4. Over the course of the period between 2010 and 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 $5,400 in revenue in 1934—$88,000 in today's dollars).

Doubtless, the Minimum Coverage Fee Provision also serves a regulatory purpose by encouraging individuals to purchase health insurance. But as we have explained, the governing precedents make plain that a regulatory purpose cannot invalidate a measure that otherwise may be sustained under the taxing power *See*, *supra*, pages 7-11. Moreover, even if the *Lochner*-era decisions retained some vitality, they would not provide

any basis for invalidating the tax here. Unlike the regulatory regimes at issue in those cases, the Minimum Coverage Fee Provision is not the sole basis on which the entire ACA is made operative. Instead, the ACA's other detailed regulatory requirements are separately laid out and are easily sustainable in their own right under Congress's commerce and spending powers.

Nor is the Minimum Coverage Fee Provision a secret criminal penalty in disguise. The amount of tax imposed is not a "heavy exaction" or otherwise disproportionate assessment. *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 (2010)). The tax is in no way tied to criminal action, and the Secretary of Treasury is precluded from enforcing by means of a criminal prosecution. *See id.* (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).

Indeed, the provision plainly lacks the punitive character of other measures the Supreme Court has held to be penalties. All that the fee provision requires is that those who forgo health insurance, and thereby impose costs on the federal government and their fellow citizens, pay a tax at most roughly equivalent to the amount they would otherwise expend purchasing insurance. By comparison, the provision deemed a penalty in *United States v. Reorganized CF & I Fabricators*, 518 U.S. 213 (1996), imposes a tax of 110% *in addition to* the amount an employer owes for an underfunded pension plan. *Id*. at 225-26.

Third, the Minimum Coverage Fee Provision does not violate any individual rights. No one has a right to be free from taxation, and Congress's decision to target individuals who decide to forgo 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."). The provision thus plainly qualifies as a legitimate, enforceable tax.

2. In concluding otherwise, Judge Hudson of the Eastern District of Virginia has reasoned that "the generation of revenue" was not "a significant legislative objective" of the ACA but instead "a transparent after-

thought," nothing more than a "tactic to achieve enlarged regulatory license." *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 786 (E.D. Va. 2010). But this focus on purported congressional motivation was misplaced. In determining whether a measure is a tax, courts should be "concerned only with its practical operation," *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) (quotation omitted), not the motives of the legislature that produced it. And in that respect, the critical question here is not whether Congress meant to achieve a regulatory objective in addition to raising revenue—plainly it did, and plainly it may. *Sonzinsky*, 300 U.S. at 513; *Aiken*, 974 F.2d at 449-50. Instead, the question for purposes of the constitutional analysis is whether the tax raises revenue for use in service of the general welfare—and plainly it does. That is as far as the inquiry need go in order to sustain the Minimum Coverage Fee Provision under the Taxation Clause. Because the provision "bear[s] directly on the revenue," it is a constitutional tax even though it is "doubtless" that the Act was designed "to promote public health." *Foreman*, 255 F. at 623.

B. The Taxation Clause does not require Congress to use any particular labels or expressly invoke the taxation power.

The Minimum Coverage Fee Provision's constitutionality under the tax power is not affected by its denomination as a "penalty," nor by the ab-

sence of a reference to the tax power in the statutory text. Appellants are simply wrong to contend otherwise. *See* Opening Br. 40-43.

1. The Supreme Court has expressly held that, in determining whether a particular exaction is a tax, courts must "look[] behind the label placed on the exaction and rest its answer directly on the operation of the provision." *Reorganized CF & I Fabricators*, 518 U.S. at 220; *see also Nelson*, 312 U.S. at 363 (in "passing on the constitutionality of a tax law," a court is "concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it" (quotation omitted)).

Indeed, the Court has long characterized legislative acts as "taxes" without regard to the precise labels used by Congress—including an exaction expressly deemed a "penalty" in the Internal Revenue Code. *See United States v. Sotelo*, 436 U.S. 268, 275 (1978); *see also License Tax Cases*, 72 U.S. at 471 ("The granting of a license * * * must be regarded as nothing more than a mere form of imposing a tax"). Other courts have followed suit, holding, for example, that a legislative measure imposing fees for handicapped parking placards was a tax. *See Hedgepeth v. Tennessee*, 215 F.3d 608, 612-15 (6th Cir. 2000). Whether the Minimum Coverage Fee

Provision uses the term "tax" is therefore immaterial to determining whether it lies within the taxing power.[3]

This Court, too, has explained that a label does not determine whether an assessment is a tax. In a series of cases arising under the Coal Act, this Court elucidated the standard for distinguishing between a tax and other kinds of assessments. The first criterion is whether the provision is "'[a]n involuntary pecuniary burden, *regardless of name*, laid upon individuals or property.'" *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 583 (4th Cir. 1996) (emphasis added) (quoting *United States v. City of Huntington*, 999 F.2d 71, 73 n.4 (4th Cir. 1993)). *See also Pittston Co. v. United States*, 199 F.3d 694, 702 (4th Cir. 1999) (same).

This is the same rule that is applied whenever a court determines whether an act of Congress lies within an enumerated power. "[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). Thus, Congress need not specify a particular head of legislative power in order for a statute to be upheld under that

[3] Judge Hudson was wrong to focus on Congress's use of the term "penalty" in lieu of "tax." *See Cuccinelli*, 728 F. Supp. 2d at 786-87. As the Supreme Court has instructed, the crucial inquiry is the function of the provision in question, not its label. *See Sotelo*, 436 U.S. at 275.

power. And even when it does invoke a particular power, the statute may be upheld as a permissible exercise of a different enumerated power. All a court need do is "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).

2. Although not constitutionally required, Congress *did* provide affirmative indicia that it intended the Minimum Coverage Provision to be a tax. The provision 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)). If a taxpayer fails to pay the amount due, typical tax penalties—with certain express limitations—apply. *See* 26 U.S.C. § 5000A(g).[4]

[4] That Congress considered it necessary to exempt the Minimum Coverage Fee Provision from certain traditional tax penalties—like criminal penalties as well as liens and levies (*see* 26 U.S.C. § 5000a(g)(2))—provides powerful evidence that Congress understood the provision to be a tax.

Courts have previously emphasized similar features in holding a measure to be a tax. This Court, for example, has found that incorporation of an assessment into the Internal Revenue Code and providing the Secretary of the IRS enforcement powers demonstrates that an act is an exercise of Congress's taxing power." *In re Leckie*, 99 F.3d at 583. *See also Hedgepeth*, 215 F.3d at 612-13 (emphasizing assessments went into funds that served the general welfare). The Second Circuit, too, has said, "[t]he placement" of a statutory provision within a subtitle "of the Internal Revenue Code," together with "its granting of enforcement powers to the Secretary of the Treasury"—as here—"provides a strong indication of Congress's intent" that the requirements under the provision be construed as taxes. *In re Chateaugay Corp.*, 53 F.3d 478, 498 (2d Cir. 1995).

The legislative history likewise demonstrates that Congress understood the provision to function in part as a tax and to be supported by the tax power. *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* Joint Comm. on Taxation, 111th Cong., *Technical 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).[5] Several members of Congress expressly invoked the tax power as a basis for enacting the Minimum Coverage Fee Provision. *See, e.g.,* 155 Cong. Rec. S13,751, S13,753 (Dec. 22, 2009) (Sen. Leahy); 155 Cong. Rec. S13,558, S13,581-82 (Dec. 20, 2009) (Sen. Baucus).

III. THE MINIMUM COVERAGE FEE PROVISION IS NOT A DIRECT TAX SUBJECT TO THE CONSTITUTIONAL REQUIREMENT OF APPORTIONMENT.

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

A. The apportionment requirement applies only to 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. This apportionment requirement is the direct result of a compromise over slavery. Article I, Section 2 of the Constitution subjected representation in the House of Repre-

[5] And the revenue estimates for the provision were included in the Congressional Budget Office's letters to Congressional leaders, just like other tax provisions, and not listed in the report of the Joint Committee on Taxation ("JCT"). *See* JCT, Report JCX-10-10 at 3 n.1.

sentatives 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.

While the delegates at the Constitutional Convention of 1787 generally favored apportioning representation in the House according to each state's population, northern and southern delegates were deeply divided over whether and how to count slaves for these purposes. 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, which was subsequently extended to taxation as well. *Id.* at 302. 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, *The Taxing Power: A Reference Guide to the United States Constitution* 27 (2005).

But the idea of apportioning all federal taxes in this manner provoked concerns 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. To address this concern, Gouverneur Morris 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." *Id.* That amendment was adopted, leading ultimately to the direct tax apportionment requirement as it now appears in Article I.

The critical point from this history are twofold: *first*, 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 *second*, it 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"). Recognizing these points,

Justice Paterson made clear in the Supreme Court's first Direct Tax Clause case that 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 narrow.

Hylton sheds useful light on the provision. Writing seriatim, the Justices suggested that only two kinds of taxes—capitation taxes and taxes on land—clearly constituted direct taxes; they expressed serious doubt that any other types of taxes fell within that category. As Justice Chase wrote,

> I am inclined to think * * * 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.

3 U.S. at 175 (opinion of Chase, J.); *see also 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. (12 Otto) 586, 602 (1881). Accordingly, the Court in the nineteenth 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 592.

Of course, in *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), the Supreme Court struck down the federal income tax as an unapportioned direct tax. Yet while *Pollock* was a departure from an unbroken string of decisions, 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 to save the other parts of the tax. *See id.* at 635-37; *Brushaber*, 240 U.S. at 16-17.

Following *Pollock*, the Court has consistently upheld 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 clarifying that all taxes on income are exempt from the apportionment requirement. *Brushaber*, 240 U.S. at 18.[6]

[6] 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* Michael J. Graetz, *The Decline (and Fall?) of the Income Tax* 285 (1997) (describing *Macomber* as "now archaic").

Since the ratification of the Sixteenth Amendment, the Direct Tax Clause has continued to be interpreted and applied in exceedingly narrow circumstances. 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 that basis, the Court has upheld a wide range of unapportioned taxes on the ground that they are not imposed on property itself. *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. IRS*, 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. Relying on the Supreme Court's consistently narrow reading of the apportionment requirement, Congress has not apportioned a tax since 1861. *See* Jensen, *Taxing Power*, *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. Because the Minimum Coverage Fee Provision is neither a capitation tax nor a tax on property, there is no apportionment requirement.

Against this backdrop, the Minimum Coverage Fee Provision plainly is not among the taxes subject to the requirement of apportionment. It 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 Justice 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 also 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").

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 property, profession, or any other 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, and the taxpayer's ability to pay. Taxpayers' option to purchase health insurance and remove themselves from the tax obviously disqualifies the tax as a capitation tax. That disqualification follows also from the fact that the ACA exempts millions of individuals whose household incomes are below the threshold required for

filing a tax return, members of Indian tribes, or individuals who may demonstrate "hardship." 26 U.S.C. § 5000A(e).

The Minimum Coverage Fee Provision thus is not imposed "because of the person's existence," Dodge, *supra*, at 841; it is imposed because of the person's decision not to purchase insurance. The tax does not operate directly on any person or property, but only indirectly as a function of the person's particular decisions. *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.

Instead, the Minimum Coverage Fee Provision is best understood to be an excise tax. It is codified in Subtitle D the Internal Revenue Code, which is entitled "Miscellaneous Excise Taxes." Excise taxes are those that "apply to activities, transactions, or the use of property" and "do not apply directly to individuals for being." Steven J. Willis & Nakku Chung, *Constitutional Decapitation & Healthcare*, 128 Tax Notes 169, 182 (2010). Precisely so of the Minimum Coverage Fee Provision, which is levied on the basis of decisions individuals make with respect to specific "transactions"—namely the decision to forgo purchasing health insurance. There

are numerous examples of Congress taxing the failure to make a particular economic arrangement. *See, e.g.*, 26 U.S.C. § 4974 (tax on failure of retirement plans to distribute assets); *id.* § 4980B (tax on failure of group health plan to extend coverage to beneficiary); *id.* § 4980E (tax on failure of employer to make comparable Archer MSA contributions). Those provisions are not subject to the apportionment requirement, and neither is the Minimum Coverage Fee Provision.

People without health insurance consume billions of dollars in medical services annually, and, in aggregate, cannot pay the total cost of those services. Congress determined that a substantial portion of those costs are passed on "to private insurers, which pass on the cost to families" with health insurance. 42 U.S.C. § 18091(a)(2)(F). Against this backdrop of insurers and insured families absorbing costs associated with the provision of health care services to the uninsured, Congress determined to tax the economic decision to forgo health insurance. The Minimum Coverage Fee Provision is thus linked not only to an individual's decision not to purchase health insurance, but also to the aggregate phenomenon of uninsured individuals accessing health care services they cannot afford to pay for directly. There is no basis in precedent or principle for subjecting this tax to the constitutional requirement of apportionment.

CONCLUSION

The judgment of the district court should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

I hereby certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7). The brief contains 6,995 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2011, I caused the foregoing brief to be filed and served through the Court's CM/ECF system. All counsel of record are registered CM/ECF users.

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