No. 11-398

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,
v.
STATE OF FLORIDA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AND CHANGE TO WIN AS *AMICI CURIAE* ADDRESSING THE MINIMUM COVERAGE PROVISION ISSUE AND SUPPORTING PETITIONERS AND REVERSAL

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INTEREST OF *AMICI CURIAE*

Amicus curiae Service Employees International Union ("SEIU") is the nation's largest healthcare union, with more than half its 2.1 million members in the healthcare field. SEIU supports the Patient Protection and Affordable Care Act of 2010 ("PPACA") because it helps ensure accessible, quality healthcare for all Americans, including SEIU members and their families.

Amicus curiae Change to Win is a federation of four labor unions – the International Brotherhood of Teamsters, United Farm Workers of America, United Food and Commercial Workers International Union, and

SEIU – which collectively represent 5.5 million working men and women. Change to Win is committed to achieving affordable healthcare for all workers and their families.[1]

SUMMARY OF ARGUMENT

The minimum coverage provision of the PPACA, 26 U.S.C. §5000A, operates as an income tax within Congress' "complete and all-embracing taxing power." *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 13 (1916). The provision gives taxpayers the choice to either purchase adequate health insurance coverage or pay additional money to the government with their annual income tax returns. The exaction applies only to those with taxable income above the income tax filing thresholds, represents no more than a small portion of any individual's income, is measured as a percentage of income, and is administered through the income tax collection system. The exaction generates substantial revenue for the federal government's use in addressing the cost of providing healthcare for taxpayers without adequate insurance, while creating an incentive for taxpayers to purchase affordable coverage, reducing future costs to the government. In every legally significant aspect, the minimum coverage provision operates as an income tax that satisfies the constitutional requirements for an exercise of Congress' taxing power.

Opponents of the PPACA nonetheless insist that the minimum coverage provision cannot be upheld as a tax because the PPACA states that covered individuals "shall" procure minimum essential coverage, and because

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed letters of consent with the Clerk of the Court.

Congress labeled the exaction a "penalty" and not a "tax." Although they point to no aspect of the provision's operation that is inconsistent with its status as a tax, according to the PPACA's opponents, one of the most significant pieces of legislation in the last 50 years must be overturned for being improperly worded.

This kind of "magic words" jurisprudence is not the law, and is deeply disrespectful of legislative prerogatives. *See*, *e.g.*, *Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992). Courts are charged with policing (and protecting) the substance of Congress' legislative authority. Whether an exaction is a valid exercise of the taxing power turns on its operation, not Congress' drafting skill or choice of label. Moreover, if there is any doubt about a statute's constitutionality, it is a "cardinal principle" of judicial review that courts, wherever possible, construe the statute to preserve its constitutionality. *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

There is no reason to construe the minimum coverage provision's use of the word "shall" as having any legal significance beyond stating the conditional basis against which the tax liability will be assessed, especially if, as opponents of the PPACA contend, such a construction renders the statute constitutionally vulnerable. The only consequence that flows from an individual's failure to act is payment of this income-based assessment as part of one's tax return. This Court has already construed an identically-structured statute as establishing "choices," rather than a "mandate," where the latter construction raised serious constitutional questions. *New York v. United States*, 505 U.S. 144, 169 (1992). The language here should be construed as establishing similar "choices" – individuals may purchase coverage or pay a tax. So construed, the statute's reach is entirely within Congress' taxing power.

Likewise, Congress' use of the word "penalty" rather than "tax" has no constitutional significance. The Court has previously recognized that Congress may exercise its taxing power through exactions with far more unambiguously regulatory labels. *See*, *e.g.*, *License Tax Cases*, 72 U.S. 462 (1866) (upholding "license" as tax).

The PPACA's opponents also claim that the minimum coverage provision cannot be a tax because Congress assertedly was motivated by a regulatory purpose or because the provision has a penalizing effect. But all taxes have regulatory consequences, and can be said to penalize those taxed. The presence (or even predominance) of a regulatory purpose is fully consistent with an exaction's validity as an exercise of Congress' taxing power. *See United States v. Sanchez*, 340 U.S. 42, 44 (1950).

It cannot be disputed that the PPACA's minimum coverage requirement could be accomplished without raising any constitutional objection through a differently worded but operationally indistinguishable exercise of the taxing power. Congress indisputably has the authority to tax the income of those who decline to purchase health insurance. That is all that the minimum coverage provision does. The provision should therefore be upheld.

ARGUMENT

I. The Minimum Coverage Provision Operates As An Income Tax That Is Within Congress' Taxation Power

The PPACA's "minimum coverage" provision states that "applicable individual[s]" "shall" maintain "minimum essential" health insurance coverage, and subjects those who do not maintain such coverage to a financial exaction. 26 U.S.C. §5000A(a)-(b). The provision is part of a comprehensive reform package designed to improve the nation's health and reduce the federal

deficit. In enacting the PPACA, Congress found that healthcare costs, including the costs of caring for the uninsured, significantly burden the federal budget. *See*, *e.g.*, H.R. Rep. No. 111-443, pt. 1, at 1 (2010); *id.*, pt. 2, at 983. The minimum coverage provision addresses this fiscal burden by encouraging individuals with sufficient income to purchase private health insurance, and by generating annual revenue of more than $4 billion. Congressional Budget Office ("CBO"), "Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act," Apr. 30, 2010, at 3. The conditional financial exaction – paid only by those with income who have not otherwise obtained coverage – promotes the PPACA's fiscal goals without requiring those who have already incurred costs to obtain coverage to pay twice.

A. The Minimum Coverage Provision Operates As An Income Tax

Although Congress did not expressly label the minimum coverage provision a "tax," the only legal consequence for failing to procure "minimum adequate coverage" is a requirement to pay additional money to the government, and that exaction operates as an income tax in all legally relevant aspects. Accordingly, the minimum coverage provision in its practical operation is a conditional income tax.[2]

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[2] The Sixteenth Amendment establishes that Congress' tax authority encompasses all income taxes, conditional or otherwise. U.S. Const. amend. XVI. Although the minimum coverage provision operates as an income tax within the scope of the Sixteenth Amendment, the provision is a valid exercise of Congress' tax authority even if it is understood as another form of excise tax, because income taxes are subject to the same constitutional constraints as other excise taxes. *See Brushaber*, 240 U.S. at 17-19.

First, payment of the exaction is conditioned upon the receipt of income. Only individuals who receive income in excess of the income tax filing threshold are subject to the exaction. 26 U.S.C. §5000A(e)(2). Like the "license fee" that this Court, in *Jefferson County v. Acker*, 527 U.S. 423, 437-42 (1999), recognized as an income tax, the exaction is "'levied on, with respect to, or measured by, net income, gross income, or gross receipts,'" *id.* at 438 (citing 4 U.S.C. §110(c)).

Second, no sources of wealth other than income are subject to the exaction. In most cases, the exaction is measured as a simple percentage of income. In others, it is subject to a floor and ceiling (with both always far below one's income). In virtually all cases, the exaction will be no more than a small fraction of a taxpayer's annual income.[3] Moreover, many individuals with moderate incomes are exempted from the exaction entirely. *See*, *e.g.*, 26 U.S.C. §5000A(e)(1) (affordability exemption).

Third, the exaction is collected and reported entirely through the income tax system and its self-reporting mechanisms, as a part of the taxpayer's total annual income tax obligations. 26 U.S.C. §5000A(b)(2). The provision defines the individuals subject to the exaction as "taxpayers" and the period during which they must

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[3] In 2016, the payment by a taxpayer without coverage cannot be more than the greater of (1) 2.5% of household income above the filing threshold, or (2) a flat dollar amount well below the filing threshold, ranging from $695 to $2,085 depending on family size. 26 U.S.C. §5000A(c)(2)-(3). The payment will thus be calculated simply as a small and fixed percentage of income for single individuals with incomes from less than $40,000 to more than $200,000 (based on current filing thresholds). That the exaction is subject to a floor and ceiling does not affect its operation as an income tax. The Social Security tax is similarly capped, 26 U.S.C. §3121(a)(1); 42 U.S.C. §430; and the "alternative minimum tax," 26 U.S.C. §55, similarly ensures that taxpayers pay a minimum amount of federal income tax.

procure insurance as their "taxable year." *Id.* §5000A(b)(2), (b)(3), (c)(2). Payments are "assessed and collected in the same manner as taxes," and are included by law in "any reference in [the Internal Revenue Code] to 'tax.'" *Id.* §§5000A(g)(1), 6671(a). The provision treats family relationships in the same manner as the general income tax code. *Id.* §5000A(b)(3) (individuals liable for payments required by dependents or spouse); *id.* §5000A(c)(4) (household income and family size defined by dependents reported on income tax return) (citing 26 U.S.C. §151). Accordingly, taxpayers will simply experience the exaction as part of their income tax obligations.

Because the exaction bears all the functional characteristics of an income tax conditioned upon choosing not to purchase adequate coverage, the minimum coverage provision functions as an income tax in "practical operation" – which is what matters for this Court's constitutional analysis. *See*, *e.g.*, *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941); *see also infra* Part II.1.[4]

B. The Minimum Coverage Provision's Operative Provisions Fall Within Congress' Plenary Power To Tax Income

In its operation as an income tax, the minimum coverage provision falls well within Congress' constitutional taxing power.

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[4] Opponents of the PPACA assert that the exaction does not operate as an income tax because income is not the *sole* factor that determines its applicability and amount. This is not the test. To the contrary, many of the factors that determine the minimum coverage tax's applicability and amount also determine a taxpayer's other income tax obligations. *E.g.*, 26 U.S.C. §151 (income tax determined by number of people within taxpayer's household).

"The great object of the Constitution was, to give Congress a power to lay taxes, adequate to the exigencies of government. . . ." *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 173 (1796) (Chase, J.). "[N]othing is clearer . . . 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). This "complete and all-embracing taxing power" "is exhaustive and embraces every conceivable power of taxation." *Brushaber*, 240 U.S. at 13. Congress thus has a broad and comprehensive power to tax, independent of the other enumerated congressional powers, and subject only to narrow limitations. *Pacific Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433, 443-46 (1868). Congress' power to tax *income* is especially broad. *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88, 99 (1936) ("When it is [income], it may be taxed . . . .").

The minimum coverage provision satisfies each of the narrow limitations on Congress' taxing power.

1. An exercise of Congress' taxation power must produce "some revenue." *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937). The minimum coverage provision easily satisfies this requirement. The PPACA was prompted in part by Congress' concern about the fiscal strain of rising healthcare costs, and, as CBO estimated, the minimum coverage provision will generate $4 billion in annual revenue. *Cf. United States v. Kahriger*, 345 U.S. 22, 28 n.4 (1953) (noting valid taxes generating $3,501 and $28,911).

2. Congress must use its taxation power to promote the "general welfare." U.S. Const., art. I, §8. The discretion to determine whether a tax serves the general welfare "belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Helvering v. Davis*, 301 U.S. 619, 640 (1937). The minimum coverage provision is part of a program-

matic response to the national problems caused by the number of Americans without adequate health insurance. *See*, *e.g.*, 42 U.S.C. §18091(a)(2). This readily satisfies the general welfare requirement.

3. The Constitution imposes two additional limits on the means by which Congress taxes: "direct taxes, including the capitation tax, shall be apportioned; [and] duties, imposts, and excises shall be uniform." *Soule*, 74 U.S. at 446. Opponents of the PPACA assert that the minimum coverage provision, if a tax, is a direct tax requiring apportionment. But payment of the tax is conditioned upon numerous circumstances, including the receipt of income and the failure to procure minimum coverage. *Hylton*, 3 U.S. at 175 (Chase, J.) (with exception of property taxes, direct taxes are those imposed without regard to circumstance). Moreover, the Sixteenth Amendment specifically grants Congress the "power to lay and collect taxes on incomes, from whatever source derived, *without apportionment* . . . ." U.S. Const. amend. XVI (emphasis added).

Under the Sixteenth Amendment, income taxes, like other excise taxes, need only be uniform. *Brushaber*, 240 U.S. at 18-19. A tax satisfies this requirement if it exhibits no "undue preference" for certain states. *United States v. Ptasynski*, 462 U.S. 74, 86 (1983). The minimum coverage tax readily satisfies this test because it applies the same non-discriminatory formula throughout the nation. *See id.*

4. An exercise of Congress' plenary taxation power must not offend the Constitution's individual rights provisions, such as prohibitions on double jeopardy or self-incrimination. *See Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994); *Marchetti v. United States*, 390 U.S. 39 (1968). There is no reasonable argument that the minimum coverage provision offends any provision of the Bill of Rights.

The minimum coverage provision's operations thus fall well within Congress' constitutional taxation power.

II. The Minimum Coverage Provision's Constitutionality Is Determined By Its Operation And Substance, Not By Constitutionally Irrelevant Matters of Form

Faced with a provision that indisputably operates as a constitutional income tax, opponents of the PPACA disregard the law's operation and instead argue that matters of form preclude treating it as a tax. They argue that the mandate cannot be upheld as an exercise of the taxing power because the mandate and the exaction are not linked in the same sentence but are placed in adjacent sentences, one of which states that covered individuals "shall" procure coverage; because Congress did not use the word "tax," but the word "penalty" in the minimum coverage provision; and because Congress made express findings regarding the provision's effects on commerce. These arguments fundamentally misconceive the roles of Congress and the courts, and improperly attach "constitutional significance" to mere "semantic difference[s]." *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 285 (1977).

1. The question before this Court when it reviews federal legislation is whether the enactment falls within the substantive scope of Congress' constitutional powers. *See*, *e.g.*, *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819). In performing this review, the constitutionality of a congressional enactment is determined by its substantive operation, not by mere matters of form. *McCray v. United States*, 195 U.S. 27, 59 (1904) ("in determining whether a particular act is within a granted power," Court considers "its scope and effect").

This Court has uniformly and robustly applied this principle in considering whether a legislative enactment is a constitutionally permissible tax. The Court has determined a monetary exaction's constitutionality by examining its "practical effect," rather than name tag, and has repeatedly stressed that "magic words or labels" cannot "disable an otherwise constitutional levy." *Quill*, 504 U.S. at 310 (citation omitted); *see also United States v. Reorganized CF & I Fabricators of Utah*, 518 U.S. 213, 220 (1996) (in tax cases, "Court look[s] behind the label placed on the exaction and rest[s] its answer directly on the operation of the provision . . . ."); *Complete Auto Transit*, 430 U.S. at 285 (rejecting "rule[s] of draftsmanship" that "distract the courts and parties from their inquiry into whether the challenged [tax provision] produced [unconstitutional] results"); *Nelson*, 312 U.S. at 363 ("In passing on the constitutionality of a tax law [the Court is] concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.") (internal quotation omitted).

2. Opponents of the PPACA turn these principles inside out. They ignore the substance and operation of the minimum coverage provision, and ask the Court to act as Congress' copy editor and return the PPACA to Congress for word-smithing. Fundamentally, they ask the Court to give the law a strained and unnecessary construction that raises serious constitutional concerns. This is contrary to the proper judicial function.

First, they complain about Congress' word choice and sentence structure. They treat §5000A(a), the so-called "individual mandate," as a regulatory provision that *must* have legal significance independent of the income tax exaction, and argue that this "mandate," standing alone, cannot be an exercise of Congress' taxing power. They then argue that the provision's financial "penalty," §5000A(b)(1), *cannot* be construed as a tax because its

purpose is to force individuals to comply with the mandate.

These arguments ignore the "cardinal principle . . . beyond debate" that "every reasonable construction must be resorted to, in order to save [the] statute from unconstitutionality." *DeBartolo*, 485 U.S. at 575 (citation omitted). This rule "recognizes that Congress . . . is bound by and swears an oath to uphold the Constitution," and that courts may "not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Id.* When the constitutionality of a congressional act is questioned, the Court has a duty to "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (citation omitted). Because the minimum coverage provision operates as a constitutional income tax in all legally relevant aspects, such a construction of the minimum coverage provision is not only "fairly possible," but the most reasonable construction.

Section §5000A can be construed as affording individuals a choice between purchasing insurance and paying a tax. For that reason, the provision *must* be construed as such if an alternate construction raises constitutional concerns. *See New York*, 505 U.S. at 170; *License Tax Cases*, 72 U.S. at 471-72 (construing federal "licenses" as imposing "taxes" instead of "giving authority to carry on the branches of business which they license" because, under latter interpretation, it "might be difficult, if not impossible, to reconcile the granting of them with the Constitution").

In *New York*, this Court considered a statute *identical* in structure to the minimum coverage provision. That statute expressly stated that the States "*shall* be responsible for providing . . . for the disposal of . . . radioactive waste," and imposed three sets of penalties for non-com-

pliance. 505 U.S. at 169 (emphasis added and citation omitted); *see also id.* at 151-53 (describing "penalties"). New York argued that the "shall be responsible" provision had to be construed "alone and in isolation, as a command to the States independent of the remainder of the Act," *id.* at 170, and that, as such, it was a constitutionally impermissible "direct command" on the States, *id.* at 169. The Court declared that the statute "could plausibly be understood *either* as a mandate to regulate or as a series of incentives," but rejected the former construction because it "would raise serious constitutional problems." *Id.* at 170 (emphasis added). The Court reiterated: "'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" *Id.* (quoting *DeBartolo*, 485 U.S. at 575). Construing the statute "as a whole," this Court concluded it imposed no "mandate," but instead afforded the States "choices" while establishing "incentives" to encourage compliance. *Id.* at 169-70.[5]

This case is no different from *New York*. The minimum coverage provision can plausibly be construed as simply affording taxpayers the choice to either purchase insurance or pay a financial exaction. This is the only legal consequence for noncompliance that Congress established. The provision nowhere declares that noncompliance is "unlawful," and it specifically prohibits its

[5] The Court reached that conclusion even though the consequences for non-compliance with the "mandate" at issue there were far more significant than the small income tax exaction here. *See*, *e.g.*, *New York*, 505 U.S. at 171-74 (States that did not comply would have to pay "surcharges" to dispose of their radioactive waste in other States, forfeit their share of those surcharges if they did not meet specified conditions, and eventually lose access to other States' sites altogether).

enforcement through criminal proceedings. 26 U.S.C. §5000A(g)(2)(A). People who decline to pay the "penalty" are characterized in the law as "taxpayers," not law violators. *Id.* §5000A(b)(2). Nothing in the PPACA requires construing the minimum coverage provision to have any legal effect beyond the financial exaction. *See, e.g.*, *Thomas More Law Center v. Obama*, 651 F.3d 529, 563 (6th Cir. 2011) ("*TMLC*") (Sutton, J., concurring) ("[The PPACA] does not compel individuals to buy insurance or even use insurance. They may pay a penalty instead . . . ."); *cf. United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) ("[I]f a statute does not specify a consequence for noncompliance . . . the federal courts will not in the ordinary course impose their own coercive sanction."). Just as in *New York*, this Court should not construe the so-called "individual mandate" "alone and in isolation" – especially if that construction raises constitutional concerns.

Contrary arguments rest on the view that the word "shall" can admit of no construction other than the creation of an independent legal mandate. But this is precisely what *New York* rejected. Indeed, the *New York* Court's refusal to interpret the word "shall" in that way was hardly novel. In *License Tax Cases*, 72 U.S. at 471, for example, the Court explained that Congress used the word "shall" "merely as a convenient mode of imposing taxes on several descriptions of business." *See infra* Part II.3. Likewise, the Court has refused to accord legal significance to statutory provisions stating that administrative actions "shall" occur within a given timeframe. *See, e.g.*, *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158-59 (2003); *Brock v. Pierce County*, 476 U.S. 253, 266 (1986). And the Court has recognized that the United States Flag Code establishes precatory "recommendations" concerning "the proper treatment of the flag," notwithstanding the Code's repeated use of the word "shall." *Compare Texas v. Johnson*, 491 U.S. 397, 418

(1989), *with*, *e.g.*, 4 U.S.C. §7(c) (original version at 36 U.S.C. §175(c) (1990)) ("*No person shall* display the flag of the United Nations or any other national or international flag equal, above, or in a position of superior prominence or honor to, or in place of, the flag of the United States at any place within the United States or any Territory or possession thereof[.]") (emphasis added); *id.* §7(b) ("When the flag is displayed on a motorcar, the staff *shall* be fixed firmly to the chassis or clamped to the right fender.") (emphasis added); *id.* §7(m) ("By order of the President, the flag *shall* be flown at half-staff . . . .") (emphasis added).[6]

3. The court below also took Congress to task for further poor word choice, claiming that, if Congress wished to enact a constitutional statute, it should have used the word "tax," not the word "penalty." *Florida v. HHS*, 648 F.3d 1235, 1319 (11th Cir. 2011).

But, as stated, deference to a co-equal branch of government requires that a monetary exaction's constitutionality be determined by its "practical impact, not [its] name tag." *Acker*, 527 U.S. at 439-42 (1999) (ordinance "declar[ing] it 'unlawful . . . to engage in' a covered occupation . . . without paying [a] license fee" established "income tax"); *see also Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 508 (1937); *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1, 27 (1910); *License Tax Cases*, 72 U.S. at 470-71. Under precedents dating

[6] Some have argued that the provision's "mandatory" language has independent legal significance because it may influence the behavior of citizens who desire to "comply[] with The Law," but would otherwise choose to pay the exaction. *See*, *e.g.*, *Seven-Sky v. Holder*, 661 F.3d 1, 49 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Leaving aside the unlikelihood that such a nuance of statutory text will lead to significantly different behavior, any such confusion about citizens' legal obligations would be eliminated by this Court's clarification that the provision merely operates as a tax and imposes no independent obligations once payment is made.

back well over a century, a monetary exaction may be an exercise of the taxing power even if Congress gives it a label that is unambiguously *regulatory*.

In 1866, the *License Tax Cases* upheld under Congress' taxing power a statute that expressly imposed a license requirement on liquor and gambling businesses. The statute stated that "no person, firm, company or corporation *shall* be engaged in" liquor and gambling businesses "until he or they *shall* have obtained a license therefor in the manner hereinafter provided," and further required that the business owner "shall register" with the collector of revenue. Act of June 30, 1864, ch. 173, §§71, 72, 13 Stat. 223, 248 (1864) (emphases added). Because liquor and gambling were considered intrastate activities, and "licenses" were generally understood to be regulatory devices that "confer[] an authority to carry on the licensed business," the statute's opponents argued that the license requirement was a regulatory act outside of Congress' commerce power. 72 U.S. at 470-71.

The Court, however, recognized that the "license" requirement *could* be construed as a financial exaction, not a regulatory device, and held that it was a constitutional exercise of Congress' taxing power even though Congress labeled the exaction a "license" and worded the "license" requirement as an absolute prohibition on unlicensed activity, *id.* at 468-69, 471; even though legislatures generally use "licenses" to regulate, *id.* at 470-71; and even though the "license" requirement discouraged businesses widely considered to be immoral, *id.* at 473.

The Court determined that these facts were constitutionally irrelevant. Because the only relevant fact was the way the "license" operated, the Court construed the statute as doing "nothing more than . . . imposing a tax." *Id.* at 471; *see also Acker*, 527 U.S. at 439-42 ("license fee" was income tax in practical applica-

tion); *United States v. Sotelo*, 436 U.S. 268, 275 (1978) ("We . . . cannot agree . . . that the 'penalty' language . . . is dispositive. . . . That the funds due are referred to as a 'penalty' . . . does not alter their essential character as taxes . . . .").

The result in *License Tax Cases* is irreconcilable with the argument that the "penalty" label is dispositive here. Indeed, the term "penalty" far more readily denotes a tax than the term "license." Congress explicitly required that the "penalty" be construed as a tax for purposes of the Internal Revenue Code, *see* 26 U.S.C. §§5000A(g)(1), 6671(a); and has long used the term "penalty" when referring to taxes. *E.g.*, Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107–16, 115 Stat. 38, 53-57 (2001), §§301-303; 26 U.S.C. §1(f) (repeatedly referring to income-tax differential paid by certain married couples as "marriage penalty"). The use of "penalty" to describe taxes is also common among courts, lawyers, and economists.[7]

Indeed, at all stages of the PPACA's consideration, legislators referred to the minimum coverage provision as a "tax" and used the terms "tax" and "penalty" interchangeably. *Infra* Part III.1. To strike down major legislation because Congress ultimately chose the word "penalty" would ignore all relevant aspects of the statute's prescribed operation, the relevant precedent on the tax authority (including the *License Tax Cases*), the historic usage of the term in tax contexts, the stated understand-

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[7] *E.g.*, *Rousey v. Jacoway*, 544 U.S. 320, 327 (2005) (describing tax on early withdrawals from IRA accounts as "tax penalty"); *Sotelo*, 436 U.S. at 275 (funds labeled "penalty" by Congress retained "essential character as taxes"); Dan Dhaliwal, Oliver Zhen Li, Robert Trezevant, *Is a Dividend Tax Penalty Incorporated into the Return on a Firm's Common Stock?*, 35 Journal of Accounting and Economics 155 (2003).

ing of many in Congress (and the reasonableness of that understanding in light of these other sources), and the Court's duty to construe statutes to preserve their constitutionality and to uphold statutes that are, *in substance*, entirely constitutional.

4. Finally, opponents of the PPACA assert that the minimum coverage provision cannot be upheld because Congress made findings regarding its effects on interstate commerce, but did not expressly invoke its taxing power. But courts have never required "findings" regarding exercises of Congress' taxing power, nor required that Congress expressly identify the constitutional basis for its legislation. To the contrary, "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); *see also Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring). Indeed, in *EEOC v. Wyoming*, this Court recognized that Congress may exercise its non-Commerce Clause powers through legislation that contains findings regarding its effects on interstate commerce but no express invocation of any alternative constitutional basis for its authority. 460 U.S. 226, 231 n.3, 244 n.18 (1983); *see also* Laurence H. Tribe, *American Constitutional Law* 307 n.6 (2d ed. 1988) ("An otherwise valid exercise of congressional authority is not, of course, invalidated if Congress happens to recite the wrong clause . . . or, indeed, if Congress recites no clause at all.").

In any case, here Congress expressly invoked neither its taxation powers *nor* its commerce powers, but simply made factual findings regarding the provision's effects on commerce. (Proponents of the PPACA *did*, however, invoke Congress' taxation powers during congressional debates regarding the provision. *See infra* Part III.1 n.8.)

Put simply, the question here is *whether Congress had the constitutional power* to enact the minimum coverage provision, not whether Congress clearly enough identified that power. Congress' commerce findings are thus irrelevant to determining whether the provision is a constitutional exercise of Congress' taxation powers.

III. The Purportedly Regulatory Or Punitive Features Of The Minimum Coverage Provision Do Not Take It Beyond Congress' Taxing Power

Opponents of the PPACA have also suggested that Congress' word choice demonstrates that Congress was motivated by a desire to regulate, not a desire to tax. They contend that this regulatory motive, or its punitive effect, means that the provision cannot be justified as an exercise of Congress' taxing power. These arguments lack merit – both as to the legislative history of the enactment and as to the relevant law.

1. To begin, the assertion that Congress had no intent to tax is wrong. Congress enacted the PPACA and the minimum coverage provision, in part, for revenue purposes. *See*, *e.g.*, PPACA, Pub. L. No. 111-148, §1563(a)(1), 124 Stat. 119, 270 (2010) ("[T]his Act will reduce the Federal deficit . . . ."); Letter from CBO to Chairman Baucus (Sept. 16, 2009) (estimating revenues generated by "penalty"); Joint Committee on Taxation, JCX-43-09 (Oct. 29, 2009) (estimating revenue effects of "revenue provisions" including "Tax on Individual Without Acceptable Health Care Coverage"). Indeed, many in Congress recognized the minimum coverage provision as a tax. Proponents expressly invoked Congress' taxing power.[8] The measure

[8] *See*, *e.g.*, 155 Cong. Rec. S13581 (Dec. 20, 2009) (Sen. Baucus); 155 Cong. Rec. S13751-52 (Dec. 22, 2009) (Sen. Leahy); 156 Cong. Rec. H1882 (Mar. 21, 2010) (Rep. Miller); 156 Cong. Rec. H1826 (Mar. 21, 2010) (Rep. Slaughter).

was described as a tax.[9] And the label "penalty" is consistent with Congress' intent to tax. All taxes penalize the activities subject to the tax. Here, throughout the legislative record, Congress used terms like "tax," "assessable payment," "assessable penalty," "tax penalty," and "penalty" interchangeably – in all cases fully understanding and intending that this measure would raise significant revenue.[10]

2. More fundamentally, it is constitutionally irrelevant whether Congress was also "motivated" by regulatory goals. *Sonzinsky*, 300 U.S. at 513. "Every tax is in some measure regulatory," *id.*, and Congress may exercise its taxing power for regulatory purposes, including to deter

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[9] *See*, *e.g.*, H.R. Rep. No. 111-443, pt. 1, at 265 (discussing "tax on individuals who opt not to purchase health insurance"); 156 Cong. Rec. E506 (Mar. 21, 2010) (Rep. Waxman) ("The individual responsibility requirement requires individuals to pay a tax on their individual tax filings . . . ."); 155 Cong. Rec. S10877 (Oct. 29, 2009) (Sen. Hatch) ("Some may say this is simply a penalty for not doing what Uncle Sam wants you to do, but let us face it, it is nothing more than a new tax.").

[10] *See*, *e.g.*, 156 Cong. Rec. H1917 (Mar. 21, 2010) (Rep. Kirk) ("Among the new taxes is a new 'Individual Mandate Tax . . . .'"); 155 Cong. Rec. S12768 (Dec. 9, 2009) (Sen. Grassley) ("The . . . individual mandate penalty . . . . can be called a penalty, but it is a tax."); 155 Cong. Rec. S11454 (Nov. 18, 2009) (Sen. McCain) ("Taxes on individuals who fail to maintain government-approved health insurance coverage will pay $4 billion in new penalties . . . ."); 155 Cong. Rec. H12576 (Nov. 6, 2009) (Rep. Franks) ("It would impose a 2.5 percent penalty tax on those who do not acquire healthcare insurance."); 155 Cong. Rec. S11143 (Nov. 5, 2009) (Sen. Johanns) (discussing "penalty tax on individuals without insurance"); 155 Cong. Rec. S10746 (Oct. 27, 2009) (Sen. Enzi) ("Most young people will probably do the math and decide . . . I can pay the $750-a year tax penalty rather than pay $5,000 a year more for health insurance."); 155 Cong. Rec. S8644 (Aug. 3, 2009) (Sen. Kyl) ("There would be a penalty if they refused to [buy health insurance] that would go directly to their income tax.").

or promote particular activities, *Sanchez*, 340 U.S. at 44 ("tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed"); *Kurth Ranch*, 511 U.S. at 782 (discussing "mixed-motive taxes that governments impose both to deter a disfavored activity and to raise money"); *Hampton & Co. v. United States*, 276 U.S. 394, 412 (1928) ("[O]ther motives in the selection of the subjects of taxes cannot invalidate congressional action."). As was articulated more than a century ago, there is no "difference between being fined and being taxed a certain sum for doing a certain thing" in the absence of "some *further* disadvantages." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897) (emphasis added).

Consequently, a revenue raising measure is a valid exercise of the taxing power even if Congress' primary purpose is regulatory. *See*, *e.g.*, *Sanchez*, 340 U.S. at 44 ("revenue purpose of the tax may be secondary"). *Hampton*, for example, held that a protectionist tariff expressly enacted "to regulate the foreign commerce" was a valid exercise of Congress' taxing power. 276 U.S. at 401. The Court noted that the first Congress imposed tariffs for protectionist purposes, and emphatically rejected the argument "that it is unconstitutional to frame [monetary exactions] with any other view than that of revenue raising." *Id.* at 411-12.

The minimum coverage provision was intended to, and will, generate significant revenue. *See supra* Part I.B.1. That is enough; the claim that the mandate was worded in a manner to encourage the purchase of insurance is of no legal consequence. Moreover, the revenue and regulatory purposes here are interrelated: Congress' goal of lessening the Treasury's healthcare burden is served whether individuals choose to pay the tax or

purchase essential coverage. As the Court recognized in upholding the similarly structured unemployment insurance system, an exaction does not lose its character as a tax simply because it can be avoided through an act that Congress wishes to encourage and that will itself reduce the nation's fiscal burden. *Steward Machine Co. v. Davis*, 301 U.S. 548, 590-92 (1937) ("*Steward*").

3. Those challenging the PPACA's constitutionality based on its regulatory effect rely on discredited *Lochner*-era cases – primarily *Child Labor Tax Case*, 259 U.S. 20 (1922); and *United States v. Butler*, 297 U.S. 1 (1936) – to contend that the minimum coverage provision's regulatory purpose takes it outside Congress' taxing power. *Cf. TMLC*, 651 F.3d at 550-54 (Sutton, J., concurring). This reliance is misplaced, because both *Child Labor Tax Case* and *Butler* involved exactions with numerous extreme penalizing features absent here. Those exactions could not be considered taxes at all, given the presence of penalizing features that were overwhelmingly non-revenue collecting in nature. Indeed, in *Kurth Ranch*, this Court made clear that the only principle of these *Lochner*-era cases that survives is that, whatever label Congress attaches to an exaction, "the extension of [its] penalizing features" may at some point be so substantial that the exaction "loses its character" as a tax. 511 U.S. at 779; *see also Steward*, 301 U.S. at 590-93 (limiting *Butler* and *Child Labor Tax Case* to their facts).

The enactment at issue here operates in all relevant respects as a tax, and has no *penalizing* features beyond those inherent in any tax. The exaction at issue in *Kurth Ranch* provides an illustration of the difference. Although labeled a tax, that exaction "not only hinge[d] on the commission of a crime, [but] also [was] exacted

only after the taxpayer ha[d] been arrested for the precise conduct that g[ave] rise to the tax obligation in the first place." *Kurth Ranch*, 511 U.S. at 781. This Court found that the exaction was a form of punishment, regardless of its label, and that it "differ[ed] . . . from mixed-motive taxes that governments impose both to deter a disfavored activity and to raise money" because any legitimate revenue-raising purposes "vanish when the taxed activity is completely forbidden." *Id.* at 782.

Likewise, the exaction in *Butler* was a draconian "tax" that threatened those subject thereto with financial ruin and thus worked "to compel submission" to a regulatory requirement. 297 U.S. at 71. This Court declared that the exaction, although labeled a tax, was not an exercise of the taxing power but "coercion by economic pressure," because "the asserted power of choice [between engaging in the disfavored conduct or paying the exaction] [was] illusory." *Id.* The "tax" was not within Congress' taxing power because it operated *exclusively* to compel compliance with Congress' regulatory scheme. And the punitive exaction in *Child Labor Tax Case* amounted to ten percent of the employer's total net income for the year, was "paid by the employer in full measure whether he employs 500 children for a year, or employs only one for a day," and (reflecting its punitive nature) required proof of *scienter*. 259 U.S. at 36-37.

If anything, these cases underscore the minimum coverage provision's constitutional status as a tax, because they demonstrate that – as we have explained – the provision's constitutionality must be measured by its practical operation. Just as Congress cannot insulate an excessively punitive exaction from constitutional scrutiny simply by labeling it a tax, an otherwise constitutional tax exaction is not rendered unconstitutional simply because Congress had some regulatory purpose or used the label

"penalty" rather than "tax." Whether a challenged exaction is a tax for constitutional purposes is determined by its actual operation and substance, not by the presence of mixed motives or by its label.

4. In terms of its actual substance and operation, the minimum coverage provision is at the furthest remove from an exaction with extended penalizing features precluding its treatment as a tax. The provision exhibits no penalizing features beyond those inherent in any tax obligation.

First, the minimum coverage provision gives taxpayers the realistic and practical option of purchasing coverage or paying the tax. Had Congress intended to ensure compliance with a regulatory "mandate," it would have structured the "penalty" so that payment would *not* relieve individuals of the underlying obligation, or it would have set the exaction so high that, as a practical matter, compliance would be the only option. *Cf. Butler*, 297 U.S. at 71 (exaction would cause "financial ruin" if collected); *Reorganized CF&I Fabricators*, 518 U.S. at 225-26 (exaction amounting to 100% of employer's pension funding deficiency was purely punitive where employer that paid exaction remained liable for all unfunded benefit liabilities). Here, Congress included no provisions with such coercive effects, and instead waived the exaction for taxpayers required to pay more than an affordably small percentage of their income to obtain insurance. *See*, *e.g.*, 26 U.S.C. §5000A(e)(1) (affordability exemption).

Second, and related, the amount of the exaction here is *at most* the approximate equivalent of the cost of insurance, not an excessively "high rate" "consistent with a punitive character." *Cf. Kurth Ranch*, 511 U.S. at 780 (punitive drug tax was eight times drug's market value). Indeed, "in the first several years of the Act, if not throughout its existence," paying the exaction "normally

will cost less than [procuring] medical insurance." *TMLC*, 651 F.3d at 563 (Sutton, J., concurring). Congress' non-punitive approach is evident both in the modest overall amount of the tax and in that the exaction is pro-rated if the taxpayer obtains insurance for part of the tax year. *See* 26 U.S.C. §5000A(c)(1)(A); *see also* 26 U.S.C. §5000A(e)(1) (affordability exemption); *cf. Child Labor Tax Case*, 259 U.S. at 36 ("penalty" not pro-rated).

Third, payment of the tax is not conditioned on illegal conduct. *Cf. Kurth Ranch*, 511 U.S. at 781-82 (conditioning payment of an exaction on commission of crime "is 'significant of penal and prohibitory intent rather than the gathering of revenue'") (quoting *United States v. Constantine*, 296 U.S. 287, 295 (1935)). As explained above, there is no legal consequence other than the exaction for opting not to purchase coverage. Indeed, the PPACA specifically bars particularly coercive remedies, such as criminal prosecution, penalties, liens, or levies, for failure to pay the exaction, 26 U.S.C. §5000A(g)(2), thereby limiting the government's remedies to collection actions and tax refund offsets.[11]

Finally, the minimum coverage provision is located in the Internal Revenue Code, collected through the tax system, enforced by the tax authorities, and in all ways experienced by the taxpayer as a tax obligation. *Cf. Child Labor Tax Case*, 259 U.S. at 35 (punitive penalty enforced by Secretary of Labor). Indeed, many features of the provision's opera-

[11] That Congress took pains to make the minimum coverage provision less punitive than other taxes further underscores that there has been no "extension of the penalizing features" that might take the exaction outside of Congress' taxing authority. *Kurth Ranch*, 511 U.S. at 779. Congress' reliance on less intrusive collection measures certainly cannot undermine the conclusion that the exaction is a tax for constitutional purposes. *Acker*, 527 U.S. at 440-41 (exaction was income tax where enforcement limited to suit for collection).

tion make sense only when the provision is understood as an income tax. If the provision were instead a regulatory mandate, Congress would not have conditioned its applicability on the receipt of income (thereby exempting individuals with low reported income but with enough wealth to procure coverage without difficulty), and would not have held taxpayers jointly liable for payments owed by those declared as dependents on their income tax returns.

In sum, the only arguably "penalizing" feature of the minimum coverage provision is the exaction itself. That is not enough to preclude its characterization as a tax. *All* taxes are punitive and "oppressive" inasmuch as the requirement of payment deters the behaviors that are taxed, but much *more* is needed before a tax becomes a punitive penalty that cannot be sustained as an exercise of Congress' taxing power. *Kurth Ranch*, 511 U.S. at 778-79; *see also Kahriger*, 345 U.S. at 28 (wagering tax was not penalty "regardless of its regulatory effect").

5. One aspect of the way that those challenging the PPACA have used these *Lochner*-era cases merits additional comment. To the extent that PPACA challengers have used them to support the broader proposition that taxes with regulatory consequences fall outside the Constitution's taxing power, that argument cannot be reconciled with the many pre- and post-*Lochner* era precedents establishing that federal taxes may be enacted for regulatory purposes.

"The taxing power is often, very often, applied for other purposes than revenue." 1 Joseph Story, *Commentaries on the Constitution of the United States* §965, at 687 (4th ed. 1873). "From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were *beyond* the constitutional power of the lawmakers to realize by legislation directly addressed to their accom-

plishment." *Sanchez*, 340 U.S. at 45 (quotation omitted, emphasis added).[12] Congress may thus impose conditional taxes or place conditions on the receipt of government funds to achieve "objectives not thought to be within Article I's enumerated legislative fields." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citation omitted).

The contrary language in *Butler* and *Child Labor Tax Case* (and other similar cases of that era) turned on the view that the Tenth Amendment bars Congress from seeking to impact, directly *or* indirectly, areas of policy deemed "matters of state concern" and thus "within power reserved to the States" – even through otherwise valid exercises of its taxing and spending powers. *Compare Butler*, 297 U.S. at 68-70; *and Child Labor Tax Case*, 259 U.S. at 36; *with*, *e.g.*, *Fernandez*, 326 U.S. at 362 ("The Tenth Amendment does not operate as a limitation upon the powers, express or implied, delegated to the national government."). That view is now discredited: The Tenth Amendment does not prohibit Congress from using its taxing and spending powers to create financial incentives for conduct that serves the general welfare. *New York*, 505 U.S. at 166-67, 171-73. As *Steward*, *Sanchez*, and *Hampton* demonstrate, this Court has "abandoned" the *Lochner*-era "distinction[] between regulatory and revenue-raising taxes." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974). Financial exactions with regulatory

[12] Because Congress' taxing power "is not limited by the direct grants of legislative power found in the Constitution," *Butler*, 297 U.S. at 66, this Court has repeatedly sustained taxes on intrastate activity, including in contexts (or during periods) where such activities were understood as beyond Congress' other enumerated powers. *See*, *e.g.*, *Fernandez v. Wiener*, 326 U.S. 340 (1945) ("death tax"); *Bromley v. McCaughn*, 280 U.S. 124 (1929) (gift tax); *Knowlton v. Moore*, 178 U.S. 41 (1900) (inheritance and legacy tax); *Scholey v. Rew*, 90 U.S. 331 (1874) (estate tax); *License Tax Cases*, 72 U.S. at 470-71 (tax on intrastate lottery and liquor trades).

purposes or effects that lack unique "penalizing" or "punitive" features remain taxes enacted pursuant to Congress' taxing authority. *Kurth Ranch*, 511 U.S. at 779.

6. Those who have challenged the PPACA's constitutionality have focused on form and labels, rather than on the statute's substantive operations, demonstrating that there can simply be no dispute that Congress has every right to obtain exactly the result it prescribed here through its tax authority. In particular, this Court has made it absolutely clear that Congress can use that authority to increase participation in socially-desired insurance programs meeting minimum standards, which is what Congress did here. *See Helvering*, 301 U.S. 619; *and Steward*, 301 U.S. 548 (upholding the unemployment and old age insurance taxes Congress established in the Social Security Act). The constitutional propriety of such an exercise of Congress' taxation power is beyond dispute, and there is no substantive basis to treat the minimum coverage provision any differently.

The Social Security Act established comprehensive insurance programs to address the financial insecurity stemming from economic retrenchment and "old age." *Helvering*, 301 U.S. at 641. To fund the "Federal Old-Age Benefits," Congress enacted an income tax on employees and an excise tax on employers. *Id.* at 635-36. To promote the development of unemployment insurance programs, Congress paired a tax on employers with a credit for contributing to state insurance funds satisfying certain criteria. *Steward*, 301 U.S. at 574.

Helvering rejected claims that the tax on employers "was not an excise as excises were understood when the Constitution was adopted" and that the Act was "an invasion of powers reserved by the Tenth Amendment to the states or to the people." 301 U.S. at 638. *Steward* rejected the argument that Congress' tax and credit system was

a regulatory mandate on employers to make particular insurance contributions and on States to create particular programs, such that the "so-called tax was not a true one." 301 U.S. at 592. *Steward* instead concluded that the conditional tax credit was a reasonable way to structure a tax, as it "promoted . . . relief through local units" while "in all fairness" ensuring that employers making contributions that helped alleviate the problem would not "pay a second time." *Id.* at 589.

Instead of mandating participation in a single national public insurance program or providing incentives for state-administered programs, the aspects of the PPACA that are challenged here adopt a market-based approach, giving taxpayers the choice of either procuring adequate coverage through a public or private insurance provider or paying a tax. This measure generates revenue *and* provides an incentive for taxpayers to purchase health insurance, while imposing no additional obligations upon those who have purchased coverage. Payment of the minimum coverage exaction is, as in *Steward*, "dependent upon the conduct of the taxpayers," and *Steward* establishes that Congress may use its taxing power to encourage activity, including the purchase of insurance, where the failure to act contributes to a costly national problem. *Id.* at 591; *see also id.* at 588-89 (finding it reasonable to reduce tax liability of those whose conduct "simplified or diminished the problem . . . and the probable demand upon the resources of the fisc").

There can be no doubt that the PPACA, like the Social Security Act, is a comprehensive effort to solve major problems that have imposed huge costs on the nation, and on the federal fisc. The PPACA addresses these problems through a variety of interrelated measures, including, for example, by barring practices (such as denying coverage for pre-existing conditions) that make afford-

able health insurance unavailable to many, and in part by providing tax incentives for individuals to purchase private insurance through market mechanisms. Here, no less than with the challenged aspects of the Social Security Act, "[t]he purpose of [Congress'] intervention . . . is to safeguard its own treasury and as an incident to that protection to place the [taxpayers] upon a footing of equal opportunity." *Id.* at 590-91. By giving taxpayers the choice to purchase insurance or pay a tax that is at most the "approximate equivalent[]," *id.* at 591, the provisions of the PPACA that are challenged here, like the provisions of the Social Security Act challenged in *Steward*, are designed to prevent taxpayers who have already paid to help ameliorate a costly and serious problem from having "to pay a second time." *Id.* at 589.

That the measure here is structured in a slightly different form does not matter. It is meaningless formalism to argue that Congress could have passed the minimum coverage provision as an increased income tax on all taxpayers accompanied by a credit for those with adequate coverage, but that it could not take the more direct course of imposing a conditional tax with the same net cost only on those who do not procure adequate coverage. Both methods afford taxpayers the same choice, with the same net tax effect. *See United States v. New York*, 315 U.S. 510, 517 (1942). The Constitution gives Congress the "useful and necessary right . . . to select . . . means" "which, in its judgment, would most advantageously effect the object to be accomplished." *M'Culloch*, 17 U.S. at 419. Here, the means Congress chose – directly imposing an income tax upon those who have not purchased health insurance – are simpler and less administratively onerous than a functionally identical tax and credit system, especially because the majority of income earners already have health coverage. Nothing in the Constitution requires Congress to refrain from using the most efficient means to accomplish its permitted ends.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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