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 *AMICI CURIAE* CATHOLIC VOTE AND STEVEN J. WILLIS IN SUPPORT OF RESPONDENTS AND URGING AFFIRMANCE ON THE MINIMUM COVERAGE PROVISION

STEVEN J. WILLIS
UNIVERSITY OF FLORIDA
COLLEGE OF LAW
8318 S.W. 103d Ave.
Gainesville, FL 32608
(352) 514-1394

PATRICK T. GILLEN
Counsel of Record
AVE MARIA SCHOOL OF LAW
1025 Commons Circle
Naples, FL 34119
(734) 355-4728
ptgillen@avemarialaw.edu
Counsel for Amicus Curiae

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INTERESTS OF *AMICUS CURIAE*[1]

CatholicVote.org, is a nonpartisan voter education project whose members seek to serve this great nation by supporting educational activities designed to promote an authentic understanding of ordered liberty and the common good as seen in light of the Roman Catholic religion. Members of *CatholicVote* believe that Catholic teaching illuminates the first principles of the American experiment set forth in the Declaration of Independence and the Constitution of the United States by situating those principles in the broader context from which they were derived, the Judeo-Christian tradition. Committed to individual liberty, minimal government, federalism, and the doctrine of subsidiarity, *CatholicVote.org* believes that the Patient Protection and Affordable Care Act is a pernicious expansion of federal power that undermines individual liberty and responsibility, diminishes the sphere of private charitable activity, and arrogates to the federal government totalitarian control of a vitally important and deeply personal matter. Members of *CatholicVote.org* will be subject to the provisions of the act which purport to dictate

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

their personal healthcare decisions and which will also adversely affect the healthcare market in which they participate. Furthermore, they are well aware of the way that the federal intrusion into the healthcare field will result in the imposition of tyrannical requirements which require action inconsistent with their religious liberty. Accordingly, *CatholicVote.org* files this brief in support of the Respondent and urges affirmance of the decision striking down the individual mandate.

SUMMARY OF ARGUMENT

Incorporated into Internal Revenue Code (IRC) §5000A, the PPACA §1501 does two separate things:

1. It mandates the purchase of health insurance by individuals.

2. It imposes a "penalty" upon individuals who violate the Mandate.

Upholding either the mandate or the penalty under the Commerce Clause would amount to an unlimited extension of federal power to regulate inactivity. In addition, it would approve a virtually unlimited federal power to exact money from individuals, ignoring the most important limited enumerated power: the power to tax. Article I Sections 2, 8 and 9 sharply limit that power, as does the Sixteenth Amendment.

This Court should find the Mandate unconstitutional under the Commerce Clause because it forces

individuals to engage in commerce, something heretofore never approved. Even if this Court were to approve the Mandate, however, it should find the penalty unconstitutional as exceeding Congress' limited power to exact money from individuals, both substantively and procedurally. The Commerce Clause does not itself provide for enforcement; instead, Congress must resort to the Necessary and Proper Clause. For an enforcement provision to be proper, it must be *consistent with* the remainder of the Constitution and must not violate other provisions or prohibitions – particularly the limited Taxing Power (the primary motivation for the Constitution) as well as the Fifth Amendment due process limitations.

The §5000A(b) Penalty is not a duty, impost, or excise. It is not a tax on derived income permitted by the Sixteenth Amendment. Instead, it is at best an un-apportioned Direct Tax on individuals. It is thus unconstitutional. Further, the Act grants the Treasury Secretary authority to assess and to collect monies without any required mechanism for prior administrative hearings or any mechanism whatsoever for prior judicial review. Indeed, it specifically precludes access to normal "Collection Due Process" [CDP] hearings. It thus violates procedural due process.

Hence the government has *three* heavy burdens. *First*, it must justify the Mandate under the Commerce Clause because the Taxing Power authorizes no such Mandates. *Second*, it must justify the Penalty under the Taxing Power: no other enumerated power can justify taking monies from individuals who

mind their own affairs. Third, the penalty assessment and collection mechanisms fail the procedural Fifth Amendment Due Process requirements. Because the government cannot carry any of the three burdens, let alone all of them, this Court must find IRC §5000A unconstitutional.

ARGUMENT

This court faces five issues:

1. Whether the Mandate violates the Commerce Clause.
2. Whether the Mandate violates the Taxing Power.
3. Whether the Penalty violates the Necessary and Proper Clause.
4. Whether the Penalty, if it is a tax, violates the Taxing Power.
5. Whether the Penalty violates Due Process.

To consider these issues, the Court should separate the Mandate from the Penalty. IRC §5000A includes both aspects of the law; however, the subsections implicate different constitutional provisions. Subsection 5000A(a) imposes the Mandate without regard to income or activity. It is not itself a tax. Subsection 5000A(b) imposes the Penalty on persons who violate the Mandate, without regard to whether each is a wage earner or income producer; instead, it

applies – with exceptions – to all individuals who exist in the natural state of being uninsured.

I. The Commerce Clause Does Not Authorize The Mandate

Others adequately explain how the Mandate violates the Commerce Clause. This Brief will not repeat that issue other than to state the Court should strike the Mandate, if not the entire statute, on those grounds.

II. The Taxing Power Does Not Authorize The Mandate

This Court should separate the Mandate from the Penalty in analyzing their separate constitutional bases. Congress has various powers to *regulate behavior*, such as the Commerce Clause. Separately, Congress has various powers to *enforce regulations*, *e.g.,* taxing, spending, limited police power, moral suasion, raising and supporting armies, and eminent domain. Even if a regulation is constitutional, its enforcement may not be. The opposite is also true: an enforcement method may be constitutional, while the underlying regulation is not. Hence, the Court must examine them separately.

Article I, §8 grants Congress the power to levy and collect taxes. Uses of the taxing power may have regulatory aims, so long as they also raise revenue. *Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937); *Hampton & Co. v. United States*, 276 U.S. 394,

413 (1928). No court, however, has found the initial prong of a Taxing Power use to be regulatory. Indeed, for all "regulatory" taxes, the tax effectively precedes the regulatory effect, unlike the §5000A(a) Mandate. More precisely, with one exception, all permissible regulatory taxes apply to some activity or transaction of the taxpayer – they do not first mandate the activity or transaction. The one exception is of no help to the government: Congress may exact a direct tax, which could have regulatory effects, but which would tax an individual's mere existence or possession of property such as land. Such a tax need not involve a pre-existing activity. It must, however, be apportioned. Congress has rarely, if ever, used this enumerated power: the Founders made it very difficult to use.

Consistent with the Article I, sections 8 and 9 limitations, all previously existing "regulatory taxes" tax the pre-existing activity. In so doing, they may discourage, encourage, or "regulate" aspects of the activity. They may even discourage the taxpayer from entering the activity. But critically, the activity comes first; then the tax applies, and only then does the regulatory effect ensue; or, the taxpayer is dissuaded by the potential tax, does not engage in the activity and no tax applies. *Cf. U.S. v. Sanchez*, 340 U.S. 42 (1950) (taxing possession of marihuana); *Sonzinsky, supra* (taxing firearms dealing); *Hampton, supra* (taxing various products importation); *Magnano v. Hamilton,* 292 U.S. 40 (1934) (taxing oleomargarine differently from butter); *Bob Jones Univ. v. Simon*, 460

U.S. 370 (1983) (taxing racially discriminatory schools). Section 5000A differs dramatically. It first imposes the Mandate and then imposes a penalty on the failure to comply. No other regulatory use of the Taxing Power operates in this manner.

For example, IRC §4071 imposes an excise on tires, presumably to raise revenue and to regulate the purchase of tires. Rationally, tire users should pay a portion of the cost of highways or other government services. The tax applies only if they engage in the *activity* of purchasing tires (it applies to the sale rather than the purchase, but as is typical of excises, it is indirect and passed-on to the consumer). Because of the tax's regulatory effect, ultimate users may purchase particular tires or some other product taxed differently; or, they may decide not to purchase tires, rely on public transportation, and thus escape the tax. Similarly, §3101 imposes a tax on wages; in return, it implicitly promises the taxpayer participation in the Social Security program. The section raises revenue, but also regulates the underlying *activity* of how wage earners provide for retirement or disability – specifically by providing retirement or disability insurance. The tax does not mandate the earning of wages. Some taxpayers may be encouraged to work more because of the related benefits. Others may be discouraged from working because of the tax. In any event, the underlying activity/choice occurs (which may involve choosing not to work or choosing not to purchase tires), the tax applies (or not) and the regulatory effect ensues.

The §5000A(b) penalty taxes – or penalizes – no event, transaction, property use, privilege exercise, or income derived; instead, it exacts a penalty or tax without any of those traditional predicates. Indeed, the Mandate imposes the predicate. That is unlike all regulatory taxes, which apply to taxpayers' choices *to do something* as opposed to *not to do* something. The government argues the decision *not to purchase* health insurance is an *activity* for purposes of the commerce clause. It does not, however, discuss whether the *mental decision* not to purchase insurance and the "arrangement of one's affairs" as a consequence constitutes sufficient activity for the imposition *of a tax*. Indeed nothing in the power to lay and collect taxes authorizes the mandate of anything other than the maintenance of records, preparation of forms and transmission of funds.

Congress might impose an excise on persons who self-pay for medical services. That would be a constitutional excise so long as it was uniform. Or, Congress could tax persons who fail to pay for medical services. Such a tax could be styled as a uniform excise on the *activity* of receiving healthcare without paying for it; or, it could be a Sixteenth Amendment income tax on the accession to wealth created by the passing-on of costs to others: obtaining services without paying. But very limited authority exists for Congress to tax something which has neither occurred nor accrued, which involves no "undeniable

accession to wealth clearly realized"[2] and which involves no event, transaction, property use, or privilege exercise other than the taxpayer simply being alive. That limited authority is the power to exact a Direct or Capitation tax – a tax which must be apportioned – a constitutional requirement failed by §5000A.

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

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[2] *Commissioner v. Glenshaw Glass Co.,* 348 U.S. 426, 431, 433 n. 11 (1955).

unconstitutional under the Commerce Clause, it cannot appropriately, in the alternative, find it constitutional under the Taxing Power, which does not permit the Mandate of activity.

The government relies on four IRC sections: 4974, 4980B, 4980H, and 9707.[3] Each is an excise; none are direct taxes. Hence, they are each irrelevant.

III. The Penalty Is Contrary To The Necessary and Proper Clause

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

To be proper, an enforcement provision must be *consistent* with the remainder of the Constitution; otherwise, the power to do what is "proper" to enforce one enumerated power could eviscerate the limited nature of other specifically enumerated powers granted Congress. *See United States v. Comstock,* 130 S.Ct.

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[3] Brief for Petitioners (minimum coverage provisions), *HHS v. Florida*, page 9, page 56, n. 10.

1949, 1956 (2010) ("Let the end be legitimate, let it be within *the scope of* the constitution, and all means which are *appropriate*, which are plainly adapted to that end, *which are not prohibited*, but *consist with* the *letter and spirit* of the constitution, are constitutional.") (emphasis added); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). Possible enforcement mechanisms are many. For example, Congress may exercise limited police powers to criminalize regulated commercial behaviors, to provide for incarceration, for the mental health of prisoners, and for civil commitment in fulfillment of those powers. The executive may seize property for public use, consistent with the Fifth Amendment just compensation obligation. Congress, through the executive, may use militia powers to force or to impede actions violative of commercial regulations. Congress – generally through the executive – may enter commerce by selling a product: specifically, it may do so with postage and impliedly it may do so with other products and services, such as those involving museums, parks, or flood insurance. Or, as is common, Congress may use its Spending Power to entice commercial behaviors. Critically, Congress chose *none* of those enforcement mechanisms for the Mandate; instead, Congress chose to penalize individuals who violate its Mandate. Hence, whether some other form of Mandate enforcement mechanism would be "proper" is irrelevant. Even if this Court approves the Mandate, this Court must decide the limits of Congress' power to command individuals to pay money, even though those individuals engage in no activity other than

minding their own business. Whether minding one's own business – including self-insurance for potential medical or other needs – constitutes activity for purposes of the commerce clause is a very different question than whether it constitutes sufficient activity for purposes of the taxing power.

Much has been written regarding whether the penalty is regulatory or whether it is a tax. The Taxing Power, however, is the *only* enumerated power to exact money from individuals (putting aside the "proper" powers to exact criminal fines or to charge a price in the actual conduct of commerce by the government, issues not involved in this matter because Congress *expressly* chose for them not to be involved). Even if the Penalty is not a tax, it must be consistent with and within the "letter and spirit" of the Taxing Power limitations and *prohibitions*; otherwise, it would not be "*appropriate*" or proper, as required as early as *McCullough* in 1819 and as recently as *Comstock* in 2010. Hence, the Mandate must satisfy the Commerce Clause and the Penalty must satisfy the Commerce Clause, the Necessary and Proper Clause, the limited Taxing Power, as well as the Fifth Amendment procedural due process requirements.

Of all the Constitutional provisions, the Taxing Power was the primary goal of the Constitutional Convention: without money, the weak government under the Articles of Confederation could not provide for defense, regulate commerce or do much of anything. The Constitution mentions the limited Taxing

Power four times (Article I, §2; Article I, §8; Article I, §9; and the Sixteenth Amendment), while it mentions the regulation of Commerce merely once (Article I, §8). Indeed the Taxing Power limitations bracket the Commerce Clause, appearing both before and after it.

Our nation's founders were particularly concerned about taxes. That was a primary prompt for the American Revolution: unfair taxes. Central to the later Constitutional debate was how to treat exactions of money from the people. James Madison listed eleven Deficiencies of the Confederation. James A. Madison, *Vices of the Political System of the United States*, THE PAPERS OF JAMES MADISON (1787) (Ed. by William Hutchinson, *et al*. University of Chicago Press 1977). First on his list was the lack of a *Taxing Power*:

> 1. Failure of the States to comply with the Constitutional requisitions.
>
> This evil has been so fully experienced both during the war and since the peace, results so naturally from the number and independent authority of the States and has been so uniformly exemplified in every similar Confederacy, that it may be considered as not less radically and permanently inherent in, than it is fatal to the object of, the present System.

Similarly, Washington, *Letter, George Washington to John Jay (Aug. 1, 1786),* Jefferson, *Letter, Thomas Jefferson to Edward Carrington (Aug. 4, 1787),* and Hamilton, *Letter, Alexander Hamilton to James*

Duane (Sept. 13, 1780), each described the Taxing Power as either central to the Constitution or as a defect in the Confederation. The Supreme Court poetically described the Taxing Power as the most essential: "The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive." *Nicol v. Ames*, 173 U.S. 509, 515 (1899).

Because the power to tax is the power to destroy, the Constitution sharply limits that power. Congress cannot legitimately, consistent with *Comstock* and *McCullough*, *evade* those limitations by asserting the power to exact money from individuals under an *un*-enumerated power when the sole enumerated power for exacting money is so clearly limited by uniformity, apportionment, and derived requirements; hence, to be constitutional the Penalty must be *consistent with* the Taxing Power, *even if* it does not directly arise from that power. *Comstock*, *supra*; *McCullough*, *supra*.

Under Article I, §8, Congress can levy and collect taxes for the general welfare; however, the "general welfare" limitation is the *least* important of the Taxing Power limitations. Indeed, the "general welfare" language primarily exists to limit what Congress may do with monies raised: it may use them to "pay the Debts and provide for the common Defense and general Welfare of the United States. . . ." Grammatically, the phrase does not specifically limit the

Taxing Power; instead, it creates and limits the Spending Power. *See* Willis & Chung, *Credits vs. Taxes: The Constitutional Effects on The Healthcare Reform Debate*, WORKING PAPER (Washington Legal Foundation), No. 176 (May 2011), at 4-6 (WILLIS & CHUNG III). The Supreme Court consistently explained: "The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare." *United States v. Butler,* 297 U.S. 1, 11 (1936).

Article I, §8 creates and limits the Taxing Power. Article I, §9 further limits the power, and the Sixteenth Amendment expands the power with further limitations. Per these provisions, taxes must be either Direct or Indirect. Indirect taxes must be uniform. Direct taxes must be apportioned. Congress may levy excises, duties, imposts, direct taxes (including Capitations), and income taxes on "gross income" "derived" "from" a "source," the last four limitations appearing in the Sixteenth Amendment.[4] These many restrictions are not trifles. Indeed, they are powerful limitations on the Taxing Power, as recognized by the D.C. Circuit in *Murphy*, at 180-85.

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

If Congress can evade those limitations by imposing non-criminal "penalties" exacting money directly from individuals, those essential limitations lose all meaning. Any exaction now considered a "tax" could be re-labeled a commercial regulation enforcement penalty. Other than a capitation or other Direct Tax, almost all taxes involve commerce: income, transfers (such as gifts and descent), imports, the use of property, or the conduct of business. The few exceptions involve questionable issues extraneous to this case. *E.g.,* IRC §4945 (The section imposes an excise on private foundations' political and lobbying *activities*. While much lobbying and political activity involves commerce, arguably some has no commercial impact.). If a non-criminal "penalty" were exempt from the alternative requirements of "uniformity," "apportionment," or "income derived from a source," those important words would essentially be repealed. That cannot be the proper result for this important case. How the Constitution limits criminal penalties is irrelevant to this matter, as the Act penalty is non-criminal. *See* JCT, "Technical Explanation of the Revenue Provisions of the 'Reconciliation Act of 2010,' as Amended, in Combination with the 'Patient Protection and Affordable Care Act,'" 33 (Mar. 21, 2010), Doc. 2010-6147, 2010 TNT 55-23.

Thus, regardless whether the Court denominates the enforcement Penalty a "penalty" or a "tax," it must subject it to the powerful limitations imposed upon the collection of monies from people, in addition to whatever limitations exist under the Commerce

Clause. Anything else would not be proper. As the Court explained in *Butler,* "The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible." *Butler*, *supra*, at 18.

"*Necessary* and *Proper*" must not eviscerate other important Constitutional limitations; indeed, it must not eviscerate the most important Constitutional limitations – those on Congress' power to tax individuals. As explained below, if this Court finds the "penalty" is a tax, it must find it unconstitutional. Similarly, if this Court finds the "penalty" is merely a "penalty," it should nevertheless find it subject to the Taxing Power limitations. In either case, this Court must also find the penalty/tax subject to the procedural due process limitations, which it fails. Thus, in any event, this Court must find the penalty unconstitutional.

IV. The Penalty Is Contrary To The Limited Taxing Power

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

1. Duty
2. Impost
3. Excise

4. Direct Tax (including a Capitation)
5. Income Tax under the Sixteenth Amendment

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

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

B. The Penalty Is Neither a Duty Nor an Impost

No one claims the penalty is either a duty or an impost.

C. The Penalty Is Not an Excise

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

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

Never has a United States excise applied to an individual's *inactivity*. Much has been argued regarding whether Congress' power to regulate commerce can reach *inactivity*. One District Court partially finessed this issue by labeling the matter being regulated as involving "economic decisions" and thereby partially avoided the activity versus inactivity issue. *Mead v. Holder,* 766 F. Supp. 2d 16, 35-37 (D.D.C. 2011). While that is questionable Commerce Clause analysis, the denomination is irrelevant for analyzing the penalty under the Necessary and Proper Clause, inter-twined with the limited Taxing Power. Whatever the reach of the Commerce Clause to regulate *inactivity or mere decisions*, no Court or commentator has ever argued the power to impose an *excise* reaches individuals' mere economic decisions, let alone inaction. Excises on individuals apply to actions: services, property use, and privilege exercises. If this Court were to define an individual's inactivity as the permissible subject of a uniform excise, it would eliminate an important distinction between taxes required to be uniform and those required to be apportioned. The *Hylton* Court made this point, if not in the most artful manner. *See* the discussion of historical excises in Steven J. Willis and Nakku Chung, *Of Constitutional Decapitation and Healthcare*, 128 TAX NOTES 169 (July 12, 2010) (WILLIS & CHUNG I) at 181-85. *See also Murphy*, *supra,* at 180-85. While some *entity* excises have applied to the accumulation of monies, *e.g.,* IRC §4943, the legitimacy of such indirect taxes is irrelevant to this matter, as *all* such examples apply to *entities* rather

than to *individuals*. Entity excises apply at least in part because entities have chosen to be entities, which involves *activity*. Excises on humans do not apply to mere decisions not to do something. If they did, they would be direct taxes, which must be apportioned. Apportionment is a critical limitation on Direct Taxes – a limitation which can indeed be failed, as it is by §5000A. *See* Steven J. Willis and Nakku Chung, *Oy Yes, the Healthcare Penalty is Unconstitutional*, 129 TAX NOTES 725 (Nov. 8, 2010) (WILLIS & CHUNG II) at 727-28 (discussing the common misunderstanding of *Hylton v. United States*, 3 U.S. 1 (3 Dall.) 171, 176 (1796) (Patterson, J.)).

D. The Penalty Is Not a Sixteenth Amendment Income Tax

The Sixteenth Amendment authorizes, without apportionment, a tax on "incomes, from whatever source derived." That phrase includes several limitations:

1. The item taxed must be income.
2. The income must be derived.
3. It must be "from" somewhere.
4. The somewhere must be a "source."

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

i. The penalty does not have a proper trigger

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

ii. The penalty does not tax income

Some suggest cost-shifting is a "significant" cause for the penalty. Indeed, the shifting of costs to another produces income; however, the cost-shifting the government decries – and the penalty attempts to reach – will not have occurred with regard to anyone at the time the penalty accrues. It is merely *potential*, as noted by the District Court:

> In choosing not to purchase health insurance, Plaintiffs are actively arranging their circumstances (whether to save for their children's education or buy a new car) so that they must, **in the future**, rely on **either their own resources** or on federal law

> requiring medical providers to care for the sick and injured.

Mead v. Holder, 766 F. Supp. 2d 16, 49 (D.D.C. 2011) (emphasis added). Because *at the point of penalty imposition*, the cost-shifting will not have occurred, it cannot be the subject of an excise, nor can it be the subject of an income tax. Excises may apply to activity, but not to potential activity. Likewise, activity may generate derived income; however, potential activity cannot. *Commissioner v. Indianapolis Power and Light*, 493 U.S. 203, 210-12 (1990).

If this Court upholds the Act, some individuals may indeed purchase health insurance with pre-existing conditions and thereby shift costs to others, or they may seek medical services without the ability to pay for them. They may game the system and may plan to do so. But that potential is not the proper subject of an excise and it does not produce any income because it is not inevitable. Some individuals will die without ever benefitting from the pre-existing conditions provision. Others will move to another country, and still others will be neglectful and never obtain medical care or insurance. As this Court explained, the mere *possibility* of an accession to wealth is insufficient to produce income taxable under IRC §61 (which follows the Sixteenth Amendment verbatim in all important aspects). *Indianapolis Power, supra.* For an item to involve "gross income," it must be certain – and the alleged wealth allegedly taxed by the penalty is not. Plaintiffs are not "inevitable" participants in the healthcare market for two

reasons. *First*, some such persons will not participate for reasons mentioned above: death, travel abroad, and personal choice. *Second*, many such persons will not participate within a given month – the time period chosen for application of the penalty. For the penalty to tax income within a given month, the taxpayer would have to receive or accrue the income being taxed within that month – something which is not inevitable (cost-shifting would often occur later, if ever).

iii. The wealth allegedly taxed has not been derived

Being derived is an essential aspect of income under the Sixteenth Amendment. *Eisner v. Macomber,* 252 U.S. 189, 207 (1920). Although *Macomber* has been severely limited, it nevertheless continues to be relevant on this important issue. Even if some individuals are currently wealthier because they *plan* to defer purchasing insurance until they become ill, they have nevertheless not yet "derived" that income in a constitutional sense. For a fuller explanation, *see* WILLIS & CHUNG III at 8, 11, 20; WILLIS & CHUNG II at 728; WILLIS & CHUNG I at 172-74, 186-92.

iv. The alleged wealth did not derive "from" anywhere

To be income constitutionally subject to tax, an item must not only amount to an accession to wealth which has been "derived," but it also must have been

derived "from" somewhere. The mere performance of tasks for oneself – such as mowing the lawn or living in one's own home – do not derive from anywhere other than oneself. They do not produce income in a constitutional sense. *Helvering v. Independent Life Insurance Company,* 292 U.S. 371, 379 (1934). ("The rental value of the building used by the owner does not constitute income within the meaning of the Sixteenth Amendment.") Similarly, "economic decisions" and "self-insurance" are not items of income derived "from" anywhere but the individual's own mind. Even if such economic decisions amount to sufficient Commerce Clause activity, they do not amount to sufficient Taxing Power activity.

v. The "source" of the alleged wealth is the individual's own personal actions, which is insufficient

The "source" test essentially re-enforces the "from" test of income taxation. To be "derived," the item must come "from" a "source." Never has a Court approved an income tax on wealth produced by an individual's decisions or actions for himself. A common example is well-known to tax students: if a person mows his lawn, he has no income despite having an accession to wealth, a nicer lawn. However, if that person mows the neighbor's lawn in exchange for the neighbor mowing his lawn, they each have *Glenshaw Glass* income: an undeniable accession to wealth, clearly realized, over which the taxpayer has complete dominion and control. Self-insurance – not the

self-payment of expenses incurred, but the *mere acceptance of future risks* – is not the proper subject of an income tax, just as it is not the proper subject of an excise. It is simply what people do throughout their lives: they accept the risks of living. At most, a tax or levy on such a thing is a Direct Tax on an individual. Any other view would render the concept of a Direct Tax meaningless. Yet, Direct Taxes – and the need for their apportionment – appear three times in the Constitution and were a hugely important part of the Constitutional Convention debate. To ignore the direct tax apportionment requirement is to ignore a central part of the Constitution. Not only was apportionment a hotly debated issue in 1789, it was also a central issue in 1875 in relation to adoption of the Fourteenth Amendment (which alters the apportionment requirement in relation to the counting of persons, but does nothing to change the apportionment requirement for taxes). Further, apportionment was a central issue in 1913 with the adoption of the Sixteenth Amendment, which eliminates apportionment for taxes on income derived from a source.

E. The Penalty Is Not an Apportioned Direct Tax or Capitation

Article I requires Apportionment of Direct Taxes. The "penalty" is not, however, apportioned by population, as the amount paid per State *per capita* will not be the same. For example, the *per capita* amount owed by Floridians will never be the identical *per capita* amount owed by Alaskans, let alone the *per*

capita amount owed by residents of every other state. Because it cannot satisfy any other of the limited Taxing Powers, the penalty is, at best, a Direct Tax. Because it is not apportioned, it is unconstitutional. *Murphy, supra* at 180-85 (D.C. Circuit upholding a tax on non-physical personal injury awards as a uniform excise rather than striking it as an unapportioned Direct Tax, but also rejecting common attacks on the apportionment requirement). Of note, *Murphy* refused to accept the government's contention that direct taxes include only those which may be fairly apportioned:

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

Murphy, *supra* at 184.

V. The Penalty Violates Procedural Due Process

Traditionally, one who asserts an action must proceed and must carry the burden of proof. Tax law is different. For most taxes – particularly for income taxes and most excises – the taxpayer has a limited opportunity for pre-judgment review.

A. Traditional Tax Cases

Typically,[5] the government initiates an audit. If the government and taxpayer disagree the IRS issues a "Notice of Deficiency."[6] A taxpayer then has 90 days to file a Tax Court petition. If the taxpayer fails to file timely, the IRS has the power to assess the tax. An assessment acts as a judgment. Other than tax protestors, no one seriously suggests they deny due process.

B. Other Tax Cases (*Except* for the Healthcare Penalty)

For some taxes – most commonly *trust fund* taxes – the procedural protections are more limited. For these, the government has no power to issue a Notice of Deficiency. Instead, it may assess and collect the tax. It may entertain a taxpayer protest; however, no

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[5] The government may proceed with §6331 "jeopardy assessments" or §6851 "termination assessments." For each, the taxpayer has the opportunity for quick post levy review. I.R.C. §7429.

[6] I.R.C. §6212.

statute requires such a procedure. Until 2005,[7] Taxpayers who objected had to pay the tax and then seek an administrative refund. If denied, they could sue in District or Claims Court, where they had the burdens of going forward, of notice, and of proof.

This extraordinarily limited procedural protection existed for many years. Some authorities questioned it on due process grounds. Indeed, the issue prompted considerable controversy among members of Congress. On June 25, 1997, a national commission chaired by Senator Kerry and Representative Portman issued "A Vision for a New IRS."[8] The report, which was critical of many IRS practices, resulted in the *Internal Revenue Service Restructuring and Reform Act of 1997*,[9] also known as the Taxpayer Bill of Rights III. While the act passed the House,[10] it failed in the Senate because Senate Finance Committee Chairman Roth refused to cooperate in bringing the

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[7] Section 3401(a) of the Internal Revenue Service Restructuring and Reform Act of 1998 (Pub. L. No. 105-206, title III, July 22, 1998, 112 Stat. 746) amends Subchapter C of chapter 64 by adding new sections 6320 and 6330.

[8] A copy of the Report is available at: http://www.house.gov/natcommirs/report1.pdf.

[9] The proposed act, which passed the House of Representatives appears at: http://services.taxanalysts.com/taxbase/leghist.nsf/f8514175e9ec0e5c852570690054e4bf/41cf1546e8912279852573d8006df731?OpenDocument.

[10] Ryan J. Donmoyer and Jacqueline Rieschick, "It's (Almost) Unanimous: IRS Reform Bill Passes House," Tax Notes, November 10, 1997, at 639.

proposal to the floor.[11] He refused because he questioned the "due process" protections provided in IRS collection proceedings. The issue became political and was the subject of many discussions in tax circles. Others wanted to move the bill through to the President. Roth, however, prevailed. After further 1998 Finance Committee Hearings, the bill passed, but with substantial new provisions for "Collection Due Process" procedures.[12] While legislative history is often of limited use, this particular history is helpful. Senator Roth specifically questioned whether existing collection procedures satisfied due process. The Senate Finance Committee held hearings on the issue. The Senate amended the bill to provide for additional taxpayer protections and entitled them "Collection Due Process" ("CDP") hearings. The House passed the bill containing that language and President Clinton signed it. This was not a case, such as with the Healthcare Act, in which few, if any, members of Congress read the bill prior to voting on it; instead, many members of Congress openly debated the Service's collection processes, the bill, and the amendment in the press. A logical conclusion is that Senator Roth and a majority of Congress actually believed that existing procedures violated due process.

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[11] Ryan J. Donmoyer, "Chairman Roth and the Politics of Reform," TAX NOTES, Dec. 22, 1997, at 1296; Ryan J. Donmoyer, "Roth Outlines 'Deficiencies' in IRS Reform Bill," TAX NOTES, Nov. 17, 1997, at 764.

[12] Internal Revenue Service Restructuring and Reform Act of 1998 (P.L. 105-206).

To summarize, a taxpayer must have a reasonable and meaningful opportunity to dispute a tax or penalty prior to collection by the IRS. While that opportunity may be administrative rather than judicial, the taxpayer must also have an opportunity to dispute the sufficiency of the original opportunity to dispute. Critically, the second opportunity *must be judicial*. These minimal requirements are statutory; however, they have significant constitutional implications. Prior to 1998, the government did not guarantee these minimal opportunities. Senator Roth – and ultimately Congress and the President – created them specifically to address what they saw as widespread due process violations. Congress, with the ultimate Presidential signature, labeled the procedures as "Collection Due Process." The label is important. It illustrates critical Congressional belief: collection without such minimal opportunities to be heard is unconstitutional as violative of the Fifth Amendment Due Process clause.

C. Procedures for the Healthcare Penalty

If the IRS believes an individual has violated the Mandate to have adequate health insurance, it must notify him or her of the penalty and demand that he or she pay it. It can then collect the alleged amount due.

That is it. No audit. No opportunity to respond. No need for *actual* notice. No administrative hearing.

No court hearing. No court judgment: mere perfunctory notice and demand followed by collection.

Perhaps the Treasury will adopt regulations providing for a hearing. Perhaps the IRS will adopt internal hearing procedures. Such opportunities existed prior to 1998 for various taxes; however, they were widely abused; indeed, they prompted the Taxpayer Bill of Rights III in 1998. They were not reviewable by any court . . . certainly not prior to collection or lien. They prompted the CDP process precisely because they were insufficient to guarantee due process: a meaningful right to be heard.

Since 1998, Taxpayers have a judicially reviewable right to a fair hearing, even if the hearing is administrative; at least they have a right to *judicial* review of the fairness. For the §5000A Penalty, however, no such right exists. Even if the Treasury adopts protest or appeal procedures, they cannot satisfy the Fifth Amendment Due Process guarantee because they cannot be *judicially* reviewable. The Tax Court lacks jurisdiction to hear such matters, and neither the Treasury nor the Service has the authority to grant such jurisdiction. District Courts would be barred by the Anti-injunction Act[13] from hearing such matters.

[13] I.R.C. §7421(a).

D. Analysis of the Procedures (or Lack Thereof)

i. How can the service "collect" the penalty?

The IRS may not use the §6331[14] levy process; nor may it file a notice of lien under §6321.[15] Also, it may not seek criminal sanctions for a taxpayer's failure to pay.[16]

On first view, subsection (g) appears taxpayer friendly: no criminal[17] sanctions, no levy and no lien. Arguably, the penalty appears essentially unenforceable.[18] A closer reading, however, eliminates the folly of such a viewpoint.

Clause 5000A(g)(2)(B)(ii) prohibits the Secretary from levying on taxpayer property. What that provision omits is the limited definition of a levy. The

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[14] I.R.C. §6331.

[15] I.R.C. §6321 provides for an automatic or "silent lien." For the lien to be effective against third parties, the Service must file a notice of lien, consistent with the CDP protection of sections 6330 and 6320.

[16] I.R.C. §5000A(g).

[17] For a fuller explanation of the due process issue, as well as how the Act may indeed trigger criminal liability, *see* Steven J. Willis and Nakku Chung, *No Healthcare Penalty? No Problem: No Due Process* (WILLIS & CHUNG IV), forthcoming 38 Am. J. L. Medicine (2012), http://ssrn.com/abstract=1998821

[18] Mellor, "*The Individual Mandate Tax: Healthcare's Toothless Watchdog*," 130 TAX NOTES 105 (Jan. 3, 2011) (opining that the penalty is a constitutional tax, but also noting its limited enforceability).

government has two substantial methods to collect the penalty.

ii. Offset

Per §6402(a) the service may retain an "overpayment" to satisfy other obligations: they keep a refund. This process, however, does not constitute a "levy" and thus is not prohibited by §5000A(g)(2)(B)(ii). Because it is not a levy, it cannot prompt a CDP hearing. Without the CDP hearing, no hearing officer determination is possible. With the determination, no Tax Court jurisdiction is possible.

Hence, if the government believes a taxpayer owes the penalty, it may seize any past, current, or future overpayment of any tax. The only limitation on this is the §5000A(g)(1) requirement that the Secretary provide "notice and demand." That notice, however, can be very much unlike notices for other taxes and penalties. It will not be a notice of deficiency prompting the right to seek Tax Court review. It will not be a §6330 notice of intent to levy prompting a CDC hearing followed by Tax Court review. It will be simple notice and demand. Nothing precludes the government from seizing a refund immediately following the notice. Nothing requires the government to listen to taxpayer disputes, let alone grant a sufficient hearing. Even if the government promulgates rules providing for such disputes, nothing grants any court jurisdiction to review the sufficiency of the hearing. Indeed, the Tax Court specifically lacks such

jurisdiction on collection matters except through the CDP process, which will be unavailable. The Anti-injunction Act precludes District and Claims Court review.

iii. Re-application of tax "payments"

Arguably, the government's ability to seize refunds is of little concern because taxpayers have the ability to ensure no refund is due. With the aid of a tax attorney or accountant one can project annual tax liability and thus adjust periodic "payments" through employer withholding and estimated tax returns. Two problems exist with that argument.

iv. Refunds

First, many taxpayers lack the skill or the resources to adjust withholding amounts. Many people rely on tax refunds as a type of short-term savings. Surely many taxpayers are capable of adjusting forms W-4 and 1040ES to eliminate the significant refunds. That all taxpayers have that skill or foresight is not credible. Hence, many taxpayers will lose refunds otherwise due through a collection process that is not a levy. Why is this so problematic? Consider the following scenario:

> Suppose Sally Taxpayer does not pay the penalty for lacking proper health insurance. Never-mind whether she is actually insured or whether she is exempt. Suppose the IRS, in searching various data bases of the

> "insured," does not find her name. What happens? The IRS sends her a Notice and Demand letter. That letter need not include any information about her right to a hearing before an administrative or judicial body because she has none. It will simply demand, assess, and collect. No Hearing. No Court. No Judgment. Just Demand and Collection.

But, what if Sally really *does* have insurance? Perhaps her insurance company misspelled her name Sallie. Or, perhaps she had a religious exemption. Or, she was imprisoned and thus not subject to the penalty. None of that would matter because Congress provided no *pre*-collection remedy. *After* Sally pays the *full* tax, including interest and a failure-to-pay penalty[19] equal to the failure-to-have-insurance penalty, she may seek a refund by filing an IRS Form 1040X. *After* exhausting her administrative rights, she can sue in District or Claims Court, assuming she knows how and can afford to do so. If she loses she may be assessed the government's litigation costs. And, *she* would have the burden of proof, not the government.

Yes, the executive may adopt procedures for a "protest letter" and an administrative hearing. But Congress specifically precluded the possibility of any

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[19] I.R.C. §6651 imposes a penalty for failure to pay a tax, which would include the §5000A penalty. Per §7203, such a failure to pay the penalty for failing to have insurance could be criminal.

judicial review of the sufficiency of such a hearing. That is contrary to the fundamental purpose behind sections 6330 and 6320: a mere administrative hearing and administrative determination of the hearing's due process sufficiency violates due process. A taxpayer must have the opportunity for pre-collection *judicial* review. But, for the Healthcare Penalty, no such judicial review is possible.

v. Estimated tax "payments"

Estimated tax "payments" made with Form 1040ES vouchers are not "payments." Instead they are deposits.[20] The government has no obligation to apply them to the current year's income tax liability – even though the taxpayer deposits them for that purpose. "Clients need to understand that the offset power of the IRS operates relatively unchecked." Raby and Raby, *The Tax Court's Offset Jurisdiction – Or Lack Thereof*, TAX NOTES, November 27, 2006, 833, at 836 (discussing, inter alia, re-application of estimated taxes). Because they do not become a "payment" of the current year's tax until the return is filed (typically April 15th of the following year), the government may apply them to another debt.

> Consider Sally taxpayer again. She has adequate health insurance and checks the "Yes"

[20] I.R.C. §6211 refers to them as "payments"; however, it disregards estimated "payments," as well as amounts withheld for purposes of determining a deficiency. Essentially, the amounts are deposits subject to re-application.

> box on her Form 1040 in response to the question about health coverage. She does not pay the penalty because she believes she does not owe it. She is not due a refund because she properly adjusted her W-4 and 1040ES voucher "payments" to preclude it. The government, however, disagrees. It does not find her name on a list of the insured or it "determines" a particular health insurance policy – the one Sally has – is inadequate.

The government will likely create a ruling process by which health insurance companies secure a determination regarding the adequacy of policies. It may require something akin to a Form 1099 be issued to all insureds. Mistakes happen, however. Can anyone believe such lists will be perfect and problem-free? While insurance companies will surely be able to litigate the denial of a favorable determination – or the withdrawal of one – taxpayers should also be able to raise such defenses.

Also, people change names: they marry, they divorce. Many use one name professionally and another socially. Some people spell their names differently for different purposes. Birth certificates can use one spelling and the person another. The population of the United States is approximately 350,000,000. Mistakes will occur with regard to some of those people. And what will be their remedy? It will be to pay the penalty and sue for a refund: their burden of going forward, of notice, and of proof. Even if the government grants administrative review, the taxpayer will have no ability to challenge the sufficiency

of that review in court, at least not until after payment.

Recall Sallie Taxpayer. Perhaps the government makes a mistake regarding her penalty liability. It owes her no tax refund, so how does it make her pay? It can re-apply future estimated tax "payments," – probably also including future employer withholding to satisfy the penalty from a prior year. It need not even notify her of that . . . at least not until it determines an income tax deficiency for the year to which Sallie thought the estimated tax "payments" applied. Sallie probably cannot challenge that deficiency because she will likely admit it. She cannot challenge the re-application of her "payments" because they were not payments . . . just deposits. Several years may potentially go by before she is even aware of the deficiency. Potentially, the statute of limitations on the penalty refund could run before she even knows of the penalty payment through subsequent re-application.

Further, suing for a refund is costly. Sallie would likely need an attorney or accountant to handle the refund claim – if the year remains open. She will need an attorney to handle the refund suit in District Court or the Claims Court. The amount of the mistaken penalty may be relatively small – perhaps a few thousand dollars. That it would be worth the cost years after the re-application of estimated taxes or of an overpayment is a serious issue. That issue itself goes to the sufficiency of the process – whether it amounts to "fair play and substantial justice."

In 1934, this Court *suggested* Fifth Amendment Due Process limitations do not restrict the Taxing Power. *Magnano v. Hamilton,* 292 U.S. 40, 44 (1934) (dealing with a Fourteenth Amendment challenge to a tax excessive in amount, as opposed to collection procedures); *relying on*, *Brushaber v. Union Pacific*, 240 U.S. 1, 20 (1916) (*stating* the inapplicability of due process to the Taxing Power, but actually *dealing with* issues of equal protection). The Court should distinguish those decisions (or reject their *dicta*) and adopt the view of its co-equal branches – Congress and the Executive. Those branches adopted the CDP process in 1998 precisely because they determined unreviewable administrative procedures were inadequate. Except in extraordinary circumstances,[21] Taxpayers must have a meaningful opportunity to dispute an obligation asserted by the government prior to the government taking their money. They must also have a meaningful pre-taking opportunity for judicial review of at least the sufficiency of that original dispute opportunity. *Cf. Fuentes v. Shevin*, 407 U.S. 67, 82 (1983) ("If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented."). For the §5000A penalty, such review is impossible. This Court should overrule any existing contrary authority exempting the Taxing

[21] Jeopardy and termination assessments, as noted *supra*.

Power from due process limitations and thereby strike §5000A of the Internal Revenue Code.

CONCLUSION

For the foregoing reasons, *amicus curiae* CatholicVote.org and Steven J. Willis respectfully request that this Supreme Court of the United States affirm the judgment of the Court of Appeals for the Eleventh Circuit. In so doing, the Court should find, *inter alia*, that the Mandate is unconstitutional because it violates limitations on the Taxing Power as well as the Due Process Clause of the Fifth Amendment.

Respectfully submitted,

STEVEN J. WILLIS
UNIVERSITY OF FLORIDA
COLLEGE OF LAW
8318 S.W. 103d Ave.
Gainesville, FL 32608
(352) 514-1394

PATRICK T. GILLEN
Counsel of Record
AVE MARIA SCHOOL OF LAW
1025 Commons Circle
Naples, Florida 34119
(734) 355-4728
ptgillen@avemarialaw.edu
Counsel for Amicus Curiae