No. 11-398

IN THE

Supreme Court of the 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 THE TAX FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS (Minimum Coverage Provision)

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QUESTION PRESENTED

Whether the minimum coverage provision of the Affordable Care Act exceeds Congress's powers under Article I of the Constitution.

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INTEREST OF THE *AMICUS CURIAE*

Tax Foundation submits this brief as *amicus curiae* in support of Respondents in the above-captioned matter.[1]

[1] No counsel for a party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for

The Tax Foundation is a non-partisan, non-profit research organization founded in 1937 to make information about government finance more understandable and accessible to the general public. Based in Washington, D.C., our analysis is guided by the principles of sound tax policy: simplicity, neutrality, transparency, and stability. The Tax Foundation's Center for Legal Reform furthers these goals by educating the legal community about economics and principled tax policy.

By addressing the definition of "tax" under Article I of the U.S. Constitution and the Anti-Injunction Act, this Court will consider a question that has been considered and will continue to be considered by nearly every federal court and state. Therefore, this decision and the rationale behind it will have a large impact upon the legality of certain taxes throughout the country. The Tax Foundation is in a unique position to aid this Court because of our extensive research in tax, fee, and penalty issues considered by courts, the academic community, and economists. Accordingly, the Tax Foundation has an institutional interest in this Court's ruling.

SUMMARY OF ARGUMENT

Long-standing American suspicion of taxes, which dates from colonial times, has led to numerous federal and state restrictions specific only to taxes, such as the federal Anti-Injunction Act, state-level supermajority or multiple reading requirements, and

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Petitioner and Respondent were timely notified of *amicus curiae*'s intent to file and their written consent have been obtained and filed with the Clerk of the Court.

voter approval thresholds. These requirements in turn have necessitated a meaningful definition of "tax," particularly to contrast against other government actions that result in revenue, such as fees and penalties.

Federal and state courts have risen to meet that need, articulating a definition that is widely accepted today: (a) a tax is an exaction imposed for the primary purpose of raising revenue for general spending, (b) a fee is an exaction imposed for the primary purpose of recovering from the payor the cost of providing a particular service to the payor, and (c) a penalty is an exaction imposed for the primary purpose of punishing the payor for an unlawful act. This definitional construct has strong historical and economic underpinnings, is supported by this Court's precedents and the academic literature, and is widely used by numerous federal and state courts.

The individual mandate is thus properly considered a penalty and not a tax for purposes of the U.S. Constitution's Taxing Power and for purposes of the Anti-Injunction Act. Holding otherwise jeopardizes a widely-used, long-standing, working definitional construct, which would have severe implications for taxpayer protections and revenue statutes across the country.

ARGUMENT

I. THE INDIVIDUAL MANDATE OPERATES AS A PENALTY AND IS NOT A TAX.

A. A Tax is Widely Defined as an Exaction Imposed for the Primary Purpose of Raising Revenue for General Spending.

American antipathy to taxes is rooted deeply in our nation's history, from early colonial taxes to the Boston Tea Party to the Whiskey Rebellion to California's Proposition 13 to today. *See, e.g.*, ALVIN RABUSHKA, TAXATION IN COLONIAL AMERICA (2008) (describing "how the colonists strove to minimize, avoid, and evade British and local taxation . . . ."); Joseph D. Reid, Jr., *Tax Revolts in Historical Perspective*, 32 NAT'L TAX J. 67, 69 (1979) ("Tax revolts are as American as 1776."); Kirk J. Stark, *The Right to Vote on Taxes*, 96 NW. U.L. REV. 191, 191 (2001) ("Time and time again Americans have turned mutinous against taxes."). Policymakers therefore have a strong incentive to avoid raising taxes, or at least seek to raise revenue in ways that can avoid the "tax hiker" label.

Tax proposals consequently are usually subject to greater scrutiny than other policy proposals and, indeed, other revenue proposals. As one example, sixteen states require legislative supermajorities for tax increases.[2] Nearly every state requires

[2] Arizona (two-thirds requirement since 1992), Arkansas (three-fourths requirement since 1934), California (two-thirds requirement since 1979), Colorado (two-thirds requirement since 1992), Delaware (three-fifths requirement since 1980), Florida (three-fifths requirement for corporate income taxes since 1971), Kentucky (three-fifths

uniformity in taxation. *See, e.g.*, Joseph Henchman & Arushi Sharma, *Virginia Constitution Requires Uniform Distribution of the Metrorail Tax Burden in Fairfax County*, TAX FOUNDATION FISCAL FACT NO. 233 (June 2010) (reviewing state uniformity case law). Others include requirements that tax bills be passed multiple times, that tax bills be passed by a minimum quorum, or that tax bills not encompass any non-tax provisions. Many of these requirements are long-standing, with some reaffirmed by referendum in recent years. At the federal level, the Anti-Injunction Act insulates state tax collections from certain legal challenges to which they could otherwise be subject. *See* 28 U.S.C. § 2283.

A workable definition of "tax" is necessary to give meaning to these tax-specific procedural protections. Relying simply on the words used in the statute invites subterfuge and nullifies taxpayer protections. Too broad a definition threatens to take tax-related procedural protections beyond their intended scope. While some may equate a tax as any government action that results in costs, monetary or non-monetary, the general public and the courts have been careful to distinguish between different forms of government-collected exactions.

The distinction between taxes and other types of charges depends on the (1) entity that imposes the

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requirement since 2000), Louisiana (two-thirds requirement since 1966), Michigan (three-fourths requirement for property taxes since 1994), Mississippi (three-fifths requirement since 1970), Missouri (two-thirds requirement since 1996), Nevada (two-thirds requirement since 1996), Oklahoma (three-fourths requirement since 1992), Oregon (three-fifths requirement since 1996), South Dakota (two-thirds requirement since 1996), Washington (two-thirds requirement since 1993).

assessment, (2) the parties upon whom the assessment is imposed, and (3) the use of the revenue. *See, e.g.*, *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992). A tax is thus an exaction imposed by the government, on the public, for the purpose of raising revenue which is then spent on general (not particular) public purposes. A charge not imposed by government, or a charge collected from those receiving particularized benefits, or a charge collected for primary purpose other than raising revenue, is not a tax. *See also United States v. State of New York*, 315 U.S. 510, 515-16 (1942) ("But a tax for purposes of [the Bankruptcy Code] includes any pecuniary burden laid upon individuals or property for the purpose of supporting the government, by whatever name it may be called.") (internal citations omitted); *United States v. La Franca*, 282 U.S. 568, 572 (1931) ("A 'tax' is an enforced contribution to provide for the support of government; a 'penalty,' as the word is here used, is an exaction imposed by statute as punishment for an unlawful act."). The government is correct when it asserts that "the validity of an assessment under the Taxing Power does not depend on whether it is denominated a tax." Pet. Br. 56-59. It depends on the charge's purpose and effect.

This *San Juan Cellular* three-part test, while relatively recent, nicely encapsulates what is a long-running and enduring standard for defining taxes. *See, e.g.*, *Millard v. Roberts*, 202 U.S. 429, 436 (1906), *quoting* 1 Story Const. § 880 ("Revenue bills . . . are those that levy taxes in the strict sense of the word and are not bills for other purposes which may

incidentally create revenue."); 4 Cooley, *The Law of Taxation*, ch. 29 § 1784 (4th ed. 1924) ("If revenue is the primary purpose and regulation is merely incidental the imposition is a tax; while if regulation is the primary purpose the mere fact that incidentally a revenue is also obtained does not make the imposition a tax . . . ."); BLACK'S LAW DICTIONARY 1214 (9th ed. 2009) (defining tax as "[a] charge, usu. monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue.").

Variations of this formulation, including the *San Juan Cellular* test, have been adopted by the vast majority of federal appellate courts and state supreme courts. *See, e.g.*, *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000) (applying *San Juan Cellular* to determine if a charge "qualifies" as a tax); *Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000) (applying *San Juan Cellular*); *Hedgepeth v. Tennessee*, 215 F.3d 608, 612 (6th Cir. 2000) (describing *San Juan Cellular* as the "leading decision" used for "the definition of the term 'tax'"); *RTC Commercial Assets Trust 1995-NP3-1 v. Phoenix Bond & Indem. Co.*, 169 F.3d 448, 457 (7th Cir. 1999) ("Penalties stand on a different footing. States do not assess penalties for the purpose of raising revenue. . . ."); *Chicago & Nw. Transp. Co. v. Webster County Bd. of Supervisors*, 71 F.3d 265, 267 (8th Cir. 1995) ("A government levy is a tax if it raises revenue to spend for the general public welfare."); *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996) (applying *San Juan Cellular* test to "determin[e] whether an assessment is a tax"); *Hill v. Kemp*, 478 F.3d 1236, 1244 (10th Cir. 2007)

(finding that a tax's "primary purpose . . . is revenue rather than regulation"); *Seven-Sky v. Holder*, 661 F.3d 1, 8 (D.C. Cir. 2011) ("It is well established that Congress used the term 'tax' in the Tax Injunction Act to mean assessments made for the purpose of raising revenues, not regulatory 'penalties' intended to encourage compliance with a law."); *Rural Tel. Coal. v. F.C.C.*, 838 F.2d 1307, 1314 (D.C. Cir. 1988) ("[A] regulation is a tax only when its primary purpose judged in legal context is raising revenue."); *Lightwave Tech., LLC v. Escambia County*, 804 So.2d 176, 178 (Ala. 2001) (finding that a charge "designed to generate revenue" for general spending is a tax); *May v. McNally*, 55 P.3d 768, 773-74 (Ariz. 2002) (adopting *San Juan Cellular*); *City of North Little Rock v. Graham*, 647 S.W.2d 452, 453 (Ark. 1983) (finding that a tax "is a means of raising revenue to pay additional money for services already in effect"); *Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350, 1354 (Cal. 1997) ("In general, taxes are imposed for revenue purposes, rather than in return for a special benefit conferred or privilege granted."); *Zelinger v. City & County of Denver*, 724 P.2d 1356, 1358 (Colo. 1986) ("A hallmark of such taxes is that they are intended to raise revenue to defray the general expenses of the taxing entity."); *Stuart v. Am. Sec. Bank*, 494 A.2d 1333, 1337 (D.C. 1985) (describing taxes as "for the purpose of raising revenue"); *Gunby v. Yates*, 102 S.E.2d 548, 550 (Ga. 1958) ("A tax is an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purposes . . . ."); *State v. Medeiros*, 973 P.2d 736, 742 (Haw. 1999) (holding that a tax does not apply to direct beneficiaries of a service, does not directly

defray the costs of a particular service, or is not necessarily proportionate to the benefit received); *BHA Inv., Inc. v. State*, 63 P.3d 474, 479 (Idaho 2003) ("[T]axes are solely for the purpose of raising revenue."); *Crocker v. Finley*, 459 N.E.2d 1346, 1350 (Ill. 1984) ("[A] charge having no relation to the services rendered, assessed to provide general revenue rather than compensation, is a tax."); *Ennis v. State Highway Comm'n*, 108 N.E.2d 687, 693 (Ind. 1952) ("Taxes are levied for the support of government . . . ."); *City of Hawarden v. US W. Commc'ns, Inc.*, 590 N.W.2d 504, 507 (Iowa 1999) (holding that an exaction intended to raise revenue is a tax); *Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n*, 956 P.2d 685, 708 (Kan. 1998) ("The primary purpose of a tax is to raise money, not regulation."); *Krumpelman v. Louisville & Jefferson County Metro. Sewer Dist.*, 314 S.W.2d 557, 561 (Ky. 1958) ("[T]axes are generally held to be a rate or duty levied each year for purposes of general revenue . . . ."); *Audubon Ins. Co. v. Bernard*, 434 So.2d 1072, 1074 (La. 1983) (holding that "revenue is the primary purpose" of a tax); *Bd. of Overseers of the Bar v. Lee*, 422 A.2d 998, 1004 (Me. 1990) ("[T]axes are primarily intended to raise revenue . . . ."); *Workmen's Comp. Comm'n v. Prop. & Cas. Ins. Guar. Corp.*, 570 A.2d 323, 325 (Md. 1990) (finding that taxes "are intended to raise revenue for public purposes"); *Emerson Coll. v. City of Boston*, 462 N.E.2d 1098, 1105 (Mass. 1984) (finding that a charge "collected not to raise revenues" but for another purpose is not a tax); *Bolt v. City of Lansing*, 587 N.W.2d 264, 269 (Mich. 1998) (holding that a charge with "a revenue-raising purpose" is a tax); *County Joe, Inc. v. City of Eagan*, 560 N.W.2d 681,

686 (Minn. 1997) (holding that a charge "expressly intended to raise revenue" is a tax); *Leggett v. Missouri State Life Ins. Co.*, 342 S.W.2d 833, 875 (Mo. 1961) (finding that a charge is not a tax unless "the object of [it] is to raise revenue to be paid into the general fund of the government to defray customary governmental expenditures"); *Monarch Mining Co. v. State Highway Comm'n*, 270 P.2d 738, 740 (Mont. 1954) ("Taxes are levied for the support of government, and their amount is regulated by its necessities."); *Douglas County Contractors Ass'n v. Douglas County*, 929 P.2d 253, 257 (Nev. 1996) (holding that a charge with the "true purpose . . . to raise revenue" is a tax); *Horner v. Governor*, 951 A.2d 180, 183 (N.H. 2008) (finding that a tax must be "intended to raise additional revenue" not "solely to support a governmental regulatory activity made necessary by the actions of those who are required to pay the charge"); *Resolution Trust Corp. v. Lanzaro*, 658 A.2d 282, 290 (N.J. 1995) (finding that a tax "is intended primarily to raise revenue"); *Scott v. Donnelly*, 133 N.W.2d 418, 423 (N.D. 1965) ("If the primary purpose is revenue, it is a tax; on the other hand, if the primary purpose is regulation, it is not a tax."); *Olustee Co-op Ass'n v. Oklahoma Wheat Utilization Research and Market Dev. Comm'n*, 391 P.2d 216, 218 (Okl. 1964) (citing definition of tax in part including purpose "to provide public revenue"); *Woodward v. City of Philadelphia*, 3 A.2d 167, 170 (Pa. 1938) ("[T]axes are defined to be burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes, and to defray the necessary expenses of government."); *State v. Foster*, 46 A. 833, 835-36 (R.I. 1900) ("If the imposition of such a condition has for

its primary object the regulation of the business, trade, or calling to which it applies, its exercise is properly referable to the police power; but if the main object is the obtaining of revenue, it is properly referable to the taxing power."); *Brown v. County of Horry*, 417 S.E.2d 565, 568 (S.C. 1992) (citing with approval the standard that "a tax is an enforced contribution to provide for the support of government . . . ."); *Valandra v. Viedt*, 259 N.W.2d 510, 512 (S.D. 1977) ("[T]axes are imposed for the purpose of general revenue . . . ."); *Memphis Retail Liquor Dealers' Ass'n v. City of Memphis*, 547 S.W.2d 244, 245-46 (Tenn. 1977) ("If the imposition is primarily for the purpose of raising revenue, it is a tax . . . ."); *Hurt v. Cooper*, 110 S.W.2d 896, 899 (Tex. 1937) (finding that a tax is a charge with the "primary purpose" of "raising of revenue"); *V-1 Oil Co. v. Utah State Tax Comm'n*, 942 P.2d 906, 911 (Utah 1996), *vacated on other grounds*, 942 P.2d 915 (Utah 1997) ("Generally speaking, a tax raises revenue for general governmental purposes . . . ."); *Marshall v. Northern Virginia Transp. Authority*, 657 S.E.2d 71, 77-78 (Va. 2008) ("We consistently have held that when the primary purpose of an enactment is to raise revenue, the enactment will be considered a tax, regardless of the name attached to the act."); *City of Spokane v. Spokane Police Guild*, 553 P.2d 1316, 1319 (Wash. 1976) ("[I]f the primary purpose of legislation is regulation rather than raising revenue, the legislation cannot be classified as a tax even if a burden or charge is imposed."); *City of Huntington v. Bacon*, 473 S.E.2d 743, 752 (W.Va. 1996) ("The primary purpose of a tax is to obtain revenue for the government . . . ."); *State v. Jackman*, 211 N.W.2d 480, 485 (Wis. 1973) ("A tax is one whose

primary purpose is to obtain revenue . . . ."). *But see Apocada v. Wilson*, 525 P.2d 876, 884-85 (N.M. 1974) (holding that a charge that raises revenue beyond costs is not a tax); *Heatherly v. State*, 678 S.E.2d 656, 657 (N.C. 2009) (dividing equally on the question of definition of tax); *State ex. rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 579 N.E.2d 705, 710 (Ohio 1991) ("It is not possible to come up with a single test that will correctly distinguish a tax from a fee in all situations where the words 'tax' and 'fee' arise."); *Auto. Club of Oregon v. State*, 840 P.2d 674, 678 (Or. 1992) (describing "tax" as any revenue collected by government, separate from "assessment").

B. The Individual Mandate's Charge is a Penalty and Not a Tax Because Its Primary Purpose is Not to Raise Revenue but to Penalize.

No evidence exists that the primary purpose of the individual mandate is to raise revenue, and for this reason, the individual mandate cannot be considered a tax for purposes of the U.S. Constitution or the Anti-Injunction Act. Of the various individuals and organizations opining on the purpose of the individual mandate, none have cited its ability to raise revenue.

The most common reason cited for the individual mandate's purpose is to regulate so-called "free riders," those who use health care services but do not bear the full cost themselves. President Obama, asked in a September 2009 ABC News interview whether the individual mandate is a tax, stated that he "absolutely reject[s] that notion," analogizing it to

state mandates to purchase auto insurance which "[n]obody considers . . . a tax increase." Jacqueline Klingebiel, *Obama: Mandate is Not a Tax*, ABC NEWS (Sep. 20, 2009), http://abcnews.go.com/blogs/politics/2009/09/obama-mandate-is-not-a-tax. "[F]or us to say that you've got to take a responsibility to get health insurance is absolutely not a tax increase." *Id.* *See also* Bradley Herring, *An Economic Perspective on the Individual Mandate's Severability from the PPACA*, 364 NEW ENG. J. MED. 16e (Mar. 10, 2011) ("The primary purpose of the individual mandate is to mitigate this adverse selection . . . ."); BlueCross BlueShield of North Carolina, *In the Spotlight: ACA Insurance Reforms* (July 13, 2011), https://www.bcbsnc.com/assets/hcr/pdfs/spotlight_insurance_reforms.pdf ("From a policy perspective, the primary purpose for the individual mandate is to enable Guarantee Issue and Community Rating to work by creating a risk pool with a relative mix of healthy and unhealthy individuals."); Guatham Nagesh, "IRS chief: Buy health insurance or lose your tax refund," DAILY CALLER (Apr. 6, 2010) (describing IRS Commissioner Doug Shulman's speech outlining options to "penalize" taxpayers who do not comply with the mandate); Igor Volsky, "On Whether the Individal [sic] Mandate Is A Tax," THINKPROGRESS.ORG (July 20, 2010) ("The mandate is not a 'tax' in the sense that its primary purpose is to raise revenue[,] even though it meets the legal definition . . . [which includes] nearly any provision that adds money to the federal treasury.").

The statute's references to the individual mandate also contradict any suggestion that it is considered a tax. The mandate appears under the

heading "Requirement to Maintain Minimum Essential Coverage." 26 U.S.C. § 5000A. The charge for not meeting this requirement is referred to as a "Shared Responsibility Payment." 26 U.S.C. § 5000A(b). The statute further refers to the mandate charge as a "penalty" twelve times and as a tax zero times. *See* 26 U.S.C. § 5000A *et seq*. The mandate also does not share the same enforcement provisions as taxes, with the IRS denied the use of liens or levies to enforce the provision. *See* 26 U.S.C. § 5000A(g)(2).

It is true that the Joint Committee on Taxation (JCT) technical explanation of the bill does refer to the individual mandate as an excise tax in its subheading on the individual mandate, but all other JCT references evidence the JCT's judgment that the mandate is not a tax. *See* Joint Committee on Taxation, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," As Amended, in Combination with the "Patient Protection and Affordable Care Act"* at 31 (Mar. 21, 2010), http://www.jct.gov/publications.html?func=startdown&id=3673. Aside from the reference in the subheading, the JCT never again refers to the mandate as a "tax" and instead invariably refers to it as a "penalty," doing so 24 times in its technical explanation of how the provision operates. *See id.* at 31-34. The explanation also falls under the policy and regulatory provisions of the Act, not under the "Revenue Provisions" heading. *See id.* at i-ii. JCT also left the mandate out of its revenue projections, where it estimated the financial impact of all provisions of the bill related to raising revenue. *See* Joint Committee on Taxation, *Estimated Revenue*

Effects of the Amendment in the Nature of a Substitute to H.R. 4872, The "Reconciliation Act of 2010," As Amended, In Combination With the Revenue Effects of H.R. 3590, The "Patient Protection And Affordable Care Act ('PPACA')," As Passed by the Senate, And Scheduled For Consideration By The House Committee On Rules On March 20, 2010, at 1-3 (Mar. 20, 2010), http://www.jct.gov/publications.html?func=startdown&id=3672.

This Court has repeatedly recognized a firm distinction between taxes and penalties, the latter of which are regulatory in nature, designed with the purpose of deterring and punishing people who are engaging in illegal activities. *See, e.g.*, *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996), quoting *La Franca*, 282 U.S. at 572 ("[A] 'penalty,' as the word is here used, is an exaction imposed by statute as punishment for an unlawful act."); *Dep't of Rev. of Montana v. Kurth Ranch*, 511 U.S. 767, 779-80 (1994) ("[W]hereas fines, penalties, and forfeitures are readily characterized as sanctions, taxes are typically different because they are usually motivated by revenue-raising, rather than punitive, purposes."); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922) ("Taxes are occasionally imposed in the discretion of the Legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty,

with the characteristics of regulation and punishment.").

The individual mandate is properly described as a penalty, not a tax, because these definitions describe the individual mandate quite well. Those who must make a payment must do so precisely because they have not adhered to the regulatory provisions of the Act. While incidental revenue may be generated, the undeniable purpose of the individual mandate is to punish, discourage, and reduce illegal behavior, as a penalty and not a tax.

II. THE GOVERNMENT'S CONTENTION THAT THE INDIVIDUAL MANDATE IS A TAX DOES NOT ADDRESS THE FACT THAT IT WOULD BE AN UNCONSTITUTIONAL CAPITATION TAX UNAPPORTIONED BY STATE POPULATION.

In asserting that the individual mandate is permissible under the Taxing Power, the Government does not address the fact that if this were true, this tax would be a capitation tax unapportioned by state population, in direct violation of the constitutional requirement that "No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." U.S. CONST. art. I, § 9, cl. 4. A direct tax is only permissible if it is apportioned among the states in proportion to population, or levied on incomes. *See* U.S. CONST. amend. XVI; *Eisner v. Macomber*, 252 U.S. 189, 206 (1920) ("A proper regard for its genesis, as well as its very clear language, requires also that this amendment shall not be extended by loose

construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.").

The prohibition of unapportioned direct taxes exists for a strong purpose. Alexander Hamilton, conceding that a federal government with unlimited taxing power invited tyranny, explained that "[t]he proportion of these taxes is not to be left to the discretion of the national Legislature but is to be determined by the numbers of each State as described in the second section of the first article." THE FEDERALIST NO. 36, 226, 229-30 (1788). Hamilton characterized the provision as a compromise that ensured that the federal government could have recourse to direct taxation if needed, but not in a way that could invite abuse or partiality. *See id.* George Mason, who felt that the provision was not sufficiently restrictive on government direct taxation, nevertheless described it correctly as meaning "that the quantity to be raised of each state, should be in proportion to their numbers in the manner therein directed." GEORGE MASON, VIRGINIA RATIFYING CONVENTION PAPERS 3:1087 (June 17, 1788).

Assuming *arguendo* that the Government's characterization of the mandate as a tax is correct, it would operate as a levy on individuals and not their incomes. The mandate penalty in 2016, for example, is imposed either in the amount of $695 per uninsured adult, or at the rate of 2.5 percent of the

uninsured taxpayer's income in excess of the filing threshold (in 2010, $9,350), whichever is greater. *See* 26 U.S.C. § 5000A(c). Although the latter calculation could conceivably be considered a tax on income, the former direct amount cannot be. If it is a tax, it is a capitation tax, levied directly on the individual. Because its collection is not apportioned according to state population, its operation would violate U.S. CONST. art. I, § 9, cl. 4.

III. HOLDING THAT THE INDIVIDUAL MANDATE IS A TAX WOULD LEAD TO SERIOUS NEGATIVE CONSEQUENCES FOR LEGAL JURISPRUDENCE.

This Court should be reluctant to reject the widely-accepted definition of "tax" as an exaction imposed for the primary purpose of raising revenue for general spending, because to do so would jeopardize settled precedent and taxpayer protections at the federal level and in nearly every state. There has been no development in law that necessitates such a far-reaching change.

A meaningful distinction between "tax" and "penalty" is vital to give operation to numerous federal and state provisions relating to tax policy. If this Court held that a tax is any government collection of revenue, then government revenue collection efforts across the country would be imperiled, as many revenue sources are not subjected to the heightened restrictions that "taxes" are. To collect fees or impose criminal fines, states for the first time would see these charges subjected to supermajority, multiple reading, and other requirements. While some states may choose to

extend such procedural requirements to non-tax revenue sources, this should be done explicitly through the legislative process, not by announcing a new definition of "tax" not comprehended at the time these provisions were adopted.

This Court should therefore be cautious not to encourage treating penalties as taxes, as that would render many state powers, and potentially the Taxing Power's limitations, meaningless.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Tax Foundation respectfully requests that the decision below be affirmed as to their conclusion that the Minimum Coverage Provision exceeds Congress's Taxing Power under the U.S. Constitution.

Respectfully submitted,

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