No.

IN THE SUPREME COURT OF THE UNITED STATES

LIBERTY UNIVERSITY, MICHELE G. WADDELL and JOANNE V. MERRILL,
Petitioners.

v.

TIMOTHY GEITHNER, KATHLEEN SEBELIUS, HILDA L. SOLIS, and ERIC H. HOLDER, JR.,
Respondents.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Anti-Injunction Act (AIA) bars courts from deciding the limits of federal power to enact a novel and unprecedented law that forces individuals into the stream of commerce and coerces employers to reorder their business to enter into a government-mandated and heavily regulated health insurance program when the challenged mandates are penalties, not taxes, where the government argues Congress never intended the AIA to apply, and where the Petitioners are currently being forced to comply with various parts of the law and thus have no other alternative remedy but the present action.

2. Whether Congress exceeded its enumerated powers by enacting a novel and unprecedented law that forces individuals who otherwise are not market participants to enter the stream of commerce and purchase a comprehensive but vaguely defined and burdensome health insurance product, and if so, to what extent can this essential part of the statutory scheme be severed.

3. Whether Congress exceeded its enumerated powers by enacting a novel and unprecedented law that forces private employers into the health insurance market

and requires them to enter into third-party contracts to provide a comprehensive but a vaguely defined health insurance product to their employees and extended beneficiaries, and if so, to what extent can this essential part of the statutory scheme be severed.

PARTIES

Petitioners are Liberty University, a Virginia non-profit corporation, Michele G. Waddell and Joanne V. Merrill.

Respondents are Timothy Geithner, Secretary of the Treasury of the United States, in his official capacity; Kathleen Sebelius, Secretary of the United States Department of Health and Human Services, in her official capacity; Hilda L. Solis, Secretary of the United States Department of Labor in her official capacity; Eric H. Holder, Jr., Attorney General of the United States, in his official capacity.

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The opinion of the Fourth Circuit Court of Appeals (App. 1a) is reported at 2011 WL 3962915. The opinion of the District Court granting the Motion to Dismiss (App. 165a) is reported at 753 F.Supp.2d 611 (W.D. Va. 2010).

JURISDICTION

The judgment of the Court of Appeals was filed on September 8, 2011. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case addresses Article I, §8 of the United States Constitution, the Anti-Injunction Act, 26 U.S.C. §7421(a) and sections 1501 and 1513 of the Patient Protection and Affordable Care Act of 2009, Pub. L. No. 111-148, 124 Stat. 119 (2010) (the "Act"), codified at 26 U.S.C. §5000A and 26 U.S.C. §4980H, respectively. The relevant constitutional provisions and statutes are reproduced in the Appendix.

STATEMENT OF THE CASE

This Court should accept review to determine whether a constitutional and statutory challenge to provisions that are injuring Petitioners and compelling individuals

and employers to purchase and perpetually maintain health insurance or pay a penalty is a "suit for the purpose of restraining the assessment or collection of any tax" so as to be barred by the Anti-Injunction Act, 26 U.S.C. §7421. ("AIA"). In addition, this Court should accept plenary review to determine whether the Commerce Clause or Taxing and Spending Clause give Congress authority to force individuals into the stream of commerce by purchasing a government-mandated health insurance product and compel employers to provide health insurance to employees and dependents. This case is the only challenge to the Act that squarely presents a challenge to both the individual and employer mandates of the Act, as discussed below.

Petitioners, a private university and two individuals, challenge §1501 ("individual mandate") and §1513 ("employer mandate") of the Act, which establish that individuals must purchase and employers must provide health insurance or pay a penalty. The individual mandate dictates that, with limited exceptions, all citizens obtain and maintain "minimum essential" health insurance coverage" or pay significant penalties. 26 U.S.C. §5000A. The employer mandate dictates that, with limited exceptions, employers provide employees with "minimum essential" health insurance coverage at what the government determines is

affordable, or pay significant penalties. 26 U.S.C. §4980H.

On March 23, 2010, Petitioners filed a Complaint seeking declaratory and injunctive relief under 42 U.S.C. §1983. Plaintiffs alleged, *inter alia*, that the individual and employer mandates exceed Congress' delegated powers under Article I, §8 of the Constitution, violate Petitioners' rights to free exercise of religion under the First Amendment and Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1(a)-(b) ("RFRA"), free speech and free association rights under the First Amendment, the Establishment Clause, the Fifth Amendment Equal Protection Clause, the Tenth Amendment, the Guarantee Clause, and provisions against direct or capitation taxes.

The district court found that Petitioners had standing to bring their claims, that their claims were ripe and that they were not barred by the AIA, but granted Respondents' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The court concluded that "Congress acted in accordance with its delegated powers under the Commerce Clause when it passed the employer and individual coverage provisions of the Act." (App 202a). The court adopted an unprecedented, expansive definition of the Commerce Clause and held that "*decisions* to pay for health care without insurance are

economic activities." (App. 205a) (emphasis added). The court held that the employer mandate provision was a logical extension of Congress' power to regulate the terms and conditions of employment. (App. 219a). The court reasoned that "the opportunity provided to an employee to enroll in an employer-sponsored health care plan is a valuable benefit offered in exchange for the employee's labor, much like a wage or salary," so that it is rational for Congress to mandate that employers provide such insurance coverage to employees. (App. 218a). The court decided and dismissed the remaining claims. (App. 256a).

On appeal to the Fourth Circuit, the government abandoned its AIA defense. Following oral argument, the panel asked the parties for supplemental briefing on the AIA. (App. 20a). Both parties submitted briefs arguing that the AIA did not apply. Significantly, the government argued that Congress intended that the AIA not apply and urged the panel to reach the merits. (App. 1a-164a). Nevertheless, on September 8, 2011, the panel, by a 2-1 vote, determined that the AIA divested the court of jurisdiction, vacated the district court order and remanded with directions to dismiss the case for lack of subject matter jurisdiction. (App., 1a-164a).

Judge Wynn concurred in the opinion drafted by Judge Motz, and went on to address

the merits of Petitioners' claims, stating that he would uphold the Act under the Taxing and Spending Clause, and that this conclusion led him back to the determination that the AIA barred Petitioners' action. (App. 68a). Judge Wynn also remarked that the the Commerce Clause argument of his dissenting colleague was "persuasive." (App. 52a).

Judge Davis dissented and wrote that the AIA did not bar adjudication of the merits. (App. 70a). Judge Davis said that both the individual and insurance mandates "pass muster as legitimate exercises of Congress's commerce power." (App. 146a). Judge Davis concluded that the individual mandate fell squarely within the boundaries this Court has established for legislation based upon the Commerce Clause: "Under seventy years of well-settled law, it is enough that the behavior regulated (whether characterized as activity or inactivity) substantially affects interstate commerce." (App. 135a). He agreed with Judge Moon in the District Court that Congress could compel employers to offer health insurance under its authority to regulate the terms and conditions of employment. (App. 139a).

As the Virginia Attorney General said in his Petition for Certiorari to the Fourth Circuit, the disposition of this case on the merits is known despite the fact that it was dismissed on

procedural grounds since both the concurring and dissenting judges analyzed the merits and found that the insurance mandates were unconstitutional. Petition for Writ of Certiorari, *Commonwealth of Va. v. Sebelius*, p. 27 (No. 11-420). This Court should grant plenary review to address both the AIA and the merits of the individual and employer mandates, and to what extent, if any, are they severable from the Act.

This is the only pending challenge to the Act that presents the threshold question of the AIA, and individual and the employer mandate. No other case presents all three issues together, and no case except this one has concluded that the AIA is a bar to reaching the merits or has addressed the employer mandate, as no case but this one raised the employer mandate on appeal.

REASONS FOR GRANTING THE PETITION

As Respondents recognized in their Petition for a Writ of Certiorari to the Eleventh Circuit in *Florida ex. rel. Bondi v. Department of Health and Human Services,* this case presents issues of "grave national importance" that have split the circuit courts, created confusion among states and citizens and have even led the Fourth Circuit to disregard all other courts' and the parties' agreement that

the Anti-Injunction Act does not apply. Petition for Writ of Certiorari, *United States Dep't of Health and Human Servs. v. State of Florida et. al.,* pp. 31-32 (No. 11-398).

In their petition seeking review of *Florida ex. rel. Bondi*, the 26 State petitioners emphasized how passage of the Act represented an impermissible expansion of Congress' enumerated powers and the urgent need for this Court's review. Petition for Writ of Certiorari, *State of Florida et. al. v. Dep't of Health and Human Servs.,* p. 14 (No. 11-400). "[T]he Court should grant certiorari to confirm that all the other limits on Congress's enumerated powers–and the very process of enumeration itself–are not rendered nugatory by a limitless spending power." *Id.* As the states said, review is urgently needed since the Courts of Appeal are "deeply divided" on the constitutionality of the mandate, which represents a "wholly novel and potentially unbounded assertion of federal authority." *Id.* at p. 34.

The National Federation of Independent Business and individual plaintiffs in *Florida ex. rel. Bondi* also emphasized the critical importance of reviewing both the constitutionality of the insurance mandates and the question of whether the mandates can be severed from the Act. Petition for Writ of

Certiorari to the Eleventh Circuit, *National Fed. Of Indep. Business, et. al v. Sebelius*, p. 11 (No.11-393). "The ACA comprehensively reforms and regulates more than one-sixth of the national economy, via several hundred statutory provisions and several thousand regulations that put myriad obligations and responsibilities on individuals, employers and the states." *Id.* "Thus, until this Court decides the extent to which the ACA survives, this entire Nation will remain mired in doubt, which imposes an enormous drag on the economy." *Id.*

In the Sixth Circuit, Judge Graham wrote:

> If the exercise of power is allowed and the mandate upheld, it is difficult to see what the limits on Congress's Commerce Clause authority would be. What aspect of human activity would escape federal power? The ultimate issue in this case is this: Does the notion of federalism still have vitality? To approve the exercise of power would arm Congress with the authority to force individuals to do whatever it sees fit (within boundaries like the First Amendment and Due Process

> Clause), as long as the regulation concerns an activity or decision that, when aggregated, can be said to have some loose, but-for type of economic connection, which nearly all human activity does.

Petition for Writ of Certiorari, *Thomas More Law Center, et. al. v. Barack Hussein Obama*, p. 8 (No. 11-117) (citing *Thomas More Law Center, et. al. v. Barack Hussein Obama*, 2011 WL 2556039 at *41 (Graham, J. dissenting)).

Petitioners ask this Court to grant their Petition and to resolve the significant conflicts between the Fourth Circuit's decision, precedents in this Court and other courts of appeal and to determine the critically important constitutional issues underlying this challenge.

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE CONFLICTS WITH PRECEDENTS FROM THIS COURT AND AMONG CIRCUIT COURTS REGARDING THE APPLICABILITY OF THE AIA TO BAR A CHALLENGE TO THE ACT.

The Fourth Circuit panel's determination that the AIA divests the court of jurisdiction conflicts with precedent from this Court, with the Sixth Circuit Court of Appeals on an identical challenge to the Act, with other

Circuits that differentiate between taxes and penalties, and with the government's own interpretation of the Act and Congressional intent.

Recognizing the federal government's pre-eminent need to assess and collect tax revenues, Congress early on enacted the AIA to prevent taxpayers from using their right of access to the courts to interfere with the timely and orderly collection of taxes. *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962). The AIA's prohibition forecloses only those actions that will impede the government's ability to collect necessary revenues. 26 U.S.C. §7421. "No suit *for the purpose of restraining the assessment or collection of any tax* shall be maintained in any court by any person." *Id* (emphasis added). While this Court has protected the government's ability to assess and collect taxes, it has also recognized that the AIA cannot close the courthouse door to all actions that might tangentially involve a payment to the government. *See e.g., Enochs*, 370 U.S. at 7 (AIA does not apply if party shows that government cannot prevail and equity jurisdiction otherwise exists); *South Carolina v. Regan,* 465 U.S. 367, 378-81 (1984) (Congress did not intend the AIA to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy). The Fourth Circuit panel contravened these

limitations and the express language of the AIA when it concluded that the challenge to the mandates was actually a suit seeking to restrain the collection of a tax and was barred by the AIA. (App. 51a-52a).

A. The Finding That The Challenge To the Act's Mandates Are Efforts To Restrain The Collection Or Assessment Of A Tax Conflicts With This Court's Precedents.

The Fourth Circuit's conclusion that the AIA bars this action conflicts with this Court's precedents and is a mischaracterization of the claims. Petitioners are not challenging the assessment or collection of the non-compliance penalties, which might never be assessed against them and, if they were, would not be assessed before April 15 2015. *See* 26 U.S.C. §§ 5000A(b)(c), 4980H(a)(b). Instead, as the Eleventh Circuit found, Petitioners question "whether the federal government can issue a mandate that Americans purchase and maintain health insurance from a private company for the entirety of their lives." *Florida ex. rel. Bondi,* 2011 WL 3519178 at *44. It is the mandates and, more particularly, Congress' authority to enact such mandates that is at the heart of this case. The Fourth Circuit's failure to recognize this significant distinction resulted

in a flawed conclusion that contradicts this Court's precedents.

This Court's 1883 exposition on the nature and purpose of the predecessor to the present AIA illustrates the conflict between the Fourth Circuit's ruling and this Court's precedents. *Snyder v. Marks*, 109 U.S. 189, 193-94 (1883). The AIA applies to "all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes" and provides an exclusive remedy for challenges to tax assessments in the form of a suit to recover back the tax after it is paid. *Id.* at 193. This Court explained that the system prescribed by the AIA was intended to be an exclusive system of corrective justice "enacted under the right belonging to the government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues." *Id.* "In the exercise of that right it declares, by section 3224 [the predecessor to 26 U.S.C. §7421], that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject-matter in question, have made the assessment and claim that it is valid." *Id.* at 193-194.

This case does not fit into that scenario. Petitioners challenge Congress' authority to enact a statutory mandate to purchase government-defined health insurance from a third party. (Appx.12a). Contained within the mandate is a penalty provision that punishes non-compliance with a fine. 26 U.S.C. §§ 5000A(b)(c), 4980H(a)(b) Petitioners object to the statutory mandate in general, not to the assessment of the fine against them, which would might never occur or would only occur beginning April 15, 2015. 26 U.S.C. §§ 5000A(b)(c), 4980H(a)(b). There is not now and might never be a collection of revenue with which Petitioners would interfere. Therefore, under *Snyder*, the AIA does not apply.

The Fourth Circuit also contradicts *Lipke v. Lederer*, 259 U.S. 557, 561-62 (1922). In *Lipke*, this Court held that the AIA did not bar an action challenging an attempt to seize property to pay a criminal penalty. *Id.* This Court said that the penalty lacked the indicia of a tax, *i.e.,* providing for the support of the government. *Id.* The AIA, "which prohibits suits to restrain assessment or collection of any tax, is without application." *Id.* The noncompliance fine here lacks the indicia of a tax, and therefore the AIA does not apply.

As this Court held in *Enochs*, "[t]he manifest purpose of s 7421(a) is to permit the

United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." 370 U.S. at 7. "In this manner the United States is assured of prompt collection of its lawful revenue." *Id.* Since there might not ever be collection of revenue for non-compliance with the insurance mandates, Petitioners' action does not pose a threat of judicial intervention to the assessment and collection of revenues, and the AIA is wholly inapplicable.

In *Bob Jones University v. Simon*, 416 U.S. 725, 736-737 (1974) this Court reiterated that the principal purpose of the AIA is "the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference, and to require that the legal right to the disputed sums be determined in a suit for refund." A collateral objective of the AIA is to protect tax collectors from litigation pending a suit for refund. *Id. See also, Hibbs v. Winn,* 542 U.S. 88, 103(2004) (reiterating the twin purposes of the AIA). This Court rejected the university's attempt to escape the AIA by claiming it was trying to maintain its flow of income, not obstruct the government's collection of revenue. *Id.* at 738. This Court disagreed and held that "a primary purpose of this lawsuit is to prevent the Service from

assessing and collecting income taxes from petitioner," which placed it squarely within the AIA. *Id.*

That is not the case here. Petitioners have not and might not ever be liable for payments under the Act, so are not seeking to avoid paying taxes. The provisions being challenged are not revenue-generating measures, but are measures designed to compel conduct under the threat of possible future fines. Petitioners are challenging Congress' authority to compel conduct, not the collection of fines. Therefore, unlike the claim in *Bob Jones*, Petitioners' claim here does not fall within the parameters of the AIA, and the panel's decision thus conflicts with *Bob Jones*.

The conflict between the Fourth Circuit's ruling and this Court's precedents is most apparent in *Regan*, 465 U.S. at 378-81. "In sum, the Act's purpose and the circumstances of its enactment indicate that Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." *Id.* at 378. In *Regan*, the state could not have been liable for the disputed taxes which would have been levied against bondholders. *Id.* at 378-379. Under those circumstances, if the AIA were applied, the state would be unable to utilize any statutory procedure, including a suit for a

refund, to contest the constitutionality of the tax. *Id.* "Accordingly, the Act cannot bar this action." *Id.* Application of the AIA in that case would have deprived the state of any opportunity to have the constitutionality of the act judicially reviewed, absent convincing a third party to file a refund suit. *Id.* at 380-381. Petitioners here would be in a similar bind. The noncompliance penalties under Sections 5000A and 4980H will not be assessed unless an individual or employer fails to obtain or maintain sufficient health insurance for some period of time after January 1, 2014. 26 U.S.C. §§ 5000A(b)(c), 4980H(a)(b). It is those mandates, not merely the potential fines, that Petitioners claim violate the Constitution. As was true in *Regan*¸ in this case, barring Petitioners' claims until punitive fines are paid and a refund sought would not further the purposes of the AIA and would subject Petitioners to irreparable injury. As this Court said in *Regan*, under these circumstances the AIA cannot bar the action. *Regan*, 465 U.S. at 380-381. Moreover, Petitioners have to reorder their lives and operations now to comply with the Act. A number of provisions have already gone into effect for employers, so injury is extant not possible at some distant time when a penalty might be due.[1] The Fourth Circuit's

[1] According to the Government Accountability Office, as of April 25, 2011, HHS had granted

conflicting ruling should be reviewed by this Court.

B. The Fourth Circuit's Ruling That The AIA Bars This Action Conflicts With Other Courts Dealing With The Same Issue.

The Fourth Circuit is the only federal court to find that the AIA applies to the Act, which creates an irreconcilable conflict regarding the threshold issue of whether affected citizens can challenge the Act.

The Sixth Circuit examined this precise issue and found that the AIA did not apply. *Thomas More Law Center v. Obama*, 2011 WL 2556039 (6th Cir. 2011). Every federal court except the Fourth Circuit has found that the

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1,347 waivers from now effective provisions in the Act setting coverage limits on employee health care plans. The waivers cover about 3.1 million people. GAO report No. GAO-11-725R, *Private Health Insurance: Waivers of Restrictions on Annual Limits on Health Benefits* (June 14, 2011) http://www.gao.gov/htext/d11725r.html (last visited October 6, 2011).

AIA does not bar a challenge to the Act. *Liberty Univ. v. Geithner*, 753 F.Supp.2d 611, 629 (W.D. Va. 2010); s*ee also, e.g., Goudy-Bachman v. U.S. Dep't of Health & Human Servs.,* 764 F. Supp.2d 684, 697 (M.D. Pa. 2011) *Virginia v. Sebelius,* 728 F.Supp.2d 768, 786-88 (E.D.Va.2010); *U.S. Citizens Assoc. v. Sebelius,* 754 F.Supp.2d 903, 909 (N.D.Ohio 2010). In *Florida ex.rel McCollum v. Department of Health and Human Services,* the district court similarly held that the AIA did not apply to the penalties for non-compliance with the insurance mandate. 716 F.Supp.2d 1120, 1142 (N.D. Fla. 2010). In language quoted in subsequent district court cases, Judge Vinson said:

> It would be inappropriate to give tax treatment under the Anti–Injunction Act to a civil penalty that, by its own terms, is not a tax; is not to be enforced as a tax; and does not bear any meaningful relationship to the revenue-generating purpose of the tax code. Merely placing a penalty (which virtually all federal statutes have) in the IRS Code, even though it otherwise bears no meaningful relationship thereto, is not enough to render the Anti–Injunction Act (which only applies to true revenue-

> raising exactions) applicable to this case.

Id. Judge Vinson, in turn relied upon an Eleventh Circuit case that held the AIA inapplicable to exactions similar to those under the insurance mandates. *Mobile Republican Assembly v. United States,* 353 F.3d 1357, 1362 n. 5 (11th Cir.2003). The *Mobile Republican* court found that the AIA does not reach penalties that are "imposed for substantive violations of laws not directly related to the tax code" and which are not good-faith efforts to enforce the technical requirements of the tax law. *Id.*

Likewise, the Fifth Circuit has refused to apply the AIA to claims in which payment of an exaction is merely ancillary to a constitutional or property rights challenge. *Linn v. Chivatero*, 714 F.2d 1278, 1283 (5th Cir. 1983); *Rutherford v. United States,* 702 F.2d 580, 583-84 (5th Cir. 1983). In *Linn*, the court refused to apply the AIA to a suit in which the plaintiff was raising a constitutional challenge to the seizure of his property. *Id.* As was true about South Carolina in *Regan*, in *Linn* the plaintiff would not be able to seek relief for the constitutional violation in a refund suit because he did not challenge the propriety of a tax that might be assessed against him, but the unlawful retention of his property. *Id.*

Similarly, in *Rutherford*, the court overturned a district court ruling that applied the AIA to bar plaintiffs' claims against a revenue officer. 702 F.2d 583. The Fifth Circuit characterized the claims as seeking recompense for deprivation of the plaintiffs' substantive due process rights rather than a refund of taxes. *Id.*

> The tax recovery proceedings available to the Rutherfords are limited strictly to a determination of the validity of the Government's demand. The statutory mechanisms for refund make no allowance for mental anguish caused by harassment, or for recovery of legal fees needlessly expended in an attempt to recover clear title to property unjustifiably claimed. . . . Because we believe that those injuries, not the lost money, are the dimensions of the Rutherfords' action against Kuntz, . . . we find that the remedy suggested by the district court is not responsive to the wrong sketched out in the Rutherfords' complaint.

Id. at 584. The same is true here. Petitioners' injuries stem not from the exaction of a penalty against them–in fact, the penalty might never be applied–but from the deprivation of

constitutional rights occasioned by Congress' enactment of the insurance mandates. Thus, as was true in *Linn* and *Rutherford*, the AIA does not apply to Petitioners' claims.

Even Respondents agree that the AIA does not apply. After initially arguing that the AIA barred Petitioners' action, Respondents abandoned that claim on appeal. More specifically, when asked to provide supplemental briefing on the matter, Respondents said that since the non-compliance penalties were not placed in the "assessable penalties" section of the IRC, then Congress did not intend that the individual mandate penalty would constitute a "tax" for purposes of the AIA. (Appx. 35a). Respondents again argued in their Petition to the Eleventh Circuit case that the AIA does not apply, and they cite to their argument in this case. Petition for Writ of Certiorari, *United States Dep't of Health and Human Servs. v. State of Florida et. al.,* pp. 31-32 (No. 11-398). Respondents press their argument based on statutory construction and Congressional intent. Their argument that the AIA does not apply should be given great deference. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837,844 (1984). This Court should review the applicability of the AIA as a threshold question prior to reaching the merits of any similar pending matter and this case presents the best

vehicle to address that issue.

In their Petition to the Eleventh Circuit, Respondents agree that the question of the applicability of the AIA should be addressed by this Court, and suggested that the Court could rely upon briefing in this case after granting Petitioners' Petition. Petition, No 11-398, at pp. 32-34 n.7.

The Fourth Circuit's ruling contradicts rulings by every other federal court to consider whether the AIA applies to challenges of the insurance mandates. It also conflicts with rulings in the Fifth and Eleventh circuits that refused to apply the act to deprive claimants of their right to redress constitutional deprivations.

II. THIS COURT SHOULD GRANT REVIEW TO DETERINE WHETHER ESSENTIAL PROVISIONS OF THE ACT THAT FORCE INDIVIDUALS AND EMPLOYERS TO PURCHASE OR PROVIDE HEALTH INSURANCE ARE SUPPORTED BY THE TAXING AND SPENDING CLAUSE.

Judge Wynn explicitly, and by implication Judge Motz in applying the AIA to the mandate penalties, wrongly declared that there is no distinction between a penalty and a tax. (App.56a), However, as Judge Sutton said

in his concurring opinion in *Thomas More Law Center*, "it is premature, and assuredly not the job of a middle-management judge, to abandon the distinction between taxes and penalties." 2011 WL 2556039 at *20 (Sutton, J., concurring). Judge Sutton noted that the early taxation cases which emphasized the distinction pre-dated this Court's expansion of the commerce power, "which largely 'rendered moot' the need to worry about the tax/penalty distinction." *Id.* (citing Laurence H. Tribe, 1 AMERICAN CONSTITUTIONAL LAW 846).

> Nonetheless, the line between 'revenue production and mere regulation,' described by Chief Justice Taft in the *Child Labor Tax Case*, 259 U.S. [20] at 38, 42 S.Ct. 449 [(1922)], retains force today. Look no further than [*Dep't of Revenue v.*] *Kurth Ranch,* [511 U.S. 767, 779-83 (1994)] a 1994 decision that post-dated *Bob Jones* and that relied on the *Child Labor Tax Case* to hold that what Congress had labeled a tax amounted to an unconstitutional penalty under the Double Jeopardy Clause.

Id. As Judge Sutton explained, this Court has consistently upheld the distinction between taxes, which are within Congress' authority

under Article I §8, and penalties, which exceed the power. The panel's dismissal of the distinction and resulting validation of the insurance mandates contradicts this precedent. As is apparent from Judge Sutton's opinion and from the district court opinion in *Florida ex. rel. Bondi*, Judge Wynn's opinion contradicts decisions in other circuits, creating a conflict on a core constitutional issue, *i.e.,* Congress' reach under the Taxing and Spending Clause.

A. The Implicit Finding That The Mandates Are Proper Exercises Of The Taxing And Spending Clause Contradicts This Court's Precedents.

As this Court held in *United States v. LaFranca*, 282 U.S. 568, 572 (1931), "[t]he two words [tax vs. penalty] are not interchangeable ....and if an exaction [is] clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." "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." *Id.* A tax can have a collateral effect of regulating conduct, but its primary purpose is to raise revenue in order to support the government. *United States v. Sanchez*, 340 U.S. 42, 45 (1950). When the punitive nature of the exaction supersedes

revenue generation, then, no matter how it is labeled, it is an impermissible penalty. *Lipke v. Lederer*, 259 U.S. 557, 561-62 (1922).

This Court's explanation of the distinction between taxes and penalties in *Child Labor Tax Case* illustrates how the Fourth Circuit's determination that the noncompliance penalties are taxes contradicts established precedent. 259 U.S. at 37. "The central objective of a tax is to obtain revenue, while a penalty regulates conduct by establishing criteria of wrongdoing and imposing its principal consequence on those who transgress its standard." *Id.* The Act regulates conduct by mandating that individuals and employers obtain and maintain health insurance, with violators punished by penalties. 26 U.S.C. §§ 5000A, 4980H.

Similarly, in *Helwig v. United States*, 188 U.S. 605, 610-11, (1903), the exaction at issue was not imposed upon all goods, but only upon importers who undervalued their goods. *Id.* It was clear that the fee was not imposed in order to generate revenue, but only to punish conduct of certain importers. *Id.* The fee acted as a warning to importers to be careful and honest or face the additional penalty. *Id.* Under those circumstances the exaction was a penalty not a tax. *Id.* Similarly, here, the exactions imposed under the insurance mandates act as warnings

to American citizens to comply with the government's mandate to obtain and maintain health insurance or be penalized. As was true in *Helwig*, the exactions here are penalties, not taxes governed by Article I, §8. If an exaction [is] "clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *LaFranca*, 282 U.S. at 572. The non-compliance penalties cannot be transformed into permissible tax assessments merely by labeling them as taxes.

The Fourth Circuit's determination that the noncompliance fees are taxes also contradicts this Court's precedents which provide that, "[i]f Congress respects the distinction between the words tax and penalty, then so should the Court." *Russello v. United States,* 464 U.S. 16, 23 (1983). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza–Fonseca*, 480 U.S. 421, 442 (1987). Thus, "[w]here Congress includes [certain] language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the [omitted text] was not intended." *Russello* 464 U.S. at 23–24.

As Judge Vinson detailed in his ruling, the Act went through a number of iterations before it was signed into law on March 23, 2010. *Florida ex. rel. McCollum*, 716 F. Supp.2d at 1134. Many of the earlier versions of the bill labeled the non-compliance exactions as "taxes." *Id.* However, the final version of the bill calls the exactions "penalties." *Id.* In addition, the Act contains a number of other exactions that are labeled taxes, showing "beyond question that Congress knew how to impose a tax when it meant to do so. Therefore, the strong inference and presumption must be that Congress did not intend for the 'penalty' to be a tax." *Id.*

Congress' substitution of the word "penalty" for "tax" in the mandate provisions, coupled with its use of the term "tax" elsewhere in the Act, leads to the inescapable conclusion that the non-compliance fines are penalties, not taxes, under this Court's precedents. The Fourth Circuit's contrary conclusion should be reviewed by this Court.

B. The Fourth Circuit's Implicit Finding That The Mandates Are Supported Under The Taxing And Spending Power Conflicts With Other Circuits.

The Fourth Circuit's opinion conflicts with every federal court which has ruled on the Act, including decisions from the Sixth and Eleventh Circuits which found the mandates to be penalties. *Thomas More Law Center*, 2011 WL 2556039 at *20 (Sutton, J., concurring), *Florida ex. rel. Bondi*, 2011 WL 3519178 at *68. Since the majority of the Fourth Circuit panel adopted this view and then found that Petitioners' claims could not proceed, it is critical that the conflict be resolved.

In *Thomas More Law Center*, the Sixth Circuit majority found that the penalties for non-compliance with the insurance mandates were just that, *i.e.,* penalties, not taxes subject to the AIA. 2011 WL 2556039 at *8. In his concurrence, Judge Sutton expanded upon the majority discussion to explain why the penalties could not be justified under the Taxing and Spending Clause. *Id.* at *17-*21. The court noted that some penalties are counted as taxes, notably the penalties assessed for non-payment of taxes, because they are related to tax enforcement. *Id.* at *7. Unlike those penalties, the penalties assessed

for non-compliance with the mandates have nothing to do with tax enforcement, and Congress noted that distinction in the language of Section 5000A. *Id.* (citing *Mobile Republican Ass'y*, 353 F.3d at 1362 n. 5). In addition, Congress distinguished the non-compliance penalties from other penalties under the Internal Revenue Code by prohibiting the IRS from using the customary tools available for collecting taxes and penalties, which again pointed to Congress' intent that the penalties not be regarded as taxes. *Id.* at *8.

Judge Sutton added several other reasons why the non-compliance exactions are regulatory penalties, not revenue-raising taxes. *Id.* at *17-*21. Congress used the word penalty, "and it is fair to assume that Congress knows the difference between a tax and a penalty." *Id.* at *18. The Act's legislative findings show that Congress invoked its Commerce Clause powers, not taxing authority. *Id.* Congress showed throughout the Act that it understood the difference between taxes and penalties. *Id.* The central function of the mandate is *not* to raise revenue but to change individual behavior by requiring all qualified Americans to obtain medical insurance. *Id.* (emphasis in original). The purpose of the Act is to broaden the health-insurance risk pool by requiring that more Americans participate in it before needing medical care. *Id.* "[I]t strains credulity to say

that proponents of the Act will call it a success if the individuals affected by the mandate simply pay penalties rather than buy private insurance." *Id.* Case law also supports the conclusion that the exactions are penalties, not taxes. *Id.* at *19 (citing *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 779 (1994)). These factors, plus the factors discussed in the majority opinion lead to the inescapable conclusion that Congress did not invoke its powers under the Taxing and Spending Clause. *Id.* at *20.

The Eleventh Circuit said that it was "unpersuaded" by the government's argument that the non-compliance exactions were valid exercises of Congress' taxing power. *Florida ex. rel. Bondi,* 2011 WL 3519178 at *68. In fact, "all of the federal courts, which have otherwise reached sharply divergent conclusions on the constitutionality of the individual mandate, have spoken on this issue with clarion uniformity. Beginning with the district court in this case, all courts have found, without exception, that the individual mandate operates as a regulatory penalty, not a tax." *Id.* (citing *Florida v. HHS*, 716 F.Supp.2d at 1143–44; *U.S. Citizens Ass'n v. Sebelius*, 754 F.Supp.2d 903, 909 (N.D.Ohio 2010); *Liberty Univ., Inc. v. Geithner*, 753 F.Supp.2d 611, 629 (W.D.Va.2010); *Virginia v. Sebelius*, 728 F.Supp.2d at 782–88; *Goudy–Bachman*, 764

F.Supp.2d at 695; *Mead v. Holder*, 766 F.Supp.2d 16, 41 (D.D.C.2011)). "The plain language of the statute and well-settled principles of statutory construction overwhelmingly establish that the individual mandate is not a tax, but rather a penalty." *Id.* at *69. "The government would have us ignore all of this and instead hold that any provision found in the Internal Revenue Code that will produce revenue may be characterized as a tax. This we are unwilling to do." *Id.*

The Fourth Circuit's contrary ruling that the exactions are "taxes" under Congress' taxing power stands alone and in conflict with every other court to have considered the issue, making this case the only case to provide a clear record to resolve this conflict.

III. THIS COURT SHOULD GRANT REVIEW TO DETERINE WHETHER ESSENTIAL PROVISIONS OF THE ACT THAT FORCE INDIVIDUALS AND EMPLOYERS TO PURCHASE OR PROVIDE HEALTH INSURANCE ARE SUPPORTED BY THE COMMERCE CLAUSE.

Judge Davis' adoption of the government's expansive definition of Congress' authority under the Commerce Clause conflicts with the scope of Congress' power as this Court has defined it since the founding:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?

Marbury v. Madison, 5 U.S. 137, 176 (1803). If the courts fail to maintain the limited nature of congressional power, then they run the risk of "giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed as pleasure." *Id*. at 178. Expanding Congress' enumerated powers to encompass the insurance mandates represents just such a situation–and threatens to fundamentally change the balance of power put in place by the Founders.

A. This Court Should Grant Review To Determine Whether The Act Which Compels Individuals To Enter Into The Stream of Commerce By Forcing Them to Buy Health Insurance Exceeds The Commerce Clause.

In early decisions establishing the parameters of the Commerce Clause, this Court emphasized the definition of "commerce" as quintessentially an economic activity. *Gibbons v. Ogden*, 9 Wheat. 1, 189-190 (1824). "Commerce is commercial intercourse between nations, parts of nations and is regulated by prescribing for carrying on the intercourse. The commerce power is the power to regulate, i.e., to prescribe the rule by which commerce is to be governed." *Id.* This Court has expanded the boundaries of Congress' Commerce Clause authority, but the underlying concept of regulating "activity" and the fundamental definition of commerce remain unchanged. As the Eleventh Circuit explained, "[e]conomic mandates such as the one contained in the Act are so unprecedented, however, that the government has been unable, either in its briefs or at oral argument, to point this Court to Supreme Court precedent that addresses their constitutionality. Nor does our independent

review reveal such a precedent." *Florida ex. rel. Bondi,* 2011 WL 3519178 at *45.

Judge Davis' attempt to equate the mandates with the regulations upheld in *Wickard v. Filburn*, 317 U.S. 111 (1942) and *Gonzales v. Raich*, 545 U.S. 1 (2005) is wholly ineffective. In *Wickard* and *Raich,* the parties agreed that the overall regulatory schemes were legitimate, but sought exceptions that would evade or interfere with the orderly enforcement of those admittedly legitimate federal regulations. *Wickard*, 317 U.S. at 128-129; *Raich*, 545 U.S. at 15. In both cases, this Court rejected the proposition that individuals engaging in an activity affected by an arguably legitimate regulatory scheme could seek to erect self-serving detours to avoid having the law apply to their activities. *Wickard*, 317 U.S. at 128-129; *Raich*, 545 U.S. at 15. Here, by contrast, there is no underlying economic or even non-economic activity being carried out by the Plaintiffs. In fact, the individual Plaintiffs have intentionally chosen not to engage in the activity of purchasing health insurance, but are being coerced into participating in the health insurance market so that they can then be regulated. (Appx. **). Congress is attempting to change the underlying nature of its authority from "regulating commerce" to "creating commerce" by mandating that mere bystanders become participants subject to regulation by

purchasing a government-defined product that mandates payments for unwanted and unnecessary medical services. This goes beyond this Court's most expansive Commerce Clause cases, *Wickard* and *Raich*, and Judge Davis' contention that *Wickard* and *Raich* support the mandates contradicts precedent.

Judge Davis unsuccessfully attempts to distinguish the insurance mandates from the over-reaching regulations struck down in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison,* 529 U.S. 598 (2000). He fails to demonstrate how the attenuated inferences necessary to find that regulating commerce includes compelling market participation differ from the inferential leaps this Court found fatal in *Lopez,* 514 U.S. at 566-568, and *Morrison,* 529 U.S. at 607. Judge Davis dismisses Petitioners' claims, based upon *Lopez* and *Morrison*, that accepting Congress' definition of the Commerce Clause implicit in the mandates would remove all effective boundaries on congressional authority. (Appx. at 110a). Judge Davis dismisses Judge Vinson's observations, which were upheld by the Eleventh Circuit, that such limitless power would allow Congress to require people to buy broccoli to live healthier and reduce health cost, or to purchase a General Motors vehicle to regulate transportation costs. To prove that

such hypotheticals were realistic, Judge Vinson said:

> … I pause here to emphasize that the foregoing is not an irrelevant and fanciful "parade of horribles." Rather, these are some of the serious concerns implicated by the individual mandate that are being discussed and debated by legal scholars. For example, in the course of defending the Constitutionality of the individual mandate, and responding to the same concerns identified above, often-cited law professor and dean of the University of California Irvine School of Law Erwin Chemerinsky has opined that although "what people choose to eat well might be regarded as a personal liberty" (and thus unregulable), "Congress could use its commerce power to require people to buy cars." *See* ReasonTV, *Wheat, Weed, and Obamacare: How the Commerce Clause Made Congress All-Powerful, August 25, 2010, available at: http://reason.tv/video/show/wheat-weed-and-obamacare-how-t.* When I mentioned this to the defendants' attorney at oral argument, he

> allowed for the possibility that "maybe Dean Chemerinsky is right." *See* Tr. at 69. Therefore, the potential for this assertion of power has received at least some theoretical consideration and has not been ruled out as Constitutionally implausible.

Florida, ex. rel. Bondi, 2011 WL 285683 at *24. Judge Davis denounces these observations and says that "it is not so" that the mandate removes "cognizable, judicially administrable limiting principles" from Congress' Commerce Clause power, but does not explain what limiting principles will remain if the mandates are upheld. (Appx. at 111a). During oral argument at the Fourth Circuit the Acting Solicitor General stated that Commerce Clause power was so broad that Congress could force people to buy wheat. In that same vein, Judge Davis asserts that even if upholding the insurance mandates would lead to mandating that people purchase broccoli in order to bolster the broccoli market, that act of compulsion would not, in practical effect, be anything new. (Appx., at 134a). Judge Davis claims that governments are formed "precisely to *compel purchases of public goods,*" and that compelling all Americans to purchase health insurance from private parties produces a public good of lowering health care costs and, therefore is a

proper function of government. (Appx., at 134a) (emphasis in original). Rather than Petitioners' claims being "novel and unsupported," as Judge Davis claims, it is his conclusion that the mandates fit within this Court's Commerce Clause jurisprudence that is novel and unsupported and contradicts this Court's precedents. (Appx., at 134a).

The mandates are an unprecedented expansion of congressional power that, if permitted to stand, will create a virtually unlimited federal police power wholly antithetical to the limited powers granted to the federal government under the Constitution. This Court should grant review to clarify the limits of the Commerce Clause.

B. This Court Should Grant Review To Determine Whether Compelling Employers To Provide Health Insurance For Employees Exceeds The Commerce Clause.

Judge Davis' conclusion that compelling all employers to provide government-defined health insurance coverage to its employees a natural outgrowth of existing employment regulations is contrary to this Court's precedent that Congress does not have the power to mandate that employers provide certain

benefits to their employees. *See, e.g., E. Enterprises v. Apfel*, 524 U.S.498 (1998). (compelling companies to cover healthcare costs unrelated to any commitment that the employers made or to any injury they caused contravened the fundamental fairness underlying the Takings Clause); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) (finding that the National Labor Relations Act was constitutional because it "*does not compel* agreements between employers and employees. It *does not compel* any agreement whatever." (emphasis added)).

In *Jones & Laughlin Steel*, this Court noted that Congress was careful to define "commerce" in a way that complemented this Court's previous limitations on Congress' power. *Id.* at 31. Congress did not purport to intrude upon the relationship between all industrial employees and employers. *Id.* The act did not impose collective bargaining upon all industries regardless of the effects upon interstate or foreign commerce, but purported to reach "only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds." *Id.*

When upholding wage and hour laws, this Court noted that the challenged provisions were carefully worded to prohibit only the

shipment of goods in interstate commerce which were produced by workers who were not paid at least a minimum wage and were required to work more than a maximum number of permitted hours per week. *United States v. Darby*, 312 U.S. 100, 110 (1941). The challenged provisions in *Darby* applied only to employees who produced goods to be used in interstate commerce. *Id.* The provisions did not, as the insurance mandate does here, prescribe the terms of the employment contract. *Id.* Therefore, it was properly focused only upon preventing unfair competition in the movement of goods interstate. *Id*. at 122.

Darby and *Jones & Laughlin Steel* establish that Congress can regulate working conditions, including wages and hours, to the extent that they affect interstate commerce. However, in the employer insurance mandate Congress goes much farther, by purporting to dictate what fringe benefits employers must offer. The Act goes beyond this Court's precedent. Congress and the lower courts are attempting to redefine this Court's precedent to permit regulation of all of the "terms of employment," including what fringe benefits shall be offered, at what level and what cost. The Court has never permitted such an intrusion in to the private relationship between employer and employee under the guise of regulating interstate commerce. This Court

should grant the petition to resolve whether that intrusion can be reconciled with Congress' limited powers under the Commerce Clause.

The conflict between the employer mandate and this Court's precedents is in no way diminished by Congress' regulation of employment-related insurance benefits, including the Employee Retirement and Income Security Act of 1974 ("ERISA"), Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), and Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). None of those enactments compels an employer to offer benefits as the Employer Mandate does here. Instead, employers who have voluntarily agreed to provide insurance benefits to their employees, and therefore are participants in the health insurance industry, are governed by the acts. No employer is required to participate in the health insurance industry so that they can be regulated, and employers are free to discontinue offering the benefits and be free of the regulations. By contrast, the mandate requires employers to participate in the health insurance industry. Therefore, the mandate not only exceeds Congress' power under the Commerce Clause, but also pre-empts state regulations regarding health insurance regulation in violation of the McCarran-Ferguson Act. *American Insurance Assn. v. Garamendi*, 539 U.S. 396, 428 (2003);

Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429–430 (1946).

The significant differences between the existing employment benefit statutes and the employer mandate reveal the conflict and the need for this Court to grant review.

IV. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE MANDATES CAN BE SEVERED FROM THE REMAINDER OF THE ACT.

Since both the district court and Fourth Circuit panel found that the insurance mandates were constitutional, they did not address the issue of whether the mandates could be severed from the remainder of the Act if they were found to be unconstitutional. Nevertheless, the issue is of critical importance to this Court's review of Petitioners' challenge, which raised not only Commerce Clause and Taxing and Spending Clause claims, but also challenges based upon other constitutional and statutory claims, which extend beyond the mandates themselves to other provisions that threaten Petitioners' core liberty interests. (App. at 172a). Four federal courts have addressed the severability issues and reached four different conclusions, creating a classic

case that requires resolution by this Court. *See, Virginia,* 728 F. Supp.2d at 790; *Florida ex. rel. Bondi*, 2011 WL 285683 at *39 (N.D. Fla. 2011); *Florida ex. rel. Bondi,* 2011 WL 3519178 at *82 (11th Cir. 2011); *Goudy-Bachman,* 2011 WL 4072875 at *21. The question of how much of the Act can be enforced should this Court find the mandates unconstitutional is critical, and the irreconcilable conflict should be resolved by this Court.

Congress emphasized the centrality of the insurance mandates to the comprehensive reforms in the Act in its recitation of findings in support of the mandates:

> (H)Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), the Public Health Service Act (42 U.S.C. 201 et seq.), and this Act, the Federal Government has a significant role in regulating health insurance. *The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market.*
>
> (I) Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act),

> if there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. *The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.*

42 U.S.C. § 18091(2)(H),(I) (emphasis added). In addition, in the Florida case, Respondents conceded that without the mandates the insurance reforms incorporated into the Act would not work. *Florida ex. rel. Bondi*, 2011 WL 285683 at *36. Respondents further said that the individual mandate "is essential to Congress's overall regulatory reform of the interstate health care and health insurance markets ... is "essential" to achieving key reforms of the interstate health insurance market ... [and is] necessary to make the other regulations in the Act effective. *Id.* at *37

(citing Memorandum in Support of Defendants' Motion to Dismiss, filed June 17, 2010 (doc. 56-1), at 46-48).

As Judge Vinson said, "[i]n other words, the individual mandate is indisputably necessary to the Act's insurance market reforms, which are, in turn, indisputably necessary to the purpose of the Act" and could not be severed *Id.* Relying upon this Court's decision in *Ayotte v. Planned Parenthood of Northern New England,* 546 U.S. 321, 329-30 (2006), Judge Vinson found that the entire Act had to be invalidated. The complexity of the 2,700-page Act meant that partial invalidation would require that the court re-balance a statutory scheme by engaging in quasi-legislative "line drawing" that would be a " 'far more serious invasion of the legislative domain' "than courts should undertake." *Id.* at *38.

However, the Eleventh Circuit did not believe that such line-drawing was required or was problematic. *Florida ex. rel. Bondi,* 2011 WL 3519178 at *82. Despite agreeing with Judge Vinson that the mandate was unconstitutional, the panel disagreed about its effect on the remainder of the Act and severed the individual mandate. *Id.*

In the *Virginia* case, the district court also found that the mandate was unconstitutional, but invalidated only part of the Act. 728 F. Supp.2d 768, 790. Relying upon

this Court's decision in *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684 (1987), the Virginia district court said that it was virtually impossible to determine whether Congress would have enacted the Act without the mandate or what, if any, portion of the Act could survive without it. *Id.* at 789. The court invalidated only the portions of the Act that specifically referenced the mandate. *Id.* at 790.

The Pennsylvania district court similarly "split the difference" between total invalidation and severing only the unconstitutional provision. *Goudy-Bachman*, 2011 WL 4072875 at *21. As was true with the Virginia court, the Pennsylvania court found that attempting to discern which provisions should be excised based upon the unconstitutionality of the mandates would be speculative at best. *Id.* at *20. It invalidated only the provisions providing for "guaranteed issue" insurance policies and coverage for "pre-existing conditions," regarded as the two key components of the Act which are dependent upon the mandates. *Id.* at *21.

The utter confusion among the lower courts and the urgency to definitively establish the constitutional of the Act compel review of the severability question.

CONCLUSION

The Fourth Circuit's ruling contradicts this Court's precedents and creates a conflict with the Fifth, Sixth and Eleventh circuits. This Court should accept plenary review to resolve the conflicts presented by this case, including whether the mandates are supported by the Taxing and Spending Clause or the Commerce Clause, and to what extent, if any, the mandates may be severed from the rest of the Act.

Petitioners respectfully request that this Court grant the Petition to address the issues of great public importance.

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APPENDIX

2011 WL 3962915
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United States Court of Appeals,
Fourth Circuit.

LIBERTY UNIVERSITY, INCORPORATED, a Virginia Nonprofit Corporation; Michele G. Waddell; Joanne V. Merrill, Plaintiffs–Appellants,

and

Martha A. Neal; David Stein, M.D.; Pausanias Alexander; Mary T. Bendorf; Delegate Kathy Byron; Jeff Helgeson, Plaintiffs,

v.

Timothy GEITHNER, Secretary of the Treasury of the United States, in his official capacity; Kathleen Sebelius, Secretary of the United States Department of Health and Human Services, in her official capacity; Hilda L. Solis, Secretary of the United States Department of Labor, in her official capacity; Eric H. Holder, Jr., Attorney General of the United States, in his official capacity, Defendants–Appellees.

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American Civil Liberties Union; American Civil Liberties Union Of Virginia, Incorporated; American Nurses Association; American Academy of Pediatrics, Incorporated; American Medical Student Association; Center for

American Progress, d/b/a Doctors for America; National Hispanic Medical Association; National Physicians Alliance; Harry Reid, Senate Majority Leader; Nancy Pelosi, House Democratic Leader; Dick Durbin, Senator, Assistant Majority Leader; Charles Schumer, Senator, Conference Vice Chair; Patty Murray, Conference Secretary; Max Baucus, Senator, Committee on Finance Chair; Tom Harkin, Senator, Committee on Health, Education, Labor and Pensions Chair; Patrick Leahy, Senator, Committee on the Judiciary Chair; Barbara Mikulski, Senator, Help Subcommittee on Retirement and Aging Chair; John D. Rockefeller, IV, Senator, Committee on Commerce Chair; Steny Hoyer, Representative, House Democratic Whip; James E. Clyburn, Representative, Democratic Assistant Leader; John B. Larson, Representative, Chair of Democratic Caucus; Xavier Becerra, Representative, Vice Chair of Democratic Caucus; John D. Dingell, Representative, Sponsor of House Health Care Reform Legislation; Henry A. Waxman, Representative, Ranking Member, Committee on Energy and Commerce; Frank Pallone, Jr., Representative, Ranking Member, Commerce Subcommittee on Health; Sander M. Levin, Representative, Ranking Member, Committee on Ways and Means; Fortney Pete Stark, Representative, Ranking Member, Ways and Means Subcommittee on Health; Robert E.

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American Health Forum; Black Women's Health Imperative; Childbirth Connection; Ibis Reproductive Health; Institute of Science and Human Values; Maryland Women's Coalition for Health Care Reform; Mental Health America; National Asian Pacific American Women's Forum; National Association of Social Workers; National Coalition for LGBT Health; National Council of Jewish Women; National Council of Women's Organizations; National Education Association; National Latina Institute for Reproductive Health; Older Women's League; Physicians for Reproductive Choice and Health; Raising Women's Voices; Sargent Shriver National Center on Poverty Law; Southwest Women's Law Center; Wider Opportunities for Women; Women's Law Center of Maryland, Incorporated; Women's Law Project, Amici Supporting Appellees.
No. 10–2347.

Argued May 10, 2011. Decided Sept. 8, 2011.

Vacated and remanded with instructions.
Wynn, Circuit Judge, filed concurring opinion.
Davis, Circuit Judge, filed dissenting opinion.

Appeal from the United States District Court for the Western District of Virginia, at Lynchburg. Norman K. Moon, Senior District Judge. (6:10–cv–00015–nkm–mfu).

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Before MOTZ, DAVIS, and WYNN, Circuit Judges.

Opinion

Vacated and remanded by published opinion. Judge MOTZ wrote the opinion, in which Judge WYNN concurred. Judge WYNN wrote a concurring opinion. Judge DAVIS Wrote a dissenting opinion.

DIANA GRIBBON MOTZ, Circuit Judge:
Liberty University and certain individuals brought this suit to enjoin, as unconstitutional, enforcement of two provisions of the recently-enacted Patient Protection and Affordable Care Act. The challenged provisions amend the Internal Revenue Code by adding: (1) a "penalty" payable to the Secretary of the Treasury by an individual taxpayer who fails to maintain adequate health insurance coverage and (2) an "assessable payment" payable to the Secretary of the Treasury by a "large employer" if at least one of its employees receives a tax credit or government subsidy to offset payments for certain health-related expenses. The district court upheld these provisions, ruling that both withstood constitutional challenge. Because this suit constitutes a pre-enforcement action seeking to restrain the assessment of a tax, the Anti–Injunction Act strips us of jurisdiction. Accordingly, we must vacate the judgment of the district court and

remand the case with instructions to dismiss for lack of jurisdiction.

I.

A.

On March 23, 2010, the President signed into law the Affordable Care Act, a comprehensive bill spanning 900 pages, which institutes numerous changes to the financing of health care in the United States. See Pub.L. No. 111–148. Liberty and some individuals (collectively "plaintiffs") challenge only two provisions of the Act.

1. The first amends the Internal Revenue Code (sometimes "the Code") by adding § 5000A ("the individual mandate").[1] See id., § 1501(b). The individual mandate requires an "applicable individual" to "ensure" that beginning after 2013, the individual "is covered under minimum essential coverage." I.R.C. § 5000A(a). The individual mandate lists a number of health insurance programs that qualify for "minimum essential coverage": government- and employer-sponsored plans, individual market plans, and other health plans recognized as adequate. § 5000A(f)(1). If an individual "taxpayer" fails to obtain the required coverage, the "taxpayer" is subject to a "penalty." § 5000A(b)(1).

The Affordable Care Act uses the Internal Revenue Code's existing tax collection system to implement the penalty. Only a "taxpayer" is subject to the penalty, id., and the Code defines a "taxpayer" as "any person subject to any internal revenue tax." Id. § 7701(a)(14). A taxpayer must include the penalty payment with his regularly-filed income tax return. § 5000A(b)(2). The taxpayer owes the penalty only if he fails to maintain minimum coverage for a continuous period of three months or longer. § 5000A(e)(4)(A). The individual mandate also makes a taxpayer liable for a penalty imposed on his "dependent," as defined in § 152 of the Code. § 5000A(b)(3)(A). Akin to the joint liability of spouses for income taxes, I.R.C. § 6013(d)(3), a taxpayer is also jointly liable for a spouse's penalty if filing a joint income tax return. § 5000A(b)(3)(B).

A taxpayer subject to the penalty owes the greater of: (1) a "flat dollar amount" equal to $95 for the taxable year beginning 2014, $325 for 2015, $695 for 2016, and $695 indexed to inflation for every year thereafter; or (2) a graduated percentage (1% in 2014, 2% in 2015, and 2.5% every year thereafter) of the amount by which the "taxpayer's household income," as defined by the Code, exceeds "gross income specified in" I.R.C. § 6012(a)(1) (the amount of income triggering the requirement to file a tax return). See § 5000A(c)(2), (3). But the penalty

may not exceed the cost of the "national average premium for qualified health plans" of a certain level of coverage. § 5000A(c)(1).
Section 5000A(g)(1) authorizes the Secretary of the Treasury ("the Secretary") to assess and collect the penalty "in the same manner as an assessable penalty under subchapter B of chapter 68" of the Internal Revenue Code, which in turn contains penalties that the Secretary is to "assess[ ] and collect[ ] in the same manner as taxes." Id. § 6671(a). Accordingly, the Affordable Care Act provides the Secretary with all the civil enforcement tools of the Internal Revenue Code subject to only one express limitation: the Secretary may not seek collection of the penalty by "fil[ing][a] notice of lien with respect to any property" or "levy[ing] on [a taxpayer's] property." § 5000A(g)(2)(B).

2. The other provision of the Act challenged by plaintiffs amends the Internal Revenue Code by adding § 4980H (the "employer mandate"). Pub.L. No. 111–148, § 1513. That provision imposes an "assessable payment" on "any applicable large employer" if a health exchange notifies the employer that at least one "full-time employee" obtains an "applicable premium tax credit or cost-sharing reduction." I.R.C. § 4980H(a), (b). An "applicable premium tax credit or cost-sharing reduction" consists of either (1) a tax credit to assist a low-income

individual with financing premiums for qualified health plans or (2) a government subsidy to help finance an individual's share of out-of-pocket health care costs, as provided by the Affordable Care Act. § 4980H(c)(3).

Section 4980H calculates the assessable payment differently depending on whether the employer offers adequate health insurance coverage to its employees. If the employer fails to offer adequate coverage to its full-time employees, the "assessable payment" is calculated by multiplying $2,000 (increased yearly by the rate of inflation), by the number of total full-time employees, prorated over the number of months an employer is liable. § 4980H(a), (c)(1), (c)(5). If, however, the employer does offer adequate insurance coverage, the "assessable payment" is calculated by multiplying $3,000 by the number of employees receiving the "applicable premium tax credit or cost-sharing reduction," prorated on a monthly basis and subject to a cap. § 4980H (b)(1), (2).

A large employer must pay these assessments "upon notice and demand by the Secretary." § 4980H(d)(1). The Secretary has the authority to assess and collect the exaction in the "same manner as an assessable penalty" provided by subchapter B of Chapter 68 of the Code. *Id.*

B.

On March 23, 2010, the day the President signed the Affordable Care Act into law, plaintiffs filed this action to enjoin the Secretary and other government officials from enforcing the Act. In their complaint, plaintiffs allege the following facts.

One of the individual plaintiffs, Michele G. Waddell, asserts that she "has made a personal choice not to purchase health insurance coverage" and does not want to do so in the future. Waddell maintains that she pays for needed health care services as she uses them. Another individual plaintiff, Joanne V. Merill, asserts that she too has "elected not to purchase health insurance coverage" and does not want to do so. Both Waddell and Merill contend that the individual mandate requires them "to either pay for health insurance coverage" or "face significant penalties."

They seek to enjoin the Secretary from assessing or collecting the exaction prescribed for failure to comply with the individual mandate. Waddell and Merill assert that, "as part of his oversight of the Internal Revenue Service," the Secretary has the "power to collect" the penalties "as part of an individual['s] income tax return." They describe the individual mandate as imposing a "penalty

in the form of a tax ... on any taxpayer" who fails to maintain minimum essential coverage. They further allege that the "Taxing and Spending Clause ... only grants Congress the power to impose taxes upon certain purchases, not to impose taxes upon citizens who choose not to purchase something such as health insurance." Similarly, Waddell and Merrill repeatedly assert that the individual mandate assesses "a direct tax that is not apportioned according to Census data or other population-based measurement," in violation of Congress's Taxing Power. Accordingly, they ask to be "free from improper taxation [that] is likely to cause significant financial hardships." They also contend that the individual mandate exceeds Congress's authority under the Commerce Clause of the Constitution.

Liberty, a private Christian university located in Lynchburg, Virginia, challenges the "employer mandate" as a tax that will impose "tax penalties" on it because it has employees who will likely receive a tax credit or cost-sharing reduction. Liberty alleges that these "significant penalties" will cause it to suffer "substantial financial hardship." According to Liberty, the employer mandate constitutes an "unapportioned direct tax upon employers in violation of" the Constitution, and "[i]mposition of the tax infringes upon Liberty University's rights to be free from improper taxation."

Liberty also asserts that the employer mandate exceeds Congress's authority under the Commerce Clause.

For relief, plaintiffs ask for an injunction restraining all defendants, including the Secretary of the Treasury, from "acting in any manner to implement, enforce, or otherwise act under the authority" of the Affordable Care Act. They seek a declaration that the Act is unconstitutional and assert that they have no "adequate remedy at law to correct" the continuing constitutional violation.

Before the district court, the Secretary moved to dismiss the case, contending inter alia that the federal tax Anti–Injunction Act (AIA), I.R.C. § 7421(a), barred the district court from reaching the merits because the challenged penalty is to "be assessed and collected" in the same manner as a tax and other penalties to which the AIA clearly applies. The court rejected this argument, holding that Congress did not intend to "convert the[se] penalties into taxes for purposes of the Anti–Injunction Act." The court reasoned that (1) Congress did not specifically extend the term "tax" in the AIA to include the challenged exactions; and (2) the exactions did not qualify as a "tax" for purposes of the AIA because they "function as regulatory penalties." After rejecting the AIA argument and the Secretary's other jurisdictional

contentions, the district court concluded that the challenged exactions are "valid exercise[s] of federal power under the Commerce Clause" and dismissed the complaint for failure to state a claim upon which relief can be granted.

Plaintiffs then filed this appeal, asserting that the district court erred as a matter of law in upholding the Affordable Care Act. The Secretary argued to the contrary, specifically declining to attack the district court's "threshold determination[ ]" as to "the applicability of the Anti–Injunction Act." The Secretary did, however, maintain that Congress's Taxing Power under Article I, § 8, cl. 1 of the Constitution authorized the exactions imposed by the challenged mandates because those mandates "operate as taxes." Because the Secretary's contention as to the constitutionality of the mandates under the Taxing Power suggested that the AIA bar might apply to this suit, we ordered the parties to file supplemental briefs to address the applicability of the AIA. In these briefs, both the Secretary and plaintiffs contend that the AIA does not bar this action. We disagree.

We initially explain why we believe that the plain language of the AIA bars our consideration of this challenge. We then address the parties' contrary arguments: first those offered by the Secretary (and largely

adopted by the dissent), then those advanced by plaintiffs.

II.

A.

We note at the outset the inescapable fact that federal courts are courts of limited jurisdiction. They possess "only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (internal citations omitted). Accordingly, a federal court has an "independent obligation" to investigate the limits of its subject-matter jurisdiction. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). This is so even when the parties "either overlook or elect not to press" the issue, *Henderson v. Shinseki*, —— U.S. ——, ——, 131 S.Ct. 1197, 1202, 179 L.Ed.2d 159 (2011), or attempt to consent to a court's jurisdiction, *see Sosna v. Iowa*, 419 U.S. 393, 398, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). Our obligation to examine our subject-matter jurisdiction is triggered whenever that jurisdiction is "fairly in doubt." *Ashcroft v. Iqbal*, —— U.S. ——, —— –, 129 S.Ct. 1937, 1945, 173 L.Ed.2d 868 (2009).

As part of the Internal Revenue Code, the AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." I.R.C. § 7421(a).2 The parties concede, as they must, that, when applicable, the AIA divests federal courts of subject-matter jurisdiction. The Supreme Court has explicitly so held. *See Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962).

By its terms the AIA bars suits seeking to restrain the assessment or collection of a tax. Thus, the AIA forbids only pre-enforcement actions brought before the Secretary of the Treasury or his delegee, the Internal Revenue Service (IRS), has assessed or collected an exaction. A taxpayer can always pay an assessment, seek a refund directly from the IRS, and then bring a refund action in federal court. *See United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4–5, 128 S.Ct. 1511, 170 L.Ed.2d 392 (2008).

The parties recognize that plaintiffs here have brought a pre-enforcement action. Moreover, although Congress has provided numerous express exceptions to the AIA bar, see I.R.C. § 7421(a), the parties do not claim that any of these exceptions applies here. Resolution of the case at hand therefore turns on whether

plaintiffs' suit seeks to restrain the assessment or collection of "any tax."

B.

A "tax, in the general understanding of the term," is simply "an exaction for the support of the government." *United States v. Butler,* 297 U.S. 1, 61, 56 S.Ct. 312, 80 L.Ed. 477 (1936). An exaction qualifies as a tax even when the exaction raises "obviously negligible" revenue and furthers a revenue purpose "secondary" to the primary goal of regulation. *United States v. Sanchez,* 340 U.S. 42, 44, 71 S.Ct. 108, 95 L.Ed. 47 (1950); *see also Bob Jones*, 416 U.S. at 741 n. 12. Thus, the term "tax" can describe a wide variety of exactions. *See Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1, 5 (1st Cir.1992) (surveying cases that have regularly "applied the label 'tax' " to a "range of exactions," even those that "might not be commonly described as taxes").

The Supreme Court has concluded that the AIA uses the term "tax" in its broadest possible sense. This is so because the AIA aims to ensure "prompt collection of ... lawful revenue" by preventing taxpayers from inundating tax collectors with pre-enforcement lawsuits over "disputed sums." *Williams Packing*, 370 U.S. at 7–8. Thus, an exaction constitutes a "tax" for purposes of the AIA so long as the method

prescribed for its assessment conforms to the process of tax enforcement. *See Snyder v. Marks*, 109 U.S. 189, 192, 3 S.Ct. 157, 27 L.Ed. 901 (1883) (defining a "tax" in the AIA as any exaction "in a condition [of being] collected as a tax"). Specifically, the AIA prohibits a pre-enforcement challenge to any "exaction [that] is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue." *Phillips v. CIR,* 283 U.S. 589, 596, 51 S.Ct. 608, 75 L.Ed. 1289 (1931) (citing *Snyder*, 109 U.S. at 192); see also *Bob Jones*, 416 U.S. at 740 (applying the AIA bar when IRS action is authorized by "requirements of the [Internal Revenue Code]"). The Supreme Court has steadfastly adhered to this broad construction, notably in holding that the AIA bars pre-enforcement challenges to exactions that do not constitute "taxes" under the Constitution. *Compare Bailey v. George*, 259 U.S. 16, 42 S.Ct. 419, 66 L.Ed. 816 (1922) with *Bailey v. Drexel Furniture Co*., 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817 (1922). In *Bailey v. Drexel Furniture*, a refund action, the Court held unconstitutional as beyond Congress's Taxing Power a "so-called tax," finding it was in truth "a mere penalty, with the characteristics of regulation and punishment." 259 U.S. at 38. Yet the Court held the very same provision a "tax" for purposes of the AIA and so dismissed a pre-enforcement challenge to the exaction. *See Bailey v. George*, 259 U.S. at 20. In recent

years, the Court has expressly affirmed these holdings, reiterating that the term "tax" in the AIA encompasses penalties that function as mere "regulatory measure[s] beyond the taxing power of Congress" and Article I of the Constitution. *Bob Jones*, 416 U.S. at 740.

The Court's broad interpretation of the AIA to bar interference with the assessment of any exaction imposed by the Code entirely accords with, and indeed seems to be mandated by, other provisions of the Internal Revenue Code. The AIA does not use the term "tax" in a vacuum; rather, it protects from judicial interference the "assessment ... of any tax." I.R.C. § 7421(a) (emphasis added). The Secretary's authority to make such an "assessment ... of any tax" derives directly from another provision in the Code, which charges the Secretary with making "assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title." § 6201(a) (emphases added); see also § 6202 ("assessment of any internal revenue tax" includes assessment of "penalties"). Thus, for purposes of the very assessment authority that the AIA protects, Congress made clear that "penalties" (as well as "interest, additional amounts, [and] additions to the tax") count as "taxes." Congress must have intended the term "tax" in the AIA to refer to this same broad range of exactions. *See Erlenbaugh v. United States*, 409 U.S. 239,

243, 93 S.Ct. 477, 34 L.Ed.2d 446 (1972) ("[A] legislative body generally uses a particular word with a consistent meaning in a given context.").

In sum, the AIA forbids actions that seek to restrain the Secretary from exercising his statutory authority to assess exactions imposed by the Internal Revenue Code. *See, e.g., Bob Jones*, 416 U.S. at 740 (holding AIA barred suit challenging IRS regulatory action when action was authorized by "requirements of the [Internal Revenue Code]"); *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1362 & n. 5 (11th Cir.2003) (holding AIA barred suits challenging "penalties imposed" for violating disclosure conditions of tax-exempt status); *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 583 & n. 12 (4th Cir.1996) (holding AIA applied to "premiums" assessed and collected by the Secretary under color of the Internal Revenue Code); *cf. Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 558 n. 9, 96 S.Ct. 2295, 49 L.Ed.2d 49 (1976) (holding AIA did not bar challenge to "fees" because fees not "assessed under" the Internal Revenue Code). The exaction imposed for failure to comply with the individual mandate constitutes a "tax[ ]" as defined in the Code's assessment provisions. See I.R.C. §§ 6201(a), 6202, 5000A(g)(1). For these reasons, the AIA bars this action.[3]

III.

The Secretary's contrary contention primarily relies on the fact that the individual mandate labels the imposed exaction a "penalty," not a "tax." § 5000A(b). For the Secretary, the Sixth Circuit, s*ee Thomas More Law Center v. Obama*, —— F.3d —— (6th Cir.2011) [No. 10–2388], and now our friend in dissent, this "penalty" label renders the AIA inapplicable.

A.

Indisputably, the AIA bars pre-enforcement challenges even when Congress has "exhibit[ed] its intent" that a challenged exaction function as a "penalty." *Compare Bailey v. Drexel*, 259 U.S. at 38, with *Bailey v. George,* 259 U.S. at 20. The term "penalty" therefore describes a category of exaction to which the Supreme Court has already applied the AIA.[4] Given this history, it seems inconceivable that Congress would intend to exclude an exaction from the AIA merely by describing it as a "penalty."

To be sure, Congress called the penalty at issue in the *Bailey* cases a "tax." That fact, however, only aids the Secretary if there is something talismanic about the label "penalty" that removes a challenged exaction from the scope of the AIA. The Secretary has cited no case even remotely supporting such a proposition. In fact,

the Supreme Court has repeatedly instructed that congressional labels have little bearing on whether an exaction qualifies as a "tax" for statutory purposes. *See, e.g., Helwig v. United States*, 188 U.S. 605, 613, 23 S.Ct. 427, 47 L.Ed. 614 (1903) (holding "use of words" does not "change the nature and character of the enactment" in the context of the revenue laws);5 *see also United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 220, 116 S.Ct. 2106, 135 L.Ed.2d 506 (1996) (requiring a court to look "behind the label placed on the exaction and rest[ ] its answer directly on the operation of the provision"); *United States v. Sotelo*, 436 U.S. 268, 275, 98 S.Ct. 1795, 56 L.Ed.2d 275 (1978) (holding exaction's "penalty" label not dispositive, but its "essential character" controls, in determining whether exaction is a tax for bankruptcy purposes); *United States v. New York*, 315 U.S. 510, 515–16, 62 S.Ct. 712, 86 L.Ed. 998 (1942) (stressing that the term "tax" includes "any pecuniary burden laid upon individuals ... for the purpose of supporting the government, by whatever name it may be called" (internal quotation omitted and emphasis added)).

Indeed, the Court has specifically found an exaction's label immaterial to the applicability of the AIA. *See Lipke*, 259 U.S. 557, 42 S.Ct. 549, 66 L.Ed. 1061 (1922). In *Lipke,* the Supreme Court held that the "mere use of [a]

word" to describe a challenged exaction was "not enough to show" whether a "tax was laid." *Id.* at 561. The Court concluded that one of the challenged exactions, although labeled a "tax," functioned in reality to "suppress crime" and so fell outside the AIA bar. *Id.* Moreover, notwithstanding the "penalty" and "special penalty" labels of the other challenged exactions, neither the majority nor Justice Brandeis in dissent gave these labels any import in determining the applicability of the AIA. *Compare id.* at 561–62 with id. at 563–65 (Brandeis, J., dissenting).

In light of this history, it is not surprising that no federal appellate court, except the Sixth Circuit in *Thomas More*, has ever held that the label affixed to an exaction controls, or is even relevant to, the applicability of the AIA.[6] Nonetheless, the Secretary and the dissent insist that the label of an exaction does control in determining if the AIA bar applies. We first address the Secretary's argument on this point and then the dissent's.

The Secretary acknowledges that when "passing on the constitutionality of a tax law," a court places no weight on the "precise form of descriptive words" attached to the challenged exaction. *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363, 61 S.Ct. 586, 85 L.Ed. 888 (1941) (internal quotation omitted) (emphasis added).

But citing the twin *Bailey* cases as authority, the Secretary contends that the opposite rule must apply for purposes of the AIA, i.e. that for purposes of the AIA, the "precise form of descriptive words" given an exaction becomes dispositive.

The Secretary's reliance on the twin *Bailey* cases is mystifying. In fact, they provide no support for his position. In *Bailey v. Drexel Furniture,* 259 U.S. at 38, a refund action, the Court held that an exaction exceeded Congress's constitutional taxing authority, while on the same day, in *Bailey v. George*, 259 U.S. at 16, it dismissed a pre-enforcement challenge to the same exaction, characterizing it as a "taxing statute" for purposes of the AIA. When dismissing the pre-enforcement action, the Court did not state or suggest that it classified the challenged statute as a "taxing statute" because Congress labeled it as such. Nor does it seem plausible that the Court implicitly relied on that label, given that it had never before and has never since found an exaction's label controlling for statutory purposes. *See, e.g., Reorganized CF & I,* 518 U.S. at 220; *Sotelo*, 436 U.S. at 275; *Lipke*, 259 U.S. at 561; *Helwig*, 188 U.S. at 613. Rather, only one explanation of the twin Bailey cases coheres with the Court's precedents: the term "tax" in the AIA reaches any exaction assessed by the Secretary pursuant to his authority

under the Internal Revenue Code—even one that constitutes a "penalty" for constitutional purposes.

The dissent's contention that the Supreme Court's reliance on the statutory label in *Bailey v. George* is so "obvious" that it required no explanation by the Court strikes us as unsound. It seems doubtful that the Court departed from its normal practice of ignoring statutory labels without explaining why it was doing so. Instead, the more likely—and just as "straightforward"—explanation is that the Court described the exaction as a "taxing statute" because Congress had charged the tax collector with assessing the challenged exaction. *See Snyder*, 109 U.S. at 192.[7] Contrary to the dissent's belief, this holding did not require the Court to perform any elaborate "functional analysis," but rather to recognize simply that the challenged exaction formed part of the general revenue laws.

The dissent's related contention—that our interpretation of *Bailey v. George* brings that case into conflict with *Lipke,* in which the Supreme Court held that the AIA did not bar a certain pre-enforcement challenge—also misses the mark. In *Lipke,* the Court faced a challenge to the Secretary's assessment of an exaction imposed pursuant to the National Prohibition Act, a statute "primarily designed to define and

suppress crime." 259 U.S. at 561 (emphasis added). Congress had enacted the statute to "prohibit intoxicating beverages" and authorized the tax collector to enforce a "tax" against persons who in violation of this criminal statute illegally manufactured or sold liquor. 41 Stat. 318. The National Prohibition Act, however, did not authorize the collector to make an assessment under his general revenue authority; rather, it converted him into a federal prosecutor. Specifically, it (1) conferred upon the collector an array of prosecutorial powers, subject to the control of the Attorney General, and (2) predicated the enforcement of the challenged tax on proof of criminal guilt. 41 Stat. 305, 317–18. The *Lipke* Court held that the AIA did not bar a pre-enforcement challenge to this exaction because "guarantees of due process" required pre-enforcement review of "penalties for crime." 262 U.S. at 562. *Lipke* thus casts no doubt on our conclusion that the term "tax" in the AIA reaches any exaction imposed by the Code and assessed by the tax collector pursuant to his general revenue authority. *Lipke* held only that when Congress converts the tax assessment process into a vehicle for criminal prosecution, the Due Process Clause prohibits courts from applying the AIA. *See United States v. One Ford Coupe Auto.*, 272 U.S. 321, 329, 47 S.Ct. 154, 71 L.Ed. 279 (1926) (characterizing *Lipke* as "merely" a "due process" case); see also *Bob Jones*, 416

U.S. at 743 (describing *Lipke* as permitting pre-enforcement review of "tax statutes" that function as "adjuncts to the criminal law"); *Lynn v. West*, 134 F.3d 582, 594–95 (4th Cir. 1998) (citing *Lipke* for proposition that courts possess jurisdiction to enjoin "a tax that is in reality a criminal penalty"). Of course, the individual mandate imposes no such criminal penalty, and thus presents no constitutional impediment to applying the AIA.

In sum, the Supreme Court has itself emphasized that *Lipke* creates only a narrow constitutional limitation, not applicable here, on the holding of the twin Bailey cases that the AIA reaches a broader range of exactions than does the term "tax" in the Constitution. *See Bob Jones*, 416 U.S. at 741 n. 12 (citing *Lipke* and noting, in the context of the AIA, that the Court has since "abandoned" any distinction between "revenue-raising" taxes and "regulatory" penalties). Yet the theory propounded by the Secretary and the dissent—that a label transforms a constitutional "tax" into a "penalty" for AIA purposes—would yield an AIA that reaches fewer exactions than does the Constitution. As former Commissioners of the IRS noted in criticizing this argument, this is the "opposite of what the Supreme Court held" in the twin Bailey cases. *See* Brief for Mortimer Caplin & Sheldon Cohen as Amici Curiae Supporting Appellees at 24, *Seven–Sky v.*

Holder, No. 11–5047 (D.C.Cir. July 1, 2011). The Secretary all but acknowledges this fact, admitting that the Bailey cases show only the "converse" of the position that he now propounds. We cannot upend the Supreme Court's settled framework for determining if an exaction is a tax for statutory purposes on the basis of a theory for which the Secretary musters only cases that hold the "converse."

B.

Perhaps in recognition of the dearth of case law supporting their argument, the Secretary and the dissent rely heavily on an inference they draw from the structure of the Internal Revenue Code to support their position.

Section 6665(a)(2) provides the starting point for this inference; it states that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the ... penalties provided by this chapter," i.e. Chapter 68. See § 6665(a)(2) (emphasis added); see also § 6671(a) (redundantly stating the same for "penalties and liabilities provided by" subchapter B of Chapter 68). According to the Secretary and the dissent, § 6665(a)(2) necessarily implies that any "penalty" outside of Chapter 68 does not qualify as a "tax" for purposes of the Code. Because Congress codified the individual mandate in Chapter 48 of the Code (entitled

"Miscellaneous Excise Taxes") rather than Chapter 68 (entitled "Assessable Penalties"), the Secretary and the dissent urge us to infer that Congress did not intend the individual mandate to constitute a "tax" for purposes of the AIA.

The fundamental difficulty with this argument is that § 6665(a)(2) merely clarifies that the term "tax" encompasses the penalties contained in Chapter 68; it does not limit the term "tax" to only these penalties. Nor can we imply such an limitation, for courts must not "read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 168, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003). There is no evidence that in enacting the clarifying language of § 6665(a)(2), Congress intended to exclude a "penalty" codified outside of Chapter 68 from also qualifying as a "tax." *See United States v. Sischo,* 262 U.S. 165, 169, 43 S.Ct. 511, 67 L.Ed. 925 (1923) (holding no inference can be made to imply an exclusion when Congress enacts an "extension," rather than "restriction," of a term).

Furthermore, the suggestion that we infer from § 6665(a)(2) a categorical exclusion from the term "tax" of all non-Chapter 68 penalties

violates Congress's express instructions. In § 7806(b) of the Code, Congress has forbidden courts from deriving any "inference" or "implication" from the "location or grouping of any particular section or provision or portion of this title." I.R .C. § 7806(b). The argument of the Secretary and the dissent demands that we draw precisely such a forbidden "inference," for under their theory, the character of a penalty turns entirely on the Chapter in which it is "locat[ed]."[8]

Moreover, the Secretary's newly-minted position that Congress has implicitly excluded any "penalty" codified outside of Chapter 68 from qualifying as a "tax" contradicts his previous interpretation of the AIA. In *Mobile Republican Assembly,* 353 F.3d 1357, the Secretary defended against a pre-enforcement challenge to an exaction imposed by I.R.C. § 527(j), for failure to comply with the conditions attached to tax-exempt status. The district court held the AIA inapplicable for precisely the reasons that the Secretary now espouses, i.e. because Congress had labeled the exaction a "penalty" and codified it outside of Chapter 68. *See National Federation of Republican Assemblies v. United States*, 148 F.Supp.2d 1273, 1280 (S.D.Ala.2001). But the Secretary appealed, insisting that the AIA did apply because the challenged "penalty" was to be "assessed and collected in the same manner as

taxes." Br. of Appellant at 32, *Mobile Republican Assembly,* 353 F.3d 1357 (Feb. 18, 2003) (No. 02–16283), 2003 WL 23469121. The Eleventh Circuit agreed and dismissed the suit because the exaction was based "squarely upon the explicit language of the Internal Revenue Code" and "form[ed] part of the overall tax subsidy scheme." 353 F.3d at 1362 n. 5.

The Secretary fails to explain his change in position or even refer to the Eleventh Circuit's holding that the AIA applies to "penalties" codified outside of Chapter 68. Instead, the Secretary's argument boils down to his intuition, accepted by the Sixth Circuit and the dissent, that "Congress said one thing in sections 6665(a)(2) and 6671(a), and something else in section 5000A [the individual mandate], and we should respect the difference." *Thomas More,* ——F.3d at ——— [No. 10–2388, slip op. at 12].

But we can easily "respect the difference" in congressional wording without holding plaintiffs' challenge exempt from the AIA bar. The legislative history of § 6665(a)(2) makes clear that Congress inserted that provision in the course of reorganizing and codifying the revenue laws in 1954, and did so merely to declare explicitly what had been implicit—that the term "tax" for purposes of the Code also refers to "penalties" imposed by the Code. See

H.R.Rep. No. 83–1337, at A420 (1954) (noting that predecessor to § 6665(a)(2) "conforms to the rules under existing law" and "contain[s] no material changes to existing law"); S.Rep. No. 83–1622, at 595–96 (1954) (same).[9] Given this history, we cannot interpret § 6665(a)(2) as working any substantive change to the Code; rather, it simply "mak[es] explicit what" was already "implied" by the Code. *Sischo*, 262 U.S. at 169; *see also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 317–18, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985). That Congress did not repeat this clarifying language when it enacted the individual mandate, which is not part of any reorganization or recodification of the Code, demonstrates nothing.[10]

Rather, Congress well knew that the Code had for decades expressly provided that for purposes of the Secretary's assessment power, the term "tax" "includ [es] ... penalties." I.R.C. § 6201(a). Specific direction that the term "tax" in the AIA encompass the individual mandate "penalty" was therefore unnecessary. *Cf. Bob Jones,* 416 U.S. at 741–42 (noting that Congress intended AIA to adapt to evolving "complexity of federal tax system"). Put another way, § 6201 specifically provides the Secretary with authority to make "assessments of all taxes (including ... penalties)," and the AIA specifically bars judicial interference with the

Secretary's power to make "assessment ... of any tax." Given that Congress has not provided to the contrary, these two provisions taken together mandate the conclusion that the AIA bars this suit seeking to "restrain" an "assessment" of the exaction challenged here, regardless of the exaction's label.

The Secretary's contrary "label" argument not only fails to persuade, it also requires a strained interpretation of the Code. The Secretary urges us to take the view that Congress intended the individual mandate to constitute the only exaction imposed by the lengthy Internal Revenue Code that does not qualify as a "tax."[11] The consequences of this counterintuitive argument extend well beyond the AIA. For example, accepting the Secretary's contention that the label "penalty" exempts the individual mandate from provisions applicable to "taxes" would inexplicably eliminate a host of procedural safeguards against abusive tax collection. *See, e.g.*, §§ 7217(a) (prohibiting executive branch officials from requesting IRS officials to "conduct or terminate an audit ... with respect to the tax liability" of any particular taxpayer), 7433(a) (providing civil damages for unauthorized "collection of Federal tax"), 7435 (providing civil damages for unauthorized enticement of disclosure concerning the "collection of any tax"). We will not presume that Congress intended such an

anomalous result, and we certainly cannot infer this intent on the basis of a mere label.

C.

The Secretary's remaining contentions, some of which are adopted by the dissent, are brief and unsupported by any statute or case law. All are policy arguments, relying on the Secretary's view of what the 2010 Congress, in enacting the individual mandate, assertedly "would regard" as "mak[ing] sense," or "would not have wanted," or as the dissent would have it, what the 2010 Congress "intended." According to the Secretary and the dissent, these policy concerns demonstrate that the 2010 Congress could not have wanted the AIA to bar pre-enforcement challenges to the individual mandate.

The most fundamental difficulty with this contention is its focus on the "intent" of the 2010 Congress in enacting the individual mandate. Our task is not to divine the intent of the 2010 Congress but simply to determine whether the term "tax" in the AIA encompasses the exaction challenged here. To resolve this question, we must look to the text of the AIA and the intent of the Congresses that enacted and re-enacted that statute, just as the Supreme Court has done in its AIA cases. *See, e.g., South Carolina v. Regan,* 465 U.S. 367, 375, 104 S.Ct. 1107, 79 L.Ed.2d 372 (1984); *Bob*

Jones, 416 U.S. at 741–42; *Snyder*, 109 U.S. at 191.

Once we conclude that the term "tax" in the AIA does encompass a challenged exaction, we can go no further. For the terms of the AIA declare that courts, save for specific statutory exceptions, not applicable here, may entertain "no suit for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a) (emphasis added). This expansive language leaves no room for a court to carve out exceptions based on the policy ramifications of a particular pre-enforcement challenge. The Supreme Court said as much in *Bob Jones*, repudiating its old cases that had embraced a "departure from the literal reading of the Act" based on "exceptional circumstances." 416 U.S. at 743. In doing so, the Court instructed that courts must give the AIA "literal force, without regard to the ... nature of the pre-enforcement challenge." Id. at 742.

Of course, the 2010 Congress could have exempted the individual mandate from the AIA. But to date it has not provided for such an exemption, and surely we cannot hold it has implicitly done so. To infer an intent on the part of the 2010 Congress to exempt this pre-enforcement challenge from the otherwise-applicable AIA bar would be tantamount to finding an implicit repeal of that bar; such an

approach would violate the "cardinal rule" that "repeals by implication are not favored." *TVA v. Hill,* 437 U.S. 153, 189, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) (applying the implicit "repeal" doctrine to the TVA's argument that "the Act cannot reasonably be interpreted as applying to [the challenged] federal project"); see also *United States v. United Continental Tuna Corp.*, 425 U.S. 170, 169 (1976) (holding that courts must be "hesitant to infer that Congress," in enacting a later statute, "intended to authorize evasion of a [prior] statute"). Given that the terms of the AIA encompass the exaction imposed by § 5000A(b), the "only permissible justification" for exempting that exaction is if the individual mandate is "irreconcilable" with the AIA. *Hill,* 437 U.S. at 189. Obviously, it is not.

Accordingly, it is simply irrelevant what the 2010 Congress would have thought about the AIA; all that matters is whether the 2010 Congress imposed a tax. If it did, then the AIA bars pre-enforcement challenges to that tax. After all, were we to embrace the argument pressed by the Secretary and the dissent that the AIA applies only when a subsequent Congress has exhibited an intent for it to apply, we would impermissibly render the AIA little more than a non-binding suggestion to future Congresses, devoid of independent legal force. *See Tuna Corp.*, 425 U.S. at 169 (holding that

courts must require explicit "expression by Congress" that it intends the "compromise or abandonment of previously articulated policies"). The Supreme Court has rejected this very view, holding that the AIA establishes a nearly irrebuttable presumption that no tax may be challenged in any pre-enforcement action. *See Bob Jones*, 416 U.S. at 743–46.

Even taken on their own terms, however, the proffered policy arguments fail. Neither the Secretary nor the dissent has identified any persuasive evidence that the 2010 Congress in fact intended to permit pre-enforcement challenges to the individual mandate.[12] The best evidence of what Congress intended, of course, is the legislation it actually enacted. *See Carcieri v. Salazar*, 555 U.S. 379, 129 S.Ct. 1058, 1066–67, 172 L.Ed.2d 791 (2009). Congress could have enacted an exemption from the AIA bar; it did so in other instances. See, e.g., I.R.C. §§ 4961(c)(1) (second-tier tax exempt from AIA), 6703(c)(1) (penalty exempt from AIA upon satisfying statutory conditions), 7421(a) (listing several exactions and procedures exempt from AIA). But Congress has provided so such exemption here. Alternatively, Congress could have crafted a specific route to pre-enforcement judicial review. *See Sigmon Coal Co. v. Apfe*l, 226 F.3d 291, 301 (4th Cir.2000); *see also Clinton v. City of New York,* 524 U.S. 417, 428–29, 118 S.Ct.

2091, 141 L.Ed.2d 393 (1998). Again, it did not do so here. Thus, Congress knows how to exempt a specific exaction from the AIA bar, and that it did not do so here strongly undermines the contention that Congress intended such an exemption.

Nor do the Secretary's policy arguments, which the dissent embraces, demonstrate that the AIA should not apply here. The Secretary contends that "it makes sense that Congress would regard it as unnecessary to apply the AIA bar" to the individual mandate because, in the mandate, Congress prohibited the Secretary from using his "principal tools" to "collect unpaid taxes." Maybe so. But the Secretary's argument ignores the fact that the AIA bars challenges seeking to restrain the "assessment or collection of any tax." I.R.C. § 7421(a) (emphasis added). Congress's intent to waive some of the Secretary's collection tools does not in any way evidence that it would want to invite pre-enforcement challenges to the Secretary's remaining collection powers or all of his assessment authority. And the Supreme Court has left no doubt that restraining even "one method of collection" triggers the AIA's prohibition on injunctive suits. *United States v. Am. Friends Serv. Comm.,* 419 U.S. 7, 10, 95 S.Ct. 13, 42 L.Ed.2d 7 (1974).

Alternatively, the Secretary argues that because the individual mandate "is 'integral' to the [Affordable Care Act's] guaranteed-issue and community-rating provisions" and has a "delayed ... effective date," Congress would have "wanted" early resolution of challenges to it and "did not intend the AIA to prohibit pre-enforcement challenges." This argument ignores that any holding that the AIA bar does not apply to the individual mandate might have serious long-term consequences for the Secretary's revenue collection. The Congressional Budget Office projects that 34 million people will remain uninsured in 2014 and thus potentially subject to the challenged "penalty." Letter from Douglas W. Elmendorf, CBO Director, to Hon. Harry Reid, Senate Majority Leader, at table 4 (Dec. 19, 2009). To exempt the individual mandate from the AIA would invite millions of taxpayers—each and every year—to refuse to pay the § 5000A(b) exaction and instead preemptively challenge the IRS's assessment.

Moreover, some of those taxpayers will undoubtedly possess a host of non-constitutional, individual grounds upon which to challenge the assessment of the § 5000A(b) exaction. As former IRS Commissioners warned in a recent brief, allowing these suits would severely hamper IRS collection efforts. *See* Brief for Mortimer Caplin & Sheldon Cohen as

Amici Curiae Supporting Appellees at 12–15, *Seven–Sky v. Holder*, No. 11–5047 (D.C.Cir. July 1, 2011). This would threaten to interrupt the IRS's collection of $4 billion annually from the challenged exaction. *See* Letter from Elmendorf to Reid at table 4. Moreover, those challenges could impede the collection of other income taxes by preemptively resolving—in litigation over the exaction imposed by § 5000A(b)—issues basic to all tax collection, such as a taxpayer's adjusted gross income.13 See I.R.C. § 5000A(c)(2)(B); *C.I .R. v. Sunnen,* 333 U.S. 591, 597–98, 68 S.Ct. 715, 92 L.Ed. 898 (1948) (issue preclusion "applicable in the federal income tax field").

Thus, while the Secretary and the dissent may be correct that we could resolve this one lawsuit with few adverse revenue consequences, the holding necessary to reach the merits here could, in the long-run, wreak havoc on the Secretary's ability to collect revenue. If Congress is persuaded by the Secretary's present litigation position, it can craft a specific AIA exception for constitutional challenges to the individual mandate. *See* I.R.C. § 7428(a) (inserting, after *Bob Jones,* an exemption for the exact sort of pre-enforcement challenge the *Bob Jones* Court had held barred by the AIA). Until it does so, however, we are bound by its directive that we entertain "no

suit" restraining the assessment of "any tax." § 7421(a).

IV.

Having dispensed with the Secretary's arguments, we turn finally to the arguments pressed by plaintiffs.

A.

Plaintiffs initially contend that the AIA bar does not apply because this "case does not seek to restrain the assessment or collection of a tax." The plaintiff university in *Bob Jones* tendered precisely the same initial argument. Its "first" contention was that the AIA did not apply because its suit was not brought "for the purpose of restraining the assessment or collection of any tax." 416 U.S. at 738. The Supreme Court held that the university's complaint "belie[d] [this] notion." *Id.* So it is here. For, in their complaint, plaintiffs characterize the individual mandate as a "tax" and ask for a judicial invalidation of this "tax[ ] upon citizens who choose not to purchase something such as health insurance." They assert that the individual mandate provision, although labeled a "penalty," is a "tax" not apportioned as required by Article I of the Constitution, and a "tax" beyond the scope of congressional power under the Sixteenth

Amendment of the Constitution. Thus, as in *Bob Jones*, plaintiffs' complaint belies their initial contention.[14]

Plaintiffs' remaining contention as to why the AIA does not bar their challenge to the individual mandate is that it imposes an unconstitutional regulatory penalty "not designed to raise revenue," which assertedly violates the Commerce Clause, the Taxing and Spending Clause, and unspecified "other constitutional rights." The problem with this argument is that a claim that an exaction is an unconstitutional regulatory penalty does not insulate a challenge to it from the AIA bar. Again, in *Bob Jones*, the Court confronted and rejected precisely this argument.

Like plaintiffs here, the university in *Bob Jones* asserted that the IRS's "threatened action" would "violate [its constitutional] rights." *Id.* at 736 (asserting various First and Fourteenth Amendment rights). In fact, in its brief to the Supreme Court, the university made an argument identical to that here. The university maintained that "what the government would unconstitutional compulsion," Brief for Petitioner at 28, *Bob Jones Univ. v. Simon*, 416 U.S. 725, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1973) (No. 72–1470), 1973 WL 172321. This mirrors the plaintiffs' contention here that the mandate is "not designed to raise revenue" but instead to

unconstitutionally "compel [ ]" specific behavior. Just as the *Bob Jones* Court held the university's argument foreclosed by the twin Bailey cases, see 416 U.S. at 740–41, we must hold plaintiffs' identical argument foreclosed by those cases.

For in *Bob Jones*, the Supreme Court not only reaffirmed the twin Bailey cases as setting forth the proper course by which a taxpayer could challenge an exaction but also explained that it had "abandoned ... distinctions" between "regulatory and revenue-raising taxes." *Id.* at 741 n. 12. The Court held that the AIA bar applied even to an exaction implementing a social policy unless a plaintiff could demonstrate that the IRS "has no legal basis" in the Code for assessing the exaction or seeks an objective "unrelated to the protection of the revenues." *Id.* at 740. Plaintiffs cannot and do not make any contention that the IRS has "no legal basis" in the Code for assessing the penalty in § 5000A or that this exaction is "unrelated to the protection of the revenues."
In sum, we find plaintiffs' argument that the AIA does not apply here wholly unpersuasive.

B.

Perhaps recognizing the weakness of their argument as to the inapplicability of the AIA, plaintiffs principally contend that a narrow

judicially-created exception to the AIA permits pursuit of their action seeking a pre-enforcement injunction against enforcement of the individual mandate.

That exception allows a plaintiff to escape the AIA bar if he demonstrates that (1) equity jurisdiction otherwise exists, i.e. irreparable injury results if no injunction issues, and that (2) "it is clear that under no circumstances could the [Secretary] ultimately prevail." *Williams Packing*, 370 U.S. at 7.[15] When making the latter determination, a court must take "the most liberal view of the law and the facts" in favor of the Secretary. *Id*. It is difficult to see how any irreparable injury justifies the injunctive relief requested here. But even assuming equity jurisdiction does exist here, plaintiffs cannot meet the stringent standard of proving with certainty that the Secretary has "no chance of success on the merits." *Bob Jones*, 416 U.S. at 745.

In rejecting the university's contention that it would prevail on the merits, the *Bob Jones* Court explained that the sole case in which a plaintiff had met this exacting standard was *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 52 S.Ct. 260, 76 L.Ed. 422 (1932). That case is a far cry from the case at hand. In *Standard Nut*, a tax collector attempted to assess a tax that federal courts had already

held in a proper post-enforcement action did not apply to the plaintiff's product. *Id.* at 510. By contrast, to date, no court has even considered the validity of the individual mandate in a post-enforcement action, let alone held it invalid in such a proceeding. Moreover, in pre-enforcement actions, the courts of appeals have divided as to the constitutionality of the individual mandate. *Compare Florida v. HHS,* ——F.3d —— (11th Cir.2011) (invalidating mandate) with *Thomas More*, —— F.3d —— (upholding mandate). Given this history and the presumption of constitutionality a federal court must afford every congressional enactment, *see United States v. Morrison*, 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), we can hardly hold that the Secretary has "no chance of success on the merits." *Bob Jones*, 416 U.S. at 745.

V.

In closing, we recognize "that Congress has imposed" a potentially "harsh regime" on some taxpayers. *Id.* at 749. However, as in *Bob Jones*, the question of whether these concerns "merit consideration" is a matter for Congress to weigh. *Id.* at 750. Unless and until Congress tells us otherwise, we must respect the AIA's bar to the "intrusion of the injunctive power of the courts into the administration of the

revenue." *Regan*, 465 U.S. at 388 (O'Connor, J., concurring).

For all these reasons, we vacate the judgment of the district court and remand the case to that court to dismiss for lack of subject-matter jurisdiction.

VACATED AND REMANDED

WYNN, Circuit Judge, concurring:

I.

I concur in Judge Motz's fine opinion holding that the Anti–Injunction Act applies to this case. I therefore agree that it should be remanded to the district court for dismissal.

I note that my distinguished colleague, after vigorously dissenting from the majority's holding that the AIA applies, chose to exercise his prerogative to address the merits.[1] While I think that his position on the Commerce Clause is persuasive, were I to reach the merits, I would uphold the constitutionality of the Affordable Care Act on the basis that Congress had the authority to enact the individual and employer mandates under its plenary taxing power.[2] However, my conclusion that the mandates are (constitutional) taxes inevitably leads back to the AIA's bar to this case.

II.

A.

Plaintiffs contend that "[t]he Taxing and Spending or General Welfare Clause does not vest Congress with the authority to enact the mandates." Opening Brief of Appellants Liberty University, Michele G. Waddell and Joanne J. Merrill at 40, *Liberty Univ. v. Geithner*, No. 10–2347. I disagree. The individual and employer mandate provisions are independently authorized by Congress's constitutional power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States...." U.S. Const. art. I, § 8, cl. 1.

"A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government." *United States v. Butler*, 297 U.S. 1, 61, 56 S.Ct. 312, 80 L.Ed. 477 (1936). Stated differently, a tax is a "pecuniary burden laid upon individuals or property for the purpose of supporting the government." *United States v. New York,* 315 U.S. 510, 515–16, 62 S.Ct. 712, 86 L.Ed. 998 (1942) (quoting *New Jersey v. Anderson*, 203 U.S. 483, 492, 27 S.Ct. 137, 51 L.Ed. 284 (1906)).

Before analyzing whether the exactions in question were authorized under Congress's taxing power, it is useful first to clarify that neither an exaction's label nor its regulatory intent or effect is germane to the constitutional inquiry. To determine whether an exaction constitutes a tax, the Supreme Court has instructed us to look not at what an exaction is called but instead at what it does. *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363, 61 S.Ct. 586, 85 L.Ed. 888 (1941) (stating that when "passing on the constitutionality of a tax law," a court is " 'concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it' ") (quoting *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 280, 52 S.Ct. 556, 76 L.Ed. 1102 (1932)); see also *United States v. New York,* 315 U.S. at 515–16 (stating that an exaction meeting the definition of a tax will be construed as such regardless of "whatever name it may be called"). This makes sense, given that the Constitution itself uses four different terms to refer to the concept of taxation: taxes, imposts, duties, and excises. U.S. Const. art. I, § 8, cl. 1.[3]

Accordingly, the Supreme Court has characterized legislative acts as "taxes" without regard to the labels used by Congress. *See, e.g., United States v. Sotelo*, 436 U.S. 268, 275, 98 S.Ct. 1795, 56 L.Ed.2d 275 (1978) (deeming an

exaction labeled a "penalty" in the Internal Revenue Code a tax for bankruptcy purposes); *License Tax Cases,* 72 U.S. (5 Wall.) 462, 470–71, 18 L.Ed. 497 (1866) (sustaining under the taxing power a federal statute requiring the purchase of a license before engaging in certain businesses and stating that "the granting of a license ... must be regarded as nothing more than a mere form of imposing a tax"); *see also In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 583 (4th Cir.1996) (holding that, for purposes of the AIA, "premiums" constituted taxes).

Further, a tax—regardless of its label—"does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed." *United States v. Sanchez*, 340 U.S. 42, 44, 71 S.Ct. 108, 95 L.Ed. 47 (1950). As long as a statute is "productive of some revenue," Congress may exercise its taxing power without "collateral inquiry as to the measure of the regulatory effect [of the statute in question]." *Sonzinsky v. United States*, 300 U.S. 506, 514, 57 S.Ct. 554, 81 L.Ed. 772 (1937). And if "the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it." *United States v. Doremus*, 249 U.S. 86, 93, 39 S.Ct. 214, 63 L.Ed. 493 (1919).

I recognize that some cases from the 1920s and 1930s suggest that taxes are either regulatory or revenue-raising and that the former are unconstitutional. *See, e.g., Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37–44, 42 S.Ct. 449, 66 L.Ed. 817 (1922) (holding that a tax on goods made by child labor was an unconstitutional penalty). However, both older and newer opinions indicate that the revenue-versus-regulatory distinction was short-lived and is now defunct. *See, e.g., United States v. Kahriger,* 345 U.S. 22, 28, 73 S.Ct. 510, 97 L.Ed. 754 (1953) (upholding tax on bookmakers and stating, "It is conceded that a federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed."), overruled in part on other grounds, *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968); *Sonzinsky,* 300 U.S. at 514 (1937 case upholding a tax on firearm dealers despite registration provision and alleged regulatory effects); *Doremus*, 249 U.S. at 95 (1919 case upholding the Narcotic Drugs Act, which taxed and regulated sales of narcotics); *McCray v. United States*, 195 U.S. 27, 59, 24 S.Ct. 769, 49 L.Ed. 78 (1904) (upholding tax on colored margarine and stating, "Since ... the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that

power may not be judicially restrained because of the results to arise from its exercise.").

It is not surprising that this distinction did not endure, given that taxes can, and do, both regulate and generate revenue at the same time. Indeed, as the Supreme Court recognized in *Sonzinsky*, "[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any U.S. at 513. And "[i]n like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–90, 57 S.Ct. 883, 81 L.Ed. 1279 (1937). Accordingly, in *Bob Jones University v. Simon*, 416 U.S. 725, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974), the Supreme Court recognized that, while in some early cases it "drew what it saw at the time as distinctions between regulatory and revenue-raising taxes," the Court "subsequently abandoned such distinctions." *Id.* at 741 n. 12, overruled in part on other grounds by *South Carolina v. Ragan*, 465 U.S. 367, 379, 104 S.Ct. 1107, 79 L.Ed.2d 372 (1984).

Courts, therefore, do not look to labels, regulatory intent, or regulatory effect. Instead,

we must consider whether something that operates as a tax is authorized under Congress's taxing power, which has been described as "very extensive," *License Tax Cases*, 72 U.S. at 471, and indeed "virtually without limitation." *United States v. Ptasynski,* 462 U.S. 74, 79, 103 S.Ct. 2239, 76 L.Ed.2d 427 (1983). As Justice Cardozo recognized in *Helvering,*

> The discretion [to tax and spend for the general welfare] belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, [or] not an exercise of judgment. This is now familiar law.
>
> "When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress."

301 U.S. at 640–41 (quoting *Butler*, 297 U.S. at 67).

There are essentially three features that a tax must exhibit to be constitutional. First, to pass constitutional muster, a tax must bear "some reasonable relation" to raising revenue. *Doremus*, 249 U.S. at 93. The amount of revenue raised is irrelevant: A tax does not cease to be one "even though the revenue

obtained is obviously negligible, or the revenue purpose of the tax may be secondary." *Sanchez*, 340 U.S. at 44 (citations omitted). Instead, the measure must simply be "productive of some revenue." *Sonzinsky*, 300 U.S. at 514 (upholding tax that raised $5,400 in revenue in 1934).

Second, to be constitutional, a tax must be imposed for the general welfare. Congress enjoys wide discretion regarding what is in the general welfare. "The discretion ... is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Helvering,* 301 U.S. at 640. Therefore, in determining whether a congressional enactment furthers the general welfare, "courts should defer substantially to the judgment of Congress." *South Dakota v. Dole*, 483 U.S. 203, 207, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987).

Finally, even if an exaction is rationally related to raising revenue and furthers the general welfare, to be constitutional, it must not infringe upon another constitutional right. For example, a tax may not infringe on an individual's right to be free from double jeopardy by further punishing criminal conduct. *See Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 780–83, 114 S.Ct.

1937, 128 L.Ed.2d 767 (1994) (concluding that a drug tax was actually a criminal penalty based on its high rate, its deterrent purpose, and a criminal prohibition on the taxed activity and holding that the tax consequently violated the Double Jeopardy Clause of the Fifth Amendment).

B.

Turning now to the case at hand, the provisions at issue are the exaction provisions in the individual and employer mandates. I would conclude, after examining their practical operation, that these provisions impose taxes.
The individual mandate exaction in 26 U.S.C. § 5000A(b) amends the Internal Revenue Code to provide that a non-exempted individual who fails to maintain a minimum level of insurance must pay a "penalty." Notably, while the individual mandate in some places uses the term "penalty," some form of the word "tax" appears in the statute over forty times. 26 U.S.C. § 5000A. For example, it references taxpayers and their returns, includes amounts due under the provision in the taxpayer's tax return liability, calculates the penalty by reference to household income for tax purposes, and allows the Secretary of the Treasury to enforce the provision like other taxes (with several procedural exceptions). *Id.* Yet, as explained above, the label applied to an

exaction is irrelevant; instead, in assessing an exaction's constitutionality, we look to its practical operation.

The practical operation of the individual mandate provision is as a tax. Individuals who are not required to file income tax returns are not required to pay the penalty. *Id.* § 5000A(e)(2). The amount of any penalty owed is generally calculated by reference to household income and reported on an individual's federal income tax return. *Id.* § 5000A(b)-(c).[4] Taxpayers filing jointly are jointly liable for the penalty. *Id.* § 5000A(b)(3)(B). And the Secretary of the Treasury is empowered to enforce the provision like a tax, albeit with several procedural exceptions.[5] *Id.* § 5000A(g). The individual mandate exaction, codified in the Internal Revenue Code, therefore functions as a tax.

Looking next at the employer mandate exaction in 26 U.S.C. § 4980H, it amends the Internal Revenue Code to impose an "assessable payment" on large employers if a health exchange notifies the employer that at least one full-time employee obtains a premium tax credit or cost-sharing reduction. *Id.* § 4980H(a)-(b). The amount of the assessable payment is calculated differently based on whether the employer offers adequate health insurance coverage to its employees. *Id.* § mandate uses

the terms "assessable payment" and "tax." *Id.* § 4980H(b). Like the individual mandate exaction, the practical operation of this provision is as a tax that is assessed and collected in the same manner as other Internal Revenue Code penalties treated as taxes.[6] *Id.* § 4980H(d).

Having concluded that the individual and employer mandates operate as taxes,[7] to determine whether they are constitutional, I must consider whether they: 1) are reasonably related to raising revenue; 2) serve the general welfare; and 3) do not infringe upon any other right.

The individual and employer exactions are surely related to raising revenue. The Congressional Budget Office estimated that the individual mandate exaction will generate approximately $4 billion annually, and the employer mandate exaction, $11 billion annually, by 2019. Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Hon. Nancy Pelosi, Speaker, U.S. House of Representatives, tbl. 4 (Mar. 20, 2010), available at http://www.cbo.gov/ftpdocs/113xx/doc11379/AmendReconProp.pdf; see also Patient Protection and Affordable Care Act, Pub.L. No. 111–148, § 1563(a), 124 Stat. 119, 270 (stating that the Affordable Care Act "will reduce the Federal

deficit"). Not only will the exactions raise significant amounts of revenue, but the revenue raised can cover the "[h]igher government costs attributable to the uninsured ... implicitly paid for by the insured ... through increased taxes or reductions in other government services as money is spent on the uninsured." Brief Amici Curiae of Economic Scholars in Support of Defendants–Appellees at 13, *Liberty Univ. v. Geithner,* No. 10–2347. In other words, as Judge Davis notes in his opinion, "[b]ecause the uninsured effectively force the rest of the nation to insure them with respect to basic, stabilizing care, this penalty is something like a premium paid into the federal government, which bears a large share of the shifted costs as the largest insurer in the nation." Post at 125. Clearly, then, the exactions bear "some reasonable relation" to raising revenue. *Doremus,* 249 U.S. at 93. *See also Sonzinsky,* 300 U.S. at 514 (upholding tax that raised $5,400 in revenue).

Further, the individual and employer mandate exactions serve the general welfare. The Affordable Care Act is aimed at, among other things, reducing the number of the uninsured as well as the cost of those who remain uninsured imposed on those who are insured. Congress found that, nationwide, hospitals provided $43 billion in uncompensated care to the uninsured in 2009 and that these costs

were shifted onto insured individuals, "increas[ing] family premiums by on average over $1,000 a year." 42 U.S.C. § 18091(a)(2)(F). It also found that "[b]y significantly reducing the number of the uninsured, the [individual mandate], together with the other provisions of th[e] Act, will lower health insurance premiums." *Id.* By encouraging individuals to purchase health insurance and employers to provide it, the individual and employer mandates alleviate the costs associated with providing uncompensated care to the uninsured and lower health insurance premiums. Such cost reductions and expansions in access to health insurance surely constitute contributions to the general welfare.

Finally, neither the exaction in the individual mandate nor that in the employer mandate infringes on other rights. The exactions do not, for example, operate to impose duplicative criminal penalties in violation of the prohibition against double jeopardy. *See Kurth Ranch,* 511 U.S. at 780–83 ("Taxes imposed upon illegal activities are fundamentally different from taxes with a pure revenue-raising purpose that are imposed despite their adverse effect on the taxed activity."). The provisions lack the punitive character of other measures the Supreme Court has held to be penalties. *Id.; see also, e.g., Bailey*, 259 U.S. at 36. And the provisions do not appear to violate

any other rights: No one has a right to be free from taxation. [8]

C.

It bears mention that the individual and employer mandate exactions do not run afoul of the constitutional requirement that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." U.S. Const. art. I, § 9, cl. 4. This clause has its origins in the Constitutional Convention's slavery debates. The Northern states consented to count a slave as three-fifths of a person for allocating representatives in Congress in exchange for a corresponding increase in the tax liability of Southern states. Brian Galle, *The Taxing Power, the Affordable Care Act, and the Limits of Constitutional Compromise*, 120 YALE L.J. ONLINE 407, 414 (Apr. 5, 2011), http://yalelawjournal.org/2011/4/5/galle.html.

Even at that time, the definition of "direct" tax was unclear. *Id.; Springer v. United States*, 102 U.S. 586, 596, 26 L.Ed. 253 (1880) ("It does not appear that an attempt was made by any one to define the exact meaning of the language employed.").

It is therefore understandable that the Supreme Court has demonstrated reluctance to strike a tax based solely on the direct/indirect distinction. *See Knowlton v. Moore*, 178 U.S. 41, 83, 20 S.Ct. 747, 44 L.Ed. 969 (1900) ("[I]t is no part of the duty of this court to lessen, impede, or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax, where such distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself." (quoting *Nicol v. Ames*, 173 U.S. 509, 515, 19 S.Ct. 522, 43 L.Ed. 786 (1899)). Indeed, the Supreme Court restricted the meaning of "direct" taxes to capitation, or head taxes, and taxes on the ownership of real property. *Springer*, 102 U.S. at 602; *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 544, 19 L.Ed. 482 (1869). Taxes on personal property have also been held to be direct. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 637, 15 S.Ct. 912, 39 L.Ed. 1108 (1895), superseded on other grounds by constitutional amendment, U.S. Const. amend. XVI, as recognized in *Brushaber*, 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493.

The Supreme Court has never struck down a federal tax as an unapportioned capitation tax. And the Supreme Court has repeatedly upheld a variety of federal taxes as indirect and therefore outside the apportionment

requirement. *See Knowlton*, 178 U.S. at 83 (upholding a federal estate tax); *Bromley v. McCaughn*, 280 U.S. 124, 138, 50 S.Ct. 46, 74 L.Ed. 226 (1929) (upholding a federal gift tax); *United States v. Mfrs. Nat'l Bank of Detroit,* 363 U.S. 194, 199, 80 S.Ct. 1103, 4 L.Ed.2d 1158 (1960) (upholding a federal estate tax collected on an insurance policy). As the Supreme Court has explained, "[a] tax laid upon the happening of an event, as distinguished from its tangible fruits, is an indirect tax which Congress undoubtedly may impose." *Tyler v. United States*, 281 U.S. 497, 502, 50 S.Ct. 356, 74 L.Ed. 991 (1930).

The individual and employer mandate exactions are not capitation taxes; nor are they direct taxes that must be apportioned. Far from being imposed without regard to circumstance, they will be imposed only upon taxpayers who can afford, but fail to maintain, health insurance, or upon employers who fail to provide adequate and affordable insurance. *See* 26 U.S.C. §§ 4980H, 5000A. As taxes "laid upon the happening of an event," the individual and employer mandate exactions are clearly indirect. *See Tyler*, 281 U.S. at 502. Nor are they property taxes, since they will not be assessed based on the ownership of property.
Indeed, the Supreme Court has so limited the application of the Direct Tax Clause that the Sixth Circuit concluded that it "relates solely to

taxation generally for the purpose of revenue only, and not impositions made incidentally under the commerce clause exerted either directly or by delegation, as a means of constraining and regulating what may be considered by the Congress as pernicious or harmful to commerce." *Rodgers v. United States,* 138 F.2d 992, 995 (6th Cir.1943). Since the individual and employer mandate exactions are neither capitation nor property taxes, the Direct Tax Clause is inapplicable, and the individual and employer mandate taxes stand.

III.

In sum, I concur in Judge Motz's fine opinion holding that the AIA applies here. Our distinguished colleague vigorously dissents from our holding and presents a credible basis for upholding the constitutionality of the Affordable Care Act under the Commerce Clause. However, were I to rule on the merits, for the reasons given in this opinion, I would uphold the constitutionality of the Affordable Care Act on the basis that Congress had the authority to enact the individual and employer mandates, which operate as taxes, under its taxing power. Accordingly, I must agree with Judge Motz that the AIA bars this suit.

DAVIS, Circuit Judge, dissenting:

Today we are asked to rule on the constitutionality of core provisions of the Patient Protection and Affordable Care Act. Appellants advance several arguments against the Act, chief among them their claim that Congress exceeded its power when it sought to require all individuals (with narrow exceptions) to obtain a certain minimum of health insurance coverage starting in 2014. 26 U.S.C. § 5000A. In particular, appellants urge that the Commerce Clause, which authorizes Congress "To regulate Commerce ... among the several States," U.S. Const. art. I, § 8, cl. 3, allows only regulation of economic activity. Thus, they contend, Congress cannot regulate appellants' "decision not to purchase health insurance and to otherwise privately manage [their] own healthcare," which they characterize as "inactivity in commerce," Appellants' Br. 1. They also contend that upholding the Act under the Commerce Clause would "create an unconstitutional national police power that would threaten all aspects of American life," id. at 11, suggesting in particular that "Congress could require that people buy and consume broccoli at regular intervals" or that "everyone above a certain income threshold buy a General Motors automobile," Appellants' Reply Br. 9 (quoting *Florida ex rel. Bondi v. Dep't of Health and Human Servs.*, —— F.Supp.2d ——, ——,

2011 WL 285683, at *24 (N.D.Fla. Jan.31, 2011), aff'd in part and *rev'd in part sub nom. Florida v. U.S. Dept. of Health & Human Servs.*, —— F.3d ——, 2011 WL 3519178 (11th Cir. Aug.12, 2011)). Appellants bring a similar facial challenge to the Act's employer mandate, and they also assert Free Exercise, Establishment Clause, and Equal Protection claims against the Act.

My good colleagues in the majority hold that the Anti–Injunction Act strips us of jurisdiction in this case. For reasons I explain at length below, I disagree. As I reject the reasoning and the result of the majority's jurisdictional analysis, I am entitled to reach the merits of appellants' claims. Reaching the merits, I would hold that the challenged provisions of the Act are a proper exercise of Congress's authority under the Commerce Clause to regulate the interstate markets for health services and health insurance. I do not believe that constitutional review of the Act requires courts to decide whether the Commerce Clause discriminates between activity and inactivity. But even if I were to assume appellants were "inactive," I could not accept appellants' contention that a distinction between "activity" and "inactivity" is vital to Commerce Clause analysis. I would therefore affirm the district court's dismissal of appellants' suit.

Appellants raise two major concerns about upholding the Act: first, they believe that individual liberty is infringed when the federal government is permitted to regulate involuntary market participants; second, they fear that our liberty will be further eroded in the future, as a ruling sustaining the Act would permit Congress to establish arbitrary purchase mandates. Because I take these concerns very seriously, I explain at some length why the Act is a far more limited exercise of federal power than appellants fear.

I. Anti–Injunction Act

A. My View

The majority concludes that the Anti–Injunction Act (AIA) applies to the challenged provisions of the Affordable Care Act, depriving us of subject-matter jurisdiction. Although the parties argue that we have jurisdiction, "federal courts have an independent obligation to ... raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Henderson ex rel. Henderson v. Shinseki,* —— U.S. ——, ——, 131 S.Ct. 1197, 1202, 179 L.Ed.2d 159 (2011).

Before today, nine federal judges had expressly considered the application of the Anti–Injunction Act, and all nine held it inapplicable

to the Affordable Care Act's mandates. See *Thomas More Law Center v. Obama,* ——F.3d ——, ——, 2011 WL 2556039, at *6–*8 (6th Cir. June 29, 2011); *Goudy–Bachman v. United States Dept. of Health & Human Servs*., 764 F.Supp.2d 684, 695–97 (M.D.Pa.2011); *Liberty University, Inc. v. Geithner,* 753 F.Supp.2d 611, 627–29 (W.D.Va.2010); *United States Citizens Ass'n v. Sebelius*, 754 F.Supp.2d 903, 909 (N.D.Ohio 2010); *Florida ex rel. McCollum v. United States Dept. of Health & Human Servs.,* 716 F.Supp.2d 1120, 1130–44 (N.D.Fla.2010); *Thomas More Law Center v. Obama,* 720 F.Supp.2d 882, 890–91 (E.D.Mich.2010); *Virginia ex rel. Cuccinelli v. Sebellius,* 702 F.Supp.2d 598, 603–605 (E.D.Va.2010). Although the two circuit courts that have considered challenges to the mandates have split, all six members of those panels agreed that the courts should reach the merits; only the Sixth Circuit panel thought it necessary to discuss the AIA. *Florida v. U.S. Dept. of Health & Human Servs.*, —— F.3d ——, 2011 WL 3519178 (11th Cir. Aug.12, 2011) (reaching the merits without raising the applicability of the AIA); *Thomas More Law Center*, —— F.3d at ——, 2011 WL at *6–*8 (expressly holding the AIA does not apply). For the following reasons, I agree with these judges and would hold that the AIA does not strip us of jurisdiction in this case.

The Anti–Injunction Act, originally enacted in 1867, directs that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person," certain enumerated exceptions aside. 26 U.S.C. § 7421(a).[1] Thus, we have jurisdiction only if the penalty provisions attached to the challenged mandates do not constitute "tax [es]" for purposes of the AIA.[2]

The Sixth Circuit recently held that the individual mandate's penalty provision was not a "tax" within the meaning of the AIA. *Thomas More Law Center*, —— F.3d at ——, 2011 WL at *6–*8. Its reasoning is straightforward: Congress spoke only of "tax[es]" in the Anti–Injunction Act, while it deemed the amount owed by those in violation of the individual mandate a "penalty." *See id*. at *7; compare 26 U.S.C. § 7421(a) with id. § 5000A(b), (c), (e), (g). And Congress did not simply use the term "penalty" in passing: Congress refers to the exaction no fewer than seventeen times in the relevant provision, and each time Congress calls it a "penalty."

In fact, Congress considered earlier versions of the individual mandate that clearly characterized the exaction as a "tax" and referred to it as such more than a dozen times. See H.R. 3962, § 501, 111th Cong. (2009) ("impos[ing] a tax" in section entitled "Tax on

individuals without acceptable health care coverage," and repeatedly referring to this exaction as a "tax"); H.R. 3200, § 401, 111th Cong. (2009) (same); S. 1796, § 1301, 111th Cong. (2009) ("impos [ing] a tax" in section entitled "Excise tax on individuals without essential health benefits coverage," and repeatedly referring to exaction as a "tax"). Congress deliberately deleted all of these references to a "tax" in the final version of the Act and instead designated the exaction a "penalty." As the Supreme Court noted in *INS v. Cardoza–Fonseca,* "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language." 480 U.S. 421, 442–43, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987). Thus, it seems odd for the majority to ignore Congress's deliberate drafting decision to call the exaction a "penalty" rather than a "tax."

When Congress has wished "penalties" to be treated as "taxes," it has said so expressly. In Subchapter A of Chapter 68 of the Internal Revenue Code, Congress directed that "any reference in this title [Title 26 of the United States Code (the Internal Revenue Code)] to 'tax' imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this

chapter." *Id.* § 6665(a)(1). Likewise, in Subchapter B of that chapter, Congress instructed that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter." *Id.* § 6671(a). Yet, Congress chose to place the individual mandate and its "penalty" provisions not in Chapter 68 but in Chapter 48, which contains no such instructions. Though Congress did provide that this penalty "be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68," and Chapter 68 "penalties" are treated as "taxes," the term "assessment and collection like a tax" does not imply that the penalty should be treated as a tax for any and all other purposes. *Id.* § 5000A(g)(1). As the Sixth Circuit recently observed, "Congress said one thing in sections 665(a)(2) and 6671(a), and something else in section 5000A, and we should respect the difference." *Thomas More*, 2011 WL at *7.

"Where, as here, resolution of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear." *Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). Courts look to legislative history first to see whether it indicates that Congress intended a particular result and then, if not, to find evidence of the

purposes of the statute. *Cf. Dolan v. United States Postal Service,* 546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute...."). Even if the statutory text were unclear here, legislative history indicates that the AIA should not apply.

Legislative history of the Affordable Care Act reveals that Congress never considered application of the Anti–Injunction Act. Nowhere in the Act's voluminous legislative history can I find a single reference to the AIA. And when members of Congress discussed the inevitable judicial review of the Affordable Care Act, no one appears to have contemplated that the AIA might bar such review for the five years, post-enactment, that would have to elapse before a tax refund suit could be brought.

Looking, then, to legislative purpose, it appears that immediate judicial review of the individual mandate would do little to frustrate the aims of the AIA. The Anti–Injunction Act was intended to "protect[ ] the expeditious collection of revenue." *South Carolina v. Regan,* 465 U.S. 367, 376, 104 S.Ct. 1107, 79 L.Ed.2d 372 (1984). Revenue from the individual mandate's penalty provision will not be assessed and

collected until the year after the mandate becomes operative—2015. Judicial review of the mandate in 2011 most assuredly will not frustrate "the expeditious collection of revenue" four years later. I also note that Congress forbid the Internal Revenue Service from employing its primary enforcement mechanisms to collect this penalty: the IRS may not seek the institution of criminal prosecutions by the Justice Department or impose a lien or levy on an individual's property for failure to pay the penalty. 26 U.S.C. § 5000A(g)(2). This indicates that Congress had scant concern for "the expeditious collection of revenue" from the penalty provision.

A failure to provide immediate judicial review in reliance on a rather strained construction of the AIA, on the other hand, might undermine the core purpose of the Affordable Care Act. In the absence of a conclusive ruling from the federal courts, some individuals may well decide for themselves that the Act is unconstitutional and thus can be ignored. In the case of an ordinary tax this would simply result in some lost revenue and the costs of tax prosecutions; here, it would push the nation farther from Congress's goal of attaining near-universal health insurance coverage. And, as leaving the constitutionality of the Act unsettled would seem likely to create

uncertainty in the health insurance and health care industries, which might depress these major sectors of the economy, it seems that application of the AIA would be at cross-purposes with the Act's reforms. Thus, I believe that there is ample reason for me to conclude that Congress had no design that the Anti–Injunction Act might apply to the individual mandate's penalty provisions.

The question of our jurisdiction over appellants' challenge to the analogous penalty attached to the employer mandate presents a closer question. That exaction is termed "an assessable payment" in the provision that imposes it, but it is then twice referred to as a "tax" in later, qualifying provisions. Compare Id. § 4980H(a) with id. § 4980H(b)(2), (c)(7). "The ... ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). Given these mixed references, and mindful of the Supreme Court's warning in *United States v. Am. Trucking Ass'ns,* 310 U.S. 534, 542, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940), that "[t]o take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the

purpose of the draftsmen of a statute," I find the text of the employer mandate provision ambiguous on the application of the Anti–Injunction Act.

Thus, I would again look to legislative history and Congressional purpose. *Cf. SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350–51, 64 S.Ct. 120, 88 L.Ed. 88 (1943) (Jackson, J.) (explaining that our canons of statutory construction "long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy"). For the reasons stated above, I would hold that Congress did not intend the Anti–Injunction Act to block timely judicial review of the employer mandate provisions. Accordingly, I would hold that we have jurisdiction to consider all of appellants' claims.

B. The Majority's View

The majority's contrary conclusion relies on two arguments, neither of which I find convincing. First, the majority contends that "the Supreme Court has repeatedly instructed that congressional labels have little bearing on

whether an exaction qualified as a 'tax' for statutory purposes" and that "the Court has specifically found an exaction's label immaterial to the applicability of the AIA," displacing the ordinary methods of statutory interpretation with a functional analysis of the challenged exactions. *Ante* pp. 22–24. Thus, in the majority's view, "it is simply irrelevant what the 2010 Congress would have thought about the AIA; all that matters is whether the 2010 Congress imposed a tax." *Ante* p. 38. Second, the majority asserts that "[t]he Supreme Court has concluded that the AIA uses the term 'tax' in its broadest possible sense" and thus that this functional analysis sweeps quite broadly: the majority holds that "the AIA prohibits a pre-enforcement challenge to any exaction that is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue." *Ante* p. 18 (internal quotation marks and braces omitted).

1.

The majority's functional approach hinges on its interpretation of two Supreme Court cases from 1922: B*ailey v. George*, 259 U.S. 16, 42 S.Ct. 419, 66 L.Ed. 816 (1922), and *Lipke v. Lederer,* 259 U.S. 557, 42 S.Ct. 549, 66 L.Ed. 1061 (1922). I read these cases differently from the manner in which the majority reads them.

Because the majority's view of *George* and *Lipke* brings these cases into conflict, I believe my approach, which harmonizes them, is preferable.

The majority asserts that in *Lipke* "the Court. specifically found an exaction's label immaterial to the applicability of the AIA ." *Ante* p. 24. The *Lipke* Court held that "[t]he mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid." 259 U.S. at 561 (emphases added). That is, "[t]he mere use of the word 'tax' " in a criminal statute—particularly where, as in the statute at issue in Lipke, the word "tax" is immediately followed by the word "penalty"—is not dispositive of Congress's "true inten[t]" regarding application of the AIA. *Id.* This is an ordinary exercise in statutory interpretation, not an instruction from the Court to disregard Congressional designations as "immaterial to the applicability of the AIA." *Ante* p. 24.

The Court did go on to examine the function of the exaction, noting that "[w]hen by its very nature the imposition is a penalty, it must be so regarded," but it did not do so in the course of an ordinary application of the AIA. *Lipke*, 259 U.S. at 561. Rather, it is clear that the Court considered the function of the exaction because

that function (as a criminal penalty) was relevant to the Court's due process concerns. It was to resolve this constitutional problem, not simply to construe the word "taxes" in the AIA, that the Court looked to the exaction's function. Thus, the Court reasoned,

> Before collection of taxes levied by statutes enacted in plain pursuance of the taxing power can be enforced, the taxpayer must be given fair opportunity for hearing; this is essential to due process of law. And certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guaranties of due process of law and trial by jury are not to be forgotten or disregarded.

Id. at 562 (emphasis added). This passage strongly indicates that the Court was applying the canon of constitutional avoidance, construing the exaction at issue together with the AIA so as not to run afoul of due process. *Cf. South Carolina v. Regan*, 465 U.S. 367, 398–400, 104 S.Ct. 1107, 79 L.Ed.2d 372 (1984) (O'Connor, J., concurring in the judgment) (relying on doctrine of constitutional avoidance to interpret the AIA not to apply to original jurisdiction of the Supreme Court). The functional analysis was required by the Court's constitutional concerns, as due process is

triggered when the penalty is criminal, whatever its designation by Congress. As the AIA was simply being interpreted to accord with the constitutional mandate of due process—which binds Congress and thus of course requires that we look beyond Congressional labels to the nature and function of the exaction—*Lipke* did not establish a new methodology for construing "taxes" under the AIA. Instead, it recognized that the term "taxes" in the AIA is flexible, like nearly all statutory language, and may admit to alternative constructions. And it affirmed that a court's goal when applying the AIA, like any other statute, is to do so in accord with the "true intendment" of Congress. *Id*. at 561.

This reading of *Lipke* harmonizes it with the two Bailey cases. As the majority explains, the Supreme Court considered a tax refund suit in *Bailey v. Drexel Furniture Co.* and held the Child Labor Tax Law unconstitutional as a "penalty" rather than a "tax." 259 U.S. 20, 38–39, 42 S.Ct. 449, 66 L.Ed. 817 (1922). The same day, in *Bailey v. George*, the Court dismissed, pursuant to the AIA (§ 3224, precursor to the modern AIA), a pre-collection suit alleging the Child Labor Tax Law was unconstitutional. 259 U.S. 16, 42 S.Ct. 419, 66 L.Ed. 816 (1922). The George Court's reasoning is extremely brief (in a one-page opinion): "The averment that a taxing statute is unconstitutional does not take

this case out of [the AIA]." *Id.* at 20. The question, of course, is why the statute, though an unconstitutional exercise of the taxing power per *Drexel Furniture*, is still "a taxing statute" for purposes of the AIA.

My answer is the more straightforward one: it constitutes a "taxing statute" for purposes of the AIA because it purported to be a taxing statute and appeared to be one on its face-that is, because it was designated as a taxing statute by Congress. *See Drexel Furniture*, 259 U.S. at 34 (noting exaction was called "Tax on Employment of Child Labor," part of "An act to provide revenue ..."). Thus, the Court provided no explanation because it relied on the most obvious reason for deeming the statute at issue a "taxing statute." The majority disagrees, arguing that "the Court never mentioned the statutory label" in George and that "it [does not] seem plausible that the Court implicitly relied on that label, given that it had never before and has never since found an exaction's label controlling for statutory purposes." *Ante* pp. 25–26.

Under the majority's approach, the *George* Court must have conducted a functional analysis of the exaction and determined that it qualified as a tax. Yet this supposed functional analysis appears nowhere in the opinion. It is difficult to believe that the Court would not

bother to specify any criteria for determining when an exaction is functionally a tax, given that the Court had just held the statute not to qualify as a tax for constitutional purposes in Drexel Furniture. If the *George* Court were relying on anything beyond the face of the statute, surely the Court would have provided some explanation of why the enactment qualified as a tax under the AIA but not under the Taxing and Spending Clause.

More troubling still, the majority's reading of George brings it into conflict with *Lipke*. Under the majority's approach, the Court in *George* must have simply recognized that "the AIA ... [reaches] any exaction that is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue." *Ante* 18 (internal quotation marks and braces omitted). But these criteria fail to distinguish the "penalty" in *Lipke*, which was held to be outside the AIA. The "penalty" in Lipke also met the majority's criteria: the National Prohibition Act simply doubled taxes already assessed and collected by the Commissioner, 41 Stat. 305, 317–18 (1919), which were laid down in the Revenue Act of 1918 "on all distilled spirits," and were "to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law," 40 Stat. 1057, 1105, Title VI—Tax on Beverages, § 600(a). That the Court

found the exaction tantamount to a criminal penalty does not change this.[3] Thus, by the majority's understanding of the AIA, there should have been no room for constitutional avoidance, and the Court in Lipke should have held the AIA applicable and refused jurisdiction.[4]

The majority seems to recognize that *Lipke* may appear problematic, but it contends that it is not. It argues that "*Lipke* held only that when Congress converts the tax assessment process into a vehicle for criminal prosecution, the Due Process Clause prohibits courts from applying the AIA." *Ante* p. 28. That was the core holding of Lipke, yes, but the question is whether the Court's construction of the AIA in reaching that holding accords with the majority's rigid interpretative regime constructed ninety years later.[5] Under the majority's proposed construction, the term "tax" in the AIA reaches all exactions which the Commissioner is empowered to collect. *Ante* pp. 19–20. Yet, the Lipke Court held that the AIA did not reach such an exaction. Though the majority would prefer that Lipke "create[d] only a narrow constitutional limitation" to the AIA, *ante* p. 28, the Court's holding is simply not framed as creating an exception to the AIA. Rather, the Court explained that it "construed" the term "tax" in the AIA (in accord with "Congress['s] intent") and held that it was not

so broad. 229 U.S. at 561–62. The majority's view of the AIA, and its corresponding interpretation of these cases, inescapably places *George* and *Lipke* in conflict.

My reading of these cases, which is fully consistent with my approach to the AIA, harmonizes them. Under my view of *Lipke*, the AIA's "taxes" is recognized to be, like any statutory language, a flexible term that must be interpreted in accord with Congressional intent and, when applicable, bounding constitutional mandates. In many cases, Congress's decision to designate something a "tax" will prove dispositive—indeed, the designation did so in *Bailey v. George*. *Lipke* simply reflects the recognition that Congress's use of the word "tax" in an otherwise non-tax provision (followed closely by the word "penalty") does not invariably mandate that the AIA be applied—constitutional concerns can override congressional designations. This is fully in accord with my view of the AIA and its relation to subsequent enactments, particularly an expansive programmatic enactment such as the ACA that would alter the fabric of many layers of American life.[6]

The majority cites several other cases for the proposition that we are to ignore Congressional designations when applying the AIA, instead asking only whether an exaction is intrinsically

a tax according to its "nature and character." *Ante* p. 23 (quoting *Helwig v. United States,* 188 U.S. 605, 613, 23 S.Ct. 427, 47 L.Ed. 614 (1903)). I will briefly discuss two of them.

Helwig v. United States, for instance, concerned the interaction of a statute that imposed "a further sum" when importers declared a value more than 10% lower than customs' subsequent appraisal and a statute that gave federal district courts exclusive jurisdiction over "penalties" and "forfeitures." The passage the majority excerpted from is quite instructive:

> Although the statute ... terms the money demanded as "a further sum," and does not describe it as a penalty, still the use of those words does not change the nature and character of the enactment. Congress may enact that such a provision shall not be considered as a penalty or in the nature of one, with reference to the further action of the officers of the government, or with reference to the distribution of the moneys thus paid, or with reference to its effect upon the individual, and it is the duty of the court to be governed by such statutory direction, but the intrinsic nature of the provision remains, and, in the absence of any declaration by Congress affecting the manner in which the provision shall be treated, courts must decide the matter in accordance with their views of the nature of the act.

188 U.S. 605, 612–13, 23 S.Ct. 427, 47 L.Ed. 614 (emphases added). Thus, the Court emphasized that it looked to "the nature and character of the enactment" only "in the absence of any declaration by Congress" giving direction to the court. Far from supporting the majority's claim that "[t]he Supreme Court has repeatedly instructed that congressional labels have little bearing on whether an exaction qualifies as a 'tax' for statutory purposes," *Helwig* indicates that Congressional labels that direct the court may of course be dispositive. Terming an exaction "a further sum" did not help the Court determine whether or not that sum was a "penalty"; but Congress's expressly considering calling an exaction a "tax" and then deleting the dozens of references to a "tax" and instead designating it a "penalty" (as Congress did in the course of its enactment of the ACA) does help courts determine whether Congress wished us to view the exaction as a "tax" for purposes of the AIA.[7] Though Congress did not expressly reference the AIA here—and, judging from the legislative history, may well not have considered application of the AIA specifically—it did consider whether to attach all the trappings of a "tax" to the exaction (including, among many others provisions, the AIA), and decided instead to specify the ones it wanted. The AIA is not among them.

The majority's second citation for that proposition, *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 116 S.Ct. 2106, 135 L.Ed.2d 506, (1996), is much like *Helwig*. There the Court determined whether a "tax" imposed on certain funding deficiencies constituted an "excise tax" for Chapter 11 purposes (as "an excise tax" was accorded higher priority than ordinary claims). It prefaced its discussion by recognizing that "Congress could have included a provision in the Bankruptcy Code calling [the relevant] exaction an excise tax ...; the only question is whether the exaction ought to be treated as a tax (and, if so, an excise) without some such dispositive direction." *Id.* at 219. Its ultimate conclusion considered legislative history of the exaction at issue and "conclude[d] that the 1978 Act reveals no congressional intent to reject generally the interpretive principle that characterizations in the Internal Revenue Code are not dispositive in the bankruptcy context...." *Id.* at 224. Here, where Congress provided one of the most direct signals it can of its intentions—it expressly considered calling the exaction a "tax" and ultimately decided not to do so—*Helwig* and *Reorganized CF & I* would direct us to follow Congress's direction and treat an exaction denominated a "penalty" as a penalty and not as a tax for purposes of the AIA.

2.

Second, the majority's approach relies upon its assertion that "[t]he Supreme Court has concluded that the AIA uses the term 'tax' in its broadest possible sense" and thus that "the AIA prohibits a pre-enforcement challenge to any exaction that is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue." *Ante* p. 18 (internal quotation marks and braces omitted).

This definition is far from self-evident. As the majority concedes, taxes and penalties are distinguished in some federal statutory "contexts." *Ante* p. 22 n. 4. In the very case discussed above, *Reorganized CF & I Fabricators*, which dates from 1996, the Court adopted these definitions for its "functional" inquiry of the exaction at issue: "A tax is an enforced contribution to provide for the support of government; a penalty ... is an exaction imposed by statute as punishment for an unlawful act." 518 U.S. at 224. The majority reasons that "[n]either the Secretary nor the Sixth Circuit cites a single case suggesting that [this distinction applies to the AIA]." *Ante* p. 22 n. 4. Of course, Lipke, on which the majority relies, is one major AIA case that distinguishes between taxes and penalties. And, as the Court in *Reorganized CF & I Fabricators* borrowed its

definitions of "tax" and "penalty" from a "somewhat different context," it appears that these definitions are not particularly context-specific. 518 U.S. at 224. Thus, if a court is to perform a "functional examination" of its own, why would it not use these well-settled definitions, under which the Affordable Care Act's exaction would clearly be a penalty (for noncompliance with the individual mandate)?

By my count, the majority puts forward three affirmative arguments favoring the "broadest possible" definition for the word "taxes" in the AIA: (1) *Snyder v. Marks*, 109 U.S. 189, 3 S.Ct. 157, 27 L.Ed. 901 (1883), established a broad definition of "tax" under the AIA; (2) the twin Bailey cases show that the AIA is "broader" than the taxing clause; and (3) the fact that the IRS grants the Secretary the authority to make "assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title" implies that the AIA, which generally protects the Government's interest in effecting unfettered tax assessments, must apply to all exactions. 26 U.S.C. § 6201(a) (emphasis added). I find these arguments unpersuasive.

First, *Snyder* does not establish the broad definition the majority cites it for. The Court explains that "tax" "meant that which is in condition to be collected as a tax, and is claimed by the proper public officers to be a tax. " 109 U.S. at 192 (emphasis added). Thus, *Snyder*

clearly makes relevant the Commissioner's designation of an exaction and, reasonably viewed, requires that the Commissioner "claim[ ]" an exaction "to be a tax." Here, of course, the Secretary of the Treasury is a party before us and supports Congress's designation of the mandate as a "penalty" rather than a "tax."8 Second, the *Bailey* cases have already been dealt with at length above. I agree that they show that the AIA is "broader" than the taxing clause when applied to exactions that are designated by Congress as "taxes "—in the limited sense that they include some exactions that purport to be taxes yet are unconstitutional—but they do no more than that.

As for the majority's final argument, it seems to require a logical leap. I reproduce the relevant paragraph for ease of reference:

The Court's broad interpretation of the AIA to bar interference with the assessment of any exaction imposed by the Code entirely accords with, and indeed seems to be mandated by, other provisions of the Internal Revenue Code. The AIA does not use the term "tax" in a vacuum; rather, it protects from judicial interference the "assessment ... of any tax." I.R.C. § 7421(a) (emphasis added). The Secretary's authority to make such an "assessment ... of any tax" derives directly from

another provision in the Code, which charges the Secretary with making "assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title." § 6201(a) (emphases added); see also § 6202 ("assessment of any internal revenue tax" includes assessment of "penalties"). Thus, for purposes of the very assessment authority that the AIA protects, Congress made clear that "penalties " (as well as "interest, additional amounts, [and] additions to the tax ") count as "taxes." Congress must have intended the term "tax " in the AIA to refer to this same broad range of exactions. *See Erlenbaugh v. United States*, 409 U.S. 239, 243, 93 S.Ct. 477, 34 L.Ed.2d 446 (1972) ("[A] legislative body generally uses a particular word with a consistent meaning in a given context.").

Ante p. 19–20 (large emphasis mine)

I agree, of course, that "for purposes of the [Secretary's] assessment authority," Congress made clear that the 'penalties' ... count as 'taxes.' " Indeed, where Congress has wished "penalty" to be treated as a "tax," it has said so. *See, e.g.*, 26 U.S.C. §§ 6665(a)(2), 6671(a) (directing that "tax" be "deemed also to refer to ... penalties" in Chapter 68 of the Internal Revenue Code). It is not at all surprising that

Congress has employed this shorthand when defining the Secretary's authorities.

The problematic leap is this: simply because the AIA generally protects the Secretary's assessment authority does not mean that the AIA must apply to all exactions. The many exemptions included in the AIA as currently codified show that Congress has often wished to exempt certain exactions from the AIA. As a matter of statutory interpretation, it seems improper for a court to insist that "taxes" means any exaction (despite the fact that Congress does not say so) and thereby to undercut Congress's deliberate decision to reject designating an exaction as a "tax" and instead to call it a "penalty." Given that we have been cited no cases that would require such a large redrafting of the AIA—other "penalties" to which the AIA have been applied were placed in Chapter 68, which expressly directs that all references to "tax" in the IRC are to refer also to the Chapter's "penalties"—I believe that this "broadest possible" interpretation of the AIA is unwarranted and unwise.

The majority appears to reject the legal force of sections 6665(a)(2) and 6671(a), arguing that section 7806(b) "forbid[s] courts from deriving any 'inference' or 'implication' from the 'location or grouping of any particular section or

provision or portion of this title.' " *Ante* p. 31. This puzzles me, as it is absolutely clear that sections 6665(a)(2) and 6671 have the force of law. Section 6665(a)(2) directs that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to ... penalties provided by this chapter." This instructs courts that Congress wished to make the word "penalty" inclusive of the word "tax" in this particular chapter (Chapter 68). Congress remains free to do otherwise in other chapters; indeed, it chose not to do so in Chapter 48, in which the individual mandate is found. Giving force to section 6665(a)(2) in no way contradicts section 7806(b) by drawing a prohibited implication from the "location or grouping" of Internal Revenue Code (IRC) provisions. Section 7806(b) prohibits inferences drawn from the location or group itself; instructions can still flow from section 6665(a)(2) that are to apply only to a specified chapter. This seems to me to be beyond serious doubt. Likewise, section 7806(b) does not prohibit courts interpreting one provision of the IRC from looking to other provisions of the IRC and noting that, where Congress has desired a particular result, it has stated so. To suggest that a court cannot draw the traditional inference from Congress's decision to define "penalty" as inclusive of "tax" in other chapters and its failure to do so here seems wholly unwarranted by section 7806(b).[9]

In the final analysis, the majority's approach essentially imposes a clear-statement rule on Congress, making the AIA applicable to all exactions, regardless of statutory language and in disregard of apparent Congressional intent, unless Congress had the foresight to expressly exempt an exaction from the AIA. The majority concedes, as it must, that the 111th Congress could have exempted the individual mandate from the AIA, but it suggests that the only way Congress could avoid the AIA's bar on immediate judicial review of the ACA is by amending the AIA itself to include an express exemption for the ACA or (in what amounts to the same thing) by referencing the AIA by name in the ACA. That is, the majority seems to believe that a clear-statement rule is operative here, and that absent a clear statement regarding the inapplicability of the AIA, it must apply to any and all exactions. Given that the Supreme Court has never recognized such a clear-statement rule, it seems to me that this turns the ordinary principles of statutory interpretation on their head.

As Justice Kennedy recently recognized for a plurality of the Court, clear-statement rules are designed to "avoid applications of otherwise unambiguous statutes that would intrude on sensitive domains in a way that Congress is unlikely to have intended had it considered the

matter." *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139, 125 S.Ct. 2169, 162 L.Ed.2d 97 (2005) (plurality op.). Justice Kennedy even warned in his plurality opinion against "convert[ing] the clear statement rule from a principle of interpretive caution into a trap for an unwary Congress." *Id.* That seems to be precisely what the majority does today.

Presumably because the majority believes such a clear-statement rule applies, it asserts that "[t]o infer an intent on the part of the 2010 Congress to implicitly exempt this pre-enforcement challenge from the AIA bar would be tantamount to inferring an implicit repeal of that bar." *Ante* p. 37. But our case is nothing like implicit repeal cases like *TVA v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978), which the majority cites in that paragraph. In *Hill*, the Court considered whether continued federal appropriations for a dam after notice that construction was being challenged under the Endangered Species Act worked an implicit repeal of the Act with respect to the dam. In an implicit repeal case, the Court is forced to consider whether Congressional action definitively to the contrary of an earlier enactment works an implied repeal. In our case, on the other hand, we are simply asking whether Congress created with the ACA the sort of exaction to which the earlier act (the AIA) applies. This requires us to construe both

the word "taxes" under the AIA and the word "penalty" in the ACA, applying our ordinary tools of statutory interpretation. We look first to the text itself, and, after finding that it is at best ambiguous, we look to legislative history and Congressional purpose. Because the application of the AIA to the ACA is in doubt—this is precisely the question we are deciding sua sponte—our case is nothing like implicit repeal cases.

Of course, my approach fully recognizes that the AIA has legal force. But, as the AIA can undoubtedly be sidestepped by any Congress as it creates a new exaction (at the very least, in the majority's view, by a clear statement that the AIA is not to apply), the AIA is non-binding on future Congresses. When courts determine the application of the AIA to the ACA, they are only considering the application of one Congressional enactment to a later one. Because one Congress cannot bind a later one, the 111th Congress was fully within its prerogative to indicate, even if only implicitly, that the AIA should not apply. *See United States v. Winstar Corp.*, 518 U.S. 839, 872, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996) (plurality op.) (quoting Blackstone for "the centuries-old concept that one legislature may not bind the legislative authority of its successors"). The independent legal force of the AIA does not spring from the fact that it can trap future,

unwary Congresses, but rather from the fact that we must seek to harmonize its terms with that of future legislation. That is, the AIA is not binding on Congress, it is binding on us, the judiciary.

Finally, as for the majority's suggestion that policy arguments favor its position because a contrary holding "might have serious long-term consequences for the Secretary's revenue collection," *ante* p. 41, I would simply note again that the Secretary of the Treasury is a party before us and argues that the AIA does not apply. Indeed, I cannot find a Supreme Court case where the AIA has been applied over the objection of the Secretary.

3.

The majority suggests that the issue presented here is one of "context," and I agree. The majority accepts "the Sixth Circuit's general observation that there are 'contexts' in which the law treats 'taxes' and 'penalties' as mutually exclusive" and explains that "[t]he question here is whether the AIA is one of these 'contexts.' " *Ante* p. 22 n. 4 (internal quotation marks omitted). To my mind, the proper question is not whether "taxes" and "penalties" are always "mutually exclusive" under the AIA, but whether Congress, in creating a later-enacted exaction, intended to create a "tax" for

purposes of the AIA. But the more important question of "context" is this: whether, in light of the context provided by Congress's deliberate decision to designate the individual mandate's exaction a "penalty" rather than a "tax" and the evidence of Congress's desire to erect no jurisdictional bar to immediate judicial review of the ACA, we should nonetheless interpret the ACA as creating a "tax" within the meaning of the AIA. My effort here, to marshal the historical, jurisprudential, interpretive, and, yes, commonsense factors necessary to answer this question, persuades me that we should not. Given this larger context, I do not believe that one interpretation of near century—old AIA cases—cases that fail to devote enough space to the AIA analysis to even spell out their reasoning—should carry the day. If the Supreme Court's vacillations concerning the proper interpretation of the AIA teach us anything, they teach us that context matters.[10]

* * * *

Because I do not believe that *Lipke* and *George* instruct courts to eschew our ordinary methods of statutory interpretation and I do not agree that the AIA reaches all exactions though by its terms it is limited to "taxes," I cannot join the majority. Where Congress expressly rejected the term "tax" in favor of "penalty," and where it appears that application of the AIA would do little to further the purposes of the AIA, but

would do much to frustrate the Affordable Care Act's reforms desired by the Congress that approved the Act, I would hold that the AIA does not strip us of jurisdiction. Thus, I would reach (and I do indeed reach) the merits of appellants' challenges.

II. The Act

Pub.L. No. 111–148, 124 Stat. 119, amended by The Health Care and Education Reconciliation Act of 2010, Pub.L. No. 111–152, 124 Stat. 1029 (2010). The Affordable Care Act is comprised of a half-dozen initiatives designed to reduce the costs of health care and the number of Americans who remain uninsured.

After a months-long national debate, the Patient Protection and Affordable Care Act was signed into law on March 23, 2010. First, the Act creates "health benefit exchanges" in each state, which are regulated to increase transparency concerning premium increases and claim denials and which offer market-based incentives tied to increases in efficiency and better health outcomes. 42 U.S.C. § 18031(e), (g).

Second, the Act prevents insurers from rejecting applicants with preexisting conditions (the "guaranteed issue" requirement) and bars insurers from charging higher premiums to

those with serious medical conditions or a history of past illness (the "community rating" requirement). Id. §§ 300gg–300gg–3.

Third, the Act makes more Americans eligible for Medicaid, and to many of those who earn too much to receive Medicaid it grants tax credits to subsidize the cost of insurance premiums and pledges federal dollars to reduce out-of-pocket expenses. *Id.* §§ 1396a(10)(A)(i)(VIII), 18071; 26 U.S.C. § 36B.

Fourth, the Act requires that individuals keep up "minimum essential [health insurance] coverage." Id. § 5000A. In particular, it directs that "[a]n applicable individual shall for each month beginning after 2013 ensure that the individual, and any [applicable] dependent ..., is covered under minimum essential coverage for such month." *Id.* Appellants term this the "individual mandate," and it is the chief target of their suit. Appellants' Br. 3. Congress found that hospitals provided $43 billion in uncompensated care to the uninsured in 2009, and that these costs were shifted onto insured individuals, "increas[ing] family premiums by on average over $1,000 a year." 42 U.S.C. § 18091(a)(2)(F). It also found that, "[b]y significantly lowering the number of the insured, the [minimum coverage] requirement, together with the other provisions of th[e] Act, will lower health insurance premiums." *Id.*

Congress created two religious exemptions to the individual mandate: a religious conscience exemption and a health-care sharing ministry exemption. 26 U.S.C. § 5000A(d)(2). I discuss the particulars of these exemptions in Part VIII, where I consider appellants' First Amendment claims.

Fifth, the Act created tax incentives making it more affordable for small businesses to offer health insurance to their employees. *Id*. § 45R. Finally, the Act required "applicable large employers ... to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan" if at least one full-time employee is receiving federal subsidies for health insurance. Id. § 4980H(a). Appellants call this the "employer mandate." Appellants' Br. 3.

Appellants Michele Waddell, Joanne Merrill, and Liberty University assert an array of constitutional challenges to the Act's individual and employer mandates and request declaratory and injunctive relief. They allege that the mandates are outside Congress's Article I powers and that the individual mandate's religious exemptions effect violations of the First Amendment's Free Exercise and Establishment Clauses as well as the equal protection component of the Fifth Amendment's

Due Process Clause. Appellants' chief contention is that the individual mandate was not validly enacted pursuant to Congress's commerce power because it regulates what they call "inactivity." *Id.* at 1. The district court carefully parsed appellants' arguments and dismissed their suit pursuant to Federal Rule of Civil Procedure 12(b)(6), concluding that appellants had failed to state a legally sufficient claim. *Liberty University, Inc. v. Geithner,* 753 F.Supp.2d 611 (W.D.Va.2010).

For the following reasons, I would affirm.

III. Constitutionality, Inactivity Aside

Putting aside appellants' "inactivity" argument, to which I return in Parts IV and V, I first consider whether the Act is otherwise authorized under Congress's "power to regulate activities that substantially affect interstate commerce." *Gonzalez v. Raich*, 545 U.S. 1, 16–17, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). In particular, I ask whether the Act runs afoul of the teachings of *United States v. Lopez* and *United States v. Morrison*, two cases in which the Supreme Court enforced limits on the Commerce Clause so as not to "convert congressional authority under the Commerce Clause to a general police power." *Lopez*, 514 U.S. 549, 567, 115 S.Ct. 1624, 131 L.Ed.2d 626

(1995); *see Morrison*, 529 U.S. 598, 617–19, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000).

A. Lopez and Morrison

In *Lopez* and *Morrison* the Supreme Court struck down two congressional enactments because the objects of regulation—the possession of guns in school zones in *Lopez,* violence against women in *Morrison*—were noneconomic. Affirming that "Congress' commerce authority includes the power to regulate those activities having substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce," *Lopez* held that gun possession in schools did not substantially affect interstate commerce. 514 U.S. at 559–60 (internal citations omitted). The Court worried that to identify the effect of guns in schools on interstate commerce it "would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567. If gun possession in schools were held to be substantially related to interstate commerce simply because such incidents harmed our "national productivity," then "Congress could regulate any activity that it found was related to the economic productivity of individual citizens" and it would

be "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." *Id.* at 564.

Morrison further clarified the holding of *Lopez.* The Court explained that "a fair reading of Lopez shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case." 529 U.S. at 610. Without "express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone," the Court refused to find a substantial effect upon interstate commerce, as it believed "the link between gun possession and ... interstate commerce was attenuated." *Id.* at 612. The Court noted that it has "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 613. Because the *Morrison* Court found that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity" and that their effects on interstate commerce (many of which were expressly enumerated by Congress) are "attenuated," it struck down the challenged congressional regulation of these crimes. *Id*. at 613, 615. As it did in *Lopez,* the Court emphasized that the "regulation ... of intrastate violence ... has always been the province of the States" and affirmed that "[t]he Constitution requires a distinction between

what is truly national and what is truly local." *Id*. 617–18.

Without doubt, appellants are correct to insist that *Lopez* and *Morrison* remind us that any formulation of the Commerce Clause must admit to limiting principles that distinguish the "truly national" from the "truly local." But the concern directly animating *Lopez* and *Morrison*—the noneconomic character of the regulated activities—is not present in this case, where the failure to obtain health insurance is manifestly an economic fact with direct effects on the interstate markets for both health insurance and health services. *Cf. Thomas More,* —— F.3d at ——, 2011 WL at *11–12 (Martin, J.); Florida, —— F.3d, at ——, 2011 WL at *94, *106 (Marcus, J., dissenting).

Nor can it be said that health insurance or health services have "always been the province of the states" in the way that education, family law, and criminal law have been. *Raich*, 529 U .S. at 618. Since the Social Security Act of 1965, Pub.L. No. 89–97, 79 Stat. 286, established Medicare and Medicaid benefits, the federal government has been the single largest provider in the interstate health insurance market and the largest purchaser in the health services market. Federal dollars have accounted for more than one-quarter of all health spending each year since 1974; in 2008,

Americans spent $2.3 billion on health services, of which the federal government paid more than $815 million—nearly 35%. Ctrs. for Medicare & Medicaid Servs., National Health Expenditure Amounts by Type of Expenditure and Source of Funds: Calendar Years 1965–2019. The year 1974 also saw the passage of the Employee Retirement Income Act (ERISA), which has a "broadly worded" and "clearly expansive" preemption provision. 29 U.S.C. § 1144(a); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 146, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001). Through ERISA, as well as later enactments like the Health Insurance Portability and Accountability Act of 1996, Pub.L. No. 104–191, 110 Stat.1936, the federal government has come to occupy much of the field of the regulation of health benefits, and many state and local attempts to regulate health insurance have been held preempted. *See, e.g., Retail Industry Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir.2007) (holding Maryland's Fair Share Health Care Fund Act, which regulated employer health care spending, preempted by ERISA, as "ERISA establishes comprehensive federal regulation of employers' provisions of benefits to their employees"); but *see Metropolitan Life Ins. Co. v. Mass.,* 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985) (holding that state mandated-benefit law survives ERISA preemption as a law that "regulates insurance,

banking, or securities" within the meaning of ERISA's savings clause). Given nearly half a century of extensive federal involvement in the national health insurance and health services sectors, it seems clear that *Lopez* and *Morrison*'s interest in protecting areas of traditional state sovereignty is not directly implicated.

That said, *Lopez* and *Morrison* do remind us that the scope of the Commerce Clause is finite and that its jurisprudence must admit to bounding principles. Thus courts must assure themselves that upholding the Act under the Commerce Clause would not effectively create a federal police power.

B. Substantial Effects

Appellants argue that if we were to hold that failure to obtain insurance substantially affects interstate commerce, we would be forced to find that the failure to purchase any marketed product substantially affects interstate commerce. Thus, they quote *Florida ex rel. Bondi*, where the district court for the Northern District of Florida found the Act unconstitutional in part because it believed that a Commerce Clause broad enough to authorize the Act must also support purchase mandates for broccoli or GM cars. Appellants' Reply Br. 9 (quoting *Bondi*, —— F.Supp.2d at –

——, ——, 2011 WL 285683, at *24). The Eleventh Circuit, upholding the district court on that point, expressed similar fears that there are no "cognizable, judicially administrable limiting principles." *Florida*, —— F.3d at ——, 2011 WL at *54. This is not so.

I begin by noting that whether failure to purchase insurance substantially affects interstate commerce relies on a great number of factual determinations. These are to be made not by the courts but by Congress, an institution with far greater ability to gather and critically evaluate the relevant information. As the Supreme Court noted in Raich, "[i]n assessing the scope of Congress' authority under the Commerce Clause, ... [our] task ... is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." 545 U.S. at 22.
The Act's effects on interstate commerce depend in large part on an unusual feature of the health care market. By federal law, a hospital participating in Medicare must stabilize any patient who arrives at its emergency room, regardless of the patient's ability to pay for treatment, Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd(b)(1), and many states impose similar requirements, see, e.g., H.R.Rep. No.

99–241(III), at 5 (1985), reprinted in 1986 U.S.C.C.A.N. 726, 726–27 (noting that "at least 22 states have enacted statutes or issued regulations requiring the provision of limited medical services whenever an emergency situation exists" and that "many state court rulings impose a common law duty on doctors and hospitals to provide necessary emergency care"). As a result, the uninsured often receive care that they are unable to pay for: in 2008, hospitals provided $43 billion in uncompensated care to the uninsured. 42 U.S.C. § 18091(a)(2)(F). To cope with these costs, hospitals increase the price of health care services, which in turn leads to rising health insurance premiums; Congress found that "[t]his cost-shifting increases family premiums by on average over $1,000 a year." *Id.*

Recognizing these direct effects on the health insurance and health services markets does not require us to "pile inference upon inference" in the way linking noneconomic acts like the possession of guns in schools or gender-motivated violence to interstate commerce might have done in *Lopez* and *Morrison*. *Lopez,* 514 U.S. at 567; see Morrison, 529 U.S. at 615. In *Lopez*, the Court rejected the Government's argument that gun possession in schools substantially affected interstate commerce due to the general "costs of crime" or because "the presence of guns in schools poses a substantial

threat to the education process," which "in turn, will result in a less productive citizenry." 514 U.S. at 564. Likewise, the Court rejected Congress's findings in *Morrison* because they "follow[ed] the but-for causal chain from the initial occurrence of violent crime ... to every attenuated effect upon interstate commerce," chiefly "deterring potential victims" from interstate travel, employment, general commercial transactions, "diminishing national productivity, increasing medical and other costs, and decreasing the supply of and demand for interstate products." 529 U.S. at 615 (quoting H.R.Rep. No. 103–711, at 385 (1990), reprinted in 1994 U.S.C.C.A.N. 1803, 1853). Where the proffered "substantial effects" in *Lopez* and *Morrison* were attenuated, here the effects are direct: considered as a class (per *Wickard* and *Raich*'s aggregation principle, see *Wickard v. Filburn*, 317 U.S. 111, 127–28, 63 S.Ct. 82, 87 L.Ed. 122 (1942); *Raich*, 545 U.S. at 22; post pp. 46–48), those who fail to purchase health insurance will seek and receive medical care they cannot afford; the cost of that care ($43 billion in 2008) is borne by the hospitals, which are forced to increase the price of health care services.

And recognizing that the uninsured's passing on $43 billion in health care costs to the insured constitutes a substantial effect on interstate commerce in no way authorizes a

purchase mandate for broccoli or any other vegetable. The health care market is unique in that its product (medical care) must be provided even to those who cannot pay, which allows some (the uninsured) to consume care on another's (the insured's) dime. Here the substantial effect on commerce comes not from simply manipulating demand in a market, as it would in the case of a broccoli or GM car mandate, but from correcting a massive market failure caused by tremendous negative externalities. Thus, we need not decide today whether the reasoning of *Wickard* and *Raich*, which were both concerned in part about limiting supply in interstate markets for fungible goods, extends to artificially inflating demand via a purchase mandate. *See Wickard*, 317 U.S. at 128 (recognizing that even wheat grown for home consumption "overhangs the market and if induced by rising prices tends to flow into the market and check price increases"); *Raich*, 545 U.S. at 19 (noting that "high demand in the interstate market"—and consequent higher prices—is likely to "draw [home consumed] marijuana into that market").

For these reasons, I would hold that the failure to obtain health insurance substantially affects the interstate markets for health insurance and health care services. *Accord Thomas More*, ––– F.3d at ———, 2011 WL at *12 (Martin, J.); *id.*

at *24–25 (Sutton, J.); *Florida*, —— F.3d at —— –, 2011 WL at *106 (Marcus, J., dissenting).

IV. Universal Participation in the Health Care Market

Nor need I decide today whether the Commerce Clause discriminates between activity and inactivity. Appellants concede that virtually all persons will voluntarily enter into the interstate health services market in their lifetimes, and they concede further, as they must, that this constitutes activity in commerce. Yet appellants insist that the Commerce Clause requires Congress to adopt an extremely narrow time-horizon: it may regulate persons seeking health care, but only once they have sought it. Appellants' Br. 34. A faithful application of *Wickard*'s and *Raich*'s teachings requires us to reject this contention.
Wickard introduced the aggregation principle into Commerce Clause jurisprudence: "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." 317 U.S. at 127–28. *Raich* reaffirmed this approach, noting that Commerce Clause analysis looks to the regulated "activities, taken in the aggregate." 545 U.S. at 22.

Further, *Raich* emphasized that

> Congress [need not] legislate with scientific exactitude. When Congress decides that the "total incidence" of a practice poses a threat to a national market, it may regulate the entire class. *See United States v. Perez*, 402 U.S. at 154–55 ("[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so."). In this vein, we have reiterated that when a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence. *Id.* at 17 (some internal quotation marks and citations omitted).

Under *Wickard* and *Raich*, we are to take the view of the legislators, not those who are regulated. Courts look at the aggregated impact of an activity, not the impact of individuals; the Commerce Clause authorizes the regulation of an "entire class," regardless of "the de minimis character of individual instances ." *Id*. We are to put aside "the mechanical application of legal formulas" and look instead to "the actual effects of the activity in question upon interstate commerce." *Wickard,* 317 U .S. at 120, 124. Indeed, it bears repeating, our task in deciding Commerce Clause challenges "is a modest one" in which we ask "only whether a 'rational basis'

exists" for Congress to find a substantial effect on interstate commerce. *Id.* at 22.

Considering that hospitals are required to provide certain care to the uninsured, that illness and accidents are nothing if not unpredictable, and that the costs of medical care are often catastrophic, I have no hesitation in concluding the Congress rationally determined that addressing the $43 billion annual cost-shifting from the uninsured to the insured could only be done via regulation before the uninsured are in need of emergency medical treatment. *Wickard* and *Raich* teach that we are to take the longer view of legislators; it is difficult to imagine that Commerce Clause analysis would aggregate individuals and allow regulation of entire classes but then, when legislators confront a problem requiring a remedy before emergencies (and their ever-growing costs) occur, refuse to permit them to adopt the time-horizon necessary to enact a solution. *Accord Florida,* – — F.3d at ——, 2011 WL at *93 (Marcus, J., dissenting).

Thus, as Congress rationally found virtually universal participation in the interstate health care market over the course of residents' lifetimes, the Act does not present an issue of congressional regulation of inactivity. *Accord Thomas More*, —— F.3d at ——, 2011 WL at

*15 (Martin, J.); id. at *27–30 (Sutton, J.); Florida, —— F.3d at ——, 2011 WL at *93–*94 (Marcus, J., dissenting). Rather, courts are asked to pass on regulation of voluntary participation in the interstate health care market that, to be effective, must be preemptive. As it is clear that the regulated behavior substantially affects interstate commerce and appellants bring no other challenge to Congress's authority under the Commerce Clause, I would hold the Act to be a proper exercise of congressional power.

V. Regulating Inactivity

But even if I were to assume that the uninsured are, in appellants' phrase, "inactive in commerce," I would be bound to uphold the Act. Despite appellants' several arguments, the Commerce Clause is not offended by the regulation of "inactivity" or, in proper circumstances, by a purchase mandate.

Appellants urge that the Act is an "unprecedented attempt to force private citizens who have decided not to participate in commerce to engage in commerce by mandating that they purchase ... health insurance...." Appellants' Br. 3. This argument presents two distinct questions: (1) "[w]hether Congress has authority under the Commerce Clause to regulate a private citizen's inactivity in

commerce"; and (2) whether such regulation can include "forc[ing][a] citizen to participate in commerce by mandating that she purchase a [commodity] ... or pay a penalty for noncompliance." *Id.* at 1. I consider these questions in turn.

A. Regulating "Inactivity in Commerce"

Appellants characterize Mss. Waddell's and Merrill's "decision not to purchase health insurance and to otherwise privately manage her own healthcare" as "inactivity in commerce," which they claim is beyond the reach of the Commerce Clause. *Id.* at 1. As the following brief review of the case law will show, this broader Commerce Clause challenge—whether it reaches non-market participants (those "inactiv[e] in commerce")—has already been litigated. The Supreme Court's "case law firmly establishes" that Congress may regulate those who have opted not to participate in a market when their self-provisioning, considered in the aggregate, "substantially affect[s]" an interstate market. *Raich*, 545 U.S. at 17. After explaining why appellants' broader challenge is foreclosed, I consider the far narrower challenge to the Act that survives.

1. Regulating Non–Market Participants

Nearly seventy years ago, in the famous case of *Wickard v. Filburn*, the Supreme Court upheld Congress's power under the Commerce Clause to regulate Mr. Filburn's private, noncommercial production of wheat. The Court squarely confronted the question: it began its discussion by noting that "[t]he question would merit little consideration ... except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm." 317 U.S. at 118. Just six years ago, the Court reaffirmed *Wickard*'s vitality in *Raich*, explaining,

Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce. As we stated in *Wickard*, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."

Raich, 545 U.S. at 17 (quoting *Wickard*, 317 U.S. at 125) (emphasis added). The *Raich* Court made clear that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class

of activity would undercut the regulation of the interstate market in that commodity." Id. at 18. Applying this principle, the Court upheld the regulation of individuals who grew marijuana solely for "home consumption"—that is, it allowed Congress to regulate individuals who deliberately chose not to participate in commerce. *Id*.

Thus, appellants' true quarrel with the Act is more limited than their language sometimes suggests. With subheadings like "*Wickard* does not support the district court's conclusion that private economic decisions can be regulated under the Commerce Clause," appellants' briefs muddy their real point. Appellants' Br. 20. As just described, it is well settled that Congress may regulate the private, noncommercial economic activities of non-market participants when their self-provisioning (growing wheat or marijuana for themselves) substantially affects an interstate market. Appellants contend that this "firmly establishe[d]" Commerce Clause law, *Raich*, 545 U.S. at 17, is inapplicable because *Wickard* and *Raich* "involved voluntary activity, whereas the Act regulates voluntary inactivity." Appellants' Br. 19. To the extent that "voluntary inactivity " again suggests deliberate non-participation in the market, this fails to distinguish Raich; yet appellants also seem to be raising a different point. "[I]t was the fact that Mr. Filburn actively grew wheat

beyond the quota, even if for personal use, that was significant in *Wickard*," as "it was that activity that constituted economic activity. By contrast, [appellants] have exerted no effort and used no resources." *Id.* at 21. It is this "distinction between activity and inactivity," *id.* at 19—absolute inactivity, not just inactivity (non-participation) in commerce—that carries the true thrust of appellants' argument.

2. Regulating the "Inactive"

Before I can consider this narrower argument, I must be sure I understand exactly what appellants mean by it. Appellants say that "Mr. Filburn actively grew wheat beyond the quota, even if for personal use" while Ms. Waddell and Mrs. Merrill "have exerted no effort and used no resources." Appellants' Br. 21. But appellants expressly state that "Miss Waddell and Mrs. Merrill have voluntarily and deliberately decided not to purchase health insurance, but to instead save for and privately manage health care." *Id.* at 10 (emphasis added). It is not clear why "sav[ing] for and privately manag[ing] health care," a species of what economists call "self-insurance,"[11] requires neither "effort" nor "resources"—in fact, one would imagine that "sav [ing]" requires "resources" (namely, money) and that "manag[ing]" requires some "effort." *Id.* at 10, 21. Though, unlike wheat and marijuana,

insurance is intangible, appellants do not suggest that interstate markets in intangible goods or services are less subject to regulation under the Commerce Clause than markets in tangible goods; thus, it is difficult to see why the legal import of the appellants' "sav[ing]" and "manag[ing]" should differ from that of Mr. Filburn's sowing and harvesting.

But even if appellants had said nothing about saving and managing and I accepted that Ms. Waddell and Mrs. Merrill had truly "exerted no effort and used no resources" with respect to health insurance—that is, that they had taken no steps to self-insure—it is difficult to make out the legal relevance of this point. Mr. Filburn and Ms. Raich deliberately chose to meet their own needs rather than enter commerce and purchase goods on the market and thus they, too, "exerted no effort and used no resources" in connection to the relevant markets; why are they more susceptible to Commerce Clause regulation than appellants simply because they privately exerted effort and expended resources for a noncommercial end?

Appellants have provided no express answer, but one is implicit in their arguments: in choosing to act, even privately, with notice of regulation, one can be said to consent or at least submit to that regulation. Under this

view, *Wickard* and *Raich* are distinguishable because they concerned regulated domains which individuals voluntarily entered upon the commencement of some "activity." Thus, appellants' complaint that "appellants in *Raich* could avoid Congress' reach by not manufacturing or possessing marijuana, but here the Appellants cannot avoid Congress' reach even if they are not doing anything." Appellants' Br. 19. Appellants express concern throughout their brief about allowing Congress to "regulate [people] because they are legal citizens who merely exist," *id.* at 20;12 likewise, the Eleventh Circuit majority worries that "[i]ndividuals subjected to this economic mandate have not made *Florida*, —— F.3d at ——, 2011 WL at *48. So I will consider the Commerce Clause ramifications of regulating "everyone."

3. Federalism & Regulations Affecting Everyone

I am aware of no "substantial effect" case, in more than a century of Commerce Clause jurisprudence, that looks beyond the class of activities regulated to the class of persons affected. And this is unsurprising, as the dispositive question is whether the object of regulation substantially affects interstate commerce; what the affected persons have done to consent (or not) to the regulation is obviously

irrelevant to that inquiry. Appellants claim that their liberty concern springs from the principles of federalism rather than black-letter Commerce Clause law. Though these principles serve to protect state sovereignty and the resulting division of power helps to secure our liberty, federalism is not an independent font of individual rights.

As Justice Kennedy explained in his concurrence in Lopez, "it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one," as power could be split between state and federal governments even before each government's powers were further separated among legislative, executive, and judicial departments. 514 U.S. at 576. Thus, "[s]tate sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' " *New York v. United States,* 505 U.S. 144, 181, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (quoting *Coleman v. Thompson,* 501 U.S. 722, 759, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (Blackmun, J., dissenting)). Federalism "enhance[s]" our liberty by disaggregating power; it helps to secure all our individual rights, but it does not create new ones. The Supreme Court's recent decision in *Bond v. United States*, which granted an individual criminal defendant standing to challenge a federal statute on the

grounds that it usurped powers reserved to the states and which discussed at length the ways in which federalism protects individual liberty, is not to the contrary. 564 U.S. ——, ——, 131 S.Ct. 2355, 2364, 180 L.Ed.2d 269 (2011). Appellants provide no support for their suggestion that some novel, heretofore unknown, individual right can spring from the principles of federalism.

Federalism was properly invoked in *Lopez* and *Morrison*, where, to police the division of authority between state and federal governments, the Court struck down federal regulation of noneconomic activity within "areas such as criminal law enforcement or education where States historically have been sovereign." *Lopez,* 514 U.S. at 564; *see Morrison*, 529 U.S. at 599. *Lopez* and *Morrison*'s concern about the loss of state authority within areas traditionally reserved to the states implicates the division of power between state and federal governments and thus goes to the very core of federalism. Appellants' individual liberty concerns do not. Appellants suggest that allowing the Act to touch all U.S. residents, whether or not they have voluntarily entered a regulated domain, "threatens ... the bedrock concept [ ] of ... individual freedom." Appellants' Br. 11–12. Federalism does not speak to this issue.

Nor does any recognized individual right. Appellants' rhetoric sometimes suggests a generalized right to be left alone; but outside of a limited right to privacy concerning "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy," including those "relating to marriage, procreation, contraception, family relationships, child rearing, and education," *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 851, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), no such right exists. And any such right springing from substantive due process would bind the states under the Fourteenth Amendment as well as the federal government under the Fifth, placing universal regulation outside the reach of any government.

Moreover, an extensive body of federal laws, many passed pursuant to the Commerce Clause, targets all U.S. residents: federal criminal law. Indeed, *Raich* itself concerned the Controlled Substances Act and the noncommercial production and consumption of marijuana; nowhere in *Raich* did the Court intimate concern that the federal government was regulating the drug use of "everyone ... just for being alive and residing in the United States." *Bondi*, —— F.Supp.2d. at ——, 2011 WL 285683, at *20. Though penalties do not attach until someone has violated the statute,

the same is true of the Act's regulation. Of course, appellants suggest that compelling action is less legitimate under the Commerce Clause than prohibiting action. I take up that question next.

VI. Compelling Action

Having established that the regulation of "inactivity in commerce" does not offend the Commerce Clause, I consider whether federal commerce regulation can properly "force [a] citizen to participate in commerce by mandating that she purchase a [commodity] ... or pay a penalty for noncompliance." Appellants' Br. 1.

As I explained at length above, the Supreme Court has taught that an enactment is authorized by the Commerce Clause where Congress could rationally conclude that the object of regulation substantially affects interstate commerce. This inquiry looks only at the relation between the object of regulation and interstate commerce; the content of the regulation—what it compels or prohibits—is irrelevant. Indeed, it has long been recognized that "[t]he power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *Wickard*, 317

U.S. at 124 (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119, 62 S.Ct. 523, 86 L.Ed. 726 (1942)); *cf. Raich,* 545 U.S. at 29 ("[S]tate action cannot circumscribe Congress' plenary commerce power."). The Necessary and Proper Clause makes clear that we are to defer to Congress with respect to the means it employs to effectuate legitimate ends. U.S. Const. art. I, § 8, cl. 18. In combination with the Commerce Clause, it empowers Congress " 'to take all measures necessary or appropriate to' the effective regulation of the interstate market." *Raich*, 545 U.S. at 38 (Scalia, J., concurring) (quoting *Shreveport Rate Cases*, 234 U.S. 342, 353, 34 S.Ct. 833, 58 L.Ed. 1341 (1914)).

But even if it were appropriate to review the method of regulation Congress has chosen to employ, I would find that the individual mandate fits well within the range of acceptable commercial regulations.

A. The Act Does Not Compel Citizens to Enter Commerce

I first note that the Act does not "force" any citizen to enter commerce. Appellants' Br. 1. Instead, residents are given a choice between obtaining health insurance (by market purchase or otherwise) and paying a non-punitive tax penalty that, by law, is capped at

"the national average premium for qualified health plans which have a bronze level of coverage." 26 U.S.C. § 5000A(c)(1)(B); see id. at § 5000A(b)(1). As the average cost of providing the most basic insurance, this amount should roughly approximate the expected costs to the regulatory scheme (in the form of higher premiums) occasioned by an individual's failure to procure insurance. Because the uninsured effectively force the rest of the nation to insure them with respect to basic, stabilizing care, this penalty is something like a premium paid into the federal government, which bears a large share of the shifted costs as the largest insurer in the nation.

B. History of Compelled Purchases

Even if the individual mandate were properly characterized as compelling residents to enter the market, this has long been an acceptable form of regulation under the Commerce Clause. For instance, the Federal Motor Carrier Safety Administration, acting pursuant to the Motor Carrier Act of 1980, requires that motor carriers purchase either liability insurance or a surety bond in order to ensure that they are able to pay for damage they may cause. See 49 C.F.R. § 387. And the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) requires that the owner of property contaminated by a

hazardous substance "provide removal or remedial action"—likely requiring resort to the market—on pain of liability for punitive damages, even where the owner bears "no[ ] culpability or responsibility for the contamination" and indeed is entirely "passiv[e]." 42 U.S.C. § 9607(c)(3); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 846–47 (4th Cir.1992). CERCLA has survived all Commerce Clause challenges, and it was expressly held a proper exercise of Congress's Commerce Clause power by the Second Circuit Court of Appeals. *See Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 203 (2d Cir.2002), cert. denied, 538 U.S. 998, 123 S.Ct. 1899, 155 L.Ed.2d 824 (2003); *cf. United States v. Olin Corp.*, 107 F.3d 1506, 1511 (11th Cir.1997) (holding CERCLA constitutional Commerce Clause legislation as applied to appellants).

Wickard itself suggests that compelled purchases are permissible. The Court explained:

It is said, however, that this Act, forcing some farmers into the market to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers. It is of the essence of regulating that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others.... And with

the wisdom, workability, or fairness, of the plan of regulation we have nothing to do.

317 U.S. at 129 (emphasis added). When describing how noncommercial wheat production decreased demand for market wheat, the Court explained that it "forestall[ed] resort to the market" and "supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market." Id. at 127, 128. Though *Wickard* did not involve an express purchase mandate, the Court understood that Mr. Filburn was effectively being "forc [ed] ... into the market to buy" wheat when it rejected his Commerce Clause challenge. *Id.* at 129.

C. Compelled Purchases as Government's Core Function

Finally, I pause to consider why purchase mandates-whether they be for health insurance or broccoli-occasion such fear of federal aggrandizement. *Cf. Thomas More*, —— F.3d at ——, 2011 WL at *32 (conveying author's "lingering intuition—shared by most Americans, I suspect—that Congress should not be able to compel citizens to buy productions they do not want") (Sutton, J). Compelled purchases are the most fundamental function of government of any sort, and the fact that the government here allowed its residents

additional freedom of choice over these purchases should diminish, not exacerbate, anxieties about federal tyranny.

Governments exist, most fundamentally, to solve collective action problems. Core governmental functions, like the provision of domestic peace, enforceable property rights, national defense, and infrastructure, are assigned to government because the market fails to produce optimal levels of such public goods.[13] Since public goods are enjoyed by all, most individuals refuse to purchase them themselves, hoping instead that they can free-ride when someone else does. By forcibly collecting tax revenue and using it to purchase public goods, governments are able to solve this collective action problem. Thus, at root, governments are formed precisely to compel purchases of public goods.

Because hospitals are required to stabilize the uninsured, the uninsured are able to pass along much of the cost of their health care to the insured.[14] Solving this problem, as the Act attempts to do, creates a public good: lower prices for health services for all citizens. Thus, the Act compels the purchase of a public good, just as the federal government does when it collects taxes and uses it to fund national defense.

Indeed, it is undisputed that Congress would have had the power under the Taxing and Spending Clause to raise taxes and use increased revenues to purchase and distribute health insurance for all. It seems quite odd that Congress's attempt to enhance individual freedom by allowing citizens to make their own purchase decisions would give rise to such bloated concerns about a federal power grab. *Cf. Thomas More*, —— F.3d at ——, 2011 WL at *31 (Sutton, J.) ("Few doubt that Congress could pass an equally coercive law under its taxing power....").

As for the broccoli mandate appellants fear, I have explained at several points why nothing I have written would authorize it. But I note that mandating the purchase (but not the consumption, which would raise serious constitutional issues) of broccoli in order to bolster the broccoli market would, in practical effect, be nothing new. Since the time of the Founding Fathers, when Alexander Hamilton called for federal subsidies for domestic manufacturers, the federal government has used tax revenues to subsidize various industries. *See Algonquin SNG, Inc. v. Federal Energy Administration,* 518 F.2d 1051, 1061 (D.C.Cir.1975) ("From earliest days, the tariff authority given Congress by the Constitution has been understood to apply to the 'protective tariff' sponsored by Alexander Hamilton, a

measure focused ... on the 'non-revenue purpose' of protecting domestic industry against foreign competition."), *rev'd by Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 96 S.Ct. 2295, 49 L.Ed.2d 49 (1976). Though centralized subsidies are far more efficient than purchase mandates—which is why a broccoli mandate is purely fantastical—they are, in effect, the same. Since they, too, are clearly within Congress's power under the Taxing and Spending Clause, allowing broccoli purchase mandates would not increase federal power. For these reasons, I find appellants' fears to be unfounded. I would reject their novel and unsupported suggestion that Commerce Clause jurisprudence ought to discriminate among regulated persons according to the amount of effort or resources they have expended in a given economic arena. Under seventy years of well-settled law, it is enough that the behavior regulated (whether characterized as activity or inactivity) substantially affects interstate commerce. Appellants can cite neither case nor constitutional text for their proposed activity/inactivity distinction. They can explain neither why it ought to be relevant to my Commerce Clause analysis nor why it ought to impel courts to ignore seventy-year-old law that takes a wholly different approach. And they cannot even provide a sufficiently concrete definition of "activity" and "inactivity" to allow

courts to reliably apply their distinction. Because I find the individual mandate to be within the bounds of Congress's commerce power defined by *Wickard, Lopez, Morrison,* and *Raich*, I would reject appellants' Commerce Clause challenge.

VII. Employer Mandate

Appellants also challenge the Affordable Care Act's employer mandate, arguing that it is not a proper exercise of Congress's power under the Commerce Clause. I disagree.

It is well settled that Congress may regulate terms of employment under the Commerce Clause. *See United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941) (upholding minimum wage and overtime provisions of the Fair Labor Standards Act); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937) (upholding National Labor Relations Act of 1935, which forbid unfair labor practices); cf. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (regulating employer retirement plans and preempting state regulations under the Commerce Clause); id. at § 1082 et seq. (setting minimum funding standards for employer retirement plans). This is true, of course, of employers "engaged [solely] in intrastate commerce," so long as Congress

could reasonably find that their intrastate activities (considered in the aggregate) substantially affect interstate commerce. *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 537, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985); *accord Darby,* 312 U.S. at 118–119; *Jones & Laughlin*, 301 U.S. at 36–38.

Appellants do not challenge Congress's finding that "employers who do not offer health insurance to their workers gain an unfair economic advantage relative to those employers who do provide coverage" and contribute to a negative feedback loop in which "uninsured workers turn to emergency rooms for health care which in turn increases costs for employers and families with health insurance," making it more difficult for employers to insure their employees. H.R.Rep. No. 111–443(II), at 985–86 (2010). Nor do appellants dispute the fact that this amounts to a substantial effect on interstate commerce. Instead, they attempt to distinguish the employer mandate from the wage and overtime provisions in *Darby* and the fair labor practices in *Jones & Laughlin* and argue that the mandate compels "private employers [to] enter into a contract with other private parties for a particular product." Appellants' Br. 25.

These arguments fail. Appellants cannot convincingly distinguish *Darby* or *Jones &*

Laughlin. They repeatedly suggest that regulated employers must be involved in interstate commerce; but, as explained above, it is well settled that employers who conduct only intrastate business may be regulated under the Commerce Clause so long as their economic activities, considered in the aggregate, substantially affect interstate commerce. Appellants emphasize the Court's observation in *Jones & Laughlin* that the National Labor Relations Act "does not compel agreements between employers and employees." *Id.* at 27 (quoting *Jones & Laughlin*, 301 U.S. at 31). Neither does the employer mandate: like the minimum wage and overtime provisions upheld in *Darby,* it merely requires that employment agreements contain certain terms (or that the employer pay a penalty).

Appellants attempt to distinguish *Darby* by arguing that "the wage and hour provisions in *Darby* ... did not prescribe what must be contained within the employment contract, other than setting a floor for wages and a ceiling for hours." Appellants' Br. 28. But the employer mandate, too, only "set[s] a floor": it requires employers to offer employees "the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan," but employers are free to select any plan (or create their own) and provide any level of

coverage above the "minimum essential" level, the mandate's "floor." 26 U.S.C. § 4980H(a)(1). Appellants' only other objection to the employer mandate is that it allegedly forces employers to contract with third parties. This is untrue: employers are free to self-insure, and many do. *See Employee Benefit Research Inst., Health Plan Differences: Fully–Insured vs. Self–Insured* (2009) (reporting that 55% of employees with health insurance were enrolled in self-insured plans in 2008); Christina H. Park, Div. of Health Care Statistics at the Nat'l Ctr. for Health Statistics, Ctrs. for Disease Control and Prevention, *Prevalence of Employer Self–Insured Health Benefits: National and State Variation,* 57 MED. CARE RES. & REV. 340, 352 (2000) (finding that 21% of all private-sector employers who offered health benefits offered a self-insured health plan in 1993; 49% of employees were enrolled in self-insured plans). Even if employers were compelled to enter the market to purchase health insurance, appellants' objection would fail for the very reasons I would reject their similar challenge to the individual mandate.

VIII. Religious Exemptions

Appellants also allege violations of the Free Exercise Clause, the Religious Freedom Restoration Act of 1993, the Establishment Clause, and equal protection. The Act makes

two religious exemptions: a religious conscience exemption and a health-care sharing ministry exemption. 26 U.S.C. § 5000A(d)(2). The former exempts members of a recognized religious sect in existence since December 31, 1950 who are "conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care." *Id.* § 1402(g)(1). The latter exempts members of a "health care sharing ministry"—a non-profit organization in existence since December 31, 1999 with members who "share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed." *Id.* § 5000A(d)(2)(B)(ii).

Appellants claim that these exemptions are "religious gerrymanders" demonstrating that the Act itself is hostile to certain religions, Appellants' Br. 45, and further that the exemptions themselves are unconstitutional under the Establishment and Equal Protection Clauses. For the following reasons, I reject these arguments.

A. Free Exercise Clause

Appellants allege that the Act compels them to violate their "sincerely held religious beliefs against facilitating, subsidizing, easing, funding, or supporting abortions" and prohibits the University from "providing health care choices for employees that do not conflict with the mission of the University and the core Christian values under which it and its employees order their day to day lives." Second Am. Compl. ¶ 142; Pls.' Opp'n 36. This argument is unavailing.

"[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Dept. of Human Res. of Or. v. Smith,* 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). Appellants claim that the Act is not neutral because its religious exemptions are "the type of 'religious gerrymanders' that the Supreme Court warned against in *Lukumi*." Appellants' Br. 45 (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993)). They are not. In *Lukumi*, the Supreme Court struck down city ordinances after finding that "[t]he record in this case compels the conclusion that the suppression of

the central element of the Santeria worship service was the object of the ordinances." 508 U.S. at 534. Here appellants never allege that "the object of [the Act] [wa]s to infringe upon or restrict practices because of their religious motivation." *Id.* The Act is a neutral law of general applicability and so does not violate the Free Exercise Clause.

B. Religious Freedom Restoration Act

I also reject the claim that application of the individual mandate to appellants would run afoul of the Religious Freedom Restoration Act of 1993 (RFRA). The RFRA directs that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the Government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S .C. § 2000bb–1.

If appellants had plead sufficient facts to demonstrate a substantial burden to their exercise of religion, I would be forced to consider the relevance of the RFRA to a subsequent act of Congress. *Cf. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017

(2006) (applying RFRA to enforcement of pre-RFRA provisions of the Controlled Substances Act). But appellants have not.

To survive the Government's 12(b)(6) motion to dismiss, appellants' complaint must "provide the grounds of [their] entitlement to relief," which "requires more than labels and conclusions." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (internal quotation marks omitted). "[C]onclusory" allegations are "not entitled to be assumed true." *Ashcroft v. Iqbal*, —— U.S. ——, ——, 129 S.Ct. 1937, 1951, 173 L.Ed.2d 868 (2009). Unless appellants' allegations "nudge[ ] their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly*, 550 U.S. at 570.

Here appellants merely alleged that the individual mandate will fo*r*ce them to violate their "sincerely held religious beliefs against facilitating, subsidizing, easing, funding, or supporting abortions." Second Am. Compl. ¶ 142. Nowhere does the complaint explain how the Act would do this. The Act contains provisions to ensure that federal funds are not used for abortions (except in cases of rape or incest, or when the life of the woman would be endangered), see Affordable Care Act § 1303; see also Exec. Order No. 13,535 of Mar. 24, 2010, 75 Fed.Reg. 15,599 (implementing

Section 1303's abortion restrictions), and that each state's health benefit exchange will include at least one plan that does not cover (non-excepted) abortions, see Affordable Care Act § 1334(a)(6). Without additional or more particularized allegations, I cannot say that appellants' complaint makes it plausible that the Act "substantially burdens [their] exercise of religion." 42 U.S.C. § 2000bb–1(b).

C. Establishment Clause and Equal Protection

Appellants also challenge the Act's religious exemptions themselves, claiming that they violate the Establishment Clause and equal protection because "they grant preferred status only to certain religious adherents." Appellants' Br. 45. I disagree. Like the "permissible legislative accommodation of religion" upheld by the Supreme Court in *Cutter v. Wilkinson*, the Act's exemptions alleviate "government-created burdens on private religious exercise," "do [ ] not override other significant interests," and neither "confer [ ] ... privileged status on any particular religious sect, [nor] single [ ] out [any] bona fide faith for disadvantageous treatment." 544 U.S. 709, 719–23, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005).

The religious conscience exemption simply incorporates the exemption created by section 1402(g)(1), which has survived every

Establishment Clause challenge to it over the last forty years. *See, e.g., Droz v. Comm'r*, 48 F.3d 1120, 1124 (9th Cir.1995); *Hatcher v. Comm'r*, 688 F.2d 82, 83–84 (10th Cir.1979); *Jaggard v. Comm'r*, 582 F.2d 1189, 1190 (8th Cir.1978); *Palmer v. Comm'r*, 52 T.C. 310, 314–15, 1969 WL 1608 (1969). For the reasons set out by our sister courts in these cases, I would reject appellants' Establishment Clause challenge to the Act's exemptions.

The exemptions easily survive appellants' equal protection challenge as well. Legislation comports with equal protection requirements so long as it employs "a rational means to serve a legitimate end." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). And "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the [legislature] has the authority to implement, the courts have been very reluctant ... to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Id.* at 441–42. Here Congress could have reasonably believed that members of groups that provide health care to their members are less likely to require public medical care, and thus less likely to produce the externalities the Act was designed to diminish. And Congress could have reasonably believed that if it did not limit these

exemptions to groups formed prior to a pre-enactment date, individuals who simply wished to avoid the individual mandate would form groups that insincerely claimed the required religious beliefs. Thus the distinctions Congress drew in the Act's religious exemptions accord all equal protection under the law.

IX. Conclusion

For the foregoing reasons, I would hold that the AIA does not deprive federal courts of jurisdiction to adjudicate the constitutionality of the Affordable Care Act. I would further hold that each of appellants' challenges to the Act lacks merit and that, specifically, both the individual and employer mandates pass muster as legitimate exercises of Congress's commerce power.

Regrettably, my fine colleagues in the majority perceive a jurisdictional bar in this case that simply is not there. Accordingly, I respectfully dissent.

[1] The Affordable Care Act itself refers to the provision as the "Requirement to maintain minimum essential coverage." Pub.L. No. 111–148, § 1501. Because plaintiffs refer to it as the individual mandate throughout their complaint and briefs, we often do so as well.

[2] The Declaratory Judgment Act authorizes a federal court to issue a declaratory judgment "except with respect to Federal taxes." 28 U.S.C. § 2201(a). In *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n. 7, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974), the Court held that "the federal tax exception to the Declaratory Judgment Act is at least as broad as the Anti–Injunction Act." Accordingly, our holding as to the Anti–Injunction Act applies equally to plaintiffs' request for declaratory relief.

[3] Although both parties generally contend that the AIA does not bar this suit, neither offers any reason why the challenge to the employer mandate escapes the AIA bar. There is good reason for that. Because Congress placed the employer mandate in the Internal Revenue Code, triggering the Secretary's authority to assess and collect payment, all of the reasons set forth in the text as to why the AIA bars a pre-enforcement challenge to the individual mandate also apply to the employer mandate. We additionally note that Congress waived none of the Secretary's collection tools in imposing the employer mandate and labeled the exaction a "tax" in certain subsections. See § 4980H(b)(2), (c)(7), (d)(1). Accordingly, the AIA clearly bars Liberty's challenge to the employer mandate.

[4] This is not to elide the general distinction between taxes and penalties. We agree with the Sixth Circuit's general observation that there are "contexts" in which "the law treats 'taxes' and 'penalties' as mutually exclusive." *Thomas More*, —— F.3d at —— (slip op. at 11) (citing one bankruptcy and two constitutional cases). The question here is whether the AIA is one of these "contexts." Neither the Secretary nor the Sixth Circuit cites a single case suggesting that it is. The dissent relies on some bankruptcy cases in an attempt to import the distinction between a revenue-raising "tax" and a regulatory "penalty" from that context. To accept the dissent's view would place us at odds with the Supreme Court's explicit holding, in the context of the AIA, that the distinction between "regulatory and revenue-raising" exactions has been "abandoned." *Bob Jones*, 416 U.S. at 741 & n. 12.

[5] *Helwig* does not, as the dissent contends, support its view that an exaction's label controls. The Court in *Helwig* acknowledged that Congress may expressly classify an exaction as a "penalty or in the nature of one, with reference to the further action of the officers of the government, or with reference to the distribution of the moneys thus paid, or with reference to its effect upon the individual," and that "it is the duty of the court to be governed by such statutory direction." 188 U.S.

at 613 (emphasis added). The Court then identified statute after statute illustrating the various ways in which Congress has historically directed a "duty," "additional duty," or "penalty" to be treated "with reference to" a specified governmental action. *Id* . at 614–19. Congress has provided no such direction "with reference to" the AIA, and Helwig makes clear that a mere label describing an exaction does not constitute such direction. *See id*. at 613 (explaining that "describing" an exaction "as 'a further sum' or 'an additional duty' will not work a statutory alteration of the nature of the imposition").

[6] We certainly respect the views of the courts, trumpeted by the dissent, that have held the AIA inapplicable to suits like the one at hand. We note, however, that even unanimity among the lower courts is not necessarily predictive of the views of the Supreme Court. *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 472, 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008) (Thomas, J., dissenting) (collecting cases where the Supreme Court has "reject[ed]" a "view uniformly held by the courts of appeals").

[7] The dissent argues that the statement in *Snyder*, 109 U.S. at 192–93, that the term "tax" in the AIA refers to those exactions "claimed by the proper public officers to be a tax," makes relevant the Secretary's present litigation

position that the AIA does not bar this lawsuit. The most fundamental problem with this argument is that the Secretary still does "claim" that the challenged exaction is a "tax," albeit one authorized by the Constitution's Taxing Clause. See Appellee's Br. at 58. We cannot hold that the AIA does not apply to this "tax" merely because the Secretary has changed his stance on the AIA and now contends that the exaction is a tax only for constitutional purposes. To give the Secretary's lawyers such a veto over the AIA bar would abdicate our "independent obligation" to assure ourselves of our own jurisdiction. *Arbaugh,* 546 U.S. at 514. Moreover, Congress called the exaction in the employer mandate a "tax." See 26 U.S.C. § 4980H(b)(2), (c)(7), (d)(1). The argument is for this reason, too, fatally flawed.

[8] Contrary to the dissent's contention, this conclusion does not "reject the legal force" of § 6665(a)(2). When Congress expressly directs that the location of a provision matters, as it has in § 6665(a)(2), then a court need not infer anything and Congress's direction controls. But to adopt the position of the Secretary and the dissent, a court would have to infer that an exaction is not to be treated as a tax from the exaction's place in the Code (here Chapter 48 rather than Chapter 68). It is this inference that the Code forbids.

[9] Congress originally inserted the text of § 6665 as § 6659 of the 1954 Code, see Internal Revenue Code of 1954, Pub.L. No. 83–289, § 6659(a)(2), 68A Stat. 1, 827 (1954), but relocated it to § 6665 in 1989 without making any changes to it, see Omnibus Reconciliation Act of 1989, Pub.L. No. 101–239, tit. VII, § 7721(a), (c)(2), 103 Stat. 2106, 2399 (1989) (codified at I.R.C. § 6665(a)).

[10] This does not mean that § 6665(a)(2), which includes Chapter 68 penalties within the term "tax" throughout the Code, serves no purpose. For example, § 6665(a)(2) may well be necessary to authorize a taxpayer to pursue a civil suit for the illegal "collection of Federal tax" against a collector who intentionally misinterprets the Code in collecting a Chapter 68 "penalty." See I.R.C. § 7433(a); *cf. Sylvester v. United States,* 978 F.Supp. 1186, 1189 (E.D.Wis.1997); *Le Premier Processors, Inc. v. United States,* 775 F.Supp. 897, 902 n. 6 (E.D.La.1990).

[11] The Secretary yet again employs faulty reasoning to reach this remarkable conclusion. He contends that three other exactions labeled as penalties and codified outside Chapter 68—I.R.C. §§ 5114(c)(3), 5684(b), 5761(e)—constitute "taxes" for purposes of the AIA because they shall be "assessed, collected, and paid in the same manner as taxes, as provided

in section 6665(a)." But the only meaningful difference between these provisions and the individual mandate is the addition of the phrase, "as provided in section 6665(a)," which refers only to the previous clause and does not incorporate the separate, unreferenced parts of § 6665(a).

[12] The Secretary offers only congressional floor statements as evidence of this supposed congressional intent. In those statements, two Senators contemplated a potential onslaught of challenges to the individual mandate but, as the Secretary puts it, "never suggested that the only way for an individual to obtain review would be ... [through] a refund action." The Supreme Court has long held that such statements are of little assistance in ascertaining congressional intent. *See, e.g., Grove City College v. Bell*, 465 U.S. 555, 567, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984). Moreover, the floor statements relied on here are irrelevant, because at most they signal an acknowledgment of potential lawsuits, not an endorsement of challenges seeking pre-enforcement injunctive relief.

The dissent goes even a step further than the Secretary, inferring an AIA exception because drafts of what became the Affordable Care Act had previously called the challenged exaction a "tax." The Supreme Court has warned against

such an approach, cautioning courts not to read much into Congress's unexplained decision to change wording in a final bill. S*ee Trailmobile Co. v. Whirls*, 331 U.S. 40, 61, 67 S.Ct. 982, 91 L.Ed. 1328 (1947) (noting that the "interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers"). Moreover, the dissent errs in suggesting that our holding "ignores" this wording change; rather, we simply hold that change irrelevant to the AIA bar. Congress's decision to call the challenged exaction a "penalty" may affect its treatment under sections of the Code that expressly distinguish "taxes" from "penalties," e.g. those pertaining to the timing of interest accrual. *See Latterman v. United States*, 872 F.2d 564, 569–70 (3d Cir.1989). Or Congress's wording change may have simply carried political benefits. *See Florida v. HHS*, 716 F.Supp.2d 1120, 1142–43 (N.D.Fla.2010). No evidence, however, indicates that the change was intended to exempt the individual mandate from the AIA.

[13] Other issues raised by the individual mandate that are common to many taxes include certain deductions from income taxes (§ 5000A(c)(4)(C)(i)), child dependency determinations (§ 5000A(b)(3)(A)), joint liability for spouses (§ 5000A(b)(3)(B)), the income level triggering a taxpayer's duty to file a return (§

5000A(c)(2)(B)), and family size for deduction purposes (§ 5000A(c)(4)(A)).

[14] Moreover, *Bob Jones* forecloses an argument that the AIA allows a challenge to the requirement that an individual maintain insurance, i.e. § 5000A(a), separate from a challenge to the penalty for noncompliance with this requirement, i.e. § 5000A(b). Some district courts have accepted this argument. *See, e.g., Goudy–Bachman v. U.S. Dep't of Health & Human Servs.*, 764 F.Supp.2d 684, 695 (M.D.Pa.2011); *Thomas More Law Center v. Obama,* 720 F.Supp.2d 882, 891 (E.D.Mich.2010). But invalidation of the individual mandate would necessarily preclude the Secretary from exercising his statutory authority to assess the accompanying penalty. Moreover, in *Bob Jones*, the Court held that the AIA barred a challenge to the IRS's interpretation of I.R.C. § 501(c)(3), even though that provision itself did not impose any tax; only when coupled with § 501(a) (making a 501(c)(3) organization exempt from income taxes) did tax consequences result. 416 U.S. at 738.

[15] The Court has carved out one other exception to the AIA for "aggrieved parties for whom [Congress] has not provided an alternative remedy." *See Regan*, 465 U.S. at 378. That exception clearly does not assist plaintiffs

because, as the Secretary concedes, they may challenge the individual mandate in a refund action. *See Bob Jones*, 416 U.S. at 746.

[1] The majority opinion vacates the district court's decision and remands plaintiffs' lawsuit for dismissal. Judge Davis dissents from the majority's dismissal of plaintiffs' suit on AIA grounds; nonetheless, on the merits, he, too, would dismiss plaintiffs' lawsuit.

[2] Justices and judges have previously spoken on the merits after stating that the court lacked jurisdiction; my approach today is therefore nothing new. *See Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, ——U.S. ——, ——, 130 S.Ct. 1758, 1777, 176 L.Ed.2d 605 (2010) (Ginsburg, J., dissenting) ("The Court errs in addressing an issue not ripe for judicial review.... I would dismiss the petition as improvidently granted. Were I to reach the merits, I would adhere to the strict limitations the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., places on judicial review of arbitral awards. § 10. Accordingly, I would affirm the judgment of the Second Circuit, which rejected petitioners' plea for vacation of the arbitrators' decision."); *Pennzoil Co. v. Texaco, Inc., 481 U.S.* 1, 23, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) (Marshall, J., concurring in the judgment) ("Were I to reach the merits I would reverse for the reasons stated in the concurring opinions of

Justices Brennan and Stevens, in which I join. But I can find no basis for the District Court's unwarranted assumption of jurisdiction over the subject matter of this lawsuit, and upon that ground alone I would reverse the decision below."); *Veterans for Common Sense v. Shinseki,* 644 F.3d 845, 900 (9th Cir.2011) (Kozinski, J., dissenting) (determining that court lacked jurisdiction but also analyzing claims on their merits); *Patel v. Holder*, 563 F.3d 565, 569 (7th Cir.2009) (majority opinion doing same); *cf. Helvering v. Davis*, 301 U.S. 619, 639–40, 57 S.Ct. 904, 81 L.Ed. 1307 (1937) (noting the belief of Justices Cardozo, Brandeis, Stone, and Roberts that the case should be dismissed but nevertheless reaching the merits in an opinion authored by Justice Cardozo).

[3] Congress also does not have to invoke the source of authority for its enactments. "The question of 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, 68 S.Ct. 421, 92 L.Ed. 596 (1948).

[4] The statute prescribes monthly penalties in an amount calculated by identifying a specified "percentage of the excess of the taxpayer's household income for the taxable year over the amount of gross income specified in section 6012(a)(1)" unless that calculation produces an

amount that is less than certain statutorily defined thresholds. 26 U.S.C. § 5000A(c)(2). Ultimately, the penalty owed by a taxpayer is equal to the lesser of either the sum of the monthly penalties owed by the taxpayer or the cost of the "national average premium for qualified health plans which have a bronze level of coverage, provide coverage for the applicable family size involved, and are offered through Exchanges for plan years beginning in the calendar year with or within which the taxable year ends." Id. § 5000A(c)(1).

[5] The fact that Congress considered it necessary to exempt the individual mandate exaction from some traditional tax collection procedures like criminal liability and liens evidences that the exaction is a tax. 26 U.S.C. § 5000A(g)(2). Otherwise, there would be no need to except the exaction from some of the standard tax collection procedures, which otherwise apply.

[6] No exceptions to the standard collection procedures exist in the case of the employer mandate. 26 U.S.C. § 4980H(d).

[7] Since the Supreme Court long ago established that Congress did not have to invoke the word "tax" to act within its taxing power, Congress's use of other verbiage in portions of the individual and employer mandates, and most notably in the "penalty" provision of the

individual mandate, sheds little light on Congressional intent. *See Nelson*, 312 U.S. at 363.

[8] Additionally, any contention that the individual mandate violates either the First, Fifth, or Tenth Amendment is, in my opinion, meritless. *See post* at 134–40; *Florida ex rel. Atty. Gen. v. U.S. Dep't of Health & Human Servs.*, —— F.3d ——, 2011 WL 3519178, at *113–17 (11th Cir. Aug.12, 2011) (Marcus, J., dissenting).

[1] Although appellants also requested declaratory relief, the Declaratory Judgment Act "enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671, 70 S.Ct. 876, 94 L.Ed. 1194 (1950); *In re Leckie Smokeless Coal Co.,* 99 F.3d 573, 582 (4th Cir.1996). In any case, the Declaratory Judgment Act expressly excludes claims "with respect to Federal taxes." 28 U.S.C. § 2201(a). The Supreme Court has held this exclusion to be "at least as broad as the Anti–Injunction Act." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n. 7, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974).

[2] This question of statutory interpretation is wholly distinct from the constitutional question concerning Congress's power under the Taxing

and Spending Clause, U.S. Const. art. I, § 8, cl. 1, to enact these mandates. Because I would hold the Act constitutional under the Commerce Clause, I need not and do not reach the latter issue.

[3] The majority attempts to sidestep this conflict, nicely arguing that the Act "did not authorize the collector to make an assessment under his general revenue authority" because "it converted him into a federal prosecutor." Ante p. 27. But the constitutional failings of the Act does not change the fact that the Commissioner would be collecting the challenged tax "under his general revenue authority." The Act did not provide any separate mechanism for the assessment and collection of this tax, or even expressly assign those duties to the Commissioner; it simply stated that "a tax shall be assessed ... and collected ... in double the amount now provided by law" from those illegally manufacturing or selling alcohol. Thus, the Commissioner could only perform such assessments and collections under the "general revenue authority" granted by the Internal Revenue Code. 41 Stat. at 318. That such assessments violated due process does not change the fact that the revenue officers doing the assessment would be acting "under color of their offices." *Ante* p. 18 (internal quotation marks omitted).

[4] This was the view of the dissenting opinion in Lipke, which relied on *George*. *See Lipke*, 259 U.S. at 563 (Brandeis, J., dissenting) ("The relief should therefore be denied, whatever the construction of section 35, tit. 2, of the Volstead Act, and even if it be deemed unconstitutional. *Compare Bailey v. George*, 259 U.S. 16, 42 Sup.Ct. 419, 66 L.Ed. 816, decided May 15, 1922.").

[5] Indeed, the rigidity of the majority's approach prompts a reminder that we confront here the court's statutory jurisdiction, not its Article III jurisdiction. Congress grants, and Congress restricts, as it chooses, the statutory jurisdiction of the lower federal courts.

[6] In this regard, Justice O'Connor nicely captured the essential purpose of the AIA when she declared: "The AIA 'depriv[es] courts of jurisdiction to resolve abstract tax controversies....' " *South Carolina v. Regan*, 465 U.S. 367, 386, 104 S.Ct. 1107, 79 L.Ed.2d 372 (1984) (O'Connor, J., concurring in the judgment); and see id. at 392 ("the Act generally precludes judicial resolution of all abstract tax controversies ..."). The essential issues presented in this case are about as far from "abstract tax controversies" as one can get.

[7] The majority focuses on *Helwig*'s use of the phrase "with reference to," suggesting that Helwig would have us consider Congressional direction here only if it is expressly labeled as being made " 'with reference to" the AIA." *Ante* 23 n. 5. But that very sentence in Helwig goes on to describe such direction as "any declaration by Congress affecting the manner in which the provision shall be treated. " 188 U.S. at 613 (emphasis added). The following citations to "statute after statute" which the majority references are part of the Court's analysis, the Court tells us, because it must determine whether the "words [employed by Congress] are not regarded by Congress as imposing a penalty and [thus] should not be so treated by the court," for "[i]f it clearly appear that it is the will of Congress that the provision shall not be regarded as in the nature of a penalty, the court must be governed by that will." *Id.* I do not mean to suggest that *Helwig* teaches that "an exaction's label controls," *ante* p. 23 n. 5, only that any Congressional direction that indicates "the will of Congress" on the application of the AIA should be considered.

[8] The majority believes the "fundamental problem with this argument is that the Secretary still does 'claim' that the challenged exaction is a 'tax,' albeit one authorized by the Constitution's Taxing Clause." *Ante* p. 26–27 n. 7. As *Snyder* is discussing the use of the word

"tax" in the precursor to the modern AIA, I read *Snyder* to refer to the Commissioner's designation with respect to the statute.

[9] I do not suggest that "we [should] infer from § 6665(a)(2) a categorical exclusion from the term 'tax' of all non-Chapter 68 penalties." Ante p. 31 (emphasis added). Rather, the fact that Congress has directed us to treat some "penalties" as "taxes" simply makes it less likely that Congress desired this result where it enacted no such direction (and in fact expressly rejected the term "tax" for the term "penalty").

[10] Justice Powell summarized the history of the AIA as follows, in part:

[T]he Court's unanimous opinion in *Williams Packing* indicates that the case was meant to be the capstone to judicial construction of the Act. It spells an end to a cyclical pattern of allegiance to the plain meaning of the Act, followed by periods of uncertainty caused by a judicial departure from that meaning, and followed in turn by the Court's rediscovery of the Act's purpose.

Bob Jones Univ., 416 U.S. at 742. Rediscoveries of congressional intent abound in the law and should not surprise us.

[11] *Cf.* 42 U.S.C. § 18091(a)(2)(A) ("In the absence of the [individual mandate], some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure...."). Because individuals who self-insure are unable to shift risk in the way that market insurance does, self-insurance is far more common among collectives or businesses, where it may be efficient. See generally M. Moshe Porat, Uri Spiegel, Uzi Yaari, Uri Ben Zion, *Market Insurance Versus Self Insurance: The Tax–Differential Treatment and Its Social Cost*, 58 J. RISK & INS. 657 (1991); Patrick L. Brockett, Samuel H. Cox, Jr., and Robert C. Witt, *Insurance Versus Self–Insurance: A Risk Management Perspective*, 53 J. RISK & INS. 242 (1986); Isaac Ehrlich, Gary S. Becker, *Market Insurance, Self–Insurance, and Self–Protection*, 80 J. POL. ECON. 623 (1972).

[12] It is no coincidence that "voluntary" or "voluntarily" appears twenty-eight times in appellants' briefs.

[13] *See generally* R.H. Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357, 357–360 (1974); Paul A. Samuelson, *The Pure Theory of Public Expenditure,* 36 REV. ECON. & STATISTICS 387 (1954). Public goods are goods that are "non-rival" and "non-excludable." "Non-rival" means that enjoyment of the good

by one citizen does not reduce the enjoyment by another; "non-excludable" means that all citizens will enjoy the good once it is produced-none can be excluded. *See, e.g.*, John P. Conley & Christopher S. Yoo, *Nonrivalry and Price Discrimination in Copyright Economics*, 157 U. PA. L.REV. 1801, 1805–11 (2009).

[14] In the language of economics, the failure to obtain insurance has "negative externalities"—negative effects on those not responsible for the decision.

753 F.Supp.2d 611

United States District Court,
W.D. Virginia,
Lynchburg Division.

LIBERTY UNIVERSITY, INC., a Virginia Nonprofit Corporation, Michele G. Waddell, David Stein, M.D., Joanne V. Merrill, Delegate Kathy Byron, and Jeff Helgeson, Plaintiffs,
v.
Timothy GEITHNER, Secretary of the Treasury of the United States, in his official capacity, Kathleen Sebelius, Secretary of the United States Department of Health and Human Services, in her official capacity, Hilda L. Solis, Secretary of the United States Department of Labor, in her official capacity, and Eric Holder, Attorney General of the United States, in his official capacity, Defendants.

No. 6:10–cv–00015–nkm.Nov. 30, 2010.

Attorneys and Law Firms

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Opinion

MEMORANDUM OPINION

NORMAN K. MOON, District Judge.

On the day the President signed into law the Patient Protection and Affordable Care Act of 2009, Plaintiffs filed this action, contesting the law's validity on constitutional and statutory grounds. Defendants (several government officials named in their official capacities) moved to dismiss the suit for lack of jurisdiction and for failure to state a claim on which relief can be granted. The parties' arguments have been fully briefed and heard, and for the reasons stated in this memorandum, I will grant Defendants' Motion to Dismiss (docket no. 25).

I. BACKGROUND

Plaintiffs Liberty University, Inc., Michele G. Waddell, David Stein, M.D., Joanne V. Merrill, Delegate Kathy Byron, and Council Member Jeff Helgeson (collectively "Plaintiffs") challenge the legality of certain provisions of the Patient Protection and Affordable Care Act

of 2009, Pub. L. No. 111–148, 124 Stat. 119 (Mar. 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111–152, 124 Stat. 1029 (Mar. 30, 2010) (collectively, the "Act"). Plaintiffs seek a declaration that the Act is unconstitutional and invalid and an order enjoining its enforcement. Defendants in this action are the following government officials, named in their official capacities: Timothy Geithner, Secretary of the Treasury; Kathleen Sebelius, Secretary of the United States Department of Health and Human Services; Hilda L. Solis, Secretary of the United States Department of Labor; and Eric Holder, Attorney General of the United States. This is not the first judicial ruling on a challenge to the Act.[1]

[1] *See Commonwealth of Virginia Ex Rel. Cuccinelli v. Sebelius*, 702 F.Supp.2d 598 (E.D.Va.2010). *Baldwin v. Sebelius,* No. 10–cv–1033, 2010 U.S. Dist. LEXIS 89192, 2010 WL 3418436 (S.D. Cal. Aug. 27, 2010); *Thomas More Law Ctr. v. Obama*, 720 F.Supp.2d 882 (E.D.Mich.2010); *Florida ex rel. McCollum v. U.S. Dep't Health & Human Servs.*, 716 F.Supp.2d 1120 (N.D.Fla.2010).

The Act institutes numerous reforms to the national health care market. It removes many barriers to insurance coverage,[2] supplies federal funds and expands Medicaid to assist the poor with obtaining coverage,[3] and encourages small businesses to purchase health insurance for their employees through tax incentives.[4] It creates health benefit exchanges, which are established and operated by states to serve as marketplaces where informed individuals and small businesses can enroll in health plans after comparing their features. *See* Act § 1311. The Act also requires certain large employers to offer health insurance to their employees and requires all individuals who do not meet a statutory exemption to purchase and maintain health insurance. Plaintiffs challenge these mandatory coverage provisions.

> [2] *See* Act §§ 1101, 1201 (prohibiting insurers from denying coverage or increasing the price of coverage for individuals with preexisting medical conditions, from rescinding coverage or declining to renew coverage based on health status, and from capping the amount of coverage available to a policyholder).
>
> [3] *See* Act §§ 1401–02 (providing premium tax credits and reduced

cost-sharing options for individuals and families with income between 100 and 400 percent of the poverty line); *id.* § 2001 (expanding Medicaid eligibility to individuals with income below 133 percent of the federal poverty level).

[4] *See* Act § 1421.

The "Shared Responsibility for Employers" provision of the Act, § 1513 (adding 26 U.S.C. § 4980H) (hereinafter "employer coverage provision" or "employer coverage requirement"), regulates the level and quality of health coverage that large employers provide to their employees. It provides that if an "applicable large employer ... fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan ... for any month" and at least one full-time employee receives a "premium tax credit or cost-sharing reduction" through a health benefit exchange, then a civil fine is imposed on the employer. Act § 1513(a), (d). An "applicable large employer" is one who employs fifty or more full-time employees on average over a calendar year. Act § 1513(c)(2). The employer coverage provision goes into effect in 2014. Act § 1513(d).

According to the "Requirement to Maintain Minimum Essential Coverage," § 1501 (adding 26 U.S.C. § 5000A) (hereinafter "individual coverage provision" or "individual coverage requirement") every "applicable individual" must obtain "minimum essential coverage" for each month or pay a penalty, which is included with the individual's tax return. Act§ 1501(a)-(b). An "applicable individual" is any individual except one who qualifies for a religious exemption, who is not a United States citizen, national, or an alien lawfully present in the United States, or who is incarcerated. Act § 1501(d).[5] The individual coverage provision takes effect in 2014. Act § 1501(a).

[5] An "applicable individual" may still be exempted from the requirement to purchase health insurance if she cannot afford such coverage because the required contribution exceeds eight percent of her household income. Act § 1501(e). Taxpayers with income under 100 percent of the poverty line, members of Indian tribes, and individuals determined to suffer "a hardship" with respect to the capability to obtain coverage are also exempted. *Id.*

There are two religious exemptions to the requirement that individuals maintain minimum essential coverage. First, the "Religious conscience exemption" applies to an individual who "is a member of a recognized religious sect or division thereof described in section 1402(g)(1) and an adherent of established tenets or teachings of such sect or division as described in such section." Act § 1501(d)(2)(A). Section 1402(g)(1) exempts from the Internal Revenue Code any "member of a recognized religious sect or division thereof [who] is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance" which insures death, disability, retirement, or health care costs. 26 U.S.C. § 1402(g)(1). Second, the "Health care sharing ministry" exemption applies to a member of a 501(c)(3) organization, which has been in existence at all times since December 31, 1999, the members of which share a common set of ethical or religious beliefs, share medical expenses in accordance with those beliefs, and retain membership even after developing a medical condition. Act § 1501(d)(2)(B).

Plaintiffs state that they are a Christian organization and Christian individuals holding religious beliefs that most or all forms of

abortion are immoral (Second Am. Compl. ¶ 72), and they claim that the Act does not protect against the mandatory insurance payments being used to fund abortion coverage. The Act explicitly states that no plan is required to cover any form of abortion services. Act § 1303(b)(1)(A)(1). In every state health benefit exchange, there must be offered at least one plan that does not provide coverage of non-excepted abortion services, § 1334(a)(6), which, under current law, are any type of abortion services except in cases of rape or incest or where the life of the woman is endangered, Exec. Order No. 13,535 of Mar. 24, 2010, 75 Fed. Reg. 15,599 (Mar. 29, 2010). Any state may pass a law prohibiting health plans offered through that state's health benefit exchange from covering any form of abortion services. Act § 1303(a)(1).

Plaintiffs allege that the employer and individual coverage provisions are beyond Congress' Article I powers (Count One), violate the Tenth Amendment (Count Two), violate the Establishment Clause of the First Amendment (Count Three), violate the Free Exercise Clause of the First Amendment (Count Four), violate the Religious Freedom Restoration Act (Count Five), violate the equal protection component of the Due Process Clause of the Fifth Amendment (Count Six), violate the right to free speech and free association under the First

Amendment (Count Seven), violate the Article I, Section 9 prohibition against unapportioned capitation or direct taxes (Count Eight), and violate the Guarantee Clause (Count Nine). Defendants move to dismiss Plaintiffs' claims in their entirety pursuant to Federal Rule of Civil Procedure 12(b)(1) and Rule 12(b)(6). Defendants argue that the Court lacks subject matter jurisdiction to hear their claims because Plaintiffs do not have standing, the issues are unripe, and the Anti–Injunction Act withdraws jurisdiction over their suit. If jurisdiction is found, Defendants argue that all of the counts should be dismissed for failure to state a claim upon which relief can be granted.

II. APPLICABLE LAW

A. Rule 12(b)(1), Subject Matter Jurisdiction

On a Rule 12(b)(1) motion, the plaintiff bears the burden of proving that subject matter jurisdiction exists. *Piney Run Pres. Ass'n v. County Comm'rs*, 523 F.3d 453, 459 (4th Cir.2008). In considering the motion, a court must accept as true all material factual allegations in the complaint and must construe the complaint in favor of the plaintiff. *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). A court should "regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings

without converting the proceeding to one for summary judgment." *Evans v. B.F. Perkins Co.,* 166 F.3d 642, 647 (4th Cir.1999). The moving party's motion to dismiss should be granted when "the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.*

B. Rule 12(b)(6), Failure to State a Claim

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a complaint to determine whether the plaintiff has properly stated a claim; "it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir.1992). Although a complaint "does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations and quotations omitted). A court need not "accept the legal conclusions drawn from the facts" or "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship,* 213 F.3d 175, 180 (4th Cir.2000). "Factual allegations must be enough to raise a right to

relief above the speculative level," *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955, with all the allegations in the complaint taken as true and all reasonable inferences drawn in the plaintiff's favor, *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 346 (4th Cir.2005). In sum, Rule 12(b)(6) does "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955. Consequently, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. –––, ––––, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009).

III. JURISDICTION

Defendants raise three grounds for dismissing the complaint for lack of jurisdiction pursuant to Rule 12(b)(1): Plaintiffs lack standing, the claims are unripe, and the suit is barred by the Anti–Injunction Act.

A. Standing

Article III of the Constitution limits federal-court jurisdiction to "Cases" and "Controversies." *Massachusetts v. EPA*, 549 U.S. 497, 516, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007). Standing to sue is an aspect of the case or controversy requirement. The doctrine of

standing serves to identify those disputes that are "appropriately resolved through the judicial process." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To establish standing, Plaintiffs must show that: (1) they "suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) "there [is] a causal connection between the injury and the conduct complained of"; and (3) "it [is] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560–61, 112 S.Ct. 2130 (citations and quotations omitted). An interest shared generally with the public at large in the proper application of the Constitution and laws will not do. *See id.* at 573–76, 112 S.Ct. 2130.

"The party invoking federal jurisdiction bears the burden of establishing" the elements of standing. *Id.* at 561, 112 S.Ct. 2130. The plaintiff must support each element of the standing requirement with "the manner and degree of evidence" required at the motion to dismiss stage. *Id*. In the past, this meant that the plaintiff's allegations were accepted as true. *See, e.g., Pennell v. San Jose*, 485 U.S. 1, 7, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988). The decisions of the Supreme Court of the United States in *Iqbal* and *Twombly*, however, clarify that, to

survive a motion to dismiss, the plaintiff's allegations must present sufficient facts to be plausible. *Iqbal*, 129 S.Ct. at 1950; *Twombly,* 550 U.S. at 570, 127 S.Ct. 1955. Standing is determined as of the date the complaint was filed. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) ("[W]e have an obligation to assure ourselves that [the plaintiff] had Article III standing at the outset of the litigation."); *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir.2003) (collecting cases).

At the outset, I find that Plaintiffs Delegate Kathy Byron, Council Member Jeff Helgeson,[6] and David Stein, M.D.[7] lack standing, and I will dismiss them from the suit.

> [6] Kathy Byron is a member of the House of Delegates of the Commonwealth of Virginia, and she voted for the Virginia Health Care Freedom Act, Va. Code § 38.2–3430.1:1 (2010), which declared that no state resident is required to purchase individual health insurance coverage. (Second Am. Compl. ¶ 39.) Jeff Helgeson is a Lynchburg, Virginia city council member and objects to the Act because it "will have a negative

impact on the city of Lynchburg, generally, and his district, in particular." (*Id.*¶¶ 13, 41.) Plaintiffs' arguments that Byron and Helgeson have standing based on their status as legislators or on their policy objections to the Act plainly fail. *See Raines v. Byrd*, 521 U.S. 811, 822–26, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (limiting scope of standing for legislators claiming an institutional injury); *United States v. Richardson*, 418 U.S. 166, 172, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974) (finding that a plaintiff must show a personalized injury, "not merely that he suffers in some indefinite way in common with people generally"); *McConnell v. FEC*, 540 U.S. 93, 227, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (rejecting voters' injuries as too "broad and diffuse" to entitle them to standing). Plaintiffs argue in the alternative that Byron and Helgeson have standing because they will have to comply with the individual coverage requirement. (Pls.' Opp'n 9.) But nowhere in the pleadings do Plaintiffs allege that Byron and Helgeson do not already

have health insurance and will suffer an injury to obtain it.

[7] Dr. David Stein is a licensed and practicing medical doctor who is opposed to the Act because he believes it will not provide quality care to more patients at lower cost. (Second Am. Compl. ¶¶ 10, 36.) To support his standing in this litigation Plaintiffs allege that regulations that likely will be passed pursuant to the Act may change the rate at which he can seek reimbursements for Medicaid and Medicare patients (*id.* ¶ 37) and will interfere with his "liberty interest in practicing his profession and providing essential health care services for his patients" (*id.* ¶ 35) These pleadings are too vague and conclusory to support standing—they do not specify which provisions of the Act harm Dr. Stein or how they do so. Dr. Stein appears to raise mere policy disagreements with the Act. This litigation is not the proper forum to air those grievances.

Plaintiff Liberty University, Inc. ("Liberty") is a nonprofit corporation organized under Virginia

law that operates a private Christian university and employs approximately 3,900 full-time employees. (Second Am. Compl. ¶¶ 8, 28; Pls.' Opp'n 2.) Liberty "makes available health savings accounts, private insurance policies and other healthcare reimbursement options to qualified employees under a salary reduction program." (Second Am. Compl. ¶ 29.) As of the date of the filing of the second amended complaint, 1,879 employees of Liberty chose to participate in its health insurance coverage; other employees opted not to participate. (*Id*. ¶¶ 29–30.) Liberty's health plan does not cover abortion, and "[a]bortion is contrary to the Christian mission of Liberty." (*Id.* ¶¶ 32–33.) Liberty represents that its current level of coverage "will almost certainly be determined insufficient" under the Act. (Pls.' Opp'n 3.)

Liberty challenges the constitutionality of the employer coverage provision, which, when it goes into effect in 2014, will require Liberty as an employer of more than fifty full-time employees to offer its employees the opportunity to enroll in minimum essential coverage, or face civil penalties.[8] Liberty alleges that the provision will increase Liberty's cost of providing health insurance coverage when it goes into effect (Second Am. Compl. ¶ 106), and Liberty also represents that, as it takes steps to comply with the provision, it will incur

"significant and costly changes" in its daily business operations well before 2014 (Pls.' Opp'n 9). As a large nonprofit organization, it claims that in the near future, it will have to rearrange its financial affairs to provide the requisite coverage, or budget for the penalties that it would incur for being out of compliance. (Pls.' Opp'n 6.) According to Liberty, such costs "cannot be postponed until the day that the law's provisions become effective." (*Id.)*

[8] Liberty also challenges certain elements of the individual coverage provision. Where generalized declaratory and injunctive relief is sought, if one individual plaintiff demonstrates standing, the court need not inquire whether other plaintiffs have standing to assert the same claim. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 52 n. 2, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006). Because I find below that Waddell and Merrill have alleged sufficient facts to support their standing to challenge the individual coverage provision, I do not need to decide whether Liberty also has demonstrated standing.

Plaintiffs Michele G. Waddell and Joanne V. Merrill make similar arguments for standing. Waddell and Merrill are individuals who do not have health coverage and do not wish to purchase it. (Second Am. Compl. ¶¶ 34, 38.) They state that they are Christians and have "sincerely held religious beliefs" that abortion is "murder and morally repugnant" and that they should not be obliged to support abortions in any way or "formally associate with" those who support abortions in any way. (Id. ¶¶ 71–76.) Waddell and Merrill challenge the validity of the individual coverage requirement and various other provisions of the Act. They argue that, before the individual coverage requirement takes effect in 2014, they will have to make "significant and costly changes" in their personal financial planning, necessitating "significant lifestyle ... changes" and extensive reorganization of their personal and financial affairs. (Pls.' Opp'n 6, 9.)[9]

> [9] Although in most places in their brief Plaintiffs phrase the injury to Liberty, Waddell, and Merrill as one that will occur in the near future, at points Plaintiffs state that injury has already occurred. (See Pls.' Opp'n 10, 13.)

Defendants contend that Plaintiffs Liberty, Waddell, and Merrill have not shown an injury

in fact based on the obligation to purchase insurance for themselves or their employees, or based on the possibility of suffering a penalty for noncompliance, because those injuries will not take place until 2014 at the earliest, and thus are not imminent. The Supreme Court has acknowledged that imminence is "a somewhat elastic concept," but has defined it as at least a "certainly impending" injury. *Lujan*, 504 U.S. at 564 n. 2, 112 S.Ct. 2130. Defendants also argue that it is speculative whether or not Plaintiffs will even be subject to the coverage provisions. Defendants maintain that Liberty only alleged that it "could be " in violation of the employer coverage requirement when it goes into effect, leaving open the possibility that its current level of coverage offered may satisfy the requirements of the Act. (Defs.' Mem. Supp. Mot. Dismiss 14.) In addition, Defendants contend that any number of circumstances may intervene to relieve Waddell and Merrill of the obligation to purchase individual health insurance in 2014: they may find employment that offers health insurance, qualify for Medicaid or Medicare, qualify for an exemption under the Act such as that for low-income individuals, or illness or injury may force them to obtain health insurance independent of the Act's mandate. (*See id.* at 15–16.)

At the motion to dismiss stage, Plaintiffs shoulder a lightened burden to support their factual allegations of injury in fact and causation. Plaintiffs need not set forth by evidence specific facts, as they would have to at the summary judgment stage, *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130, but need only provide general factual allegations that are plausible. With this standard in mind, I hold that Plaintiffs' allegations of injury in fact and causation are within the realm of factual plausibility and sufficient to establish standing at this stage of the litigation.

The present or near-future costs of complying with a statute that has not yet gone into effect can be an injury in fact sufficient to confer standing. In *Virginia v. American Booksellers Ass'n, Inc.*, a group of booksellers brought a facial challenge to a state law prohibiting the knowing display for commercial purposes of certain material deemed harmful to juveniles on the basis that the law violated the First Amendment rights of adults. 484 U.S. 383, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988). The state argued in defense that the plaintiff booksellers lacked standing because the law had not become effective at the time of their suit, and that any present economic harm they suffered was insufficient to show injury in fact. *Id.* at 392, 108 S.Ct. 636. The Court rejected those arguments and held that the booksellers had

standing because upon the booksellers' interpretation of the law, they would "have to take significant and costly compliance measures or risk criminal prosecution." Id. As long as plaintiffs had "alleged an actual and well-founded fear that the law [would] be enforced against them," their case could proceed. *Id*. at 393, 108 S.Ct. 636.

The facts of *American Booksellers* are similar to those here. In the present suit, Plaintiffs allege that they will have to undertake a significant and costly reorganization of their financial affairs in order to comply with the Act when it takes effect or risk heavy civil penalties. Parts of the Act have already taken effect, and the employer and individual coverage requirements are to take effect in 2014. Plaintiffs' allegations plausibly state that, were the Act in force today, Plaintiffs would be obligated by the health insurance coverage requirements to purchase or provide coverage. Although Defendants are correct that there is some uncertainty whether, in 2014, Plaintiffs will continue to fall under the auspices of the Act, Plaintiffs' allegations, which I take as true, show that they have good reason to believe they will. Because the future expenditure required by the Act entails significant financial planning in advance of the actual purchase of insurance in 2014, Plaintiffs allege that they must incur the preparation costs in the near term, without

knowledge of what their status under the Act will be in 2014. *See Thomas More Law Ctr.,* 720 F.Supp.2d at 889.

I do not rest on *American Booksellers* alone. Other courts have recognized that the present, detrimental effect on a plaintiff of a future contingent liability can constitute an injury in fact. *See Lac Du Flambeau Band of Lake Superior v. Norton*, 422 F.3d 490, 498 (7th Cir.2005) ("[T]he present impact of a future though uncertain harm may establish injury in fact for standing purposes."); *Jones v. Gale,* 470 F.3d 1261, 1267 (8th Cir.2006) (holding plaintiffs had standing "to challenge the constitutionality of a law that has a direct negative effect on their borrowing power, financial strength, and fiscal planning") (quotations omitted); *Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1298–1301 (10th Cir.2008) (finding that consultants whose present "financial strength and fiscal planning" was hampered by an agency interpretation of Medicare regulations that created liability for the consultants had standing to challenge the interpretation, even though the liability was contingent on Medicare paying certain expenses then seeking reimbursement); cf. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937) (allowing to proceed suit by insurer against policyholder who claimed insurer was liable for disability

payments but policyholder had not yet sought payment). For example, in *Lac Du Flambeau Band*, the United States Court of Appeals for the Seventh Circuit, on a motion to dismiss, found that the plaintiff Indian tribe suffered present economic injury in the form of a higher cost of capital from a compact that made the state's rejection of the tribe's casino application more likely, even though the injury depended first on federal approval of the application. 422 F.3d at 498. Presently felt economic pressure, like that Plaintiffs claim to experience from the employer and individual coverage provisions, may originate from a future event that is in some respects uncertain to occur. Indeed, Plaintiffs' alleged injuries are not even contingent on the occurrence of a future event—if the employer and individual coverage provisions went into effect today, Plaintiffs allege that they would have to comply. Because of the delay in the effective date of the provisions, there is merely some uncertainty whether Plaintiffs will be in the same position in 2014 as they are in today.

Defendants argue that a plaintiff "could always assert a current need to prepare for the most remote and ill-defined harms" but that should not be sufficient to establish an injury in fact. (Defs.' Reply 4.) But the harm faced by Plaintiffs is not remote or ill-defined—in 2014, the provisions, which are already signed into

law, will trigger the statutory requirement to purchase health insurance, and that obligation is weighty enough to require costly and advance financial preparation. The connection between the future harm and the alleged present injury is reasonably direct. In any case, recognizing standing for this type of injury does not make the courts vulnerable to plaintiffs bypassing traditional standing requirements to get into court. The need to show a concrete, particularized economic injury that is fairly traceable to the challenged conduct and redressable by the suit remains. In addition, the factual allegations about presently incurred compliance costs must have evidentiary support or the claims will be dismissed at successive stages of litigation when affidavits or evidence at trial are needed to support them. Attorneys or unrepresented parties could be subject to sanction under Federal Rule of Civil Procedure [11] for alleging facts that do not have evidentiary support. Furthermore, the allegations of preparation costs must be plausible, which in most frivolous claims they would not be. Finally, if something happens to change Plaintiffs' circumstances in the future, the case may become moot. *See Becker v. FEC,* 230 F.3d 381, 386 n. 3 (1st Cir.2000).

Defendants also take the position that the near-term compliance costs are not fairly traceable to the employer and individual

coverage provisions, but rather could stem from any number of factors. (Defs.' Reply 4–5.) A plaintiff's alleged injury is not "fairly traceable" to a challenged provision if that injury "stems not from the operation of [the provision] but from [his] own ... personal choice." *McConnell v. FEC,* 540 U.S. 93, 228, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). Taking the allegations as true, it is clear that the significant adjustments that Plaintiffs must make to their financial affairs in anticipation of the mandatory coverage requirements are fairly traceable to the Act's requirements. The coverage provided by Liberty as of the filing of the complaint encompassed 1,879 employees and enrollment was optional; under the Act, Liberty alleges it would have to make coverage available for all 3,900 of its full-time employees. (Tr. 47:14–48:2.) Liberty has made clear that it does not want to undertake the expansion in coverage that would be required by the Act, so it would not otherwise incur the near-term costs attendant to doing so. Similarly, the Act requires Waddell and Merrill to purchase insurance when they otherwise would not do so. That those subject to the requirement to purchase insurance will need to make significant and costly changes well before the requirement takes effect is certainly a reasonable allegation. Liberty is a large nonprofit institution with thousands of employees, and under the employer coverage

provision, it will need to offer affordable coverage to all of its full-time employees. Waddell and Merrill are individuals whose financial budgets do not include health insurance, and in order to accommodate the substantial cost of purchasing a policy, they will arguably need to make lifestyle changes. "There is nothing improbable about the contention" that the employer and individual coverage requirements cause Plaintiffs "to feel economic pressure today." T*homas More Law Ctr.*, 720 F.Supp.2d at 889. The allegations to support standing are plausible and sufficiently specific to survive the motion to dismiss.

B. Ripeness

Plaintiffs' claims must also be ripe for adjudication. The requirement that a matter be ripe "prevents judicial consideration of issues until a controversy is presented in clean-cut and concrete form." *Miller v. Brown,* 462 F.3d 312, 318–19 (4th Cir.2006) (quotation omitted). "[R]ipeness is peculiarly a question of timing...." *Blanchette v. Conn. Gen. Ins. Corp. (Reg'l Rail Reorganization Act Cases*), 419 U.S. 102, 138–39, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). In determining whether a matter is ripe, the court must "decide whether the issue is substantively definitive enough to be fit for judicial decision and whether hardship will result from withholding court consideration." *Bryant Woods*

Inn, Inc. v. Howard County, 124 F.3d 597, 602 (4th Cir.1997) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *modified on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977)). "A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Miller*, 462 F.3d at 319; *see also Texas v. United States*, 523 U.S. 296, 300–01, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998). Hardship is determined by "the immediacy of the threat and the burden imposed on the petitioner who would be compelled to act under threat of enforcement of the challenged law." *Charter Fed. Sav. Bank v. Office of Thrift Supervision,* 976 F.2d 203, 208–09 (4th Cir.1992). The burden of proving ripeness is on the party bringing the action. *Miller*, 462 F.3d at 319.

The issues raised in the standing and ripeness arguments overlap, *see Miller*, 462 F.3d at 319, and to the extent that I have addressed them in the discussion on standing above, I will not rehash them at length here. On this facial challenge, the issues to be decided are purely legal in nature and further development of the factual record would not clarify the issues for judicial resolution. Although the challenged provisions of the Act will not take effect for years, Plaintiffs have sufficiently alleged that

in the present or near future they are or will be burdened by the need to undertake significant and costly changes in their financial affairs and lifestyles in order to be prepared to comply with the Act. *See Am. Booksellers*, 484 U.S. at 392–93, 108 S.Ct. 636 (finding jurisdiction for a pre-enforcement suit where plaintiff booksellers would have to take costly compliance measures to avoid criminal prosecution). The challenged provisions create a direct and immediate dilemma, forcing Plaintiffs to choose between extensively reorganizing their financial affairs before the provisions go into effect, or risking heavy civil penalties. Under *Abbott Laboratories*, such a predicament satisfies the hardship requirement of the ripeness inquiry. *See Abbott Labs.*, 387 U.S. at 152–53, 87 S.Ct. 1507 (holding pre-enforcement challenge ripe because regulation had "a direct effect on the day-to-day business" of prescription drug companies by forcing them to either re-label drug products at great expense or risk serious criminal and civil penalties). I am satisfied that Plaintiffs have met their burden at this stage in the litigation to allege their suit is not premature.

C. Anti–Injunction Act

Defendants urge that Plaintiffs' assertions are barred by the Anti–Injunction Act, 26 U.S.C. § 7421(a). The Anti–Injunction Act, which is

located in the Internal Revenue Code, provides, in pertinent part, that

no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

26 U.S.C. § 7421(a). The two primary objectives of the Anti–Injunction Act are "[1] to allow the federal government to assess and collect allegedly due taxes without judicial interference and [2] to compel taxpayers to raise their objections to collected taxes in suits for refunds." *In re Leckie Smokeless Coal Co.,* 99 F.3d 573, 584 (4th Cir.1996); *accord South Carolina v. Regan*, 465 U.S. 367, 376, 104 S.Ct. 1107, 79 L.Ed.2d 372 (1984); *Bob Jones Univ. v. Simon,* 416 U.S. 725, 736, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974).[10]

[10] The Anti–Injunction Act is coextensive with the Declaratory Judgment Act, 28 U.S.C. § 2201(a), which withdraws federal court authority to grant declaratory relief in federal tax cases. *Leckie,* 99 F.3d at 583; *see also Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 299 (4th Cir.2000). If the Anti–Injunction Act does not bar the claims, neither

> does the Declaratory Judgment Act. *Id.*

The individual coverage provision, which added § 5000A to the Internal Revenue Code, provides that a failure to maintain individual minimum essential coverage results in "a penalty" imposed on the offending taxpayer, which is to be included on the taxpayer's return for the taxable year in which the violation occurred. Act § 1501(b). The Act provides that the penalty for violation of the individual coverage requirement "shall be assessed and collected in the same manner as an assessable penalty under [26 U.S.C. §§ 6671 et seq.]." Act § 1501(g)(1).[11] Likewise, the employer coverage provision, which added § 4980H to the Internal Revenue Code, provides that the failure to offer employees the opportunity to enroll in health coverage results in "an assessable penalty" which "shall be assessed and collected in the same manner as an assessable penalty under [26 U.S.C. §§ 6671 et seq.]." Act § 1513(a), (d).

[11] Notwithstanding § 1501(g)(1), failure to pay the penalty does not result in criminal sanctions or a lien or levy on the taxpayer's property. Act § 1501(g)(2).

Section 6671 states

(a) Penalty assessed as tax. The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

26 U.S.C. § 6671(a).

Defendants take the position that the penalties for violating the employer and individual coverage provisions are to be assessed and collected in the same manner as the penalties under § 6671, and § 6671 states that references to "tax" in the Internal Revenue Code are deemed also to refer to penalties. Thus, Defendants ask the Court to conclude that the reference to "tax" in the Anti–Injunction Act encompasses the penalties set forth in the Act. Characterizing this action as a suit for the purpose of restraining the assessment and collection of a tax, Defendants contend that the Court is without jurisdiction.

Defendants' argument is unconvincing. The Act merely directs that the penalties it imposes are to be "assessed and collected" in the same manner as the penalties under § 6671. Assessment and collection refers to the manner

in which the amount of the tax is determined and the method by which the payment for the tax is gathered. Instructions to assess and collect the Act's exactions in the same manner as the penalties under § 6671 does not convey anything about the jurisdiction of a court to hear a suit challenging that assessment and collection. The Act does not provide that any textual reference to a penalty should be treated as a reference to a tax under the Internal Revenue Code, as § 6671 provides. Surely, Congress could have specified, as it did in § 6671, that it intended for the term "tax" in the tax code to refer to the penalties provided by the Act. It did not, and so I cannot conclude that § 1501(g)(1) and § 1513(d) of the Act by themselves convert the penalties into taxes for the purposes of the Anti–Injunction Act.[12]

> [12] I need not determine whether the language of 26 U.S.C. § 6671 renders the penalties provided under that subchapter as "taxes" for the purpose of the Anti–Injunction Act. I observe that other courts have held that it does *See Barr v. United States*, 736 F.2d 1134, 1135 (7th Cir.1984); *Underwood v. United States,* No CIV 06–0824, 2007 U.S. Dist. LEXIS 9679, at *4–5, 2007 WL

914710, at *1–2 (D.N.M. Jan. 12, 2007).

The exactions provided by the Act for violation of the employer and individual coverage provisions do not otherwise fall within the term "tax" under the Anti–Injunction Act. The Anti–Injunction Act does not define "tax." In other contexts, the Supreme Court has recognized a difference between a tax and a penalty. *See Dep't of Revenue v. Kurth Ranch,* 511 U.S. 767, 779–80, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) ("Whereas 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."); *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224, 116 S.Ct. 2106, 135 L.Ed.2d 506 (1996) ("[A] tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government," whereas "if the concept of penalty means anything, it means punishment for an unlawful act or omission."); *United States v. La Franca*, 282 U.S. 568, 572, 51 S.Ct. 278, 75 L.Ed. 551 (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."). This distinction is not always easy to draw, as "[e]very tax is in some measure regulatory,"

Sonzinsky v. United States, 300 U.S. 506, 513, 57 S.Ct. 554, 81 L.Ed. 772 (1937), and a regulatory penalty can raise revenue much like a tax would. The attempt to distinguish a tax from a penalty with regard to the applicability of the Anti–Injunction Act is further complicated by *Bob Jones University*, in which the Court stated that no distinction exists between "regulatory and revenue-raising taxes." 416 U.S. at 741 n. 12, 94 S.Ct. 2038. While *Bob Jones University* maintains that the purpose of a tax is irrelevant to whether a suit to enforce the tax is barred by the Anti–Injunction Act, it does not purport to stretch the meaning of the term "tax" in the Anti–Injunction Act to encompass exactions that are by their name and nature regulatory penalties, not taxes. To make sense of this indeterminacy, the United States Court of Appeals for the Fourth Circuit has asked whether the assessment was "(a) [a]n involuntary pecuniary burden, regardless of name, laid upon individuals or property; (b) [i]mposed by or under authority of the legislature; (c) [f]or public purposes, including the purposes of defraying expenses of government or undertakings authorized by it; (d) [u]nder the police or taxing power of the state." *Leckie*, 99 F.3d at 583.

After considering the prevailing case law, I conclude that the better characterization of the

exactions imposed under the Act for violations of the employer and individual coverage provisions is that of regulatory penalties, not taxes. In the Act, Congress called them a "penalty" and an "assessable penalty." Congress specifically chose not to label them as taxes when drafting the Act, although it described several other exactions in the Act as taxes. *See, e.g.*, Act § 1405 (imposing "on the sale of any taxable medical device by the manufacturer, producer, or importer a tax"); § 9001 (imposing a "tax" on high cost employer-sponsored health coverage); § 9015 (imposing a "tax" on additional hospital insurance for high-income taxpayers); § 10907 (imposing "on any indoor tanning service a tax"). To be sure, both mandatory coverage provisions are placed in the section of the tax code entitled "Miscellaneous Excise Taxes," but the tax code itself instructs that no inference of legislative construction is to be drawn from the location or grouping of any particular provision of the tax code. 26 U.S.C. § 7806(b).

Even more importantly, the assessments function as regulatory penalties—they encourage compliance with the Act by imposing a punitive expense on conduct that offends the Act. As I will discuss in Section IV, the statutory fees were enacted in aid of Congress' regulatory powers under the Commerce Clause. In its lengthy statutory findings on the

individual coverage provision, § 1501(a), not once does Congress indicate that it was exercising its taxing authority to impose the penalties. Thus, the fourth criterion of the test applied in *Leckie* is deficient.[13] Although the penalties are expected to raise revenue (Defs.' Mem. Supp. Mot. Dismiss 37), they were not included among the "Revenue Provisions" of Title IX of the Act, which indicates that generating revenue was not their main purpose. Indeed, Defendants do not seek to deny the regulatory purpose of the penalties. (See, e.g., Defs.' Mem. Supp. Mot. Dismiss 27–28, 37.) For these reasons, the Anti–Injunction Act does not divest this Court of jurisdiction to hear the present challenge.

> [13] Congress enacted the provisions as an amendment to the Internal Revenue Code, which might weigh in favor of finding that the penalties are taxes under the *Leckie* test. *See Leckie*, 99 F.3d at 583 n. 12. In this case, however, it is neither necessary nor advisable to determine whether the penalties would be constitutionally authorized under Congress' taxing power in order to apply the fourth prong of the *Leckie* test. It is enough that the penalties are a constitutional exercise of the power

> to regulate commerce, and that Congress did not purport to promulgate the legislation pursuant to its taxing power, to satisfactorily determine that the exactions are not "[u]nder the police or taxing power" of Congress for the purposes of *Leckie*. *See id.* at 583.

IV. CONGRESSIONAL AUTHORITY UNDER ARTICLE I

Plaintiffs allege in Count One of the complaint that the employer and individual coverage requirements are beyond the scope of Congress' authority provided by Article I of the Constitution. In response, Defendants identify three sources of constitutional authority for the provisions in question: the Commerce Clause, the General Welfare Clause, and the Necessary and Proper Clause. The burden is on Plaintiffs to make a "plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000). Because Plaintiffs bring a facial challenge, they must establish that "no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128

S.Ct. 1184, 170 L.Ed.2d 151 (2008) (quoting *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)) (quotations omitted).

For the reasons provided below, I hold that Congress acted in accordance with its constitutionally delegated powers under the Commerce Clause when it passed the employer and individual coverage provisions of the Act, and I will dismiss Count One. Because I find that the employer and individual coverage provisions are within Congress' authority under the Commerce Clause, it is unnecessary to consider whether the provisions would be constitutional exercises of power pursuant to the General Welfare Clause or the Necessary and Proper Clause.

A. Individual Coverage Provision

The Constitution grants Congress the power to "regulate Commerce ... among the several States...." U.S. Const. art. I, § 8, cl. 3. The Supreme Court has identified three general categories of regulation of interstate commerce in which Congress is authorized to engage. Congress can regulate the channels of interstate commerce, the instrumentalities of interstate commerce and persons or things in interstate commerce, and activities that substantially affect interstate commerce.

Gonzales v. Raich, 545 U.S. 1, 16–17, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). The third category is the focus of this claim.

"In assessing the scope of Congress' authority under the Commerce Clause," the Court's task "is a modest one." *Id.* at 22, 125 S.Ct. 2195. The Court need not itself determine whether the regulated activities, "taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.* Congress must have a rational basis for determining that the "total incidence" of the class of activity substantially affects interstate commerce; "the de minimis character of individual instances arising under that statute is of no consequence." *Id.* at 17, 125 S.Ct. 2195; see also id. at 22, 125 S.Ct. 2195 ("That the regulation ensnares some purely intrastate activity is of no moment."). Where the regulated class of activities is within the reach of federal power, "the courts have no power to excise, as trivial, individual instances of the class." *Id.* at 23, 125 S.Ct. 2195 (quotations omitted).

The Supreme Court has emphasized that it is economic activity that must substantially affect interstate commerce. *United States v. Lopez,* 514 U.S. 549, 559–61, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995); *Morrison*, 529 U.S. at 614, 120 S.Ct. 1740 ("[T]hus far in our Nation's

history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."). It has at the same time established that Congress' power to regulate activities that substantially affect interstate commerce extends to regulation of "purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce." *Raich*, 545 U.S. at 17, 125 S.Ct. 2195 (quotations omitted); *accord United States v. Malloy*, 568 F.3d 166, 179 (4th Cir.2009). Local activity, regardless of whether it is commercial in nature, may still be reached *631 by Congress if it "exerts a substantial economic effect on interstate commerce." *Raich*, 545 U.S. at 17, 125 S.Ct. 2195. In addition, Congress can regulate "purely intrastate activity that is not itself 'commercial' ... if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 18, 125 S.Ct. 2195.

It is well-established that Congress holds the authority to regulate the business of insurance. *United States v. South–Eastern Underwriters Ass'n,* 322 U.S. 533, 552–53, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).

In question here is the Act's requirement that all individuals not exempted under the Act purchase and maintain minimum essential

health care coverage. Plaintiffs make two interrelated arguments for finding that the individual coverage provision exceeds the authority granted to Congress under the Commerce Clause. According to Plaintiffs, the conduct regulated by the provision—the failure to purchase health insurance—is a decision not to engage in interstate commerce, and consequently it is not a form of activity; rather, it is better characterized as inactivity, or "simply existing." (Pls.' Opp'n 23.) Further, Plaintiffs charge that the failure to purchase health insurance is not commercial in nature, and does not "result in substantial direct economic effects" on interstate commerce. (Second Am. Compl. ¶ 100.) In contrast, Defendants argue that decisions to forego health insurance coverage are economic and substantially affect the interstate health care market because the uninsured, when sick, are able to obtain emergency room care for little or no money, shifting the costs for that uncompensated care on to health care providers, the insured population in the form of higher premiums, and the government. (Defs.' Mem. Supp. Mot. Dismiss 30–31.)[14] Defendants contend that the costs of providing health care are multiplied by individuals who make the economic calculation not to purchase health insurance during the years when they are healthy but opt back into the health insurance system later when they need care. *(Id.* 32.) It is

Defendants' stance that every individual must choose a way to finance the health care services that he or she will inevitably require, and that by making these choices one becomes an active market participant, not a passive bystander. (*Id.* 32–33.)

[14] The Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, imposes on hospitals that participate in Medicare and offer emergency services the requirement to provide to persons presented for treatment "an appropriate medical screening ... to determine whether or not an emergency medical condition ... exists," and to stabilize the condition or, if medically warranted, to transfer such persons to other facilities. § 1395dd(a)-(c); *Williams v. United States,* 242 F.3d 169, 173–74 (4th Cir.2001). Under § 1395dd, hospitals are required to perform' these duties uniformly, "regardless of whether the persons arriving in the emergency rooms are insured or are able to pay." *Williams,* 242 F.3d at 174. Section 1395dd in effect guarantees a minimum level of health care

> without discrimination based on ability to pay.

Plaintiffs contend that the individual coverage provision is similar to the statutes struck down in *Lopez* and *Morrison*, in that those statutes and the provision of the Act here all involved regulation of non-commercial activity or inactivity, and those cases should govern. Defendants respond that an individual's decision not to purchase health insurance is a form of economic activity, and the Court's decisions in *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942) and *Raich* should dictate the result in the present matter. A review of those cases is helpful.

In *Lopez* and *Morrison*, the Supreme Court found that the challenged statutes legislated non-commercial activities, and it held that those activities were beyond the reach of federal power under the Commerce Clause. The Gun–Free School Zone Act of 1990, the statute at issue in Lopez, criminalized possession of a gun within a statutorily defined school zone. *Lopez,* 514 U.S. 549, 115 S.Ct. 1624. The Court observed that the statute "by its terms has nothing to do with 'commerce' or any sort of economic enterprise," *id.* at 561, 115 S.Ct. 1624, and concluded that possessing a gun in a school zone was not an economic activity, *id.* at 567, 115 S.Ct. 1624. Finding that the link between

the regulated activity and any effects on interstate commerce was too attenuated, the Court rejected the government's arguments that possession of a gun in a school zone may result in violent crime and thereby affect the national economy through insurance costs, reduced travel, and diminished education and productivity. *Id.* at 567, 115 S.Ct. 1624. The statute invalidated in *Lopez* regulated a single subject, the possession of firearms in a school zone, and was not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561, 115 S.Ct. 1624. Similarly, in *Morrison*, the Court invalidated a federal civil remedy for the victims of gender-motivated crimes of violence based on its conclusion that the regulated conduct was noneconomic and of a criminal nature. *Morrison*, 529 U.S. at 613, 120 S.Ct. 1740.

In *Wickard* and *Raich*, the Court upheld the laws being challenged as valid exercises of Congress' power under the Commerce Clause. *Wickard* concerned a penalty exacted under federal law on the wheat production of a commercial farm that exceeded marketing quotas established by statute. *Wickard,* 317 U.S. at 113, 63 S.Ct. 82. The penalty was part of a general statutory scheme to control the volume of wheat being sold in interstate

commerce in order to avoid wheat surpluses and shortages, which caused wheat prices to fluctuate. *Id.* at 115, 63 S.Ct. 82. The Court upheld application of the penalty to wheat grown on the farm solely for personal consumption, reasoning that Congress could have rationally believed that a farmer's choice to grow his own wheat, when he otherwise would have had to purchase that wheat on the market, would substantially undermine the statute's purpose to control wheat prices. *Id.* at 128–29, 63 S.Ct. 82. The Court dismissed the plaintiff's arguments that the act forced farmers to purchase wheat in interstate commerce when they could otherwise grow it for themselves. *Id.* at 129, 63 S.Ct. 82.

Raich, the Court's most recent elaboration of Commerce Clause power pertinent to this case, also concerned the extent of federal power to regulate intrastate production for personal consumption. In that case, the Court sustained Congress' authority to prohibit the local cultivation and possession of homegrown marijuana intended solely for personal use because the act as a whole regulated the "production, distribution, and consumption" of marijuana "for which there is an established, and lucrative, interstate market." *Raich*, 545 U.S. at 26, 125 S.Ct. 2195. It was rational for Congress to believe that the failure to include locally cultivated marijuana for personal use in

the law's regulatory scope would undermine the orderly enforcement of the entire regulatory scheme and significantly impact "the supply and demand sides of the market for marijuana." *Id.* at 28, 30, 125 S.Ct. 2195. Together, *Wickard* and *Raich* teach that Congress has broad power to regulate purely local matters that have substantial economic effects, even where the regulated individuals claim not to participate in interstate commerce. I will examine the congressional findings contained in the Act because they can be helpful in reviewing a statutory scheme, see *Raic*h, 545 U.S. at 21, 125 S.Ct. 2195, but I pause to observe that such findings are not sufficient, by themselves, to sustain the constitutionality of the Act, s*ee Morrison,* 529 U.S. at 614, 120 S.Ct. 1740. In the congressional findings set forth in § 1501(a)(2), Congress explained that the national market in health insurance and health care services amounted to $2.5 trillion in 2009 and consumed 17.6 percent of the annual gross domestic product. It recognized that administrative costs for private health insurance were $90 billion in 2006 and constituted 26 to 30 percent of premiums in the individual and small group insurance markets. In addition, the costs of providing uncompensated care for the uninsured amounted to $43 billion in 2008 and were passed on to consumers in the form of substantially higher premiums. In order to

reduce these significant costs and make coverage more affordable for consumers, Congress required non-exempted individuals to obtain health insurance coverage, which, together with the other provisions of the Act, Congress found would add millions of new consumers to the health insurance market and increase the number of insured individuals. Without an individual coverage requirement, Congress found that healthy individuals would wait to purchase health insurance until they needed care, driving up the cost of health insurance premiums. Congress stated that the individual coverage requirement "is essential to creating effective health insurance markets" with broad health insurance pools including healthy individuals. Act § 1501(a)(2)(I).

While the unique nature of the market for health care and the breadth of the Act present a novel set of facts for consideration, the well-settled principles expounded in *Raich* and *Wickard* control the disposition of this claim. I hold that there is a rational basis for Congress to conclude that individuals' decisions about how and when to pay for health care are activities that in the aggregate substantially affect the interstate health care market.

The conduct regulated by the individual coverage provision—individuals' decisions to forego purchasing health insurance coverage—

is economic in nature, and so the provision is not susceptible to the shortcomings of the statutes struck down by the Court in *Lopez* and *Morrison*. Nearly everyone will require health care services at some point in their lifetimes, and it is not always possible to predict when one will be afflicted by illness or injury and require care. The "fundamental need for health care and the necessity of paying for such services received" creates the market in health care services, of which nearly everyone is a participant. *Thomas More Law Ctr.*, 720 F.Supp.2d at 894. Regardless of whether one relies on an insurance policy, one's savings, or the backstop of free or reduced-cost emergency room services, one has made a choice regarding the method of payment for the health care services one expects to receive. Far from "inactivity," by choosing to forgo insurance, Plaintiffs are making an economic decision to try to pay for health care services later, out of pocket, rather than now, through the purchase of insurance. *Id.* at 894. As Congress found, the total incidence of these economic decisions has a substantial impact on the national market for health care by collectively shifting billions of dollars on to other market participants and driving up the prices of insurance policies.

The conclusion that decisions to pay for health care without insurance are economic activities follows from the Supreme Court's rulings in

Wickard and *Raich*. Plaintiffs' preference for paying for health care needs out of pocket rather than purchasing insurance on the market is much like the preference of the plaintiff farmer in *Wickard* for fulfilling his demand for wheat by growing his own rather than by purchasing it. Plaintiffs do not consider themselves to be engaging in commerce, but as in *Wickard,* economic activity subject to regulation under the Commerce Clause need not involve transacting business in the marketplace. *See Wickard*, 317 U.S. at 128, 63 S.Ct. 82 ("[T]he power to regulate commerce includes the power to regulate ... the practices affecting " the prices of commodities in interstate commerce.) (emphasis added). In *Wickard,* the plaintiff argued that his production of wheat was "not intended in any part for commerce but wholly for consumption on the farm." *Id.* at 118, 63 S.Ct. 82. The Court rejected that argument, stating that one effect of Congress' regulation was to "forestall resort to the market by producing to meet [one's] own needs." *Id.* at 127, 63 S.Ct. 82. Because of the nature of supply and demand, Plaintiffs' choices directly affect the price of insurance in the market, which Congress set out in the Act to control.

Raich is equally applicable. The plaintiffs there, neither of whom bought or sold marijuana, claimed that they were not

participating in commerce at all. But the Court held that it was rational to conclude that growing marijuana at home, whatever the nature of that activity, exerted in the aggregate a substantial economic effect on interstate commerce because it affected the supply and demand in the national market for marijuana. *Raich*, 545 U.S. at 19, 125 S.Ct. 2195. Here, similarly, the choice of individuals to go uninsured affects national market conditions for health insurance, reducing the supply of consumers of health insurance who are in good health, and thereby increasing the cost of covering the insured population. Plaintiffs cannot avoid extension of the Act to their conduct just because they allege they provide for their own care and will not, in fact, obtain uncompensated care at the expense of other market participants. As long as the regulated class of activities is within the reach of federal power, "the courts have no power to excise, as trivial, individual instances of the class." *Id.* at 23, 125 S.Ct. 2195 (quotations omitted).

The conduct regulated by the individual coverage provision is also within the scope of Congress' powers under the Commerce Clause because it is rational to believe the failure to regulate the uninsured would undercut the Act's larger regulatory scheme for the interstate health care market. *See id.* at 18, 125 S.Ct. 2195; *cf. Wickard*, 317 U.S. at 128–29, 63

S.Ct. 82 ("Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."). The Act institutes a number of reforms of the interstate insurance market to increase the availability and affordability of health insurance, including the requirement that insurers guarantee coverage for all individuals, even those with preexisting medical conditions. As Congress stated in its findings, the individual coverage provision is "essential" to this larger regulatory scheme because without it, individuals would postpone health insurance until they need substantial care, at which point the Act would obligate insurers to cover them at the same cost as everyone else. This would increase the cost of health insurance and decrease the number of insured individuals—precisely the harms that Congress sought to address with the Act's regulatory measures.

For these reasons, the individual coverage requirement is a valid exercise of federal power under the Commerce Clause, even as applied to the facts of this case.

B. Employer Coverage Provision

Plaintiffs also maintain that the requirement that applicable large employers supply

minimum essential coverage for their employees is an unconstitutional exercise of power under the Commerce Clause. In the complaint, Plaintiffs allege that employers are being compelled by the Act to participate in interstate commerce when they otherwise would not, just as individuals are forced into the marketplace by the individual coverage provision. (Second Am. Compl. ¶¶ 96–99.) According to Plaintiffs, the Commerce Clause does not grant Congress the authority to require employers to provide "certain additional benefits" to all of their employees, i.e., to "purchase a particular product at a particular price." (Pls.' Opp'n 26.) Defendants respond that the employer coverage provision facially regulates interstate economic matters. Regulating the terms by which an employer sponsors health insurance for its employees is the same as regulating the terms of employment, which is within the Commerce Clause power. (Defs.' Mem. Supp. Mot. Dismiss 38).

As Defendants correctly point out, it is well-established in Supreme Court precedent that Congress has the power to regulate the terms and conditions of employment. *See United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941) (upholding the Fair Labor Standards Act ("FLSA"), which requires certain employers to pay their employees a minimum

wage and to pay overtime wages for work in excess of a statutorily-specified amount of hours); *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 33–43, 57 S.Ct. 615, 81 L.Ed. 893 (1937) (upholding the National Labor Relations Act ("NLRA") of 1935, which prohibits unfair labor practices and restricts employer interference with union membership); *NLRB v. Fainblatt,* 306 U.S. 601, 604–09, 59 S.Ct. 668, 83 L.Ed. 1014 (1939) (upholding Congress' authority to enforce the NLRA against a small garment business); *Baltimore & Ohio R.R. Co. v. Interstate Commerce Comm'n,* 221 U.S. 612, 619, 31 S.Ct. 621, 55 L.Ed. 878 (1911) (upholding statute prescribing maximum hours for employees engaged in intrastate activity connected with the movement of any train); *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 537, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (upholding Congress' authority to enforce the FLSA's minimum wage and overtime standards against both private and public employers); *see also EEOC v. Wyoming*, 460 U.S. 226, 248, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983) (Stevens, J., concurring) ("Today, there should be universal agreement on the proposition that Congress has ample power to regulate the terms and conditions of employment throughout the economy.").

The opportunity provided to an employee to enroll in an employer-sponsored health care

plan is a valuable benefit offered in exchange for the employee's labor, much like a wage or salary. The Act requires that certain large employers offer employees the opportunity to enroll in "minimum essential coverage under an eligible employer-sponsored plan." Act § 1513(a)(1). The requirement imposed by the Act on employers to offer a minimum level of health insurance resembles the requirement imposed by the FLSA on employers to offer a minimum wage upheld in Darby, and Plaintiffs fail to distinguish the two. Plaintiffs' depiction of the employer coverage provision as requiring employers to purchase a product against their will is misleading; the employer coverage requirement is more accurately described as regulating the terms of the employment contract. Employers regulated under § 1513 are already engaged in commerce—that employers need to arrange with third party insurers to offer such coverage to their employees is of no consequence.

A rational basis exists for Congress to conclude that the terms of health coverage offered by employers to their employees have substantial effects cumulatively on interstate commerce. Maintaining adequate health care coverage is among the foremost concerns of employees when considering whether to take advantage of better job opportunities. "Job lock" occurs when a worker declines to accept a better job because

taking the new job requires giving up the worker's current health plan, and he fears he will be unable to obtain a comparable one. See CONG. BUDGET OFFICE, KEY ISSUES IN ANALYZING MAJOR HEALTH INSURANCE PROPOSALS 8, 164–65 (2008). In this way, the interstate economy is impeded by the failure of certain large employers to offer adequate health care coverage. Accordingly, the employer coverage provision is a lawful exercise of Congress' Commerce Clause power.

V. TENTH AMENDMENT

Plaintiffs charge in Count Two of the complaint that the Act is unconstitutional for violating the Tenth Amendment. The Tenth Amendment states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The amendment is violated if (1) Congress does not have authority under the Constitution to pass the regulation, or (2) the means of regulation employed impermissibly infringe on state sovereignty by undercutting and displacing state authority and by commandeering state legislative functions. *United States v. Johnson*, 114 F.3d 476, 480–81 (4th Cir.1997); *New York v. United States,* 505 U.S. 144, 159, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

The first basis for invalidity fails because the Act is a valid exercise of Congress' Commerce Clause power. *See New York,* 505 U.S. at 156, 112 S.Ct. 2408 ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.").

The second basis also lacks merit. Plaintiffs allege that the requirement that individuals obtain health insurance and that states create health benefit exchanges undercuts and displaces state authority, although they do not explain in any detail what state authority is being intruded upon. (Pls.' Opp'n 32.) Plaintiffs rest their argument on *Johnson,* 114 F.3d 476. There, the Fourth Circuit addressed the claim that the Child Support Recovery Act, which criminalized the willful non-payment of state-ordered child support, impermissibly undercut and displaced state authority over the areas of criminal law and family law. *Id.* at 480–81. The court rejected the challenge, holding that federal laws criminalizing conduct are "commonplace under the dual-sovereign concept" and involve no violation where they are constitutionally authorized. *Id.* at 481. Johnson does not help Plaintiffs; Congress has the constitutional power to regulate the business of insurance, *South–Eastern Underwriters Ass'n,* 322 U.S. at 552–53, 64 S.Ct. 1162, and has frequently regulated health

insurance and health care services.[15] Apart from exceeding Congress' enumerated powers under Article I, which the Act does not, there is no foundation under Johnson for invalidating the regulatory scheme.

> [15] *See, e.g.*, Medicare Act, Pub. L. No. 89–97, 79 Stat. 286, 42 U.S.C. § 1395 et seq. (providing government-funded health insurance for the aged); Employee Retirement and Income Security Act of 1974, Pub. L. No. 93–406, 88 Stat. 829, 29 U.S.C. § 1001 et seq. (establishing federal requirements for health insurance plans offered by private employers); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99–272, 100 Stat. 82, § 1161 et seq. (enabling workers who lose their health benefits to continue receiving certain benefits from their plans for a time); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–191, 110 Stat. 1936, 42 U.S.C. § 1320d et seq. (directly regulating private health insurance plans).

Plaintiffs also say that the Act commandeers state legislative functions because it directs

states to create health benefit exchanges. (Pls.' Opp'n 32–33.) But states are merely given the option to set up the exchanges. The Act authorizes each state to adopt the federal standards for health benefit exchanges or pass state laws that satisfactorily implement the standards. Act § 1321(b). If a state chooses not to do so, then the federal government must establish and operate the exchange within the state. Act § 1321(c). Congress has the power to offer states the choice of regulating private activity according to federal standards or having state law preempted by federal regulation. *New York,* 505 U.S. at 167, 112 S.Ct. 2408. In this respect, the Act is plainly constitutional. Count Two will be dismissed.

VI. ESTABLISHMENT CLAUSE

Plaintiffs raise Establishment Clause challenges to the religious conscience exemption and to the health care sharing ministry exemption to the individual coverage provision. *See* Act § 1501(d)(2). Plaintiffs allege that, because the Act invests in Defendants the right to determine which sects are "recognized" pursuant to the religious conscience exemption, it presents a host of Establishment Clause difficulties, including: lacking a secular purpose, privileging certain religious sects over others, fostering excessive entanglement by requiring the government to make doctrinal

decisions, and demonstrating hostility toward Plaintiffs' religious beliefs. (Second Am. Compl. ¶¶ 120–128.) Plaintiffs further allege that the healthcare sharing ministries exemption violates the Establishment Clause because it arbitrarily excludes Plaintiffs from availing themselves of its benefits. (*Id.* ¶ 129.)

The First Amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U.S. CONST. amend. I. While these two clauses, known as the Establishment Clause and Free Exercise Clause, "express complementary values, they often exert conflicting pressures." *Cutter v. Wilkinson*, 544 U.S. 709, 719, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (citing *Locke v. Davey*, 540 U.S. 712, 718, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004); *Walz v. Tax Comm'n,* 397 U.S. 664, 668–69, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970)). Despite this tension, " 'there is room for play in the joints' between the Clauses." *Cutter*, 544 U.S at 719, 125 S.Ct. 2113 (quoting *Walz*, 397 U.S. at 669, 90 S.Ct. 1409). That is, there is an interstice in which Congress can take action "neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause." *Id.* at 719, 125 S.Ct. 2113. The accommodation of religious exercise fits within this category.

In *Cutter*, the Supreme Court upheld a provision of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") against an Establishment Clause challenge. *Id.* at 713, 125 S.Ct. 2113. Among other things, RLUIPA requires courts to apply a strict scrutiny standard of review where the government imposes a "substantial burden on the religious exercise" of institutionalized persons. 42 U.S.C. § 2000cc–1(a)(1)–(2). Respondent, the director of the Ohio Department of Rehabilitation and Correction, brought a facial challenge to RLUIPA. Speaking for the unanimous Court, Justice Ginsburg wrote "[t]his Court has long recognized that the government may ... accommodate religious practices ... without violating the Establishment Clause.' " *Cutter,* 544 U.S. at 713, 125 S.Ct. 2113 (quoting *Hobbie v. Unemployment Appeals Comm'n,* 480 U.S. 136, 144–45, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987)); *see also Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) (upholding exemption of Title VII's prohibition on religious discrimination as applied to secular nonprofit activities of a church).

While the Court noted that certain accommodations might "devolve into 'an unlawful fostering of religion,' " RLUIPA did

not cross the line. *Cutter*, 544 U.S. at 714, 125 S.Ct. 2113 (quoting Corp. of the Presiding Bishop, 483 U.S. at 334–35, 107 S.Ct. 2862). First, the statute "alleviated exceptional government-created burdens on private religious exercise." *Id*. at 720, 125 S.Ct. 2113 (citing *Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 705, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994)). That is, RLUIPA created accommodations for "institutionalized persons who are unable freely to attend to their religious needs...." *Id.* at 721, 125 S.Ct. 2113. In the same vein, the Court noted with approval Congress' accommodation of religious practice in the military. *Id.* at 722, 125 S.Ct. 2113. Second, RLUIPA's accommodation was "measured so that it does not override other significant interests." Id. The act was unlike that struck down in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709, 105 S.Ct. 2914, 86 L.Ed.2d 557 (1985), which "arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath." Third, the Court found it significant that "RLUIPA does not differentiate among bona fide faiths." *Cutter*, 544 U.S. at 723, 125 S.Ct. 2113. The Court distinguished *Kiryas Joel*, which invalidated a state law creating a special school district for the Satmar sect of Hasidic Jews. *Kiryas Joel*, 512 U.S. at 690, 114 S.Ct. 2481.

Significantly, in *Cutter*, the Court declined to follow *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), which has long provided the standard means of analyzing Establishment Clause cases. *See Cutter*, 544 U.S. at 717 n. 6, 125 S.Ct. 2113. Lemon's three-part test requires that "[f]irst the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally, the statute must not foster an excessive government entanglement with religion." 403 U.S. at 612–13, 91 S.Ct. 2105. In *Agostini v. Felton,* 521 U.S. 203, 218, 223–33, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997), the Court "folded the entanglement inquiry into the primary effect inquiry ... because both inquiries rely on the same evidence, and the degree of entanglement has implications for whether a statute advances or inhibits religion." *Zelman v. Simmons–Harris,* 536 U.S. 639, 668, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (O'Connor, J., concurring) (citation omitted); *see also Madison v. Riter*, 355 F.3d 310, 319–20 (4th Cir.2003). Although critics have been sounding the death knell of *Lemon* for some time,[16] it remains good law and merits this Court's attention. *See McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (interpreting the "secular purpose" requirement).

[16] *See Cutter*, 544 U.S. at 726 n. 1, 125 S.Ct. 2113 (Thomas, J., concurring) (calling the Lemon test "discredited"); *Van Orden v. Perry,* 545 U.S. 677, 685–86, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (declining to apply the *Lemon* test); *Wallace v. Jaffree*, 472 U.S. 38, 110, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (Rehnquist, J., dissenting) ("The three-part [Lemon] test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize.").

A. Religious Conscience Exemption

Considering first the religious conscience exemption, I observe at the outset that the exemption adopts the § 1402(g)(1) exemption from the Internal Revenue Code, and every court to consider an Establishment Clause challenge to § 1402(g)(1) over the last forty years has upheld the exemption. *See Varga v. United States,* 467 F.Supp. 1113, 1118–19 (D.Md.1979); *Droz v. Comm'r*, 48 F.3d 1120, 1124 (9th Cir.1995); *Hatcher v. Comm'r*, 688 F.2d 82, 83–84 (10th Cir.1979); *Jaggard v. Comm'r,* 582 F.2d 1189, 1190 (8th Cir.1978); *Henson v. Comm'r*, 66 T.C. 835, 838 (1976); *Palmer v. Comm'r*, 52 T.C. 310, 314–15 (1969). While the mere fact of a long history cannot cure an otherwise unconstitutional practice, it

is "not something to be lightly cast aside." *Walz*, 397 U.S. at 678, 90 S.Ct. 1409.

Moreover, the provision falls well within the bounds for permissible religious accommodation under *Cutter*. First, the exception relieves a government-imposed burden on religious exercise. It ameliorates the burden that the Act would otherwise impose on those who have a conscientious objection to the receipt of medical benefits. Second, the exception does not override other significant interests. Unlike the accommodation struck down in *Caldor,* the religious conscience exemption does not arm its beneficiaries with the right to trample over the interests of others. Finally, the exemption does not "differentiate among bona fide faiths" in any relevant sense. The accommodation ensures that similarly situated groups are treated similarly. *See Kiryas Joel*, 512 U.S. at 703, 114 S.Ct. 2481; see also id. at 727, 114 S.Ct. 2481 (Kennedy, J., concurring) ("Nor is it true that New York's failure to accommodate another religious community facing similar burdens would be insulated from challenge in the courts."). Accommodations may "justify treating those who share [a particular] belief differently from those who do not; but they do not justify discriminations based on sect." *Id.* at 715, 114 S.Ct. 2481 (O'Connor, J., concurring). By its terms, the religious conscience exemption

applies to all members of all recognized faiths that have a sincere, conscientious objection to receiving medical benefits. Plaintiffs in this case have no such objection, and therefore cannot claim that they are burdened in the same way that the religious conscience exemption contemplates. Nor is there any reason to believe that the exemption will be applied in a way that would result in disparate treatment of similarly situated persons. The accommodation is therefore not problematic under *Cutter*.

Plaintiffs urge that the religious conscience exemption creates excessive entanglement under Lemon, because it "vests Defendants with the right to determine what is a recognized religious sect entitled to exemption under the Act" and calls for surveillance and "monitoring of the tenets of certain religious sects and sincerity of adherents' beliefs." (Pls.' Opp'n 41–42.) First, it bears repeating that the Supreme Court and Fourth Circuit have recognized that the entanglement inquiry is largely subsumed into the primary effects prong of Lemon. *See Zelman*, 536 U.S. at 668, 122 S.Ct. 2460; *Madison,* 355 F.3d at 319–20. The parties do not seem to dispute that the primary effect of the legislation in this case is neither to advance nor inhibit religion. Evaluating a religious exemption to Title VII in Corporation of the Presiding Bishop, the Court

recognized that "[f]or a law to have forbidden 'effects' under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence." 483 U.S. at 337, 107 S.Ct. 2862. The Court has also distinguished between the impermissible grant of affirmative benefits on the basis of religion, and "allow[ing] religious communities and institutions to pursue their own interests free from governmental interference." *Kiryas Joel*, 512 U.S. at 706, 114 S.Ct. 2481 (citing *Corp. of the Presiding Bishop*, 483 U.S. at 336–37, 107 S.Ct. 2862).

Furthermore, there is no indication—other than Plaintiffs' naked assertion—that the exemption in issue would require "monitoring" of religious practices. In *Lemon,* the challenged statute used state funds to pay teachers of non-sectarian subjects in religious schools. The state would have to "be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion ... [and therefore a] comprehensive, discriminating, and continuing state surveillance will inevitably be required...." *Lemon*, 403 U.S. at 619, 91 S.Ct. 2105. In contrast, the religious conscience exemption would merely require a one-time or periodic inquiry into the existence of a religious sect, the existence of that sect's tenets pertaining to abstention from acceptance of medical benefits, and an individual's bona fide belief in those

tenets. A one-time or periodic review does not by itself create impermissible entanglement. *See Bowen v. Kendrick*, 487 U.S. 589, 615, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988) (upholding law allowing government to "police the grants that are given out ... to ensure that federal funds are not used for impermissible purposes."); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 764–65, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976) (upholding law contemplating the occasional audit of universities to assure non-sectarian use of funds). After all, "[e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause." *Agostini*, 521 U.S. at 233, 117 S.Ct. 1997.

Nor is it constitutionally problematic to inquire into whether a belief is "religious" in nature and sincerely held. *See Benning v. Georgia*, 391 F.3d 1299, 1313 (11th Cir.2004); *Sutton v. Rasheed*, 323 F.3d 236, 250–51 (3d Cir.2003). I note in this regard that RLUIPA's requirement that a plaintiff show a substantial burden on the free exercise of religion requires a threshold showing that a religious belief or practice exists. To hold that courts or the government cannot inquire into the existence of such beliefs or practices would severely hamper the government's ability to thwart frivolous or fraudulent claims.

Finally, Plaintiffs' assertion that the exemption lacks a secular purpose is without merit. The secular purpose requirement "does not mean that the law's purpose must be unrelated to religion.... Rather, *Lemon*'s 'purpose' requirement aims at preventing the relevant governmental decisionmaker from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Corp. of the Presiding Bishop*, 483 U.S. at 335, 107 S.Ct. 2862. Accordingly, "[u]nder the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.*

As the religious conscience exemption falls within permissible boundaries set in *Cutter* and Lemon, the Court finds that it is unproblematic under the Establishment Clause.

B. Health Care Sharing Ministries Exemption

Plaintiffs' allegations concerning the health care sharing ministries exemption are far leaner than their allegations regarding the religious conscience exemption. In sum, Liberty alleges that the health care sharing ministries exemption "discriminates against Liberty University's religious beliefs by implementing an arbitrary date of December 31, 1999 for

participation in a healthcare sharing plan." (Second Am. Compl. ¶ 129.) As an initial matter, it is worth noting that I.R.C. § 1402(g)(1), which has been upheld numerous times, see part A, supra, is similarly limited in applicability to members of sects which have "been in existence at all times" since 1950. Moreover, the Court must read the time limitation in light of *Cutter*'s requirement that an accommodation be "measured so that it does not override other significant interests." 544 U.S. at 722, 125 S.Ct. 2113. If Congress allowed any and all groups to form healthcare sharing 501(c)(3) organizations, it could effect an end-run around the mandatory coverage provisions. For reasons substantially similar to those discussed above, the health care sharing ministries exemption is a constitutionally permissible accommodation of religion under Cutter and Lemon. Therefore, Plaintiffs' Establishment Clause claims are without merit and will be dismissed.

VII. FREE EXERCISE CLAUSE AND RELIGIOUS FREEDOM RESTORATION ACT

Counts Four and Five of Plaintiffs' complaint raise challenges under the Free Exercise Clause and Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb–1. The essence of those claims is that the Act forces Plaintiffs to violate their "sincerely held religious beliefs

against facilitating, subsidizing, easing, funding, or supporting abortions." (Second Am. Compl. ¶ 142.)[17] Liberty also alleges that the Act will prohibit it from "providing health care choices for employees that do not conflict with the mission of the University and the core Christian values under which it and its employees order their day to day lives." (Pls.' Opp'n 36.)

> [17] Plaintiffs' brief characterizes the complaint as raising other Free Exercise claims: "Plaintiffs [also] state that they conduct their daily lives in accordance with their sincerely held religious beliefs, which includes making healthy lifestyle choices, paying only for health care procedures that are necessary ... and paying for their health care services as they need them." (Pls.' Opp'n 35–36.) A fair reading of the complaint does not support this novel characterization, and the parties have not briefed these issues.

A. Free Exercise Clause

The Free Exercise Clause does not excuse individuals from compliance with neutral laws of general applicability. *Employment Div., Dep't*

of Human Res. v. Smith, 494 U.S. 872, 878–79, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). However, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). To survive a free exercise challenge, such a law must "advance interests of the highest order and must be narrowly tailored in pursuit of those interests." Id. (quotations omitted). Plaintiffs contend that the Act is not a neutral law of general applicability, and that this Court should apply the "most rigorous scrutiny" in evaluating any free exercise implications. In support of this contention, Plaintiffs submit that the religious exemptions identified above render the Act non-neutral on its face. I disagree.

At the outset it bears repeating that Congress is free to accommodate religious practices without running afoul of either of the religion clauses. Accommodation occupies the "play in the joints" between the Establishment Clause and the Free Exercise Clause. *Cutter*, 544 U.S. at 719, 125 S.Ct. 2113. Moreover, Lukumi shows that the neutrality inquiry in the free exercise context seeks to protect "against governmental hostility [toward religion] which is masked, as well as overt." *Lukumi*, 508 U.S. at 534, 113 S.Ct. 2217 (emphasis added). The

Act demonstrates no such hostility. Contrary to Plaintiffs' contention, the Act does not effect a "religious gerrymander" of the sort that animated the *Lukumi* decision. In *Lukumi,* the Court overturned a facially neutral city ordinance where there was overwhelming evidence that the law was imposed to prevent practitioners of the Santeria religion from performing ritual animal sacrifice. *Id.* at 526, 113 S.Ct. 2217. The law was appropriately described as a "gerrymander" because "[t]he net result ... is that few if any killings of animals [were] prohibited other than Santeria sacrifice...." *Id.* at 536, 113 S.Ct. 2217. The Act is a far cry from the ordinance at issue in Lukumi, the only purpose of which was to single out a religious sect for negative treatment.

Moreover, the Court in *Locke* significantly softened the facial neutrality rule of *Lukumi*. In *Locke*, the Court upheld the constitutionality of a state statute that established a scholarship program for post-secondary students, but explicitly prohibited use of scholarship funds to support studies in devotional theology. 540 U.S. at 715, 124 S.Ct. 1307. While the respondent charged that the statute was presumptively unconstitutional because of its apparent lack of facial neutrality, the Court rejected the claim:

> [T]o do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning.... In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community.
> And it does not require students to choose between their religious beliefs and receiving a government benefit.

Id. at 720–21, 124 S.Ct. 1307 (citations omitted). Similarly, the Act presents none of the above identified infirmities. It cannot fairly be said to display a "disfavor" of religion. Instead it shows a respect for religious exercise by carving out exceptions for those who are conscientiously opposed to receiving health care benefits, and those who share medical benefits in accordance with their religious beliefs. The mere fact that Plaintiffs may not avail themselves of either of the religious exemptions does not show disfavor or hostility.

In addition, Plaintiffs have not raised a plausible claim that the Act burdens religious practice. They fail to allege how any payments required under the Act, whether fines, fees, taxes, or the cost of the policy, would be used to fund abortion. Indeed, the Act contains strict

safeguards at multiple levels to prevent federal funds from being used to pay for abortion services beyond those in cases of rape or incest, or where the life of the woman would be endangered. *See* Act §§ 1303, 1334; Exec. Order No. 13,535 of Mar. 24, 2010, 75 Fed. Reg. 15,599. In plans that do provide non-excepted abortion coverage, a separate payment for non-excepted abortion services must be made by the policyholder to the insurer, and the insurer must deposit those payments in a separate allocation account that consists solely of those payments; the insurer must use only the amounts in that account to pay for non-excepted abortion services. Act § 1303(b)(2)(B), (C). Insurers are prohibited from using funds attributable to premium tax credits or cost-sharing reductions in out-of-pocket maximum limits for individuals with income below 400 percent of the federal poverty level to pay for non-excepted abortion services. Act § 1303(b)(2)(A).

Furthermore, at least one plan that does not cover non-excepted abortion services will be offered for enrollment through each of the state health benefit exchanges, as required by the Act. Act § 1334(a)(6). Moreover, the Act specifically allows plans in the exchanges to decline to cover all abortion services whatsoever, including excepted abortion services. Act § 1303(b)(1). Liberty already

makes available private insurance policies, and provides "health care services that are desirable to its employees and consistent with the University's core Christian values...." (Second Am. Compl. ¶¶ 29, 31.) Plaintiffs have raised no plausible allegation that they will be unable to participate in providing or purchasing similar health care services when the Act is fully implemented. As such, their free exercise claim is not plausible under *Iqbal,* 129 S.Ct. at 1949–51.

B. Religious Freedom Restoration Act

RFRA, which was enacted as a direct response to the Court's decision in Smith, generally forbids the government from imposing a substantial burden on the free exercise of religion, "even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb–1(a). A substantial burden is only permissible if the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb–1(b). As discussed in part A, supra, Plaintiffs' conclusory allegations that they will be burdened are not entitled to a presumption of truth under *Iqbal*, 129 S.Ct. at 1950–51. Because Plaintiffs' RFRA claim, like their free exercise claim, fails to allege more than a "mere

possibility" of harm, it is insufficient to withstand a motion to dismiss. *Id*. at 1949.

VIII. EQUAL PROTECTION

In Count Six, Plaintiffs allege that the individual coverage provision infringes on their right to equal protection under the due process clause of the Fifth Amendment. Specifically, Plaintiffs argue that the religious conscience exemption and the health care sharing ministries exemption treat Plaintiffs, who have religious objections to the Act but do not qualify for either of the exemptions, differently than other similarly situated individuals and organizations that have religious objections and do satisfy the requirements of one of the exemptions. (Second Am. Compl. ¶¶ 157–59; Pls.' Opp'n 44.)

Under equal protection law, "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). "Unless a statute provokes strict judicial scrutiny because it interferes with a fundamental right or discriminates against a suspect class, it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose." *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457–58, 108 S.Ct. 2481, 101 L.Ed.2d

399 (1988) (quotations omitted). "Heightened scrutiny is applied to an equal protection challenge to a regulation which applies selectively to religious activity only if the plaintiff can show the basis for the distinction was religious and not secular in nature." *Olsen v. Comm'r,* 709 F.2d 278, 283 (4th Cir.1983) (citing *Gillette v. United States*, 401 U.S. 437, 452, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971)). "If the justification for the distinction is secular, it need only be rational." *Id.*

A rational basis exists where the distinction "advances legitimate legislative goals in a rational fashion." *Schweiker v. Wilson,* 450 U.S. 221, 234, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981). The distinction need not be perfect, and may in practice result in some inequity. Id. The court does not ask whether the distinction will advance the legislative goals in fact, only whether the legislature rationally could have believed that the distinction would promote those goals. *W. & S. Life Ins. Co. v. State Bd. of Equalization,* 451 U.S. 648, 671–72, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981). That a statute is underinclusive because it contains an exemption does not make it irrational. "[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the

others." *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955) (citation omitted).

I must first determine which level of scrutiny to apply to these classifications. Although Plaintiffs state in a footnote in their brief that they do not concede that rational basis review applies, they do not provide any argument for reviewing the classification under heightened scrutiny. (Pls.' Opp'n 45 n.1.) Notably, neither exemption is addressed on its face to a particular religious sect or division thereof; instead, both exemptions identify characteristics that cut across denominations. The exemptions serve the valid secular purpose of accommodating the religious practice of persons who have religious objections to accepting the benefits of health insurance or who already share health expenses with others in accordance with shared religious beliefs. Alleviation of significant governmental interference with religious practice is a legitimate, secular legislative purpose. *See Corp. of the Presiding Bishop*, 483 U.S. at 335, 107 S.Ct. 2862; *Gillette*, 401 U.S. at 453–54, 91 S.Ct. 828; *Ward v. Comm'r*, 608 F.2d 599, 602 (5th Cir.1979); *Jaggard*, 582 F.2d at 1190. Accordingly, with no reason to believe the exemptions were designed to favor or penalize a particular religious group, I proceed to analyze the exemptions under rational basis review.

Both exemptions easily satisfy the rationality standard. The religious conscience exemption accommodates those religious adherents who meet the criteria of § 1402(g)(1); courts have repeatedly held, when confronted with an equal protection challenge, that § 1402(g)(1) is rationally related to legitimate government objectives. *See Droz*, 48 F.3d at 1125; *Bethel Baptist Church v. United States*, 822 F.2d 1334, 1341–42 (3d Cir.1987); *Templeton v. Comm'r,* 719 F.2d 1408, 1413–14 (7th Cir.1983); *Ward,* 608 F.2d at 602. Here, Congress could have rationally believed that the religious conscience exemption to the requirement to purchase individual health care coverage would alleviate interference with religious adherents' ability to exercise their faith. Congress found that the individual coverage provision is "essential" to the operation of the Act, § 1501(a)(2)(H)-(I), and consequently had good reason to limit the scope of exemptions granted from the requirement to those individuals who are members of religious groups that make provision for their dependent members and whose religious convictions are irreconcilable with the requirements of the Act, *see Templeton*, 719 F.2d at 1413–14. The limitation to religious sects in existence since December 31, 1950 may prevent others from taking advantage of the exemption, but it is not irrational. *See Bethel Baptist Church*, 822 F.2d at 1342.

For substantially the same reasons, the distinction made in the health care sharing ministries exemption is rationally related to the legitimate goal of accommodating the exercise of religion while limiting the scope of the exemption. It is reasonable to believe that, of individuals without health care coverage, members of religious organizations that share medical expenses among their members are less likely to incur uncompensated care—which would shift their health care costs on to third parties—than other individuals. Congress could have believed that the limitation to such ministries in existence since December 31, 1999 operates to exempt only ministries with established records of providing for their members. The distinction need not be perfect, *Schweiker,* 450 U.S. at 234, 101 S.Ct. 1074, only rational, and I conclude that it is. Plaintiffs' equal protection challenge will be dismissed.

IX. FREEDOM OF SPEECH AND ASSOCIATION

In Count Seven, Plaintiffs charge that the Act violates their rights of freedom of speech and association guaranteed under the First Amendment. Plaintiffs primarily frame the constitutional violation as one of compelled association. The challenge amounts to an allegation that the employer and individual

coverage provisions, by requiring Plaintiffs to purchase health insurance for themselves or their employees, force Plaintiffs to associate with those who "support or engage in abortion" and with insurers who fund abortions. (Second Am. Compl. ¶ 69; Pls.' Opp'n 41.) Plaintiffs allege that this involuntary association interferes with their ability to exercise their religious beliefs, which include "not being yoked with those who support or engage in abortions." (Pls.' Opp'n 41.)

The Constitution protects one's right to associate with others for the purpose of engaging in activities protected by the First Amendment, such as speech, assembly, petition for the redress of grievances, and the exercise of religion. *Roberts v. U.S. Jaycees,* 468 U.S. 609, 618, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). First Amendment rights cannot be adequately protected unless one has the right to join together with others to exercise those rights. *Id.* at 622, 104 S.Ct. 3244. The Supreme Court has recognized that forcing a group engaged in expressive activity to accept members it does not desire may impair the freedom of association. *Id.* at 623, 104 S.Ct. 3244 ("Freedom of association [ ] plainly presupposes a freedom not to associate.").[18]

> [18] Government actions also may infringe on the freedom to associate by imposing penalties or withholding benefits from individuals because of their membership in a disfavored group, *Healy v. James*, 408 U.S. 169, 180–84, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972), requiring disclosure of the fact of membership in a group seeking anonymity, *Brown v. Socialist Workers '74 Campaign Comm.,* 459 U.S. 87, 91–92, 103 S.Ct. 416, 74 L.Ed.2d 250 (1982), or by interfering with the internal affairs of a group, *Cousins v. Wigoda,* 419 U.S. 477, 487–88, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975).

Plaintiffs' challenge—essentially a restated free exercise claim—is misplaced. Plaintiffs allege that they hold the religious belief that they should not associate with those who support or engage in abortion. In that case, the problem is the possibility of Defendants' infringement on Plaintiffs' free exercise of their religious belief not to "yoke" themselves with others.[19] No impairment of their ability to associate with others to engage in activities protected by the First Amendment appears to be alleged. As Defendants correctly point out, the requirement to purchase health insurance does not prevent

Plaintiffs from expressing their views about anything and does not require them to endorse a view with which they disagree. (Defs.' Mem. Supp. Mot. Dismiss 45.) To the extent that Plaintiffs must associate with others, the association is minimally disruptive, as it was in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 69–70, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (hereinafter "FAIR "). In that case, the Supreme Court held that a law requiring law schools to accept military recruiters on campus did not affect the schools' associational rights because the schools were merely required to "interact with" recruiters, not accept recruiters as part of the school. *Id.* at 69–70, 126 S.Ct. 1297 ("A military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message."). The Act does not require health plans to cover abortion, and it ensures that at least one policy offered through each health benefit exchange will not cover non-excepted abortion services. Act §§ 1303, 1334; see also discussion in Section VII.A, supra. Consequently, the purported association here is merely that Plaintiffs will be forced to hold insurance policies in the same health care system in which other policies cover abortion. The connection is too remote to intrude upon Plaintiffs' free association rights.

[19] *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), the only case Plaintiffs cite in support of this argument, addressed a challenge under the right to freely exercise one's religion, not to freely associate with others.

Plaintiffs' free speech claim fares no better. It is not elaborated in much detail in either the complaint or Plaintiffs' brief, however, I will read the pleadings as raising two grounds for violation of Plaintiffs' free speech rights. First, according to Plaintiffs, decisions about paying for health care are a form of speech, and by requiring Plaintiffs to purchase health insurance, the Act allegedly forces Plaintiffs' speech. (See Pls.' Opp'n 41.) Freedom of speech prohibits the government from telling people what they must say. *FAIR*, 547 U.S. at 63, 126 S.Ct. 1297. The government's ability to force a speaker to host or accommodate another speaker's message where it affects the complaining speaker's message is also limited. Id.[20] Plaintiffs argue that *Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) supports their claim. There, the Court held that the state of New Hampshire could not force the appellees to display a license plate bearing the motto "Live Free or Die," to which the appellees had moral, religious, and political

objections. *Wooley*, 430 U.S. at 713, 97 S.Ct. 1428. But Plaintiffs cite no case for the proposition that compelling the purchase of insurance expresses a message, let alone would express a particular message about Plaintiffs' position on abortion with which Plaintiffs disagree. Obtaining a health care policy is a commercial transaction that reflects a personal choice about the best mix of coverage and price that serves one's medical needs. While one's religious beliefs may factor into the choice about which health care policy to purchase, the purchase and maintenance of the policy is not itself a speech activity, thus the First Amendment is not implicated.

[20] *See also Hurley v. Irish–American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 566, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (state law cannot require a parade to include a group whose message the parade's organizer does not wish to send); P*ac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 20–21, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion) (state agency cannot require a utility company to include a third-party newsletter in its billing envelope); accord id., at 25, 106 S.Ct. 903 (Marshall J., concurring); *Miami*

> *Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) (right-of-reply statute violates editors' right to determine the content of their newspapers).

Plaintiffs' second argument for infringement is that the mandatory payment for health insurance, or any payment of "fines, fees and taxes" imposed by the Act, are being used to subsidize speech with which Plaintiffs disagree; specifically, the funds are being used to cover abortion services. (Second Am. Compl. ¶ 169.) Free speech protection is implicated where the government requires an individual to subsidize a private message with which he disagrees. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005). Such forced subsidies of speech were held to be unconstitutional where nonunion public school teachers were required to pay a fee to unions that was used to fund political speech, *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), and where lawyers admitted to practice in California were forced to pay a state bar association which it used for political expression, *Keller v. State Bar of Cal.,* 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). But free speech rights are not violated where the individual is required to subsidize a government message with which he disagrees.

See Johanns, 544 U.S. at 559, 125 S.Ct. 2055. Compelled support of government programs, even those that advocate a position on a particular issue, is "perfectly constitutional, as every taxpayer must attest." *Id.*; *accord Bd. of Regents of Univ. of Wis. Sys. v. Southworth,* 529 U.S. 217, 229, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000) ("The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties.").

Here, Plaintiffs fail to allege how any payments required under the Act, whether fines, fees, taxes, or the cost of the policy, would be used to fund abortion. *See Twombly*, 550 U.S. at 570, 127 S.Ct. 1955 (requiring "enough facts to state a claim to relief that is plausible on its face."). As I explained in detail in the discussion of Plaintiffs' free exercise claim, see Section VII.A, supra, the Act contains safeguards to prevent federal funds from being used to pay for abortion services beyond those in cases of rape or incest, or where the life of the woman would be endangered, and requires the segregation of payments for non-excepted abortion services. Act §§ 1303, 1334; Exec. Order No. 13,535 of Mar. 24, 2010, 75 Fed. Reg. 15,599. Even if those provisions were not considered sufficient to protect against Plaintiffs' payments being used to support non-excepted abortion coverage, the government may support by taxes

or other exactions a health care delivery program, even one that could be considered to express a perspective on abortion, without violating Plaintiffs' free speech rights. *See Bd. of Regents of Univ. of Wis. Sys.*, 529 U.S. at 229, 120 S.Ct. 1346.[21] Count Seven will be dismissed.

> 21 In regard to forced subsidization of private speech, Plaintiffs have not alleged in sufficient detail for this Court's evaluation any mechanism whereby Plaintiffs' funds would be used to cover abortion services On this facial challenge, where Plaintiffs must allege the Act is unconstitutional in all of its applications, the Court does not need to speculate about the possibility that the segregation of funds into allocated accounts would fail to prevent Plaintiff's funds from contributing to abortion services.

X. CAPITATION TAX AND DIRECT TAX

The Constitution directs that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken," U.S. CONST. art. I, § 9, cl. 4, and provides that

"direct Taxes shall be apportioned among the several States ... according to their respective Numbers," U.S. CONST. art. I, § 2, cl. 3. Plaintiffs allege in Count Eight that the penalty provisions set forth in the Act for the employer and individual coverage requirements are unconstitutional capitation or direct taxes. Whether the Act was authorized under the commerce power or the power to tax is relevant to this consideration. *Edye v. Robertson (Head Money Cases)*, 112 U.S. 580, 595–96, 5 S.Ct. 247, 28 L.Ed. 798 (1884). The imposition of assessments is a legitimate means of regulating commerce, and "[i]f regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax." *South Carolina ex rel. Tindal v. Block,* 717 F.2d 874, 887 (4th Cir.1983) (exaction on commercially-sold milk not a tax); *see also Rodgers v. United States,* 138 F.2d 992, 994 (6th Cir.1943) (cotton marketing quotas not a tax); *United States v. Stangland*, 242 F.2d 843, 848 (7th Cir.1957) (wheat marketing quotas not a tax).

As I held above, the employer and individual coverage provisions are a regulation of interstate commerce authorized by the Commerce Clause. Although the penalties collected under the Act are expected to raise revenue, their main purpose is to enforce the requirement that individuals and employers

purchase or provide health insurance. Therefore, the penalty provisions, as "mere incident[s] of the regulation of commerce," *Head Money Cases*, 112 U.S. at 595, 5 S.Ct. 247, are not considered taxes for the purpose of the present claim. *See Thomas More Law Ctr.,* 720 F.Supp.2d at 894–96 (rejecting a challenge to the constitutionality of the penalty provisions of the individual coverage requirement of the Act). Count Eight will be dismissed.

XI. GUARANTEE CLAUSE

The Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government...." U.S. CONST. art. IV, § 4. The meaning of the Guarantee Clause has not been clearly delineated, but it is rarely a basis for finding an act of Congress unconstitutional. *See Largess v. Sup. Jud. Ct. for the State of Mass.*, 373 F.3d 219, 226–27 (1st Cir.2004) ("If there is any role for federal courts under the Clause, it is restricted to real threats to a republican form of government."). The United States Court of Appeals for the First Circuit defined a republican form of government as having the characteristics of a supreme power resting in a body of citizens entitled to vote and exercised by elected officers and representatives

responsible to them and governing according to law. *Id.* at 227.

Plaintiffs' claim in Count Nine is that the Act grants to Congress the ability to "veto" the private choices about health care made by individuals, employers, and states, giving the federal government "absolute sovereignty" and "censorial power" over the people. (Pls.' Opp'n 34–35.)[22] The Act does no such thing; nothing prevents the people and their representatives from amending or repealing the Act through the democratic process. Because I hold above that the challenged provisions of the Act are well within Congress' authority under the Commerce Clause, I find the Guarantee Clause claim to lack merit.

[22] Plaintiff also allege that the Act forces state governments to adopt federal standards "or lose their sovereignity." (Pls.' Opp'n 35.) As I explained in Section V, supra, Congress has the power to give states the choice whether to adopt regulations or have the federal government adopt and implement those regulations. *See New York,* 505 U.S. at 167, 112 S.Ct. 2408.

XII. CONCLUSION

For the reasons stated herein, the Court will grant Defendants' Motion to Dismiss. An appropriate order will follow.

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 157. Quality Affordable Health Care for All Americans
Subchapter V. Shared Responsibility for Health Care
Part A. Individual Responsibility

42 U.S.C.A. § 18091

§ 18091. Requirement to maintain minimum essential coverage
(a) Findings
Congress makes the following findings:
(1) In general
The individual responsibility requirement provided for in this section (in this subsection referred to as the "requirement") is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2).
(2) Effects on the national economy and interstate commerce
The effects described in this paragraph are the following:
(A) The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased. In the absence of the requirement, some individuals would make an economic and financial decision to forego health

insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers.

(B) Health insurance and health care services are a significant part of the national economy. National health spending is projected to increase from $2,500,000,000,000, or 17.6 percent of the economy, in 2009 to $4,700,000,000,000 in 2019. Private health insurance spending is projected to be $854,000,000,000 in 2009, and pays for medical supplies, drugs, and equipment that are shipped in interstate commerce. Since most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce.

(C) The requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services, and will increase the number and share of Americans who are insured.

(D) The requirement achieves near-universal coverage by building upon and strengthening the private employer-based health insurance system, which covers 176,000,000 Americans nationwide. In Massachusetts, a similar requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered

employer-based coverage has actually increased.

(E) The economy loses up to $207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured. By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will significantly reduce this economic cost.

(F) The cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008. To pay for this cost, health care providers pass on the cost to private insurers, which pass on the cost to families. This cost-shifting increases family premiums by on average over $1,000 a year. By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums.

(G) 62 percent of all personal bankruptcies are caused in part by medical expenses. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will improve financial security for families.

(H) Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), the Public Health Service Act (42 U.S.C. 201 et seq.), and this Act, the Federal Government has a significant role in regulating health insurance. The requirement is an essential part of this larger regulation of economic activity,

and the absence of the requirement would undercut Federal regulation of the health insurance market.

(I) Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act), if there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

(J) Administrative costs for private health insurance, which were $90,000,000,000 in 2006, are 26 to 30 percent of premiums in the current individual and small group markets. By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the requirement, together with the other provisions of this Act, will significantly reduce administrative costs and lower health insurance premiums. The requirement is essential to creating effective health insurance

markets that do not require underwriting and eliminate its associated administrative costs.
(3) Supreme Court ruling

In *United States v. South-Eastern Underwriters Association* (322 U.S. 533 (1944)), the Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation.
Credits

(Pub.L. 111-148, Title I, § 1501(a), Title X, § 10106(a), Mar. 23, 2010, 124 Stat. 242, 907.)
Editors' Notes
ENACTMENT OF SECTION

<Pub.L. 111-148, Title I, 1501(a), (d), Mar. 23, 2010, 124 Stat. 242, 249, provided that section shall apply to taxable years ending after Dec. 31, 2013.>

Current through P.L. 112-28 approved 8-12-11

United States Code Annotated
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle D. Miscellaneous Excise Taxes (Refs & Annos)
Chapter 48. Maintenance of Minimum Essential Coverage

26 U.S.C.A. § 5000A

§ 5000A. Requirement to maintain minimum essential coverage

Effective: March 30, 2010
Currentness

(a) Requirement to maintain minimum essential coverage.--An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

(b) Shared responsibility payment.--

(1) In general.--If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a

penalty with respect to such failures in the amount determined under subsection (c).

(2) Inclusion with return.--Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

(3) Payment of penalty.--If an individual with respect to whom a penalty is imposed by this section for any month--

(A) is a dependent (as defined in section 152) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

(B) files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

(c) Amount of penalty.--

(1) In general.--The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of--

(A) the sum of the monthly penalty amounts determined under paragraph (2) for months in the taxable year during which 1 or more such failures occurred, or

(B) an amount equal to the national average premium for qualified health plans which have a bronze level of coverage, provide coverage for the applicable family size involved, and are offered through Exchanges for plan years beginning in the calendar year with or within which the taxable year ends.

(2) Monthly penalty amounts.--For purposes of paragraph (1)(A), the monthly penalty amount with respect to any taxpayer for any month during which any failure described in subsection (b)(1) occurred is an amount equal to 1/12 of the greater of the following amounts:

(A) Flat dollar amount.--An amount equal to the lesser of--

(i) the sum of the applicable dollar amounts for all individuals with respect to whom such failure occurred during such month, or

(ii) 300 percent of the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

(B) Percentage of income.--An amount equal to the following percentage of the excess of the taxpayer's household income for the taxable year over the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer for the taxable year:

(i) 1.0 percent for taxable years beginning in 2014.

(ii) 2.0 percent for taxable years beginning in 2015.

(iii) 2.5 percent for taxable years beginning after 2015.

(3) Applicable dollar amount.--For purposes of paragraph (1)--

(A) In general.--Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $695.

(B) Phase in.--The applicable dollar amount is $95 for 2014 and $325 for 2015.

(C) Special rule for individuals under age 18.--If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall be equal to one-

half of the applicable dollar amount for the calendar year in which the month occurs.

(D) Indexing of amount.--In the case of any calendar year beginning after 2016, the applicable dollar amount shall be equal to $695, increased by an amount equal to--

(i) $695, multiplied by

(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year, determined by substituting "calendar year 2015" for "calendar year 1992" in subparagraph (B) thereof.

If the amount of any increase under clause (i) is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.

(4) Terms relating to income and families.--For purposes of this section--

(A) Family size.--The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year.

(B) Household income.--The term "household income" means, with respect to any taxpayer

for any taxable year, an amount equal to the sum of--

(i) the modified adjusted gross income of the taxpayer, plus

(ii) the aggregate modified adjusted gross incomes of all other individuals who--

(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

(II) were required to file a return of tax imposed by section 1 for the taxable year.

(C) Modified adjusted gross income.--The term "modified adjusted gross income" means adjusted gross income increased by--

(i) any amount excluded from gross income under section 911, and

(ii) any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax.

[(D) Repealed. Pub.L. 111-152, Title I, § 1002(b)(1), Mar. 30, 2010, 124 Stat. 1032]

(d) Applicable individual.--For purposes of this section--

(1) In general.--The term "applicable individual" means, with respect to any month, an individual other than an individual described in paragraph (2), (3), or (4).

(2) Religious exemptions.--

(A) Religious conscience exemption.--Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act which certifies that such individual is--

(i) a member of a recognized religious sect or division thereof which is described in section 1402(g)(1), and

(ii) an adherent of established tenets or teachings of such sect or division as described in such section.

(B) Health care sharing ministry.--

(i) In general.--Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

(ii) Health care sharing ministry.--The term "health care sharing ministry" means an organization--

(I) which is described in section 501(c)(3) and is exempt from taxation under section 501(a),

(II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,

(III) members of which retain membership even after they develop a medical condition,

(IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and

(V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

(3) Individuals not lawfully present.--Such term shall not include an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.

(4) Incarcerated individuals.--Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

(e) Exemptions.--No penalty shall be imposed under subsection (a) with respect to--

(1) Individuals who cannot afford coverage.--

(A) In general.--Any applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act. For purposes of applying this subparagraph, the taxpayer's household income shall be increased by any exclusion from gross income for any portion of the required contribution made through a salary reduction arrangement.

(B) Required contribution.--For purposes of this paragraph, the term "required contribution" means--

(i) in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-

employer-sponsored plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage, or

(ii) in the case of an individual eligible only to purchase minimum essential coverage described in subsection (f)(1)(C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified health plan through the Exchange), reduced by the amount of the credit allowable under section 36B for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

(C) Special rules for individuals related to employees.--For purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination under subparagraph (A) shall be made by reference to required contribution of the employee.

(D) Indexing.--In the case of plan years beginning in any calendar year after 2014,

subparagraph (A) shall be applied by substituting for '8 percent' the percentage the Secretary of Health and Human Services determines reflects the excess of the rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period.

(2) Taxpayers with income below filing threshold.--Any applicable individual for any month during a calendar year if the individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act is less than the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer.

(3) Members of Indian tribes.--Any applicable individual for any month during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6)).

(4) Months during short coverage gaps.--

(A) In general.--Any month the last day of which occurred during a period in which the applicable individual was not covered by minimum essential coverage for a continuous period of less than 3 months.

(B) Special rules.--For purposes of applying this paragraph--

(i) the length of a continuous period shall be determined without regard to the calendar years in which months in such period occur,

(ii) if a continuous period is greater than the period allowed under subparagraph (A), no exception shall be provided under this paragraph for any month in the period, and

(iii) if there is more than 1 continuous period described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph shall only apply to months in the first of such periods.

The Secretary shall prescribe rules for the collection of the penalty imposed by this section in cases where continuous periods include months in more than 1 taxable year.

(5) Hardships.--Any applicable individual who for any month is determined by the Secretary of Health and Human Services under section 1311(d)(4)(H) to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

(f) Minimum essential coverage.--For purposes of this section--

(1) In general.--The term "minimum essential coverage" means any of the following:

(A) Government sponsored programs.--Coverage under--

(i) the Medicare program under part A of title XVIII of the Social Security Act,

(ii) the Medicaid program under title XIX of the Social Security Act,

(iii) the CHIP program under title XXI of the Social Security Act,

(iv) medical coverage under chapter 55 of title 10, United States Code, including coverage under the TRICARE program;

(v) a health care program under chapter 17 or 18 of title 38, United States Code, as determined by the Secretary of Veterans Affairs, in coordination with the Secretary of Health and Human Services and the Secretary,

(vi) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers); or

(vii) the Nonappropriated Fund Health Benefits Program of the Department of Defense,

established under section 349 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337; 10 U.S.C. 1587 note).

(B) Employer-sponsored plan.--Coverage under an eligible employer-sponsored plan.

(C) Plans in the individual market.--Coverage under a health plan offered in the individual market within a State.

(D) Grandfathered health plan.--Coverage under a grandfathered health plan.

(E) Other coverage.--Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health and Human Services, in coordination with the Secretary, recognizes for purposes of this subsection.

(2) Eligible employer-sponsored plan.--The term "eligible employer-sponsored plan" means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is--

(A) a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act), or

(B) any other plan or coverage offered in the small or large group market within a State.

Such term shall include a grandfathered health plan described in paragraph (1)(D) offered in a group market.

(3) Excepted benefits not treated as minimum essential coverage.--The term "minimum essential coverage" shall not include health insurance coverage which consists of coverage of excepted benefits--

(A) described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act; or

(B) described in paragraph (2), (3), or (4) of such subsection if the benefits are provided under a separate policy, certificate, or contract of insurance.

(4) Individuals residing outside United States or residents of territories.--Any applicable individual shall be treated as having minimum essential coverage for any month--

(A) if such month occurs during any period described in subparagraph (A) or (B) of section 911(d)(1) which is applicable to the individual, or

(B) if such individual is a bona fide resident of any possession of the United States (as

determined under section 937(a)) for such month.

(5) Insurance-related terms.--Any term used in this section which is also used in title I of the Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

(g) Administration and procedure.--

(1) In general.--The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Special rules.--Notwithstanding any other provision of law--

(A) Waiver of criminal penalties.--In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

(B) Limitations on liens and levies.--The Secretary shall not--

(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

(ii) levy on any such property with respect to such failure.

Credits

(Added and amended Pub.L. 111-148, Title I, § 1501(b), Title X, § 10106(b) to (d), Mar. 23, 2010, 124 Stat. 244, 909; Pub.L. 111-152, Title I, §§ 1002, 1004(a)(1)(C), (a)(2)(B), Mar. 30, 2010, 124 Stat. 1032, 1034; Pub.L. 111-159, § 2(a), Apr. 26, 2010, 124 Stat. 1123; Pub.L. 111-173, § 1(a), May 27, 2010, 124 Stat. 1215.)

Editors' Notes

ENACTMENT OF SECTION

<Pub.L. 111-148, Title I, § 1501(b), (d), Mar. 23, 2010, 124 Stat. 244, 249, provided that this section, as amended by Pub.L. 111-159, § 2(a), Apr. 26, 2010, 124 Stat. 1123 and Pub.L. 111-173, § 1(a), May 27, 2010, 124 Stat. 1215, shall apply to taxable years ending after Dec. 31, 2013.>

Current through P.L. 112-28 approved 8-12-11

United States Code Annotated

Title 26. Internal Revenue Code (Refs & Annos)
Subtitle D. Miscellaneous Excise Taxes (Refs & Annos)

Chapter 43. Qualified Pension, Etc., Plans (Refs & Annos)

26 U.S.C.A. § 4980H

§ 4980H. Shared responsibility for employers regarding health coverage

Currentness

(a) Large employers not offering health coverage.--If--

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having

enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.--

(1) In general.--If--

(A) an applicable large employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable

premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $3,000.

(2) Overall limitation.--The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

[(3) Repealed. Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169]

(c) Definitions and special rules.--For purposes of this section--

(1) Applicable payment amount.--The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000.

(2) Applicable large employer.--

(A) In general.--The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.

(B) Exemption for certain employers.--

(i) In general.--An employer shall not be considered to employ more than 50 full-time employees if--

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers.--The term "seasonal worker" means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including workers covered by section 500.20(s)(1) of title 29, Code of Federal Regulations and retail workers employed exclusively during holiday seasons.

(C) Rules for determining employer size.--For purposes of this paragraph--

(i) Application of aggregation rule for employers.--All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year.--In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) Predecessors.--Any reference in this subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties.--

(i) In general.--The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating--

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) Aggregation.--In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated among such persons ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees.--Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(3) Applicable premium tax credit and cost-sharing reduction.--The term "applicable premium tax credit and cost-sharing reduction" means--

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee.--

(A) In general.--The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service.--The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.--

(A) In general.--In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of--

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(B) Rounding.--If the amount of any increase under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions.--Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible.--For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) Administration and procedure.--

(1) In general.--Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment.--The Secretary may provide for the payment of any assessable payment provided by this section on an annual,

monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc.--The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

Credits

(Added and amended Pub.L. 111-148, Title I, § 1513(a), Title X, §§ 10106(e), (f)(1), (2), 10108(i)(1)(A), Mar. 23, 2010, 124 Stat. 253, 910, 914; Pub.L. 111-152, Title I, § 1003, Mar. 30, 2010, 124 Stat. 1033; Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169.)

Editors' Notes

ENACTMENT OF SECTION

<Pub.L. 111-148, Title I, § 1513(a), (d), Mar. 23, 2010, 124 Stat. 253, 256, provided that section shall apply to months beginning after Dec. 31, 2013.>

Current through P.L. 112-28 approved 8-12-11

26 U.S.C.A. § 7421
§ 7421. Prohibition of suits to restrain assessment or collection
Effective: December 21, 2000
Currentness

(a) Tax.--Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

(b) Liability of transferee or fiduciary.--No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of--

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3713(b) of title 31, United States Code1 in respect of any such tax.

Credits

(Aug. 16, 1954, c. 736, 68A Stat. 876; Nov. 2, 1966, Pub.L. 89-719, Title I, § 110(c), 80 Stat. 1144; Oct. 4, 1976, Pub.L. 94-455, Title XII, § 1204(c)(11), 90 Stat. 1699; Nov. 10, 1978, Pub.L. 95-628, § 9(b)(1), 92 Stat. 3633; Sept. 13, 1982, Pub.L. 97-258, § 3(f)(13), 96 Stat. 1065; Aug. 5, 1997, Pub.L. 105-34, Title XII, §§ 1222(b)(1), 1239(e)(3), Title XIV, § 1454(b)(4), 111 Stat. 1019, 1028, 1057; July 22, 1998, Pub.L. 105-206, Title III, § 3201(e)(3), 112 Stat. 740; Oct. 21, 1998, Pub.L. 105-277, Div. J, Title IV, § 4002(c)(1), (f), 112 Stat. 2681-906, 2681-907; Dec. 21, 2000, Pub.L. 106-554, § 1(a)(7) [Title III, §§ 313(b)(2)(B), 319(24)], 114 Stat. 2763, 2763A-642, 2763A-647.)
Current through P.L. 112-28 approved 8-12-11

Footnotes

1 So in original. A comma probably should appear here.