No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

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

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS (Minimum Coverage Provision)

GILLIAN E. METZGER
TREVOR W. MORRISON
435 West 116th Street
New York, NY 10027
(212) 854-1997

ANDREW J. PINCUS
Counsel of Record
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*

Amici are professors of law who teach and write about constitutional law and tax law, including Congress's power to tax. They have substantial expertise in the text, history, and structure of the Constitution, as well as this Court's decisions relating to the legislative authority of the federal government, especially the tax power. Their legal expertise thus bears directly on the constitutional issues before the Court.[1] *Amici* are:

- Jack M. Balkin, Knight Professor of Constitutional Law and the First Amendment, Yale Law School;
- Brian Galle, Assistant Professor of Law, Boston College Law School;
- Edward Kleinbard, Professor of Law, University of Southern California Gould School of Law;
- Gillian E. Metzger, Vice Dean and Stanley H. Fuld Professor of Law, Columbia Law School;
- Trevor W. Morrison, Isidor and Seville Sulzbacher Professor of Law, Columbia Law School.[2]

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk.

[2] Institutional affiliations are provided for identification purposes only.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this brief to explain why the minimum cov**e**rage provision of the Affordable Care Act ("ACA") falls well within the settled understanding of the scope of Congress's tax power.[3]

The ACA establishes a comprehensive regime to address the crisis in uncompensated health care services in the United States. Uninsured individuals frequently obtain healthcare services without fully paying for them. Providing uncompensated services to the uninsured cost the American healthcare system $43 billion in 2008 alone—a cost that was substantially subsidized by the government with the remainder passed on to private insurers, insured families, and employers. See Pub. L. No. 111-148, §§ 1501(a)(2)(F), 10106(a) (2010); Jack Hadley et al., *Covering the Uninsured in 2008: Current Costs, Sources of Payment, and Incremental Costs*, Health Affairs W403-W406 (Aug. 25, 2008) (*cited in* H.R.

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[3] We do not address whether the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a) ("AIA"), precludes the Court from reaching the merits of the questions presented in this case. Critically, the Court could decide that this case does not involve a "suit for the purpose of restraining the assessment or collection of [a] tax" under the AIA, but nonetheless uphold the Minimum Coverage Provision as an exercise of the tax power, because the scope of the AIA and of Congress's tax power are not coterminous. Michael Dorf & Neil Siegel, *"Early Bird Special" Indeed!: Why the Tax Anti-Injunction Act Permits the Present Challenges to the Minimum Coverage Provision*, 121 Yale L.J. Online (2011) (draft at 3-4), available at http://papers.ssrn.com-/sol3-/papers.cfm?abstract_-id=1969540 (because the levy imposed by the Provision cannot be assessed and collected until 2015, the current litigation is not "for the purpose of restraining assessment and collection of [a] tax," and the AIA does not apply).

Rep. No. 111-443, pt. 2, 111th Cong., 2d Sess., at 983 (2010)).

The Minimum Coverage Provision addresses this serious problem by requiring individuals either to purchase a minimally adequate health insurance plan for themselves and their families or to pay an annual tax. See Pub. L. No. 111-148, §§ 1501(b), 10106, *amended by* Pub. L. No. 111-152 § 1002 (2010), *codified at* 26 U.S.C. § 5000A.[4]

Amici are confident that the Minimum Coverage Provision is a permissible exercise of Congress's authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. But the provision also falls squarely within the Constitution's grant to Congress of the "Power To lay and collect Taxes, Duties, Imposts and Excises." *Id.* art. I, § 8, cl. 1.

This Court has long recognized that Congress's tax power is exceedingly broad. A tax is valid as long as it (1) serves the general welfare, (2) is reasonably related to revenue raising, and (3) does not violate any independent constitutional prohibition. The Court has also repeatedly affirmed that the tax power is not limited to subjects that fall within Congress's other enumerated powers, and that a levy may be upheld as a tax even if its overwhelming purpose and effect is regulatory.

The Minimum Coverage Provision plainly satisfies these requirements. Indeed, several appellate

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[4] The amount of the tax is set at a percentage of income or an absolute amount, whichever is greater, up to the average national cost of purchasing a minimally adequate policy for the taxpayer's household size. Those earning too little to owe federal income tax are exempt, as are several other specified groups.

judges addressing the various constitutional challenges to the ACA either stated that the Provision is a valid exercise of Congress's tax power or acknowledged that the tax power could well support enactment of a measure of this sort. *Liberty University, Inc.* v. *Geithner*, 2011 WL 3962915, at *16 (4th Cir. 2011) (Wynn, J., concurring) (agreeing with the panel's holding that the AIA applies and then stating that, "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"); *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 552-53 (6th Cir. 2011) (Sutton, C.J., concurring in part and delivering the opinion of the court in part) (suggesting that, "*if* the legislature had used taxes in this part of the Affordable Care Act, the Act likely would be constitutional"); see also *Seven-Sky* v. *Holder*, 661 F.3d 1, 48 & n.38 (D.C. Cir. 2011) (Kavanaugh, J., dissenting as to jurisdiction) (stating that "just a minor tweak to the current statutory language would definitively establish the law's constitutionality under the Taxing Clause" and suggesting that, even without such a "tweak," the Minimum Coverage Provision could perhaps be interpreted to "pass muster under the Taxing Clause").

To some judges unwilling to uphold the Minimum Coverage Provision under the tax power, the critical obstacle was not whether the Congress's constitutional authority could encompass the provision but whether Congress sufficiently evidenced its intent to exercise that power. *Florida* v. *HHS*, 648 F.3d 1235, 1314 (11th Cir. 2011) ("The breadth of the taxing power, well noted by the government and its *amici,* fails to resolve the question we face: whether the individual mandate is a tax in the first place."),

cert. granted, No. 11-398; *Thomas More Law Ctr.*, 651 F.3d at 553 (Sutton, C.J., concurring in part and delivering the opinion of the court in part) (fact that the Minimum Coverage Provision likely could have been passed as an exercise of Congress's tax power "does not tell us whether Congress invoked this power or whether the penalty is a 'Tax[ ]' under Article I of the Constitution. It did not, and it is not.").

In refusing to evaluate the Minimum Coverage Provision as an exercise of Congress's tax power, these judges departed from the well-established principle that federal statutes must be accorded a presumption of constitutionality. Fidelity to that presumption—and respect for the elected Branches and the people they represent—requires that a provision falling within a grant of legislative power, including the tax power, be deemed an exercise of that power in the absence of clear evidence that Congress intended otherwise. Any other approach would as a practical matter replace the presumption of constitutionality with a presumption that Congress prefers to have its enactments invalidated if it does not invoke its tax power with some special level of clarity or specificity. There is no warrant for such a dramatic departure from this Court's time-tested approach.

That is especially true because this Court in the tax context has repeatedly ***rejected*** the argument that an enactment may be sustained under the tax power only if Congress expressly invoked that authority or used the term "tax" in the relevant provision. Thus, the Court has characterized monetary levies as "taxes" even though they were not labeled as such by Congress. Eschewing a formalistic focus on labels, the Court's cases teach that if an enactment functions as a tax—that is, if it is a "pecuniary bur-

den laid upon individuals or property for the purpose of supporting the government," *United States* v. *New York*, 315 U.S. 510, 515-16 (1942) (quotation marks omitted)—it may be sustained under the tax power without regard to whether the term "tax" appears in the statute. When Congress enacted the Provision, therefore, it could not have anticipated that applying the label "tax" was essential to invoke its tax power.

Certainly the legislative record in this case does not support concluding that Congress intended to disclaim reliance on its tax power. Although parts of the record could be read to suggest that some in Congress did not deem the Minimum Coverage Provision a tax, other parts strongly affirm the view that Congress considered the Provision to be a tax.

The Provision itself contains numerous references consistent with its characterization as a tax, including a specification that the amount owing shall be paid as part of individuals' annual tax returns. The legislative record also contains several references to the Provision as a tax. There is, therefore, simply no warrant to infer that Congress meant to rule out treating the Provision as a tax—especially if the consequence were a finding that the Provision is unconstitutional.

ARGUMENT

The question whether the Minimum Coverage Provision is a constitutional exercise of Congress's tax power divides logically into two issues: whether the tax power is broad enough to support a measure like the Minimum Coverage Provision, and whether the Provision may be upheld as an exercise of that power. This brief addresses those questions in turn,

and explains why the Court should answer yes to both.

I. THE MINIMUM COVERAGE PROVISION FALLS WITHIN CONGRESS'S EXPANSIVE TAX POWER AND IS NOT AN IMPERMISSIBLE DIRECT TAX.

A. The Tax Power Is Broad, And Extends To Levies With A Regulatory Purpose And Effect.

The Constitution grants Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises." U.S. Const. art. I, § 8, cl. 1. This Court has long emphasized the wide scope of Congress's taxing power, describing it as "extensive," *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1867), "exhaustive," *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 12 (1916), and "virtually without limitation," *United States* v. *Ptasynski*, 462 U.S. 74, 79 (1983). It is thus well-settled that "the constitutional restraints on taxing are few," and that, in general, "[t]he remedy for excessive taxation is in the hands of Congress, not the courts." *United States* v. *Kahriger*, 345 U.S. 22, 28 (1953), *overruled in part on other grounds by Marchetti* v. *United States*, 390 U.S. 39 (1968).

The breadth of the taxing power is no accident. The fundamental problem that doomed the Articles of Confederation was the Continental Congress's lack of taxing authority. Rather than levying taxes itself, the federal government was required to send the States "requisitions" for funds, with the amount per State set "in proportion to the value of all land within each State." Articles of Confed. art. VIII (1781). The States were then expected to levy and collect taxes to provide the requisitioned amount. They of-

ten failed to do so, however, and Congress had few means by which to enforce compliance. See generally Roger Brown, *Redeeming the Republic: Federalists, Taxation, and the Origins of the Constitution* (1993).

The failure of the requisition system, which ultimately "reduced the United States to bankruptcy[,] * * * demonstrated the need of a central government that should possess the power of taxation." Charles Bullock, *The Origin, Purpose and Effect of the Direct-Tax Clause of the Federal Constitution I*, 15 Pol. Sci. Q. 217, 218 (1900). Creating a federal government with a more robust taxing power and adequate revenue was thus a principal motivation for adopting the Constitution. See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 388 (1821); see also *The Federalist* No. 30 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Brown, *supra*, at 3-8. Indeed, "nothing is clearer, from the discussions in the Convention and the discussions which preceded final ratification by the necessary number of States, than the purpose to give this power to Congress, as to the taxation of everything except exports, in its fullest extent." *Veazie Bank* v. *Fenno*, 75 U.S. (8 Wall.) 533, 540 (1869).

Against that historical backdrop, this Court has rejected arguments that the tax power extends only to matters within Congress's reach under the Commerce Clause or other grants of legislative authority. Instead, it has recognized that the Taxation Clause "delegates a power separate and distinct from those later enumerated" in Article I, Section 8, and that its scope is "not restricted by them." *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950). In the *License Tax Cases*, 72 U.S. (5 Wall.) 462 (1867), for example, the Court noted that "Congress has no power of regulation nor any direct control" over "the

internal commerce or domestic trade of the States," but nonetheless sustained under the tax power a federal statute requiring purchase of a license before engaging even in certain intrastate trades and businesses. *Id.* at 470-71; see also *United States* v. *Sanchez*, 340 U.S. 42, 44 (1950) ("Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate.").

Similarly, a tax is not rendered invalid because it is motivated by a regulatory purpose or because it has a regulatory effect. The Court long ago deemed it "beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed." *Sanchez*, 340 U.S. at 44; see also *Kahriger*, 345 U.S. at 27 (noting numerous instances in which the Court upheld taxes notwithstanding a manifest "intent to curtail and hinder, as well as tax"); *Minor* v. *United States*, 396 U.S. 87, 98 n.13 (1969). "[A] tax is not any the less a tax because it has a regulatory effect." *Sonzinsky* v. *United States*, 300 U.S. 506, 513 (1937).

For precisely this reason, the Court has long "held that the fact that other motives may impel the exercise of federal taxing power does not authorize courts to inquire into that subject." *United States* v. *Doremus*, 249 U.S. 86, 93 (1919). As long as "the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it." *Ibid.*; see also *Sonzinsky*, 300 U.S. at 513-14 ("Inquiry into the hidden motives which may move (a legislature) to exercise a power constitutionally conferred upon it is beyond the competency of courts."); *A. Magnano Co.*

v. *Hamilton*, 292 U.S. 40, 44 (1934); *McCray* v. *United States*, 195 U.S. 27, 59 (1904).

To be sure, during the 1920s and 1930s the Court did invalidate some federal taxes on the ground that they had been adopted primarily to enforce compliance with a regulatory program that exceeded Congress's authority under the then-prevailing interpretation of the Commerce Clause. See, *e.g.*, *United States* v. *Butler*, 297 U.S. 1, 58-59 (1936); *United States* v. *Constantine*, 296 U.S. 287, 295 (1935); *Hill v. Wallace*, 259 U.S. 44, 66-68 (1922); *Bailey* v. *Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20, 37-38 (1922). The Court has since discredited those decisions, however, explaining that it had "abandoned" its earlier "distinctions between regulatory and revenue-raising taxes," *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 741 n.12 (1974), and insisting that a tax remains valid "even though * * * the revenue purpose of the tax may be secondary." *Sanchez*, 340 U.S. at 44.

Even if the Court's *Lochner*-era decisions retained some force today, they would merely support invalidating as pretextual a tax so high as to amount to a coercive penalty to compel compliance with a regulatory scheme that falls wholly outside Congress's other enumerated powers. That was the situation addressed by those decisions, and that is how the Court has interpreted them since then. See*, e.g.*, *Kahriger*, 345 U.S. at 29-32. Absent such extreme circumstances, however, those cases do not license judicial second-guessing of Congress's intentions in enacting legitimate taxes. Instead, any scrutiny the Court today devotes to the purposes underlying a tax focuses on ensuring it is not a criminal sanction in disguise. See *Mont. Dep't of Revenue* v. *Kurth Ranch*,

511 U.S. 767, 779-83 (1994) (tax on drugs constituted criminal punishment and therefore violated the Double Jeopardy Clause).

B. The Minimum Coverage Provision Falls Within The Tax Power Because It Serves The General Welfare, Is Reasonably Related To Revenue Raising, And Does Not Infringe Any Constitutionally-Protected Individual Rights.

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

First, a tax measure must raise funds that specifically "pay the Debts and provide for the common Defence and general Welfare." U.S. Const. art. I, § 8, cl. 1. Congress, however, enjoys wide discretion to determine whether a tax measure serves the general welfare. *Helvering* v. *Davis*, 301 U.S. 619, 641 (1937); see also *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987); *Buckley* v. *Valeo*, 424 U.S. 1, 90-91 (1976).

Second, the measure must bear "some reasonable relation" to the "raising of revenue," *Doremus*, 249 U.S. at 93-94, even if the revenue actually produced is "negligible." *Sanchez*, 340 U.S. at 44; accord *Kahriger*, 345 U.S. at 28 (noting tax at issue "produces revenue"); *Sonzinsky*, 300 U.S. at 514 (upholding tax "productive of some revenue").

Third, like any exercise of enumerated power, a tax is invalid if it runs afoul of the provisions of the Constitution that protect individual rights, such as the Fifth Amendment's prohibition on double jeopardy. See *Kurth Ranch*, 511 U.S. at 778-79, 784.

The Minimum Coverage Provision satisfies these requirements.

1. In determining whether a congressional enactment furthers the general welfare, "courts should defer substantially to the judgment of Congress." *Dole*, 483 U.S. at 207. By encouraging individuals to purchase health insurance, the Minimum Coverage Provision alleviates the costs—incurred by the government and by other Americans (through increased health insurance premiums)—that are associated with providing uncompensated care to the uninsured. Such cost reductions and expansions in access to health insurance assuredly constitute contributions to the general welfare.

2. The Minimum Coverage Provision clearly constitutes a revenue-raising measure. Congress specifically found that the ACA "will reduce the Federal deficit," Pub. L. No. 111-148, § 1563(a)(1), 124 Stat. 119, 270, and the Congressional Budget Office estimated that the Minimum Coverage Provision in particular will produce approximately $4 billion annually by 2017. Letter from Douglas Elmendorf, Director, Cong. Budget Office, to Nancy Pelosi, Speaker, U.S. House of Representatives (Mar. 20, 2010), at 2, tbl.4. Between 2010 and 2019, the provision is estimated to generate approximately $17 billion in revenue. *Ibid*.

These sums are more than enough to satisfy the revenue requirement. See *Sonzinsky*, 300 U.S. at 514 n.1 (upholding tax that raised $5,400 in revenue in 1934—less than $90,000 in today's dollars); see also *Seven-Sky*, 661 F.3d at 45 (Kavanaugh, J., dissenting as to jurisdiction) (noting the $4 billion raised by the Provision would "would pay the annual salaries of about 100,000 members of the U.S. Military. That's real revenue.").

To be sure, the Minimum Coverage Provision also serves a regulatory purpose by encouraging individuals to purchase health insurance. But as we have explained (see pages 9-11, *supra*), this Court's precedents make plain that a regulatory purpose cannot invalidate a measure that otherwise may be sustained under the tax power.

Moreover, even if the *Lochner*-era decisions retained some vitality, they would not provide any basis for invalidating the tax here. Unlike the regulatory regimes at issue in those cases, the Minimum Coverage Provision is not the only means of enforcing the multi-faceted statutory plan contained in the ACA. The statute's other requirements are separately specified and are easily sustainable in their own right under Congress's commerce and spending powers.

The critical question on this point is not whether Congress in enacting the Minimum Coverage Provision meant to achieve a regulatory objective in addition to raising revenue—plainly it did, and plainly it may. *Sonzinsky*, 300 U.S. at 513. The question for purposes of the constitutional analysis is whether the Minimum Coverage Provision raises revenue for use in service of the general welfare—and plainly it does.

The Provision also is neither punitive nor a disguised criminal penalty. The amount of tax imposed by the Provision is not a "heavy exaction" or otherwise disproportionate assessment. *Bailey*, 259 U.S. at 36. It is limited to the national average of the premiums for the lowest level of qualified health plans for the taxpayer's family size that are available on the newly created health exchanges, and it contains exemptions based on low income and inability

to pay. See Pub. L. No. 111-148, § 1501(b) (adding 26 U.S.C. §§ 5000A(c)(1), (2), 5000A(e)(1), (2)) (as amended by Pub. L. No. 111-152, § 1002 (2010)).

That is quite unlike impositions found to constitute regulatory penalties rather than taxes, where individuals faced substantial monetary liability well in excess of any underlying value. See *United States* v. *Reorganized CF & I Fabricators*, 518 U.S. 213, 225-26 (1996) (finding tax to be a penalty where it imposed a tax of 110 percent in addition to the amount an employer owed for an underfunded pension plan); *Kurth Ranch*, 511 U.S. at 780 & n.17 (noting high rate of taxation, at approximately 400 percent of market value, in concluding tax was actually a criminal penalty); *Constantine*, 296 U.S. at 295 (concluding imposition ten to forty times as large as underlying tax was a penalty and emphasizing that the fact an "exaction * * * is highly exorbitant * * * points in the direction of a penalty rather than a tax").[5]

Moreover, the fact that the Minimum Coverage Provision imposes a tax only on individuals who fail to comply with the requirement that they obtain insurance provides no basis for concluding that the Provision is not a tax. This Court has upheld a variety of provisions as valid taxes even though they established requirements that were enforced through

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[5] The Minimum Coverage Provision also is not tied to criminal conduct, and the Secretary of the Treasury is precluded from enforcing it through prosecution. See 26 U.S.C. § 5000A(g)(2). Cf. *Kurth Ranch,* 511 U.S. at 780-83 (emphasizing high tax rate, deterrent purpose, and criminal prohibition on underlying taxed activity in concluding tax amounted to a criminal penalty).

financial impositions. *Doremus,* 249 U.S. at 90-91 & 94-95 (upholding measure making it unlawful for an individual to transfer opiates except by using IRS forms that were available only when the individual registered and paid a tax); *Sanchez*, 340 U.S. at 44 (upholding a registration requirement for dealing in marijuana together with an increased tax on those failing to comply); see also U.S. Br. 59-62 (explaining why the obligation to purchase insurance does not undermine the Provision's status as a tax).[6]

3. The Minimum Coverage Provision does not violate any constitutionally-protected individual right. No one has a right to be free from taxation, and Congress's decision to target individuals who choose to forgo insurance is indisputably rational, given the aggregate impact of that choice on the government and society as a whole. *Regan* v. *Taxation with Representation*, 461 U.S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."). The provision thus plainly qualifies as a legitimate, enforceable tax.

C. The Minimum Coverage Provision Is Not A Direct Tax Subject To The Constitution's Apportionment Requirement.

The Direct Tax Clause provides that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein be-

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[6] Judge Kavanaugh's observation that "[t]he only reason the current statute *may not* suffice under the Taxing Clause is that [it] arguably does not just incentivize certain kinds of lawful behavior but also mandates such behavior," *Seven-Sky*, 661 F.3d at 48 (dissenting as to jurisdiction; emphasis in original), is thus inconsistent with this Court's precedents.

fore directed to be taken." U.S. Const. art. I, § 9, cl. 4. The apportionment requirement does not apply to the Minimum Coverage Provision.

Although the precise meaning of "direct tax" was obscure even at the Founding, this Court has consistently understood the class of taxes subject to the apportionment requirement to be extremely narrow.[7] Writing seriatim in *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796), the Court's first Direct Tax Clause case, the Justices suggested that only two kinds of taxes—capitation taxes and taxes on land—clearly constituted direct taxes; they expressed serious doubt that any other types of taxes fell within that category. See *id.* at 175 (opinion of Chase, J.) ("I am inclined to think * * * that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstances; and a tax on LAND."); *id.* at 177 (opinion of Paterson, J.) ("Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point."); *id.* at 183 (opinion of Iredell, J.) ("Perhaps a direct tax in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil.").

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[7] The requirement that direct taxes be apportioned was included in the Constitution to help secure a compromise over the treatment of slaves for purposes of representation. Edwin Seligman, *The Income Tax* 552 (1914). It was limited to direct taxes precisely to ensure it would not interfere substantially with the broad taxing authority the Framers intended to grant to the federal government. Bullock, *supra*, at 222.

Accordingly, the Court in the nineteenth century sustained unapportioned taxes on a variety of forms of income and property on the ground that they qualified as excises, including: taxes on insurance premiums, *Pac. Ins. Co.* v. *Soule*, 74 U.S. (7 Wall.) 433 (1869); state bank notes, *Veazie Bank*, 75 U.S. (8 Wall.) 533; inheritances, *Scholey* v. *Rew*, 90 U.S. (23 Wall.) 331 (1875); and income, *Springer* v. *United States*, 102 U.S. 586, 592 (1880).[8]

The Direct Tax Clause continues to be interpreted very narrowly today. As one court of appeals recently put it, "[o]nly three taxes are definitely known to be direct: (1) a capitation * * *, (2) a tax upon real property, and (3) a tax upon personal property." *Murphy* v. *IRS*, 493 F.3d 170, 181 (D.C. Cir. 2007). Plainly, the Minimum Coverage Provision is not one of these types of taxes.

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[8] In *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), the Court struck down the federal income tax as an unapportioned direct tax. *Pollock* did not hold that all income taxes are direct taxes, but instead was limited to taxes on income derived from real and personal property. The Nation responded by adopting the Sixteenth Amendment, providing that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. amend. XVI. And the Court upheld a wide range of unapportioned taxes after *Pollock*. See *Knowlton* v. *Moore*, 178 U.S. 41 (1900) (federal estate tax); *Patton* v. *Brady*, 184 U.S. 608 (1902) (tax on manufacturing of tobacco); *Thomas* v. *United States*, 192 U.S. 363 (1904) (stamp tax on memorandum or contracts of sale of stock certificates); *Spreckels Sugar Ref. Co.* v. *McClain*, 192 U.S. 397 (1904) (tax on sugar refining); *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 177 (1911) (corporate income tax).

The Provision is in no way tied to property. Neither is it a capitation. As Justice Story explained, "capitation taxes, or, as they are more commonly called, poll taxes, [are] taxes upon the polls, heads, or persons, of the contributors." Joseph Story, *Commentaries on the Constitution of the United States* § 954 (Melville Bigelow ed., 5th ed. 1891). Such a tax is imposed on the person "without regard to property, profession, or any other circumstance." *Hylton*, 3 U.S. at 175 (opinion of Chase, J.).

That does not describe the Minimum Coverage Provision. Far from being imposed "without regard to property, profession, or any other circumstance," *ibid.*, it is instead contingent on very specific circumstances: the taxpayer's failure to pay premiums into a qualified health care plan in a given month, and the taxpayer's ability to pay. The Provision does not operate directly on any person or property, but only indirectly as a function of a taxpayer's particular decisions. See *Tyler* v. *United States*, 281 U.S. 497, 502 (1930) ("A tax laid upon the happening of an event, as distinguished from its tangible fruits, is an indirect tax.").[9]

This Court has never struck down a federal tax on the ground that it is an unapportioned capitation,

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[9] There are numerous examples of Congress taxing the failure to make a particular economic arrangement. See, *e.g.*, 26 U.S.C. § 4974 (tax on failure of retirement plans to distribute assets); *id.* § 4980B (tax on failure of group health plan to extend coverage to beneficiary); *id.* § 4980E (tax on failure of employer to make comparable Archer MSA contributions). None of those provisions is subject to the Direct Tax Clause's apportionment requirement.

and there is no basis for concluding that the Minimum Coverage Provision is the first such tax.

II. THE MINIMUM COVERAGE PROVISION SHOULD BE TREATED AS A TAX BECAUSE CONGRESS DID NOT CLEARLY INTEND OTHERWISE.

Some lower courts have rested their refusal to uphold the Provision under the tax power—even though it falls easily within the settled understanding of Congress's broad authority—on their conclusion that Congress did not clearly evidence its intent to exercise its tax power. See *Florida* v. *HHS*, 648 F.3d at 1313-20; *Thomas More Law Ctr.*, 651 F.3d at 552-54 (Sutton, C.J.) (concurring in part and delivering the opinion of the court in part).

That determination is at odds with this Court's precedents and with the presumption of constitutionality that attaches to duly-enacted federal laws. Fidelity to that presumption requires that a provision falling within the reach of Congress's tax power should be deemed an exercise of that power unless there is clear evidence that Congress intended otherwise. That evidence is lacking here.

A. Federal Statutes Are Presumed Constitutional And Congress Is Not Required To Identify Expressly The Powers Under Which It Acts.

The Minimum Coverage Provision, like the ACA of which it is part, constitutes legislation "'adjusting the burdens and benefits of economic life,'" and as such "'come[s] to the Court with a presumption of constitutionality.'" *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) (quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15

(1976)). As applied to federal legislation, the presumption of constitutionality is rooted in basic separation of powers principles. "Respect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality." *Salazar* v. *Buono*, 130 S. Ct. 1803, 1820 (2010) (plurality opinion); see also *Mistretta* v. *United States*, 488 U.S. 361, 384 (1989) ("'When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons.'"); *United States* v. *Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds").

The presumption of constitutionality generally does not apply when a measure implicates individual constitutional rights whose invasion triggers more searching judicial scrutiny. *United States* v. *Playboy Entertainment Group*, 529 U.S. 803, 817 (2000) ("When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed."). But the Court has consistently and repeatedly held that the presumption of constitutionality applies to ordinary economic legislation subject to minimal rationality review. *E.g., FCC* v. *Beach Communications*, 508 U.S. 307, 314-15 (1993) ("On rational-basis review, a classification in a statute * * * comes to us bearing a strong presumption of validity."); *Usery*, 428 U.S. at 5 ("It is by now well established that legislative Acts adjusting the burdens

and benefits of economic life come to the Court with a presumption of constitutionality.").

The Court has also applied the presumption of constitutionality when adjudicating claims that legislation exceeds the bounds of Congress's enumerated powers. *Morrison*, 529 U.S. at 607 (invoking "presumption of constitutionality" in challenge to legislation as exceeding Congress's commerce power and its authority under § 5 of the Fourteenth Amendment).

One consequence of this Court's adherence to the presumption of constitutionality is that it "has never insisted that a legislative body articulate its reasons for enacting a statute." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1981); see also *Beach Communications*, 508 U.S. at 315 (same). The presumption that Congress intends to legislate constitutionally means that Congress must be given the benefit of any constitutionally adequate basis for legislating that a reviewing court can plausibly identify. *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (courts should generally assume an adequate basis for legislating unless "facts made known or generally assumed * * * preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislature."); see also *United States* v. *Lopez*, 514 U.S. 549, 562-63 (1995) ("We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.") (citing *Katzenbach* v. *McClung*, 379 U.S. 294, 304 (1964), and *Perez* v. *United States*, 402 U.S. 146, 156 (1971), to same effect).

Most significantly for the present case, the Court repeatedly has recognized that the principle that

Congress need not identify the basis for an enactment means that Congress need not specify the head of legislative authority under which it acts. In the first great opinion on federal powers, *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall did not require Congress to specify which powers authorized the creation of the Second Bank of the United States. *Id.* at 407 (noting a variety of different powers from which the Bank might be justified).

Nor has the Court imposed any such requirement in the years since. Instead, it has confirmed that "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); accord *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983) (Congress need not "anywhere recite the words 'section 5' or 'Fourteenth Amendment'" to invoke its Section 5 power). All that is needed is for a court to be "able to discern some legislative purpose or factual predicate that supports the exercise of that power." *EEOC*, 460 U.S. at 243 n.18.[10]

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[10] Where the purpose or predicate relevant to a particular head of constitutional authority cannot be discerned, of course, the Court will not uphold the statute on that ground. See *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Savings Bank*, 527 U.S. 627, 642 & n.7 (1999) (rejecting the Fifth Amendment's Just Compensation Clause as a basis for sustaining the Patent Remedy Act, noting not just that Congress had explicitly invoked other powers but also that "[t]here is no suggestion in the language of the statute itself, or in the House or Senate Reports of the bill which became the statute, that Congress had [the Just Compensation Clause] in mind").

The Court has applied this well-settled approach in the context of the tax power, holding in the *License Tax Cases* that the federal enactment—which was framed in terms of the granting of a license—was authorized by tax power, because "[t]he granting of a license * * * must be regarded as nothing more than a mere form of imposing a tax." 72 U.S. at 471; cf. *United States* v. *United States Shoe Corp.*, 523 U.S. 360, 367 (1998) ("'[W]e must regard things rather than names' * * * in determining whether an imposition on exports ranks as a tax" for purposes of constitutional analysis) (quoting *Pace* v. *Burgess*, 92 U.S. 372, 276 (1876).

Indeed, the Court repeatedly has analyzed legislation based on powers that Congress did ***not*** expressly invoke. See*, e.g., Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 78 (2000) (analyzing constitutionality of Age Discrimination in Employment Act (ADEA) of 1967 under Fourteenth Amendment, even though Congress did not explicitly state it was acting pursuant to that power and the Court had previously sustained the ADEA under the commerce power); *Griffin* v. *Breckenridge*, 403 U.S. 88, 97, 104-05 (1971) (analyzing constitutionality of 42 U.S.C. § 1985(3) under Thirteenth Amendment, despite statutory language echoing the Fourteenth Amendment's Equal Protection Clause); *The Civil Rights Cases*, 109 U.S. 3, 10 (1883) (analyzing the Civil Rights Act of 1867 under the Thirteenth Amendment notwithstanding Congress's express invocation of the Fourteenth Amendment).[11]

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[11] Lower courts have done so consistently as well, insisting that "absent an outright congressional declamation," a court must inquire "whether or not the objectives of the legislation are

Although the Court stated in *Pennhurst State School & Hospital* v. *Halderman* that "we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment," 451 U.S. 1, 16 (1981), it quickly rejected any effort to convert that language into a requirement that Congress "expressly articulate" the particular legislative power on which any given measure is based. See *EEOC*, 460 U.S. at 243 n.18. Moreover, the Court's statement in *Pennhurst* was rooted in the particularly sensitive federalism concerns raised when Congress regulates the States themselves pursuant to Section 5 of the Fourteenth Amendment.[12] The Court has never even intimated

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within the scope of Congress'[s] power." *Mills* v. *State of Maine*, 118 F.3d 37, 43-44 (1st Cir. 1997); see also *Varner* v. *Illinois State Univ.*, 226 F.3d 927, 930 n. 2 (7th Cir. 2000) (sustaining Equal Pay Act under § 5 of the Fourteenth Amendment and rejecting claim that Congress relied on the commerce power, not § 5 authority, in applying the Act to the States, notwithstanding Congress's express invocation of the commerce power). Some courts have stated that Congress's "specific intent" to invoke a particular power is "irrelevant." See *Lesage v. Texas*, 158 F.3d 213, 217 (5th Cir. 1998), rev'd on other grounds, 528 U.S. 18 (1999); *Crawford* v. *Davis*, 109 F.3d 1281 1283 (8th Cir. 1997). But see *Chavez* v. *Arte Publico Press*, 204 F.3d 601, 605 (5th Cir. 2000) (suggesting that *Pennhurst* and *Florida Prepaid* may preclude reliance on implicit Fourteenth Amendment authority, but nonetheless analyzing validity of legislation under § 5).

[12] This Court subsequently characterized *Pennhurst* as announcing a "plain statement rule," under which "in the face of * * * [statutory] ambiguity, the Court "will not attribute to Congress an intent to intrude on state governmental functions." *Gregory* v. *Ashcroft*, 501 U.S. 452, 470 (1991). Such clear statement rules do not address Congress's constitutional authority to pass the provision in question, but instead operate solely to narrow the provision's substantive scope. See *ibid.* (stating that the plain statement rule it articulated applies "regardless of

that any similar hesitancy should apply where, as here, the statutory provision in question regulates purely private activity in a manner that does not implicate specific state prerogatives.

Of course, statements by Congress can help establish that a challenged measure meets the substantive prerequisites for the exercise of particular legislative powers. Thus, congressional findings can assist in demonstrating that a regulated activity has a substantial impact on interstate commerce when that impact is not "visible to the naked eye." *Lopez*, 514 U.S. at 562-63.

Similarly, congressional identification of a pattern of constitutional violations on the part of the States helps establish that legislation designed to prevent or remedy such violations falls within Congress's authority under Section 5 of the Fourteenth Amendment. See *Nevada Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721, 729-36 (2003) (reviewing congressional evidence in concluding that pattern exists sufficient to sustain the Family and Medical Leave Act under Section 5); *Board of Trustees* v. *Garrett*, 531 U.S. 356, 368 (2001) (Congress failed to "identify a pattern of irrational state discrimination in employment against the disabled" such as would be re-

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whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment"); *Goshtasby* v. *Bd. Of Trustees*, 141 F.3d 761, 768 (7th Cir. 1998) ("Despite * * * *Pennhurst* * * * the rule remains that Congress need not use magic words to exercise its enforcement power under § 5"; "[t]he question in *Pennhurst* was whether Congress intended a particular result, regardless of the constitutional grant of power under which it acted") (internal quotations and additions omitted), abrogated on other grounds by *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62 (2000).

quired to uphold Title I of the Americans with Disabilities Act under Section 5).

But this Court has carefully—and repeatedly—disclaimed any requirement that the constitutional grounds on which a statute may be upheld are limited to the specific head or heads of legislative power explicitly invoked by Congress.

B. Clear Evidence Is Required To Conclude That Congress Has Disavowed Reliance On The Tax Power.

Congress can, of course, refuse to invoke one of its constitutional powers when enacting particular legislation. Respect for Congress and its primary policymaking role arguably means courts should honor an express congressional renunciation of a particular power as the basis for challenged legislation.

In light of the presumption that federal laws are constitutional, however, the standard for determining that Congress has renounced a power must be a high one—Congress should not be deemed to have disavowed a basis for upholding a challenged measure absent clear evidence to that effect. It is common sense that Congress would wish a law that it has passed to be valid and effective. To be sure, legislative *opponents* of a bill might want it held unconstitutional if possible, but the majorities who vote *for* a bill almost always prefer that courts consider every possible basis for upholding their work. Before invalidating a law that is within Congress's constitutional authority, and thereby negating the decision made by the People's democratically-elected representatives, a court should be absolutely certain that Congress would have preferred that counter-intuitive result.

A contrary approach, allowing courts to infer congressional disavowal of a constitutional power based on ambiguous or conflicting evidence, would flout the presumption of constitutionality's insistence that federal legislation must not be struck down "except upon a clear showing of unconstitutionality." *Salazar*, 130 S. Ct. at 1820 (plurality opinion). The need for clear evidence of congressional rejection is all the more acute if dispensing with a particular power might put a measure wholly outside the scope of congressional authority. See *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Building & Constr. Trade Council*, 485 U.S. 568, 575 (1988) ("'[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'") (quoting *Hooper* v. *California,* 155 U.S. 648, 657 (1895)).

There is an especially strong need for clear evidence before concluding that Congress has disavowed reliance on its tax power. "[T]he presumption of constitutionality of an act of Congress * * * is particularly strong in the case of a revenue measure." *Nammack* v. *Comm'r*, 56 T.C. 1379, 1385 (1971), aff'd, 459 F.2d 1045 (2d Cir.1972) (*per curiam*). Indeed, tax laws are typically accorded a strong presumption of constitutionality even when they implicate certain individual rights. *Leathers* v. *Medlock*, 499 U.S. 439, 451 (1991) ("in the First Amendment context [there is a] * * * strong presumption in favor of duly enacted taxation schemes"); *Regan*, 461 U.S. at 547 ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."). This case, of course, does not involve any claimed violation of an individual right. But the critical point is that the presumption of constitutionality applies with particular force in the tax area, and

courts therefore should be extremely reluctant to deprive Congress of the benefit of its tax power.

Moreover, relying simply on the absence of the label "tax" to conclude that a monetary levy does not constitute a tax would be at odds with the well-established principle, invoked in a number of areas of the law, that courts must "look[] behind the label placed on [an] exaction" in determining whether it is a tax. *Reorganized CF & I Fabricators*, 518 U.S. at 220. Thus, "whether or not [a provision is] called a 'tax' in the statute creating it," a court must focus "directly on the operation of the provision" in determining whether it constitutes a tax for purposes of the bankruptcy code. *Ibid*. Similarly, in "passing on the constitutionality of a tax law," a court is "concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Nelson* v. *Sears, Roebuck, & Co.*, 312 U.S. 359, 363 (1941) (quotation omitted); see also *United States* v. *Sotelo*, 436 U.S. 268, 275 (1978) (characterizing as a tax an exaction labeled a "penalty" in the Internal Revenue Code); *Hedgepeth* v. *Tennessee*, 215 F.3d 608, 612-15 (6th Cir. 2000) (fee for handicapped parking placards was a tax); *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 583 (4th Cir. 1996) (Coal Act premiums are taxes).

Against this backdrop, a change in this Court's approach could prove quite disruptive. To give just one example, a sudden insistence that taxes must be expressly labeled as such would mark a significant departure from current understandings of when unsecured claims for excise taxes are entitled to a priority in bankruptcy proceedings. See *Reorganized CF & I Fabricators*, 518 U.S. at 220-24 (discussing the

Court's long history of holding that labels are not determinative in that context).

C. Congress Did Not Clearly Disclaim Reliance On Its Tax Power In Adopting The Minimum Coverage Provision.

There is no clear evidence here demonstrating that Congress disclaimed reliance on its tax power in enacting the Minimum Coverage Provision.

1. Those arguing that the tax power is unavailable point out that the Provision is denominated as a "penalty," which departs from the language in earlier versions of the legislation (including the bill that first passed the House) that denominated the Provision a "tax." Moreover, they continue, the ACA contains other exactions that are expressly termed taxes. In addition, Congress included findings in the ACA establishing the aggregate impact on interstate commerce of failing to obtain insurance, but none on the revenue that the Minimum Coverage Provision was expected to raise.

That evidence is plainly insufficient to overcome the presumption of constitutionality.

As noted above, this Court has never demanded that Congress expressly invoke a particular head of constitutional power before legislation may be upheld under that power. That is especially true for the tax power, because the Court has expressly held that the label "tax" is ***not*** required—how a provision operates, not what it is called, determines whether it is a tax. Congress therefore had no reason to expect that changing the word "tax" to "penalty" in the Minimum Coverage Provision could possibly foreclose invocation of the tax power.

Nor could Congress have expected such a dramatic result to flow from the fact that other measures in the ACA are expressly labeled taxes. Ordinarily, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (internal quotations omitted). But the critical question here is whether Congress intended this change to preclude reliance on the tax power, even if that meant the Provision would be held unconstitutional. Against the background of consistent jurisprudence declaring statutory labels irrelevant in the tax context (see pages 23 & 28-29, *supra*), Congress had no reason to expect that this change could be constitutionally decisive. And Congress also could not have anticipated that the absence of statutory findings expressly tied to the tax power might possibly have such an effect in view of the absence of decisions by this Court requiring such findings.

Attributing a constitutionally decisive consequence to the labels Congress used is especially unjustified given the "extraordinary electoral circumstances" that "short-circuited" the usual legislative process leading to the ACA's passage. *Seven-Sky*, 661 F.3d at 30 n.13 (Kavanaugh, J., dissenting as to jurisdiction). Congress's use of the budget reconciliation procedure meant there was no opportunity for the House and Senate to produce a conference report resolving differences between the two chambers' bills, and subsequent amendments were severely limited by Senate rules limiting reconciliation measures. See Katherine Hayes, *Overview of the Policy, Procedure, and Legislative History of the Affordable*

Care Act, 7 NAELA J. 1, 7-9 (2011). The restrictive nature of the process strongly weighs against drawing any inferences about congressional intent—let alone outcome determinative inferences—from changes to the text during that process.

2. Moreover, much more substantial evidence demonstrates that Congress intended to invoke its tax power and that it understood the Minimum Coverage Provision to be a tax.

Most significantly, the Provision operates like a tax. Congress incorporated the Provision into the Internal Revenue Code and made identification of health insurance coverage or payment part of the most common tax-related activity: filing an annual tax return. Pub. L. No. 111-148, §§ 1501(b), 1502 (amending Internal Revenue Code to include 26 U.S.C. §§ 5000A, 6055).

The Provision repeatedly references taxpayers and tax returns, with "some form of the word 'tax' appear[ing] * * * over forty times." *Liberty University*, 2011 WL 3962915, at *19 (Wynn, J., concurring). Any amount due from the taxpayer under the Provision is included with the taxpayer's return and thus paid into general revenues, along with any other tax that is due. See Pub. L. No. 111-148, § 1502(b) (adding 26 U.S.C. § 5000A(b)(2)); see generally U.S. Br. 53.

Congress did exempt the Provision from certain traditional tax enforcement mechanisms—such as criminal penalties, liens, and levies. 26 U.S.C. § 5000A(g)(2). But it retained others. See U.S. Br. 54. And the very fact that Congress deemed it necessary to exempt the Provision from some tax enforcement measures powerfully suggests that Congress unders-

tood the provision to be a tax. Cf. *Seven-Sky*, 661 F.3d at 33 n.15 (Kavanaugh, J., dissenting as to jurisdiction) ("The key point * * * is that the penalty may be enforced only by the IRS * * * . The fact that the IRS cannot use *all* of its traditional enforcement tools does not make it any less an IRS-enforced provision.").

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

Moreover, the legislative history demonstrates that Congress understood the Minimum Coverage Provision to function in part as a tax and to be supported by the tax power. See H.R. Rep. No. 111-443, pt. 1, at 265 (referring to the Minimum Coverage Fee Provision as imposing "[a] tax on individuals who opt not to purchase health insurance"); see also Joint Comm. on Taxation, 111th Cong., *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," As Amended, in Combi-*

nation with the "Patient Protection and Affordable Care Act" (Mar. 21, 2010) (including Minimum Coverage Provision in explanation of the revenue provisions of the ACA in combination with the Reconciliation Act).

Several members of Congress expressly invoked the tax power as a basis for enacting the Provision. The Chairman of the Senate Finance Committee, for example, concluded that "Congress has power to enact this legislation pursuant to the taxing and spending powers." 155 Cong. Rec. S13,830, S13,832 (Dec. 23, 2009) (Sen. Baucus); see also 155 Cong. Rec. S13,558, S13,581-82 (Dec. 20, 2009) (Sen. Baucus); accord 155 Cong. Rec. S13,751, S13,753 (Dec. 22, 2009) (Sen. Leahy). Opponents of the ACA likewise deemed it a tax. *E.g.*, 155 Cong. Rec. S13,755, S13,755-56 (Dec. 22, 2009) (Sen. Wicker); 155 Cong. Rec. S13,558, S13,579 (Dec. 20, 2009) (Sen. Coburn).

* * *

The legislative record is best read as demonstrating that Congress intended the Minimum Coverage Provision to be a tax. But even if the record is viewed as unclear, such ambiguity is plainly insufficient to withhold from the Provision the constitutional benefit of Congress's tax authority. There simply is no basis for concluding that, having finally achieved comprehensive health care reform in the United States, Congress would have preferred its work to be nullified rather than upheld as a permissible exercise of the tax power.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

GILLIAN E. METZGER
TREVOR W. MORRISON
435 West 116th Street
New York, NY 10027
(212) 854-1997

ANDREW J. PINCUS
Counsel of Record
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

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