Nos. 10-2347

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LIBERTY UNIVERSITY, a Virginia Nonprofit Corporation; MICHELE G. WADDELL; JOANNE V. MERRILL,

PLAINTIFFS - APPELLANTS,

v.

TIMOTHY GEITNER, 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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR AMICUS CURIAE LANDMARK LEGAL FOUNDATION

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STATEMENT OF INTEREST AND AUTHORITY TO FILE

Amicus Curiae Landmark Legal Foundation is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, strict construction of the Constitution and individual rights. Specializing in Constitutional history and litigation, Landmark presents herein a unique perspective concerning the legal issues and implications of the U.S. Supreme Court's decision in *NFIB v. Sebelius* on this Court's consideration of the mandate that employers provide certain insurance coverage or face imposition of an unconstitutional direct tax.

This brief is filed with the consent of the parties.

I. INTRODUCTION AND BACKGROUND.

Appellants challenge the constitutionality of the Patient Protection and Affordable Care Act's ("PPACA") employer mandate, 26 U.S.C. Section 4980H ("employer mandate" or "Section 4980H"). Specifically, Appellants argue the employer mandate exceeds Congress' enumerated powers and that it violates Appellants' free exercise of religion. Brief for Appellants at i. Amicus Curiae Landmark Legal Foundation supports these arguments and submits this brief in support of the proposition that the employer mandate exceeds constitutional restrictions on congressional power to promulgate taxes.

The employer mandate differs from Section 5000A of the PPACA ("individual mandate") in a crucial respect – it is not tied to income. The Supreme Court, in *NFIB v. Sebelius,* recognized the individual mandate is "triggered by specific circumstances – earning a certain amount of income but not obtaining health insurance." *National Federation of Independent Business v. Sebelius*, 567 U.S. __, 132 S.Ct. 2599 (2012). The employer mandate, however, is not tied to earning income. It applies despite any employer action or activity.

II. IN ENACTING THE EMPLOYER MANDATE, CONGRESS EXCEEDED ITS POWERS UNDER THE TAXING CLAUSE.

The employer mandate's "assessable payment" provision in 26 U.S.C. Section 4980H (2012) cannot be justified as a permissible tax under any

constitutional test. Any argument proffered by Appellees that this provision constitutes a permissible exercise of Congress's taxation authority fails under all established precedents and should be rejected by this Court.

Amici endorses Appellant's argument that the employer mandate violates the origination clause. Brief for Appellant at p. 33. Should the Court look beyond this argument, Section 4980H still fails to satisfy the constitutional restrictions on taxes set forth in Article I, Section 9, Clause 4 (prohibition on the issuance of capitation or direct taxes unless apportioned among the states), the 16th Amendment (income tax) and the limitations set forth by the Supreme Court as applicable to other Article I, Section 8 taxes such as excises.

Section 4980H fails as a constitutionally permissible excise because there is no action on the part of the employer at the time the payment is imposed. It fails as an income tax because the payment is not tied to any income earned by the employer. Moreover, the employer realizes no gain when electing not to purchase insurance for employees. It most closely resembles a direct tax and must be apportioned among the states. As Congress did not take any steps to apportion the penalty, the federal government cannot rely on arguments that the employer payment constitutes a valid exercise of congressional authority to raise taxes.

Should this Court endeavor to uphold the employer mandate as a valid tax, this Court must engage in an analysis to determine whether the employer mandate

comports with the constitutional limits on Congress' power to levy taxes. Indeed, "any tax must still comply with other requirements in the Constitution." *National Federation of Independent Business v. Sebelius*, 567 U.S. __, 132 S. Ct. 2566, 2598 (2012).

A. The Employer Mandate Constitutes An Improper Direct Tax.

Of the types of taxes permissible under the Constitution, the employer mandate can best be categorized as a direct tax. It is a tax upon the employer for simply existing.

Article I, Section 9 Clause 4 of the Constitution prohibits the levying of capitation or direct taxes unless apportioned among the states: "No Capitation or other direct tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." The Apportionment Clause was an impediment to congressional attempts to establish income taxes by statute and not constitutional amendment. Pursuant to this clause, the Supreme Court invalidated an income tax on real estate and taxes on income of personal property. *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895) (*Pollock I*).

In a subsequent decision, *Pollock v. Farmers' Loan and Trust Co.* (*Pollock II*), the Supreme Court recognized the plenary power of Congress to lay taxes apportioned among the states, "The power to lay direct taxes apportioned among the several states in proportion to their representation based on population as

ascertained by the census, was plenary and absolute; but to lay direct taxes without apportionment was forbidden." *Pollock v. Farmers' Loan and Trust Co.*, 158 U.S. 601, 618 (1895). The Court then discussed the constitutional prohibition upon direct taxes – absent apportionment: "The Constitution ordains affirmatively that representatives and direct taxes shall be apportioned among the several States according to numbers, and negatively that no direct tax shall be laid unless in proportion to the enumeration." *Pollock*, 158 U.S. at 621.

Whereas indirect taxes such as excises involve activity and, as such are avoidable, direct taxes are imposed directly on the individual or business entity. The entity has no option to avoid the exaction. Thomas Cooley, writing in 1876, provided a cogent distinction that resonates in the modern context:

> Taxes are direct, when they are levied upon and collected from those who were expected to pay them, and indirect when they are levied upon and collected from one class of persons, with the understanding and expectation that they will be ultimately paid by the consumer or user of the things or property taxed, under the guise of an increase in the price of the property so taxed. Thomas M. Cooley, *A Treatise on the Law of Taxation* 5 (Chicago, Callaghan and Co. 1876) quoted in Erik M. Jensen, *The Apportionment of 'Direct Taxes': Are Consumption Taxes Constitutional?* 97 Colum. L. Rev. 2334, 2419 (1997).

It is universally recognized that the *Pollock* decisions helped spur the issuance and passage of the 16th Amendment. See Steven J. Willis and Nakku Chung, *Constitutional Decapitation and Healthcare*, 2010 TNT 133-6, July 13, 2010, see also Jensen, The Apportionment of 'Direct Taxes': Are Consumption

Taxes Constitutional? 97 Colum. L. Rev. at 2336. After the 16th Amendment's ratification, direct taxes, levied without apportionment, were constitutionally permissible; however, income had to originate from a source and had to be derived. Certain modern commentators believe the 16th Amendment essentially invalidated Article I, Section 9, Clause 4, the clause remains in force and continues to be relied upon.

Consider the recent case of *Murphy v. I.R.S.* An en banc panel of the D.C. Circuit Court of Appeals refused to adopt the federal government's arguments that "only 'taxes that are capable of apportionment in the first instance, specifically, capitation taxes and taxes on land,' are direct taxes." *Murphy v. I.R.S.*, 493 F.3d 170, 182 (D.C. Cir. 2007). In short, the government posited arguments that Article I, Section 9, Clause 4 has been supplanted by the 16th Amendment. The Court concluded otherwise when it stated, "...[N]either need we adopt the Government's position that direct taxes are only those capable of satisfying the constraint of apportionment. In the abstract, such a constraint is no constraint at all; virtually any tax may be apportioned by establishing different rates in different states." *Murphy*, 493 F.3d at 184. The Circuit Court concluded the tax at issue (a tax on compensatory damages for mental pain and suffering) qualified as a justifiable excise tax. It did not determine whether this tax would have passed muster as a justifiable direct tax. However, by relying on the principles espoused in Pollock II,

the court indicated the constitutional constraints imposed by Article I, Section 9, Clause 4 continue to be valid.[1]

In distinguishing the individual mandate's penalty provision from a capitation tax, Chief Justice Roberts, relying on an earlier distinction, stated, "Capitations are taxes paid by every person, 'without regard to property, profession, or any other circumstance.'" *National Federation of Independent Business v. Sebelius*, 567 U.S. __, 132 S. Ct. at 2599 (citing *Hylton v. United States*, 3 U.S. 171, 175 (1796)). Capitation taxes are "a tax that everyone must pay simply for existing." *Id.*

Chief Justice Roberts distinguished the individual mandate from a direct tax because of its links to earning income. "The whole point of the shared responsibility payment is that it is triggered by specific circumstances – *earning a certain amount of income but not obtaining health insurance*." *National Federation of Independent Business v. Sebelius*, 567 U.S. __, 132 S. Ct. at 2599 (emphasis added).

Unlike the individual mandate, the Section 4980H is not tied to earning any income. Instead, it establishes two factors in determining whether the penalty applies: (1) total number of employees and; (2) whether those employees receive government subsidies to help purchase insurance in exchanges. See generally 26

[1] See Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?* 97 Colum. L. Rev. 2334, 2345 (1997) concluding that "A repudiation of Pollock is at most a rejection of the Court's conclusion that a tax on income from property is a direct tax; it speaks not at all to other levies that might be direct taxes."

U.S.C. § 4980H. The penalty applies whether or not a business earns income. In this regard it is distinguishable from the individual mandate.

Under the current statutory scheme, many employers who have taken no action (not purchasing health insurance) are obligated to pay a flat amount based on the number of employees. This is strong evidence that the payment is a direct tax, rather than an income tax or excise.

B. Section 4980H Cannot Be Justified As A Permissible Excise Tax.

Despite appearing under the Internal Revenue Code's "Miscellaneous Excise Taxes" subtitle, the employer mandate fails the Constitution's excise tax requirements. Excise taxes require some sort of action or activity on the part of the employer or business to be assessed. Professor Steven J. Willis and Mr. Nakku Chung succinctly describe an excise tax in the following manner, "[an excise tax] involves something an obligor chose to do: purchase a product or service, use a product or service, transfer property, or conduct commercial activity." Steven J. Willis and Nakku Chung, *Constitutional Decapitation and Healthcare*, 2010 TNT 133-6, July 13, 2010.

Traditionally, excise taxes flow from the funds or income derived from a particular business activity. A tax on the proceeds from the sale of mining property is considered an excise because the income derived flowed from the operation of a specific business. "The very process of mining is, in sense,

equivalent in its results to a manufacturing process. And, however the operation shall be described, the transaction is indubitably 'business'..." *Strattons Independence, Ltd, v. Howbert*, 231 U.S. 399, 415 (1914).

Operative in this analysis was the fact the business entity engaged in commercial activity. Writing shortly after the invalidation of the income tax in *Pollock* and before the ratification of the 16th Amendment, the Supreme Court permitted an excise tax tied to a business earning income. "[The excise tax in question avoided the dictates of Pollock] by imposing not an income tax but an excise tax upon the conduct of business in a corporate capacity, measuring, however, the amount of tax by the income of the corporation..." *Strattons* at 414.

There are instances where courts have gone beyond the business activity threshold and considered additional transactions as justifiably subject to excise taxes. However, in these instances, the excise always originated when the individual or entity engaged in some sort of action or activity. This common theme of action or activity thus proves vital to determining whether a tax is a valid excise.

For example, in *Bromley v. McCaughn*, the Supreme Court concluded that a tax levied upon the maker of a gift constituted a viable excise tax. The Supreme Court concluded that where an individual exercised a power to give property to another, he or she could be subject to excise taxes. "The Supreme Court has

consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property or the exercise of a single power over property incident to ownership can justifiably be categorized as an excise." *Bromely v. McCaughn*, 280 U.S. 124, 136 (1929). Similarly, in *Murphy v. I.R.S.*, an *en banc* panel of the D.C. Circuit held that a tax on an individual's award of compensatory damages was a valid excise tax on the basis that the award was incident to the exercise of a particular right. *Murphy v. I.R.S.*, 493 F.3d 170 (D.C. Cir. 2007).

In *Murphy*, the court considered whether the tax on compensatory damages for mental pain and suffering was "more akin, on the one hand, to a capitation or a tax upon one's ownership of property, a privilege an activity or a transaction." *Murphy*, 493 F.3d at 184. Concluding the tax applied only after the individual engaged in a transaction, which occurred in this case at the time she received a compensatory award, the court considered whether the tax could be justified as an excise. Noting the individual did not receive her damages "pursuant to a business activity," the court looked to whether the individual exercised a power "incident to ownership." *Murphy*, 493 F.3d at 184. The taxation of proceeds received from an award of compensatory damages could be favorably compared to a situation where the individual exercise a statutory right or privilege. This exercise of a right or

privilege was crucial to the court's ultimate conclusion that the gift tax passed constitutional muster.

Further reinforcing the principle that action or activity is a necessary component to an excise, the Supreme Court has stated, "[Excise taxes] were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and the sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like." *Steward Machine Co. v. Davis*, 301 U.S. 548, 581 (1937) (quoting *Thomas v. United States*, 192 U.S. 363, 370 (1904)).

The employer mandate does not fall within this framework. Section 4980H imposes a penalty upon the employer who elects not to purchase health insurance for his/her employees. Consider the common thread and rationale behind the precedent. In these cases, an entity is engaged in some sort of action. Excise taxes are permissible when the individual sells a business, purchases a product, exercises a power over property or exercises a given right. A tax cannot be properly qualified as an excise when it involves the absence of action.

Simply labeling the payment provision an excise tax does not suffice and efforts to characterize it as valid must be rejected.

C. Justifications Proffered In Concurring Opinions In This Court That The Individual Mandate Constitutes A Valid Tax Are Inapplicable In The Present Case.

In *Liberty University v. Geithner*, the concurrence would uphold the constitutionality of Section 5000A of the PPACA (the individual mandate), as "independently authorized" under Article I, Section 8, Clause 1. *Liberty University v. Geithner*, 671 F.3d 391, 415 (4th Cir. 2011) (Wynn, J. concurring).

Respectfully, this concurrence is inapplicable to the present case. The cases presented do not support the argument that § 4980H is a constitutional tax.

Concluding that the pertinent inquiry is whether something operating as a tax is "authorized under Congress's taxing power," the concurrence sets forth a three part analysis for determining whether a given tax is constitutional. *Id.* at 416-417. The tax must bear "some reasonable relation" to raising revenue, it must "be imposed for the general welfare," and the tax "must not infringe upon another constitutional right." *Id.* The concurring opinion assembles crucial elements for the text from two of the cases involving excise taxes. As explained above, the employer mandate cannot be justified as a valid excise tax.

Cases standing for the proposition that a tax is constitutional provided it bears some relation to raising revenue are inapplicable. These cases, *United States v. Doremus* and *Sozinsky v. United States*, involve challenges to taxes placed on the sale of coca leaves and the sale of firearms respectively. *United States v.*

Doremus, 249 U.S. 86 (1919); *Sozinsky v. United States*, 300 U.S. 506 (1937). The scenarios in these cases involved levies placed upon actions or activity. These fact patterns are readily distinguishable from the present scenario. Under § 4980H, the employer has taken no action, nor engaged in any business activity.

Furthermore, in *Doremus*, the Supreme Court stated, "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 motive which induced it." *Doremus*, 249 U.S. at 93. Following the dictates of *Doremus*, the statute in question must not bear some reasonable relation to raising revenue; it must bear a reasonable relation to the taxing authority conferred by the Constitution. The propriety of a tax should therefore be analyzed within a constitutional framework. It is not enough to conclude that a given tax raises revenue. It must comport with constitutional constraints.

Moreover, reliance on *Sozinsky* is misplaced. "Simply" being productive of some revenue is not enough. In addition to being "productive of some revenue," the tax must also comport with constitutional constraints, such as the requirement that a direct tax be apportioned among the states or an income tax be derived from some source.

D. Section 4980H Cannot Be Justified As A Permissible Income Tax.

The 16th Amendment authorizes taxation upon income without apportionment, "The Congress has the power to lay and collect taxes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. Amend. XVI. Admittedly, this conferral vests Congress with broad authority to determine what constitutes "income." However, this power is not absolute. To be qualified as "income," an entity or business must realize a gain.

Instructive in any analysis and application of the 16th Amendment is the seminal case *Eisner v. Macomber* where the Supreme Court, when considering the constitutionality of an income tax on stock dividends, stated, "it becomes essential to distinguish between what is and what is not 'income,' as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form." *Eisner v. Macomber*, 252 U.S. 189, 206 (1920). The Court continued, "Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised." Eisner, 252 U.S. at 206. The 16th Amendment did not "extend the taxing power to new subjects, but merely removed the necessity which

otherwise might exist for an apportionment among the States of taxes laid on income." *Eisner*, 252 U.S. at 206.

The Amendment's language specifies that, to be subject to its mandates, the tax must originate from (1) a "source" and (2) it must be "derived." The payment provision taxes no income or gain. In fact there is no source of income and income is not derived. Consider the language of Chief Justice Earl Warren when he described income: "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). In that case, the Supreme Court concluded that, to be considered income and hence subject to taxation under the 16th Amendment, there must be some sort of realization event. The income had to be "clearly realized."

Similarly, in *Commissioner v. Indianapolis Power & Light Co.*, the Supreme Court determined that a loan did not constitute income. "The economic benefit of a loan, however, consists entirely of the opportunity to earn income on the use of the money prior to the time the loan must be repaid. And in that context our system is content to tax these earnings as they are realized." *Commissioner v. Indianapolis Power & Light Co.*, 493 U.S. 203, 208 (1990). The Court continues, "We recognize [Indianapolis Power & Light] derives an economic benefit from these deposits. But a taxpayer does not realize taxable income from every event

that improves his economic condition." *Indianapolis Power & Light Co.*, 493 U.S. at 21.

Finally, a "corporate income tax" is based on the philosophy of ability to pay, as it consists of some portion of the profit remaining after a company has provided for its workers." *Trinova Corporation v. Michigan Department of Treasury*, 498 U.S. 358, 363 (1991).

Section 4980H imposes a tax upon an employer who elects not to provide "minimal essential coverage." For income tax purposes, there is no realization event and there is not any derived income. The employer has not taken any affirmative action to realize any gain. The employer's economic situation may improve as a result of electing not to provide coverage, but there is not a realization event and hence no quantifiable income.

Moreover, unlike Section 5000A's individual mandate, the employer mandate penalty is not tied to actual income or profits. As stated previously, Chief Justice Roberts partially relied on the fact that the individual mandate was "triggered by specific circumstances – earning a certain amount of income but not obtaining health insurance." *National Federation of Independent Business v. Sebelius*, 567 U.S. __, 132 S. Ct. at 2599. Again, the penalty is conditioned upon total number of employees and whether those employees receive premium credits.

There is no statutory link to earned income. Business income does not dictate the amount of the penalty an employer must pay.

E. Section 4980H Constitutes An Impermissible Direct Tax Because It Is Not Apportioned Among The States.

The employer mandate does not pass muster as either an excise tax or an income tax. By elimination, the only safe harbor available is a successful justification of the provision as a direct tax. However, there has been no effort to apportion the employer mandate among the states. It therefore fails this constitutional mandate.

If the Court were to justify Section 4980H by determining it constitutes a valid tax, the federal government's ability to tax employers would be without limits. The government attempts to mandate a payment upon an employer who has taken no action and has not even earned income. The employer has not sold a good or provided a service; the employer has not realized an economic gain. The employer mandate fails to qualify as a constitutional tax under any scenario.

CONCLUSION

The provisions of the PPACA discussed at length in this brief represent an enormous and unprecedented attempt to expand federal power. If this provision is

upheld as constitutional, the federal government's authority to regulate employer non-activity will be limitless.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing amicus curiae brief was electronically submitted on March 6, 2013, to the Office of the Clerk for the United States Court of Appeals for the Fourth Circuit via the court's CM/ECF system, which will generate and send by e-mail a Notice of Docket Activity to all CM/ECF registered attorneys participating in this case. Counsel for appellants and appellees are registered CM/ECF users.

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