Washington, DC State Night Venues

1789 Restaurant 1226 36th St. NW Washington, DC Phone: 202-965-1789 Web site: www.1789restaurant.com Venue Type: *American Steakhouse*	**Acadiana** 901 New York Ave. NW Washington, VA Phone: 202-408-8848 Web site: www.acadianarestaurant.com Venue Type: *New Orleans Creole*
Bistro Bis 15 E St. NW Hotel George Washington, DC Phone: 202-661-2700 Web site: www.bistrobis.com Venue Type: *French*	**BLT's Steakhouse** 1625 Eye St. NW Washington, DC Phone: 202-689-8999 Web site: www.bltsteak.com Venue Type: *American Steakhouse*
Brassiere Beck 1101 K St. NW Washington, DC Phone: 202-408-1717 Web site: www.beckdc.com Venue Type: *Belgian*	**Café Berlin** 322 Massachusetts Ave., NE Washington, DC Phone: 202-543-7656 Web site: www.cafeberlindc.com Venue Type: German
Café Milano 3251 Prospect St. NW Washington, DC Phone: 202-333-6183 Web site: www.cafemilano.net Venue Type: *Italian*	**Capital Grille** 601 Pennsylvania Ave. NW Washington, DC Phone: 202-737-6200 Web site: www.thecapitalgrille.com Venue Type: *American Steakhouse*
Ceiba 701 14th St. NW Washington, DC Phone: 202-393-3983 Web site: www.ceibarestaurant.com Venue Type: *Latin American*	**Charlie Palmer Steak** 101 Constitution Ave. NW Washington, DC Phone: 202-547-8100 Web site: www.charliepalmer.com Venue Type: *American Steakhouse*
Clyde's of Gallery Place 707 7th St. NW Washington, DC Phone: 202-349-3700 Web site: www.clydes.com Venue Type: *American*	**Dandy Restaurant and Cruise Ship** Zero Prince St. Alexandria, VA Phone: 703-683-6076 Web site: www.dandydinnerboat.com Venue Type: *Cruise; American*
DC Coast 1401 K St. NW Washington, DC Phone: 202-216-5988 Web site: www.dccoast.com Venue Type: *Seafood*	**District Chophouse & Brewery** 509 7th St. NW Washington, DC Phone: 202-347-3434 Web site: www.districtchophouse.com Venue Type: *American Steakhouse*
Equinox Restaurant 818 Connecticut Ave. NW Washington, DC	**Fogo de Chao** 1101 Pennsylvania Ave. NW Washington, DC

Washington, DC State Night Venues

Phone: 202-331-8118 Web site: www.equinoxrestaurant.com Venue Type: *American*	Phone: 202-347-4668 Web site: www.fogodechao.com Venue Type: *Brazillian Steakhouse*
Georgia Brown's 950 15th St. NW Washington, DC Phone: 202-393-4499 Web site: www.gbrowns.com Venue Type: *American Southern*	**Heritage India** 1337 Connecticut Ave NW Washington, DC Phone: 202-331-1414 Web site: www. www.heritageindiausa.com Venue Type: *Indian*
I Ricchi 1220 19th St. NW Washington, DC Phone: 202-835-0459 Web site: www.iricchi.net Venue Type: *Italian*	**Indigo Landing** 1 Mariana Drive Washington Sailing Marina Alexandria, VA Phone: 703-548-0001 Web site: www.indigolanding.com Venue Type: *American; Southern*
Johnny's Half Shell 400 N. Capitol St. NW Washington, DC Phone: 202-737-0400 Web site: www.johnnyshalfshell.net Venue Type: *Seafood*	**Kinkead's An American Brasserie** 2000 Pennsylvania Ave NW Washington, DC Phone: 202-296-7700 Web site: www.kinkead.com Venue Type: *Seafood*
M & S Grill 600 13th Street, NW Washington, DC Phone: 202-347-1500 Web site: mccormickandschmicks.com Venue Type: American/Seafood	**Michel Richard Citronelle** 3000 M St. NW The Latham Hotel Washington, DC Phone: 202-625-2150 Web site: www.citronelledc.com Venue Type: *French*
Morton's of Chicago 1050 Connecticut Ave. NW Washington, DC Phone: 202-955-5997 Web site: www.mortons.com/ Venue Type: *American Steakhouse*	**Mount Vernon Inn** South End of the GW Parkway Mount Vernon, VA Phone: 703-780-0011 Web site: www.mountvernon.org Venue Type: *American*
Occidental 1475 Pennsylvania Ave. NW Washington, DC Phone: 202-783-1475 Web site: www.occidentaldc.com Venue Type: *American*	**Oceanaire Seafood Room** 1201 F St. NW Washington, DC Phone: 202-347-2277 Web site: www.theoceanaire.com Venue Type: *Seafood*
Odyssey Crusises 600 Water St. SW Gangplank Marina Washington, DC	**Old Ebbitt** 675 15th St. NW Washington, DC Phone: 202-347-4800

Washington, DC State Night Venues

Phone: 202-488-6010 Web site: www.odysseycruises.com Venue Type: *Cruise; American*	Web site: www.ebbitt.com Venue Type: *American*
Palm Restaurant 1225 19th St. NW Washington, DC Phone: 202-293-9091 Web site: www.thepalm.com Venue Type: *American*	**Ruth's Chris Steakhouse (Chinatown)** 724 9th St. NW Washington, DC Phone: 202-393-4488 Web site: www.ruthschris.com Venue Type: *American Steakhouse*
Ruth's Chris Steakhouse (Dupont) 1801 Connecticut Ave. NW Washington, DC Phone: 202-797-0033 Web site: www.ruthschris.com Venue Type: *American Steakhouse*	**Sam & Harry's** 1200 19th St. NW Washington, DC Phone: 202-296-4333 Web site: www.samandharrys.com Venue Type: *American Steakhouse*
Sequoia Restauarnt 3000 K St. NW Washington Harbour Washington, DC Phone: 202-944-4200 Web site: www.arkrestaurants.com/sequoia_dc.html Venue Type: *American/Seafood*	**Smith & Wollensky's** 1112 19th St. NW Washington, DC Phone: 202-466-1100 Web site: www.smithandwollensky.com Venue Type: *American Steakhouse*
The Caucus Room 401 9th St. NW Washington, DC Phone: 202-393-1300 Web site: www.thecaucusroom.com Venue Type: *American Steakhouse*	**Vidalia** 1990 M St. NW Washington, DC Phone: 202-659-1990 Web site: www.vidaliadc.com Venue Type: *American Southern*
Zola 800 F St. NW Washington, DC Phone: 202-654-0999 Web site: www.zoladc.com Venue Type: *American*	**ZENGO Restaurant** 781 7th Street, NW Washington, DC Phone: 202-393-2929 Web site: www.modernmexican.com Venue Type: *Latin*

STATE	DATE	BAL.
Ohio	12/31/09	**$ 19,385.70**
William Batchelder	11/09/09	
William Coley	10/14/09	
William Coley	10/13/09	
John Adams	12/17/09	
Diageo North America	08/26/10	
Procter & Gamble	07/28/10	
Seth Morgan	08/17/10	
Jay Hottinger	08/17/10	
Barbara Sears	08/19/10	
Finney, Stagnaro, Saba & Patterson	08/30/10	
Gary G Koch	08/30/10	
Abbot Laboratories	08/30/10	
Key Bank National Association	08/30/10	
Purdue Pharma	08/30/10	
The American Petroleum Institute	08/30/10	
NRA - Institute for Legislative Action	08/30/10	
Sean P Dunn	08/30/10	
SZD Whiteboard LLC	08/30/10	
Cardinal Health	08/30/10	
Willa J Ebersole	08/30/10	
CashAmerica	08/30/10	
Ohio Children's Hospital Association	08/30/10	
Vory's Sater, Seymour and Pease	08/30/10	
Ohio Farmers Insurance Co.	08/30/10	
Columbia Gas of Ohio	08/30/10	
Duke Energy	08/30/10	
Copart General Disbursement	08/30/10	
Roetzel & Andress	08/30/10	
NFIB	08/30/10	
RAI Services Company	08/30/10	
AT&T	08/30/10	
Ohio Cable Telecommunications Association	08/30/10	
Danny Bubp	08/11/10	
Kara Joseph	08/11/10	
Todd Snitchler	08/11/10	
Bill Batchelder	08/27/10	
James J. Zehringer	08/26/10	
Kris Jordan	08/27/10	
Peter A. Beck	08/26/10	
Ohio Association of Wholesalers-Distributors	08/31/10	
National Cable Telecommunications Association	09/09/10	
The Huntington Banschares Incorporated	09/14/10	
Tom Niehaus	10/20/10	
Greater Cleveland Partnership PAC	10/20/10	
Astellas Pharma US Inc.	10/20/10	
Clifford K. Hite	10/20/10	
Lynn Wachtmann	10/20/10	
Gerald Stebetton	10/20/10	

Jarrod Martin	10/20/10		
Louis W. Blessing, Jr	10/20/10		
Current Balance		**$**	**8,099.54**

CREDIT	DEBIT
	530.56
	1,303.19
	1,684.89
	1,389.38
1,000.00	
1,500.00	
	2,106.29
	1,844.46
	2,167.49
250.00	
500.00	
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500.00	
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1,000.00	
1,000.00	
1,000.00	
1,500.00	
1,500.00	
	2,139.61
	2,120.64
	1,988.17
	1,466.60
	1,760.28
	2,290.59
	1,928.14
1,000.00	
1,000.00	
500.00	
	2,082.62
500.00	
300.00	
	1,587.79
	1,381.51
	2,078.85

1,903.45
2,081.65

Hello!

I'd like to invite you to attend **ALEC's States & Nation Policy Summit in Washington, D.C. on December 1-3, 2010**. Online registration is open through November 10th. Each year, ALEC's conference attracts state legislators, business executives, and public policy experts from across the country to discuss the issues and develop policy. Each meeting features issue-focused workshops, plenary sessions, and Task Force meetings, as well as numerous networking opportunities and social events. This year's speakers include Newt Gingrich and Governor Rick Perry (TX).

New legislators are invited to join ALEC for *A Christmas Carol* at Ford's Theatre on Thursday, December 2nd. To reserve tickets, please contact Laura Elliott at lelliott@alec.org.

To register now, please click on the link below:
http://www.alec.org/AM/Template.cfm?Section=SNPS_Registration_Info.

If you have questions about scholarships to this event, you can contact me at:
XXXXXXXXXXX

Current ALEC Members 11/2/2010

Paid Thru Date:

State: OH

2010					
112197	LM	Rep.	John P. Adams	12/31/2010 kara.joseph@ohr.state.oh.us	(614) 466-1507
5988	LM	Rep.	Ron Amstutz	12/31/2010 district03@ohr.state.oh.us	(614) 466-1474
112876	LM	Rep.	Kevin Bacon	12/31/2010 [redacted]	(614) 644-6030
112464	LM	Rep.	Williams G. Batchelder, III	12/31/2010 district69@ohr.state.oh.us	(614) 466-8140
35090	LM	Rep.	Louis W. Blessing, Jr.	12/31/2010 district29@ohr.state.oh.us	(614) 466-9091
117023	LM	Rep.	Terry R. Boose	12/31/2010 terry.boose@ohr.state.oh.us	(614) 466-9628
109519	LM	Rep.	Danny R. Bubp	12/31/2010 district88@ohr.state.oh.us	(614) 644-6034
100503	LM	Sen.	Stephen P. Buehrer	12/31/2010 SD01@senate.state.oh.us	(614) 466-8150
117029	LM	Rep.	Dave Burke	12/31/2010 district83@ohr.state.oh.us	(614) 466-8147
15786	LM	Sen.	John A. Carey	12/31/2010 SD17@senate.state.oh.us	(614) 466-8156
110016	LM	Rep.	Bill P. Coley, II	12/31/2010 [redacted]	(614) 466-8550
117022	LM	Rep.	Timothy Derickson	12/31/2010 district53@ohr.state.oh.us	(614) 644-5094
106761	LM	Rep.	Clyde M. Evans	12/31/2010 district87@ohr.state.oh.us	(614) 466-1366
103243	LM	Sen.	Keith L. Faber	12/31/2010 SD12@senate.state.oh.us	(614) 466-7584
111902	LM	Rep.	Bruce W. Goodwin	12/31/2010 district74@ohr.state.oh.us	(614) 644-5091
117030	LM	Rep.	Robert D. Hackett	12/31/2010 district84@ohr.state.oh.us	(614) 466-1470
115745	LM	Rep.	Dave Hall	12/31/2010 [redacted]	[redacted]
111885	LM	Rep.	Cliff Hite	12/31/2010 district76@ohr.state.oh.us	(614) 466-3819
112451	LM	Rep.	Matt Huffman	12/31/2010 district04@ohr.state.oh.us	(614) 466-9624
103210	LM	Sen.	Jim Hughes	12/31/2010 SD16@senate.state.oh.us	(614) 466-5981
112891	LM	Rep.	Shannon Jones	12/31/2010 district67@ohr.state.oh.us	(614) 644-6027
117004	LM	Rep.	Kris Jordan	12/31/2010 kris.jordan@ohr.state.oh.us	(614) 644-6711
117017	LM	Rep.	Peggy Lehner	12/31/2010 district37@ohr.state.oh.us	(614) 644-6008
115783	LM	Rep.	Ronald Maag	12/31/2010 district35@ohr.state.oh.us	(614) 644-6023
115744	LM	Rep.	Jarrod Martin	12/31/2010 district70@ohr.state.oh.us	(614) 644-6020
115731	LM	Rep.	Seth A. Morgan	12/31/2010 district36@ohr.state.oh.us	(614) 644-8051
103238	LM	Sen.	Tom Niehaus	12/31/2010 SD14@senate.state.oh.us	(614) 466-8082
106742	LM	Sen.	Thomas F. Patton	12/31/2010 SD24@senate.state.oh.us	(614) 466-8056
115766	LM	Rep.	Barbara Sears	12/31/2010 barbara.sears@ohr.state.oh.us	(614) 466-1731
111903	LM	Sen.	William Seitz	12/31/2010 sd08@senate.state.oh.us	(614) 466-8068
115746	LM	Rep.	Todd Snitchler	12/31/2010 district50@ohr.state.oh.us	(614) 466-9078
112899	LM	Rep.	Gerald L. Stebelton	12/31/2010 district05@ohr.state.oh.us	(614) 466-8100
110021	LM	Rep.	Joseph W. Uecker	12/31/2010 district66@ohr.state.oh.us	(614) 466-8131
6079	LM	Rep.	Lynn R. Wachtmann	12/31/2010 district75@ohr.state.oh.us	(614) 466-3760
112211	LM	Rep.	Jim Zehringer	12/31/2010 district77@ohr.state.oh.us	(614) 466-6344
	35				
2011					
118983	LM	Rep.	Peter A. Beck	12/31/2011 district67@ohr.state.oh.us	(614) 644-6027
109032	LM	Rep.	Courtney E. Combs	12/31/2011 district54@ohr.state.oh.us	(614) 644-6721

15759	LM	Rep.	Dale Hottinger	12/31/2011 district71@ohr.state.oh.us	(614) 466-1482
	3				
2012					
106765	LM	Sen.	Robert Gibbs	12/31/2012 [redacted]	(614) 466-7505
117037	LM	Sen.	Karen L. Gillmor	12/31/2012 SD26@senate.state.oh.us	(614) 466-8049
109602	LM	Sen.	Mark D. Wagoner	12/31/2012 SD02@senate.state.oh.us	(614) 466-8060
	3				
OH	**Total**		**41**		

ALEC

PRESS RELEASE

For Immediate Release:
October 20, 2010

Contact: Raegan Weber
(202) 742-8536
rweber@alec.org

Jonathan Williams
(202) 742-8533
jwilliams@alec.org

New Study Outlines the Road to Economic Recovery for States:

Ohio's Economic Outlook Ranks 42nd Nationally

SIDNEY, OH - According to the latest edition of an annual study by the American Legislative Exchange Council (ALEC), Ohio's economic outlook ranks 42nd out of the 50 states. As states face their toughest budgetary climates in a generation, the third edition of Rich States, Poor States: ALEC-Laffer State Economic Competitiveness Index <http://www.alec.org/AM/Template.cfm?Section=Rich_States_Poor_States> offers a clear cut roadmap to prosperity.

"We cannot spend, borrow, or tax our way into prosperity," said Representative John Adams, Ohio House Minority Whip and ALEC State Chair. "State government must learn to live within its means, as we continually look for ways to make our great state more competitive and cultivate a business climate that will produce jobs."

While the state boasts of leading the nation in "green job" creation, Ohio's anti-growth policies have taken their toll on the state's overall economic outlook. When you add Ohio's local income tax rates to the state income tax, taxpayers face some of the highest rates in the nation. Additionally, the study gives Ohio substandard marks for its poor labor policy and one of the worst state-level death taxes in the nation. Among bordering states, Indiana ranks 20th, West Virginia ranks 27th, Michigan ranks 26th, Kentucky ranks 40th, and Pennsylvania ranks 43rd.

Co-author and renowned economist Dr. Arthur B. Laffer summarized the report's findings when he said, "Tax and economic policies are essential to the competitiveness of our states." Rich States, Poor States presents state economic outlook rankings based on public policies that have a proven impact on growth, revealing which states have the best chance of experiencing economic recovery, and which need to re-examine their policies before they can expect to see improvement.

Laffer and his co-authors, Stephen Moore, senior economics writer at The Wall Street Journal, and Jonathan Williams, director of ALEC's Tax and Fiscal Policy Task Force, analyzed how economic competitiveness drives income, population, and job growth in the states.

"Our research shows that states with responsible spending and competitive tax rates enjoy the best economic outlook," Williams said. "States do not enact changes in a vacuum - every time they increase the cost of doing business in their state, their state brand immediately loses value."

Below is a list of the five states on top and bottom of the list for economic outlook in 2010.

TOP FIVE STATES	BOTTOM FIVE STATES
1. Utah	46. California
2. Colorado	47. Illinois
3. Arizona	48. New Jersey
4. South Dakota	49. Vermont
5. Florida	50. New York

To read more about the state-to-state comparisons, and view the full report, download it for free at www.alec.org.

- 30 -

ALEC

PRESS RELEASE

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October 20, 2010

Contact: Raegan Weber
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rweber@alec.org

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jwilliams@alec.org

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- 30 -

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

STATE OF FLORIDA, by and through
Bill McCollum, et al.;

Plaintiffs,

v. Case No.: 3:10-cv-91-RV/EMT

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,

Defendants.
_____/

ORDER AND MEMORANDUM OPINION

Now pending is the defendants' motion to dismiss (doc. 55). This motion seeks dismissal of Counts One, Two, Three, and Six of the plaintiffs' amended complaint for lack of subject matter jurisdiction (pursuant to Rule 12(b)(1), Fed. R. Civ. P.), and dismissal of all counts in the amended complaint for failure to state a claim upon which relief can be granted (pursuant to Rule 12(b)(6), Fed. R. Civ. P.). The plaintiffs have filed a response in opposition, and the defendants have filed a reply to that response. A hearing was held in this matter on September 14, 2010.

I. INTRODUCTION

This litigation --- one of many filed throughout the country --- raises a facial Constitutional challenge to the federal healthcare reform law, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (the "Act"). It has been filed by sixteen state Attorneys General and four state Governors (the "state plaintiffs");[1] two private citizens, Mary Brown

[1] The state plaintiffs represent: Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North and South Dakota, Pennsylvania, South Carolina, Texas, Utah, and Washington.

and Kaj Ahlburg (the "individual plaintiffs"); and the National Federation of Independent Business ("NFIB") (together, the "plaintiffs"). The defendants are the United States Department of Health and Human Services, Department of Treasury, Department of Labor, and their respective secretaries (together, the "defendants").

Before addressing the plaintiffs' allegations, and the arguments in support of the defendants' motion to dismiss, I will take a moment to emphasize preliminarily what this case is, and is not, about.

The Act is a controversial and polarizing law about which reasonable and intelligent people can disagree in good faith. There are some who believe it will expand access to medical treatment, reduce costs, lead to improved care, have a positive effect on the national economy, and reduce the annual federal budgetary deficit, while others expect that it will do exactly the opposite. Some say it was the product of an open and honest process between lawmakers sufficiently acquainted with its myriad provisions, while others contend that it was drafted behind closed doors and pushed through Congress by parliamentary tricks, late night weekend votes, and last minute deals among members of Congress who did not read or otherwise know what was in it. There are some who believe the Act is designed to strengthen the private insurance market and build upon free market principles, and others who believe it will greatly expand the size and reach of the federal government and is intended to create a socialized government healthcare system.

While these competing arguments would make for an interesting debate and discussion, it is not my task or duty to wade into the thicket of conflicting opinion on any of these points of disagreement. For purposes of this case, it matters not whether the Act is wise or unwise, or whether it will positively or negatively impact healthcare and the economy. Nor (except to the limited extent noted in Part III.A(7) infra) am I concerned with the manner in which it was passed into law. My review of the statute is not to question or second guess the wisdom, motives, or methods

of Congress. I am only charged with deciding if the Act is Constitutional. If it is, the legislation must be upheld --- even if it is a bad law. United States v. Butler, 297 U.S. 1, 79, 56 S. Ct. 312, 80 L. Ed. 477 (1936) ("For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government") (Stone, J., dissenting). Conversely, if it is unconstitutional, the legislation must be struck down --- even if it is a good law. Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20, 37, 42 S. Ct. 449, 66 L. Ed. 817 (1922) (reviewing court must strike down unconstitutional law even though that law is "designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards.").

At this stage in the case, however, my job is much simpler and more narrow than that. In ruling on the defendants' motion to dismiss, I must only decide if this court has jurisdiction to consider some of the plaintiffs' claims, and whether each of the counts of the amended complaint states a plausible claim for relief.

II. BACKGROUND

As Congress has recognized: "By most measures, we have the best medical care system in the world." H.R. Rep. No. 111-443, pt. 1. However, at the same time, no one can deny that there are significant and serious problems. Costs are high and millions do not have insurance. Lack of health insurance can preclude the uninsured from accessing preventative care. If and when the uninsured are injured or become ill, they receive treatment, as the defendants acknowledge, because in this country medical care is generally not denied due to lack of insurance coverage or inability to pay. However, the costs that are incurred to treat the uninsured are sometimes left unpaid --- to the tune of $43 billion in 2008 (which is less than 2% of all national healthcare expenditures for that year). The costs of uncompensated

care are passed along to market participants in the form of higher costs and raised premiums, which, in turn, can help perpetuate the cycle (or the "premium spiral," as the defendants call it) and add to the number of uninsured. It was against this backdrop that Congress passed the Act.

A. The Legislative Scheme

At nearly 2,700 pages, the Act is very lengthy and includes many provisions, only a few of which are specifically at issue in this litigation. Chief among them is Section 1501, which, beginning in 2014, will require that all citizens (with stated exceptions) obtain federally-approved health insurance, or pay a monetary penalty (the "individual mandate"). This provision is necessary, according to Congress and the defendants, to lower premiums (by spreading risks across a much larger pool) and to meet "a core objective of the Act," which is to expand insurance coverage to the uninsured by precluding the insurance companies from refusing to cover (or charging exorbitant rates to) people with pre-existing medical conditions. Without the individual mandate and penalty in place, the argument goes, people would simply "game the system" by waiting until they get sick or injured and only then purchase health insurance (that insurers must by law now provide), which would result in increased costs for the insurance companies. This is known as "the moral hazard." The increased costs would ultimately be passed along to consumers in the form of raised premiums, thereby creating market pressures that would (arguably) inevitably drive the health insurance industry into extinction. The plaintiffs allege that regardless of whether the individual mandate is well-meaning and essential to the Act, it is unconstitutional and will have both a "profound and injurious impact" on the states, individuals, and businesses.

The plaintiffs object to several interrelated portions of the Act as well. First, the Act significantly alters and expands the Medicaid program. Created in 1965, Medicaid is a cooperative federal-state program that provides for federal financial assistance (in the form of matching funds) to states that elect to provide medical

care to needy persons. The Act will add millions of new enrollees to the states' Medicaid rolls by expanding the program to include all individuals under the age of 65 with incomes up to 133% of the federal poverty line. Second, the Act provides for creation of "health benefit exchanges" designed to allow individuals and small businesses to leverage their buying power to obtain competitive prices. The Act contemplates that these exchanges will be set up and operated by the states, or by the federal government if the states elect not to do so. And lastly, the Act requires that the states (along with other "large employers") provide their employees with a prescribed minimum level of health insurance coverage (the "employer mandate"). The plaintiffs allege that these several provisions violate the Constitution and state sovereignty by coercing and commandeering the states and depriving them of their "historic flexibility" to run their state government, healthcare, and Medicaid programs. The plaintiffs anticipate that these and various other provisions in the Act will cost Florida (and the other states similarly) billions of dollars between now and the year 2019, not including the administrative costs it will take to implement the Act, and that these costs will only increase in the subsequent years. In short, the plaintiffs contend that the legislation is coercive, intrusive, and could bankrupt the states.[2]

B. This Lawsuit and the Motion to Dismiss

The plaintiffs advance six causes of action in their amended complaint, and they seek declaratory and injunctive relief with respect to each. They contend that the Act violates the Constitution in the following ways: (1) the individual mandate and concomitant penalty exceed Congress's authority under the Commerce Clause

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[2] Not all states feel this way, and there is even a division within a few of the plaintiff states. Three Attorneys General and four Governors previously requested leave to participate in this case as amici curiae, and they have indicated that they favor the changes the Act will bring as they believe the new legislation will save money and reduce their already overburdened state budgets (docs. 57, 59).

and violate the Ninth and Tenth Amendments (Count I); (2) the individual mandate and penalty violate substantive due process under the Fifth Amendment (Count II); (3) "alternatively," if the penalty imposed for failing to comply with the individual mandate is found to be a tax, it is an unconstitutional unapportioned capitation or direct tax in violation of U.S. Const. art. I, § 9, cl. 4, and the Ninth and Tenth Amendments (Count III); (4) the Act coerces and commandeers the states with respect to Medicaid by altering and expanding the program in violation of Article I and the Ninth and Tenth Amendments (Count IV); (5) it coerces and commandeers with respect to the health benefit exchanges in violation of Article I and the Ninth and Tenth Amendments (Count V); and (6) the employer mandate interferes with the states' sovereignty as large employers and in the performance of government functions in violation of Article I and the Ninth and Tenth Amendments (Count VI). See generally Amended Complaint ("Am. Compl.") (doc. 42).

The defendants seek to have the complaint dismissed on numerous grounds; four of the counts for lack of jurisdiction (under Rule 12(b)(1)), and all six of them for failure to state a claim upon which relief can be granted (under Rule 12(b)(6)). With respect to jurisdiction, the defendants contend that for the challenges to the individual mandate and employer mandate (Counts I, II, and VI), the plaintiffs lack standing; the claims are not ripe; and the claims are barred by the Anti-Injunction Act. (By not raising similar arguments for Counts IV and V, the defendants appear to impliedly concede that those counts allege injuries that are immediately ripe for review). As for the plaintiffs' "alternative" cause of action contending that, if the individual mandate penalty is deemed to be a tax, then it is an impermissible and unconstitutional one (Count III), the defendants maintain that, too, is precluded by the Anti-Injunction Act.

If the foregoing jurisdictional challenges fail, the defendants go on to assert that those causes of action, and all others, fail to state a claim for which relief can be granted.

III. DISCUSSION

A. Is the "Penalty" for Non-Compliance with the Individual Mandate Actually a "Tax" for Constitutional Analysis?

A fundamental issue overlaps the defendants' challenges to several of the plaintiffs' claims, and that is whether the individual mandate penalty is a "tax" within Congress's broad taxing power and thus subject to the Anti-Injunction Act, or instead, a "penalty" that must be authorized, if at all, by Congress's narrower Commerce Clause power. Because of the importance of this issue, I will analyze it first and at some length.

The defendants contend that the individual mandate penalty is a tax that is sustainable under Congress's expansive power to tax for the general welfare. U.S. Const. art I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the . . . general Welfare"). The plaintiffs urge that, if it is a tax, it is an unconstitutional one. The defendants maintain that the plaintiffs have no standing to raise the claim at this point in time because of the Anti-Injunction Act.

The Anti-Injunction Act [26 U.S.C. § 7421(a)] 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 . . . ." The remedy for challenging an improper tax is a post-collection suit for refund. As the Supreme Court has explained:

> The Anti-Injunction Act . . . could scarcely be more explicit --- "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court . . ." The Court has interpreted the principal purpose of this language to be 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." The Court has also identified "a collateral objective of the Act --- protection of the collector from litigation pending a suit for refund."

Bob Jones Univ. v. Simon, 416 U.S. 725, 736-37, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974) (citations omitted); accord, e.g., United States v. Clintwood Elkhorn Min. Co., 553 U.S. 1, 10, 128 S. Ct. 1511, 170 L. Ed. 2d 392 (2008) ("[The Anti-Injunction Act] commands that (absent certain exceptions) 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court,'" even if the tax is alleged to be unconstitutional, which means "the taxpayer must succumb to an unconstitutional tax, and seek recourse only after it has been unlawfully exacted"); Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7, 82 S. Ct. 1125, 8 L. Ed. 2d 292 (1962) (explaining that the "manifest purpose" of the Anti-Injunction Act "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. In this manner the United States is assured of prompt collection of its lawful revenue."). The Anti-Injunction Act, in short, applies to "truly revenue-raising tax statutes," see Bob Jones Univ., supra, 416 U.S. at 743, and seeks "protection of the revenues" pending a suit for refund. See id. at 737, 740.

Because the individual mandate does not go into effect until 2014, which means the penalty for non-compliance could not be assessed until that time, the Anti-Injunction Act, if it applies, could render much of this case premature and inappropriate as any injunctive or declaratory relief in favor of the plaintiffs could hinder collection of tax revenue. See id. at 732 n.7, 738-39 (where the outcome of a suit seeking injunctive or declaratory relief will prevent assessment and collection of tax revenue, the case "falls within the literal scope and the purposes of the [Anti-Injunction Act]"). Consequently, whether the individual mandate penalty is a tax is an important question that not only implicates jurisdiction (vis-a-vis the Anti-Injunction Act), and is not only the specific basis of one of the plaintiffs' causes of action, but it also goes to the merits of the individual mandate-related challenges of Counts One and Two (that is, whether the penalty can be justified by, and enforced

through, Congress's indisputably broad taxing power), or whether, instead, the penalty must pass Constitutional muster, if at all, under the more limited Commerce Clause authority. As noted, I should, and will, consider this significant issue at the outset.[3]

(1) Revenue-raising vs. regulatory

The plaintiffs contend that the individual mandate penalty is not a "true tax" because, among other things, it will (at most) "generate only 'some revenue,' and then only as an incident to some persons' failure to obey the law." See Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss ("Pl. Mem."), at 19 (doc. 68). In other words, because its primary purpose is regulatory --- and will only raise "little" revenue --- it is not a tax as the term is generally understood. It is true, as held in certain of the early tax cases to which the plaintiffs cite, see, e.g., Lipke v. Lederer, 259 U.S. 557, 42 S. Ct. 549, 66 L. Ed. 1061 (1922); Hill v. Wallace,

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[3] The plaintiffs have briefly suggested that the Anti-Injunction does not apply to this case because their challenge "is to the individual mandate itself" and not the "incidental penalty that accompanies the individual mandate." While it is true that the language of the Anti-Injunction Act only prohibits suits "for the purpose of restraining the assessment or collection of any tax," which would not apply to the individual mandate for every citizen to maintain healthcare coverage, the mandate and penalty clearly work in tandem. If the penalty is a legitimate tax, striking the individual mandate down will necessarily impede assessment and collection of tax revenue. The Anti-Injunction Act is not limited to direct and actual tax assessment or collection; the Eleventh Circuit and other courts have held that the statute also reaches activities that may "eventually" impede the collection of revenue (even if indirectly). See, e.g., Gulden v. United States, 287 Fed. Appx. 813, 815-17 (11th Cir. 2008) (explaining that the Anti-Injunction Act is "interpreted broadly" and "bars not only suits that directly seek to restrain the assessment or collection of taxes, but also suits that seek to restrain . . . activities 'which are intended to or may culminate in the assessment or collection of taxes'") (citation omitted); Judicial Watch Inc. v. Rossotti, 317 F.3d 401, 405 (4th Cir. 2003) ("it is clear that the Anti-Injunction Act extends beyond the mere assessment and collection of taxes to embrace other activities," such as those that may eventually "culminate in the assessment or collection of taxes").

259 U.S. 44, 42 S. Ct. 453, 66 L. Ed. 822 (1922), that the Supreme Court once drew distinctions between regulatory and revenue-raising taxes. However, those holdings had a very short shelf-life. As noted in Bob Jones Univ., supra, which cited to Lipke and Hill for that position, "the Court . . . subsequently abandoned such distinctions." 416 U.S. at 741 n.12; see also id. at 743 (further stating that the cases were "of narrow scope" and "produced a prompt correction in course"). Succeeding case law recognized that "[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 the less a tax because it has a regulatory effect." Sonzinsky v. United States, 300 U.S. 506, 513, 57 S. Ct. 554, 81 L. Ed. 772 (1937); see also id. ("it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax . . . tends to restrict or suppress the thing taxed"). Thus, as the law currently exists, "[i]t is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. The principle applies even though the revenue obtained is obviously negligible, or the revenue purpose of the tax may be secondary." United States v. Sanchez, 340 U.S. 42, 44, 71 S. Ct. 108, 95 L. Ed. 47 (1950); accord United States v. Kahriger, 345 U.S. 22, 27 n.3, 28, 73 S. Ct. 510, 97 L. Ed. 754 (1953) (holding same and sustaining federal gambling tax even though its proponents sought to hinder the activity at issue and "'indulge[d] the hope that the imposition of this type of tax would eliminate that kind of activity'"), overruled on other grounds, Marchetti v. United States, 390 U.S. 39, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968). The elimination of the "regulatory vs. revenue-raising" test does not necessarily mean, however, that the exaction at issue in this case is a "tax."

(2) The Court's role in ascertaining what Congress intended

In deciding this specific question, I will start from the assumption (only for the analysis of whether it is a tax) that Congress could have used its broad taxing

power to impose the exaction and that, if it had clearly (or even arguably) intended to do so, then the exaction would have been sustainable under its taxing authority. See Kahriger, supra, 345 U.S. at 28, 31 ("As is well known, the constitutional restraints on taxing are few," and courts are generally "without authority to limit the exercise of the taxing power"); see also United States v. Ptasynski, 462 U.S. 74, 103 S. Ct. 2239, 76 L. Ed. 2d 427 (1983) (observing that "Congress's power to tax is virtually without limitation").[4] However, that is not what happened here. Although factually dissimilar, on this point I find instructive the early case of Helwig v. United States, 188 U.S. 605, 23 S. Ct. 427, 47 L. Ed. 614 (1903). At issue in that case was a federal law that required importers to pay a duty on imported items based on their declared value, plus "a further sum" for any item subsequently found to have been inadequately valued. The sole question the Supreme Court was called upon to decide was whether, for jurisdictional purposes, the so-called "further sum" was "revenue from imports or tonnage" (i.e., a tax), or whether it was in the nature of a penalty. The Court stated:

> Although the statute, under § 7, supra, 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, . . . 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.

Id. at 612-13 (emphasis added). In concluding that the provision was a penalty, the Court stated that, based on the statutory language and its application to the facts

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[4] But see the discussion with respect to Count Three, Part III.C(4) infra.

of the case, it was "impossible . . . to hold this provision to be other than penal in its nature." Id. at 613. To be clear, it is not necessarily significant for our purposes that Helwig found the "further sum" to be in the nature of a penalty and not a tax; rather, what is significant is what the Supreme Court said along the way to getting there. In reaching its conclusion, the Court made it a point to stress --- as it did in the emphasized portion quoted above --- that regardless of the "ordinary or general meaning of the words" in the statute, and regardless of the "nature and character of the enactment," the exaction would not have been found a penalty if Congress intended otherwise. Thus, "[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. (emphasis added).

As applied to the facts of this case, Helwig can be interpreted as concluding that, regardless of whether the exaction could otherwise qualify as a tax (based on the dictionary definition or "ordinary or general meaning of the word"), it cannot be regarded as one if it "clearly appears" that Congress did not intend it to be. In this case, there are several reasons (perhaps none dispositive alone, but convincing in total) why it is inarguably clear that Congress did not intend for the exaction to be regarded as a tax.[5]

(3) Congress did not call it a tax, despite knowing how to do so

In addition to the Act, there were several healthcare reform bills introduced

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[5] Although it only matters what Congress intended, I note for background purposes that before the Act was passed into law, one of its chief proponents, President Barack Obama, strongly and emphatically denied that the penalty was a tax. When confronted with the dictionary definition of a "tax" during a much-publicized interview widely disseminated by all of the news media, and asked how the penalty did not meet that definition, the President said it was "absolutely not a tax" and, in fact, "[n]obody considers [it] a tax increase." See, e.g., Obama: Requiring Health Insurance is Not a Tax Increase, CNN, Sept. 29, 2009, available at: http://www.cnn.com/2009/POLITICS/09/20/obama.health.care/index.html.

and debated during the 111th Congress. For example, "America's Affordable Health Choices Act of 2009" (H.R. 3200) was introduced in the House of Representatives on July 14, 2009. Like the Act, it contained an individual mandate and concomitant penalty. However, it called the penalty a tax. Section 401 was unambiguously titled "Tax on Individuals Without Acceptable Health Care Coverage," and went on to refer to the exaction as a "tax" no less than fourteen times in that section alone. See, e.g., id. (providing that with respect to "any individual who does not meet the requirements of subsection (d) at any time during the taxable year, there is hereby imposed a tax"). H.R. 3200 was thereafter superseded by a similar bill, "Affordable Health Care for America Act" (H.R. 3962), which was actually passed in the House of Representatives on November 7, 2009. That second House bill also included an individual mandate and penalty, and it repeatedly referred to the penalty as a "tax." See, e.g., Section 501 (providing that for any person who does not comply with the individual mandate "there is hereby imposed a tax," and referring to that "tax" multiple times); Section 307(c)(1)(A) (further referring to the penalty as a "tax[ ] on individuals not obtaining acceptable coverage").

While the above bills were being considered in the House, the Senate was working on its healthcare reform bills as well. On October 13, 2009, the Senate Finance Committee passed a bill, "America's Healthy Future Act" (S. 1796). A precursor to the Act, this bill contained an individual mandate and accompanying penalty. In the section titled "Excise Tax on Individuals Without Essential Health Benefits Coverage," the penalty was called a "tax." See Section 1301 ("If an applicable individual fails to [obtain required insurance] there is hereby imposed a tax").

In contrast to the foregoing, the Act --- which was the final version of the healthcare legislation later passed by the Senate on December 24, 2009 --- did not call the failure to comply with the individual mandate a tax; it was instead called a "penalty." The Act reads in pertinent part: "If an applicable individual fails to meet

the requirement of subsection (a) . . . there is hereby imposed a penalty." Act § 1501(b)(1). Congress's conspicuous decision to not use the term "tax" in the Act when referring to the exaction (as it had done in at least three earlier incarnations of the legislation) is significant. "'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, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (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 v. United States, 464 U.S. 16, 23-24, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983); see also United States v. NEC Corp., 931 F.2d 1493, 1502 (11th Cir. 1991) (changes in statutory language "generally indicate[ ] an intent to change the meaning of the statute"); Southern Pac. Transportation Co. v. Usery, 539 F.2d 386, 390-91 (5th Cir. 1976) (rejecting the interpretation of a statute that was based on language in an earlier House version that the Senate changed prior to passing into law, and attaching "weight to the [Senate's] conscious and deliberate substitution of [the House's] language") (binding under Bonner v. City of Prichard, Alabama, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc)).

Congress's failure to call the penalty a "tax" is especially significant in light of the fact that the Act itself imposes a number of taxes in several other sections (see, e.g., Excise Tax on Medical Device Manufacturers, § 1405 ("There is hereby imposed on the sale of any taxable medical device by the manufacturer, producer, or importer a tax"); Excise Tax on High Cost Employer-Sponsored Health Coverage, § 9001 ("there is hereby imposed a tax"); Additional Hospital Insurance Tax on High-Income Taxpayers, § 9015 ("there is hereby imposed a tax"); Excise Tax on Indoor Tanning Services, § 10907 ("There is hereby imposed on any indoor tanning service a tax")). This shows 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. See generally Hodge v. Muscatine County, 196 U.S. 276, 25 S. Ct. 237, 49 L. Ed. 477 (1905) (noting that "[i]t is not easy to draw an exact line of demarcation between a tax and a penalty," but where the statute uses "tax" in one section and "penalty" in another, courts "cannot go far afield" in treating the exaction as it is called; to do otherwise "would be a distortion of the words employed"); see also Duncan v. Walker, 533 U.S. 167, 173, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001) ("It is well settled that '[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.'") (citations omitted); Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians, 563 F.3d 1205, 1209 (11th Cir. 2009) ("[W]here Congress knows how to say something but chooses not to, its silence is controlling"); DIRECTV, Inc. v. Brown, 371 F.3d 814, 818 (11th Cir. 2004) ("[W]hen Congress uses different language in similar sections, it intends different meanings.").

The defendants assert in their memorandum, see Memorandum in Support of Defendants' Motion to Dismiss ("Def. Mem."), at 33, 50 n.23 (doc. 56-1), as they did during oral argument, that in deciding whether the exaction is a penalty or tax, "it doesn't matter" what Congress called it because the label "is not conclusive." See Transcript of Oral Argument ("Tr."), at 27-29 (doc. 77). As a general rule, it is true that the label used is not controlling or dispositive because Congress, at times, may be unclear and use inartful or ambiguous language. Therefore, as the Supreme Court recognized more than 100 years ago in Helwig, supra, the use of a particular word "does not change the nature and character of the [exaction]," and it is the ultimate duty of the court to decide the issue based on "the intrinsic nature of the provision" irrespective of what it is called. See 188 U.S. at 612-13; accord Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 314, 13 L. Ed. 996 (1851) ("it is the thing, and not the name, which is to be considered"). However, as also noted in

Helwig, this rule must be set aside when it is clear and manifest that Congress intended the exaction to be regarded as one and not the other. For that reason, the defendants are wrong to contend that what Congress called it "doesn't matter." To the extent that the label used is not just a label, but is actually indicative of legislative purpose and intent, it very much does matter. By deliberately changing the characterization of the exaction from a "tax" to a "penalty," but at the same time including many other "taxes" in the Act, it is manifestly clear that Congress intended it to be a penalty and not a tax.[6]

Quoting the Third Circuit in Penn Mut. Indem. Co. v. C.I.R, 277 F.2d 16, 20 (3d Cir. 1960), the defendants maintain that "'Congress has the power to impose taxes generally, and if the particular imposition does not run afoul of any constitutional restrictions then the tax is lawful, call it what you will.'" Def. Mem. at 50 n.23. I do not necessarily disagree with this position, at least not when it is quite clear that Congress intends to impose a tax and is acting pursuant to its taxing power. However, as will be discussed in the next section, that is not the situation here. In the Penn Mutual Indemnity case, for example, it was clear and undisputed that Congress had exercised its taxing authority to impose the exaction; it was inarguably a "tax," and the only question was whether it was an excise tax, an income tax, or some other type of tax. It was in that particular context that the Third Circuit's analysis included the quoted statement, and further elaborated that: "It is not necessary to uphold the validity of the tax imposed by the United States

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[6] A hypothetical helps to further illustrate this point. Suppose that after the Act imposed the penalty it went on to expressly state: "This penalty is not a tax." According to the logic of the defendants' argument, if the intrinsic nature of the penalty was a tax, it could still be regarded as one despite what it was called and despite the clear and unmistakable Congressional intent to the contrary. Such an outcome would be absurd. In my view, changing the word from tax to penalty, but at the same time including various other true (and accurately characterized) taxes in the Act, is the equivalent of Congress saying "This penalty is not a tax."

that the tax itself bear an accurate label." See 277 F.2d at 20. That is obviously a very different situation from the one presented here, where the precise label of an acknowledged tax is not being disputed, but rather whether it is even a tax at all.

(4) Congress did not state that it was acting under its taxing authority, and, in fact, it treated the penalty differently than traditional taxes

Congress did not state in the Act that it was exercising its taxing authority to impose the individual mandate and penalty; instead, it relied exclusively on its power under the Commerce Clause. U.S. Const. art I, § 8, cl. 3 ("[Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). The Act recites numerous (and detailed) factual findings to show that the individual mandate regulates commercial activity important to the economy. Specifically, it states that: "The [individual mandate] is commercial and economic in nature, and substantially affects interstate commerce" in that, inter alia, "[h]ealth insurance and health care services are a significant part of the national economy" and the mandate "will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services." Act § 1501(a)(1)-(2)(B)(C). It further states that health insurance "is in interstate commerce," and the individual mandate is "essential to creating effective health insurance markets." Id. § 1501(a)(2)(F), (H). The Act contains no indication that Congress was exercising its taxing authority or that it meant for the penalty to be regarded as a tax. Although the penalty is to be placed in the Internal Revenue Code under the heading "Miscellaneous Excise Taxes," the plain language of the Code itself states that this does not give rise to any inference or presumption that it was intended to be a tax. See United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 222-23, 116 S. Ct. 2106, 135 L. Ed. 2d 506 (1996) (citing to 26 U.S.C. § 7806(b), which provides that: "No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title").

In fact, while the penalty is placed under the "Excise Taxes" heading of the Code, at the same time Congress specifically exempted and divorced the penalty from all the traditional enforcement and collection methods used by the Internal Revenue Service, such as tax liens, levies, and criminal proceedings. See Act § 1501(b). These exemptions from normal tax attributes --- coupled with Congress's failure to identify its taxing authority --- belie the claim that, simply because it is mentioned in the Internal Revenue Code, the penalty must be a tax.[7]

(5) Lack of statutorily-identified revenue-generating purpose

Perhaps most significantly, the Act does not mention any revenue-generating purpose that is to be served by the individual mandate penalty, even though such a purpose is required. See Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819, 841, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) ("'A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government'"). In this circuit, the ultimate test of tax validity "is whether on its face the tax operates as a revenue generating measure and the attendant regulations are in aid of a revenue purpose." United

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[7] In highlighting that Congress did not identify its taxing power as the basis for imposing the "penalty," I am not suggesting that legislative action is invalid if a power source is not identified. To the contrary, I recognize that "Congress's failure to cite [a particular power] does not eliminate the possibility that [said power] can sustain this legislation." United States v. Moghadam, 175 F.3d 1269, 1275 n.10 (11th Cir. 1999); see also Wilson-Jones v. Caviness, 99 F.3d 203, 208 (6th Cir. 1996) ("A source of power [can] justify an act of Congress even if Congress did not state that it rested the act on the particular source of power.") (citing cases, including Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144, 68 S. Ct. 421, 92 L. Ed. 596 (1948) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.")). Thus, to be clear, I am not saying that the penalty is invalid as a tax because Congress did not expressly identify its taxing power. Rather, its failure to do so (particularly when it took time to extensively identify its Commerce Clause power), is merely one of several facts that shows Congress was not exercising its taxing authority and did not intend for the penalty to be regarded as a tax.

States v. Ross, 458 F.2d 1144, 1145 (5th Cir. 1972) (emphasis added) (binding under Bonner, supra, 661 F.2d at 1207).

The revenue-generating provisions in the Act were an important part of the legislation as they were necessary under current Congressional procedure to score its final cost. To be sure, much of the debate within and outside Congress focused on the bill's final price tag and whether it would exceed the threshold of $1 trillion over the course of the first ten years; and while the legislation was being debated, Congress worked closely and often with the Congressional Budget Office ("CBO") to ensure that it did not. Obviously, if the penalty had been intended by Congress to be a true revenue-generating tax (that could be used to keep the Act's final cost down) then it would have been treated as a tax "on its face." During oral argument, defense counsel stated that "[t]he purpose of the [penalty] is . . . to raise revenue to offset expenditures of the federal government that it makes in connection, for example, with the Medicaid expansion." See Tr. at 9. However, there is absolutely no support for that statement in the statute itself.

On its face, the Act lists seventeen "Revenue Offset Provisions" (including the several taxes described supra), and, as reconciled, it further includes a section entitled "Provisions Relating to Revenue" (which also references those taxes and other revenue offsetting provisions). However, the individual mandate penalty is not listed anywhere among them. Nowhere in the statute is the penalty provision identified or even mentioned as raising revenue and offsetting the Act's costs. It is especially noteworthy that the Act does not identify revenue to be generated from the penalty (which the defendants now maintain would raise about $4 billion each year), but the statute identifies the tanning salon tax as revenue-raising (even though that tax is expected to raise a significantly smaller $300 million annually). See Joint Committee on Taxation, Estimated Revenue Effects of the Manager's Amendment to the Revenue Provisions Contained in the "Patient Protection and Affordable Care Act," as Passed by the Senate on December 24, 2009 (JCX-10-

10), March 11, 2010, at 2. If Congress had intended and understood the penalty to be a tax that would raise revenue for the government, which could in turn be used to partially finance the Act's budgetary effect and help keep its ten-year cost below the $1 trillion threshold by offsetting its expenditures, it makes little sense that Congress would ignore a "tax" that could be expected to raise almost $20 billion in revenue between the years 2015-2019, yet mention another tax that was expected to raise less than one-tenth of that revenue annually during the same time period.

To the extent there is statutory ambiguity on this issue, both sides ask that I look to the Act's legislative history to determine if Congress intended the penalty to be a tax. Ironically, they rely on the same piece of legislative history in making their respective arguments, to wit, the 157-page "Technical Explanation" of the Act that was prepared by the Staff of the Joint Committee on Taxation on March 21, 2010 (the same day the House voted to approve and accept the Senate bill and two days before the bill was signed into law). The plaintiffs highlight the fact that the report "consistently" refers to the penalty as a penalty and not a tax, see Pl. Mem. at 19 (as compared, for example, with the tanning salon tax that is consistently referred to as a "tax" in that same report, see JCT, Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as amended, in Combination with the "Patient Protection and Affordable Care Act" (JCX-18-10), March 21, 2010, at 108). The defendants, on the other hand, highlight the fact that the JCT referred to the penalty as an "excise tax" in a single heading in that report. See Def. Mem. at 51.

As the Supreme Court has repeatedly held, "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 568, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) (emphasis added). On the facts

of this case, "penalty" is not an ambiguous term, but rather was a carefully and intentionally selected word that has a specific meaning and carries a particular import (discussed infra). Moreover, even if the term was ambiguous, the Supreme Court has pointed out two "serious criticisms" of attempting to rely on legislative history:

> Not all extrinsic materials are reliable sources of insight into legislative understandings . . ., and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" See Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 214 (1983). Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members --- or, worse yet, unelected staffers and lobbyists --- both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text. Id.

In this case, both criticisms are directly on the mark. The report is ambiguous and contradictory, as evidenced by the simple fact that both sides claim it supports their position. Should I look to the heading (that calls the exaction an "excise tax"), or should I look to the actual body of the report (that calls it a penalty no less than twenty times with no mention of it being a tax)? It is, as Judge Leventhal said, like "looking over a crowd and picking out your friends." Further, a strong argument could be (and has been) made that the staffers who drafted the report were merely engaging in last minute "strategic manipulation" to secure results they were unable to achieve through the Act itself. See, e.g., The Insurance Mandate in Peril, Wall St. J., Apr. 29, 2010, at A19 (opining that the "excise tax" heading in the JCT

report should not be used to convert the penalty into a tax because the Supreme Court "will not allow staffers and lawyers to change the statutory cards that Congress already dealt when it adopted the Senate language"). For these reasons, as recognized by the Supreme Court, resort to, or reliance upon, the JCT staff's Technical Explanation would be inappropriate on the facts of this case --- even if the term "penalty" was ambiguous (which it is not).

To summarize the foregoing, it "clearly appears" from the statute itself, see Helwig, supra, 188 U.S. 613, that Congress did not intend to impose a tax when it imposed the penalty. To hold otherwise would require me to look beyond the plain words of the statute. I would have to ignore that Congress:

(i) specifically changed the term in previous incarnations of the statute from "tax" to "penalty;"

(ii) used the term "tax" in describing the several other exactions provided for in the Act;

(iii) specifically relied on and identified its Commerce Clause power and not its taxing power;

(iv) eliminated traditional IRS enforcement methods for the failure to pay the "tax;" and

(v) failed to identify in the legislation any revenue that would be raised from it, notwithstanding that at least seventeen other revenue-generating provisions were specifically so identified.

The defendants have not pointed to any reported case decided by any court of record that has ever found and sustained a tax in a situation such as the one presented here, and my independent research has also revealed none. At bottom, the defendants are asking that I divine hidden and unstated intentions, and despite considerable evidence to the contrary, conclude that Congress really meant to say one thing when it expressly said something else. The Supreme Court confronted the inverse of this situation in Sonzinsky, supra, and I believe the rationale of that

case forecloses the defendants' argument.

The issue in Sonzinsky was whether a levy on the sale of firearms was a tax. The exaction was called a tax on its face, and it was undisputed that it had been passed pursuant to Congress's taxing power. Nonetheless, the petitioner sought to invalidate the tax because it was "prohibitive in effect and [disclosed] unmistakably the legislative purpose to regulate rather than to tax." The petitioner argued that it was not "a true tax, but a penalty." In rejecting this argument, the Supreme Court explained:

> Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power.

Stated somewhat differently, reviewing courts cannot look beyond a statute and inquire as to whether Congress meant something different than what it said. If an exaction says "tax" on its face and was imposed pursuant to Congress's taxing power, courts "are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may [be a penalty intended] to restrict the activities taxed." See generally Sonzinsky, supra, 300 U.S. at 511-14; accord Kahriger, supra, 345 U.S. at 22 (similarly declining invitation to hold that "under the pretense of exercising" a particular power, Congress was, in fact, exercising another power).

The holding of Sonzinsky cuts both ways, and applying that holding to the facts here, I have no choice but to find that the penalty is not a tax. Because it is called a penalty on its face (and because Congress knew how to say "tax" when it intended to, and for all the other reasons noted), it would be improper to inquire as to whether Congress really meant to impose a tax. I will not assume that Congress had an unstated design to act pursuant to its taxing authority, nor will I impute a

revenue-generating purpose to the penalty when Congress specifically chose not to provide one. It is "beyond the competency" of this court to question and ascertain whether Congress really meant to do and say something other than what it did. As the Supreme Court held by necessary implication, this court cannot "undertake, by collateral inquiry as to the measure of the [revenue-raising] effect of a [penalty], to ascribe to Congress an attempt, under the guise of [the Commerce Clause], to exercise another power." See Sonzinsky, supra, 300 U.S. at 514. This conclusion is further justified in this case since President Obama, who signed the bill into law, has "absolutely" rejected the argument that the penalty is a tax. See supra note 5.

To conclude, as I do, that Congress imposed a penalty and not a tax is not merely formalistic hair-splitting. There are clear, important, and well-established differences between the two. See Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 779-80, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994) ("Whereas [penalties] are readily characterized as sanctions, taxes are typically different because they are usually motivated by revenue-raising, rather than punitive, purposes."); Reorganized CF&I Fabricators of Utah, Inc., supra, 518 U.S. at 224 ("'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.'"). Thus, as the Supreme Court has said, "[t]he two words are not interchangeable one for the other . . . ; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." La Franca, supra, 282 U.S. at 572.

(6) Does the Anti-Injunction Act apply anyway?

The defendants insist that the Anti-Injunction Act should still preclude the

individual mandate challenges even if the penalty is not a tax. For this argument, the defendants rely on Title 26, United States Code, Section 6671, which states that the "penalties" provided under subchapter B of chapter 68 of the IRS Code (a classification that includes the individual mandate penalty) "shall be assessed and collected in the same manner as taxes." If the penalty is intended to be assessed and collected in the same manner as a tax, the defendants contend, then the Anti-Injunction Act should apply. I do not agree. First of all, the penalty is obviously not to be collected and treated "in the same manner as taxes" in light of the fact that Congress specifically divorced the penalty from the tax code's traditional collection and enforcement mechanisms. Further, and more significantly, as noted supra, the whole point of the Anti-Injunction Act is to protect the government in the collection of its lawful tax revenues, and thus it applies to "truly revenue-raising tax statutes," which Congress plainly did not understand and intend the penalty to be. The Eleventh Circuit has recognized (albeit by implication) that the Anti-Injunction Act does not reach penalties that are, as here, "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. Cf. Mobile Republican Assembly v. United States, 353 F.3d 1357, 1362 n.5 (11th Cir. 2003). The defendants have cited two out-of-circuit cases in support of their contention that Section 6671(a) requires penalties to be treated the same as taxes for Anti-Injunction Act purposes, Barr v. United States, 736 F.2d 1134 (7th Cir. 1984); Warren v. United States, 874 F.2d 280 (5th Cir. 1989). Although those cases did indeed hold that the penalties at issue fell under the Anti-Injunction Act, they do not really support the defendants' position. As the plaintiffs note, the penalties in both those cases were imposed for failing to pay an undisputed tax, that is, falsely claiming an exemption in Barr, and refusing to sign a tax return in Warren. In other words, the penalties were "directly related to the tax code." Cf. Mobile Republican Assembly, supra, 353 F.3d at 1362 n.5. Allowing IRS penalties such as those to qualify as a tax for Anti-Injunction Act