No. 11-398

IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For The Eleventh Circuit

BRIEF OF STATE CHAMBERS OF COMMERCE AND RELATED ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS ON THE ANTI-INJUNCTION ACT

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INTEREST OF THE AMICI[1]

Amici are an informal coalition of state chambers of commerce and related organizations, including the Arkansas State Chamber of Commerce and Associated Industries of Arkansas, the Florida Chamber of Commerce, the Georgia Chamber of Commerce, the Illinois Chamber of Commerce, the Indiana Chamber of Commerce, the Kentucky Chamber of Commerce, the Michigan Chamber of Commerce, the Ohio Chamber of Commerce, the State Chamber of Oklahoma, the Pennsylvania Chamber of Business and Industry, the South Carolina Chamber of Commerce, the Tennessee Chamber of Commerce and Industry, the Texas Association of Business, the Association of Washington Business, and the Wisconsin Manufacturers and Commerce. These organizations represent tens of thousands of businesses, and have advocated for the interests of businesses and employers across the country in relation to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 109 (2010) (collectively, the "Act" or the "ACA"). The businesses these organizations represent will bear tremendous

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[1] The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the amici curiae provided any monetary contribution to its preparation or submission.

administrative and economic costs from the uncertainty that will be created if the Court does not rule on the constitutionality of the ACA until its penalty provisions go into effect in 2014. As representatives of businesses from across the country, the amici are uniquely positioned to describe how this uncertainty will negatively affect business.

SUMMARY OF ARGUMENT

The Anti-Injunction Act does not bar consideration of this suit because Respondents only seek to challenge the ACA's individual insurance mandate, and not the collection of any tax. Further, the penalty mandated by the ACA is not a tax. Therefore, the Anti-Injunction Act does not apply because, at most, Respondents' position can only be construed as one seeking to enjoin the ACA's penalties. Finally, the Anti-Injunction Act bars only suits that have the *immediate* purpose of barring the collection of a tax, and no such purpose is present in this case.

The amici believe that not hearing the current challenge to the ACA will have the following adverse effects on our nation's businesses.

First, a delayed ruling will affect employers' ability to provide health care coverage to their employees. Businesses face significant uncertainty over the ACA, and as many as two-thirds of businesses are expected to change their employee health care coverage in response to the Act. Any such changes will be impossible to plan with confidence, however, if the Court does not now rule

on the ACA's constitutionality. This uncertainty places a serious strain on the finances of the nation's employers, as they will be forced to guess what health care coverage may, or may not, be legally sufficient in the future.

Second, the uncertainty over a delayed ruling will affect the ability of businesses to hire and retain new workers. Approximately 30% of small business owners have cited uncertainties about the ACA as the reason they are not hiring new workers, and 74% have cited the ACA as making it more difficult to hire. A delayed ruling will only exacerbate this problem by preventing employers from accurately calculating the cost of labor and the number of workers they can afford to hire or retain.

Third, the federal government will collect over 500 billion dollars in revenue under the ACA over the next several years, including an estimated 52 billion dollars in penalties from employers who do not provide the required level of health care coverage, all of which the government may ultimately have to refund if the Act is found to be unconstitutional. This amount represents not only an enormous direct cost, but also an opportunity cost by limiting the amount that employers can invest in their businesses.

This Court has both strong legal grounds and policy reasons to address the constitutionality of the ACA in the present litigation. Therefore, the Court should hold that the Anti-Injunction Act is not a bar to this Court ruling on the constitutionality of the ACA.

ARGUMENT

I. THE ANTI-INJUNCTION ACT DOES NOT BAR CONSIDERATION OF THIS SUIT.

A. The Respondents Only Seek To Challenge The ACA's Individual Insurance Mandate, Not The Collection Of Any Tax.

The Anti-Injunction Act does not bar consideration of this suit because the Respondents only seek to challenge the ACA's individual insurance mandate, and not the collection of a "tax."

The Anti-Injunction Act prohibits any suit "for the purpose of restraining the assessment or collection of any *tax*." 26 U.S.C. § 7421(a) (emphasis added). The Anti-Injunction Act's purpose is to facilitate "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference," by "requir[ing] that the legal right to the disputed sums be determined in a suit for refund." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-37 (1974).

Unlike the usual situation where a party seeks to avoid paying some "disputed sum," Respondents' purpose in filing this suit is to challenge the ACA's mandate that every applicable individual purchase health insurance, which is a substantive legal requirement created by 26 U.S.C. § 5000A(a). The penalty imposed on individuals who fail to comply with this requirement is irrelevant, however, because Respondents do not challenge the resulting

sanction; Respondents only contest the mandate. Therefore, the suit is not at all one about "disputed sums" or a tax. Instead, this suit is about the federal government's power to force individuals to spend their financial resources.

This analysis has been adopted by lower courts addressing this issue and should be adopted here. *See Seven-Sky v. Holder*, 661 F.3d 1, 8-10, 12-13 (D.C. Cir. 2011) (noting that focus on substantive mandate rather than any tax rendered the Anti-Injunction Act inapplicable); *cf. Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 554 (6th Cir. 2011) (mandate is a "substantive provision").

Therefore, this Court should rule that the Anti-Injunction Act is no bar to its consideration of this lawsuit, as this suit only seeks to challenge the ACA's mandate, and Respondents do not seek to restrain the collection of a tax.

B. A Penalty Is Not A Tax, Therefore The Anti-Injunction Act Does Not Apply.

Even if this suit could be construed as an action primarily seeking to stop enforcement of the penalties of the ACA, the Anti-Injunction Act only bars suits seeking an injunction against a tax, and a penalty is not the same as a tax.

The Anti-Injunction Act 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 . . . ." 26 U.S.C. § 7421(a) (emphasis added). The central issue, therefore, is whether the individual mandate imposed by the ACA constitutes

a tax or something altogether different. As Judge Vinson noted in the lower court's ruling, "[o]n 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." *Florida v. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1138-39 (N.D. Fla. 2011). There are several compelling reasons to hold that the penalty imposed by the ACA is not a tax.

First, Congress deliberately changed the language of the ACA from "tax" to "penalty" with regard to the individual mandate provision, thereby giving clear evidence of its intent on this issue. Early versions of the ACA used the term "tax" instead of penalty. *See* H.R. Res. 3962, 111th Cong. § 501 and 307(c)(1)(A) (as passed by House, November 7, 2009) (imposing a "tax" on any person who does not comply with an individual mandate); S. Res. 1796, 111th Cong. § 1301 ("[I]f an applicable individual fails to [obtain required insurance] there is hereby imposed a tax."). By contrast, the final version of the ACA imposes a "penalty" for failure to purchase insurance. *See* 26 U.S.C. § 5000A(b)(1) ("If an applicable individual fails to meet the requirement of subsection (a) . . . there is hereby imposed a penalty."). "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 disregarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442 (1987). This change is particularly significant in that Congress retained the use of the term "tax" to describe

numerous other provisions in the final version of the ACA. *See, e.g.*, 26 U.S.C. §§ 4191 and 4980I. Therefore, Congress obviously intended that the individual mandate penalty should not be considered a tax.

Second, Congress specifically stated that it was acting under its authority pursuant to the Commerce Clause rather than its taxing authority. *See* 42 U.S.C. § 18091(a)(1) ("The [individual mandate] is commercial and economic in nature, and substantially affects interstate commerce."). Congress also prohibited the use of traditional enforcement and collection methods used by the Internal Revenue Service, such as tax liens, to enforce the individual penalty. *See* 26 U.S.C. § 5000A(g)(2)(B). By passing the legislation pursuant to its power under the Commerce Clause instead of its general taxing authority, and by eliminating traditional tax enforcement methods for the individual mandate penalty, Congress intended that the penalty provision should not be considered a tax.

Third, the penalty imposed by the ACA does not have a revenue generating purpose, and therefore should not be considered a tax. *See Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 841 (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.'" (quoting *United States v. Butler,* 297 U.S. 1, 61 (1936))). Here, although the ACA contains several revenue generating provisions and sections with names such as "Revenue Offset Provisions" and "Provisions Relating to Revenue,"

the individual mandate penalty is not included in any such provisions. Furthermore, Congress did not identify the amount of revenue that would be generated by the individual mandate penalty. By contrast, Congress did provide revenue amounts for numerous other provisions in the ACA which it explicitly described as taxes. Given the controversy over the ACA's potential costs and sources of revenue, *see Florida v. Dep't of Health & Human Servs.*, 716 F. Supp. 2d at 1137-38, Congress's intentional decision to avoid categorizing the individual mandate penalty as a revenue generating provision is significant and lends further weight to the conclusion that the penalty was never intended to be, nor is it in any respect, a tax.

Congress's decision to impose a "penalty" rather than a "tax" was deliberate. "If it clearly appears 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." *Helwig v. United States*, 188 U.S. 605, 613 (1903). Similarly, if Congress intended for the provisions to be a penalty rather than a tax, then the Court must accede to that expression of the will of Congress. *Id.*

C. This Suit Does Not Have The Immediate Purpose Of Restraining The Collection Of A Tax, And Therefore Is Not Prohibited By The Anti-Injunction Act.

The Anti-Injunction Act further does not apply here because it only bars suits that have the *immediate* purpose of restraining the collection of a

tax. While the statute itself does not include the word "immediate," cases interpreting the Anti-Injunction Act can only be read coherently if the element of immediacy is included. If the Anti-Injunction Act is read with this "immediacy" requirement, the present litigation is not barred because it does not have the "immediate" purpose of restraining the collection of a tax as the legal authority to assess and collect such a tax will not exist until 2014.

First, requiring an immediacy component does not upset the main purpose of the Anti-Injunction Act, which "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 a refund." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962). Nor does allowing the ACA to be reviewed here frustrate the Anti-Injunction Act's collateral purpose of protecting the "collecting officers [who] have made the assessment and claim that it is valid." *Id.* at 8. This is because there is no legal authority to assess and collect the penalty as yet, and there will be no such authority until 2014. Indeed, this appears to be an issue of first impression. In no previous Anti-Injunction Act case did the court have to decide the applicability of the Anti-Injunction Act when there was no taxing authority to assess and collect the challenged penalties at the time the courts were presented with the issue. The most sensible reading is that the Anti-Injunction Act cannot apply until the legal authority to collect a tax exists, just as the Anti-Injunction Act does not apply after the tax has been collected. *See* Michael C. Dorf & Neil S. Siegel,

"*Early Bird Special" Indeed!: Why the Tax Anti-Injunction Act Permits the Present Challenges to the Minimum Coverage Provision*, 121 YALE L.J. ONLINE 389 (2012), http://yalelawjournal.org/images/pdfs/1042.pdf.

Second, the Anti-Injunction Act must be read to include an element of "immediacy" because, without this implied term, it could bar actions for a refund. The Anti-Injunction Act states: "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). Courts have read this language as not applying to actions for a refund. *See Bob Jones Univ. v. Simon*, 416 U.S. 725, 748 n.22 (1974) ("It may be possible to conclude that a suit for a refund is not 'for the purpose of restraining the assessment or collection of any tax…,' and thus that neither the literal terms nor the principal purpose of § 7421(a) is applicable."). Permitting an action for a refund, however, is contrary to the literal language of the statute, because many refund actions have the "purpose of restraining the assessment or collection of any tax." Thus, the Anti-Injunction Act cannot be read literally without overturning established case law that refund actions are not barred by the statute.

Specifically, plaintiffs in a refund action suit are often more concerned about stopping future collections of the tax than about recouping a refund for that year's tax. For example, after the holding in *Bob Jones University v. Simon* barred the suit of Bob Jones University because it sought to stop the collection of a tax, the university paid a nominal amount of the tax that it was contesting and then immediately brought suit for a refund. *See* 461 U.S.

574, 581-82 (1983). Ostensibly, the ultimate goal of Bob Jones University in bringing the refund suit was to bar any future collections of the tax by judicial estoppel. Therefore, even a refund suit can be brought for "the purpose of restraining the assessment or collection of any tax."

Reading the Anti-Injunction Act to bar refund actions, however, does not comport with the statute's purpose, which "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 judicial suit for a refund." *Enochs*, 370 U.S. at 7. Courts have avoided such an anomalous result by reading the Anti-Injunction Act as essentially barring suits with the "immediate" purpose of restraining the collection of any tax. Refund actions do not create such a restraint because the immediate purpose of a refund suit is to obtain a refund.

When the Anti-Injunction Act is read consistent with this line of reasoning, it cannot serve as a bar to the present suit because this pre-enforcement challenge does not have the "immediate" purpose of restraining the assessment or collection of the individual mandate penalty, as the legal authority to assess and collect the penalty will not exist until 2014. Instead, the present litigation has the immediate purpose of seeking clarification from the federal courts regarding the constitutionality of the ACA, including its mandate that individuals purchase costly health insurance.

While this reading of the suit's intent may implicate the Declaratory Judgment Act, 28 U.S.C. §

2201 (2006) (prohibiting declaratory judgment actions "with respect to federal taxes"), prior cases have interpreted the Declaratory Judgment Act as co-extensive with the Anti-Injunction Act with respect to tax litigation, except for certain enumerated exceptions. *See Bob Jones*, 416 U.S. at 732-33 n.7. Furthermore, the Declaratory Judgment Act issue can be avoided altogether if the purpose of the present suit is properly framed as a suit seeking to enjoin the mandate imposed by the ACA.

Because the Anti-Injunction Act can only be read coherently if it is interpreted as barring suits with the "immediate" purpose of restraining the assessment or collection of any tax, then the present litigation should not be barred because the penalty or tax at issue will not be levied until 2014. Therefore, for this additional reason, the Anti-Injunction Act should not apply as a bar to the present litigation.

II. THE UNCERTAINTY CREATED BY FURTHER DELAY IN RESOLVING THIS ISSUE WILL CREATE UNDUE HARDSHIP ON U.S. BUSINESSES.

If the Court delays ruling on the constitutionality of the ACA, employers across the country will face enormous administrative and financial costs in the next few years as they struggle with the uncertainty of how this Court may ultimately rule on the issues in the present litigation. The enormous costs of this uncertainty and the impact those costs will have on American businesses, large and small, weigh heavily in favor of the Court ruling on the constitutionality of the ACA now rather than later.

A. The ACA Has Already Created Tremendous Uncertainty For Employer-Based Health Care Coverage, And A Delayed Ruling Would Exacerbate This Problem.

The ACA is 976 pages long.[2] Additionally, the Act contains over forty provisions that require, permit, or contemplate rulemaking by federal agencies to implement the legislation,[3] which has already resulted in thousands of pages of additional regulations. Putting aside this litigation, the sheer scope of the ACA combined with the ongoing issuance of regulations has created great uncertainty among businesses about what type of health care coverage is mandated by the Act, if any, and what type of coverage they should provide to their employees. Businesses must both plan for and implement any changes that the ACA requires, for the moment, under the assumption that the constitutionality of the Act will ultimately be upheld. A delayed ruling from this Court, however, would further magnify this problem because boards of directors and companies are currently planning for multiple different outcomes depending upon whether the ACA is ultimately upheld.

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[2] *See* OFFICE OF LEGISLATIVE COUNSEL, COMPILATION OF PATIENT PROTECTION AND AFFORDABLE CARE ACT (2010), *available at* http://housedocs.house.gov/energycommerce/ppacacon.pdf.

[3] CURTIS W. COPELAND, CONG. RESEARCH SERV., R41880, REGULATIONS PURSUANT TO THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (P.L. 111-148) 2 (2010), *available at* http://assets.opencrs.com/rpts/R41180_20100413.pdf.

To deal with the uncertainty created by the ACA's new mandates, many employers either plan to or already have performed modeling to determine the financial impact of health reform on their organization. For example, according to one survey of 650 mid-to senior-level benefit professionals, "79% of employers plan to model the financial impact of health care reform on their organization."[4] This modeling is necessary because the ACA will have a dramatic impact on the cost of labor by requiring employers to provide health care coverage for full-time employees or pay a penalty. Consequently, many businesses are attempting to achieve compliance with the ACA's mandates in the least expensive way possible. For many companies, this process requires a careful balancing of business needs with their corporate and fiduciary duties to investors. All businesses will face tremendous transactional and administrative costs in changing their health care plans as the ACA's mandates change.

The Department of Health and Human Services estimates that more than two-thirds of companies could change their current coverage for employees as a result of the ACA, and for small businesses, as many as 80% may change their current coverage.[5]

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[4] Kathyrn L. Moore, *The Future of Employment-Based Health Insurance After the Patient Protection and ACA*, 89 Neb. L. Rev. 885, 909-910 (2010) (citing Towers Watson, *Health Care Form: Looming Fear Mask Unprecedented Employer Opportunities to Mitigate Costs, Risks and Reset Total Rewards* 3 (2010)).

[5] U.S. Departments of Health and Human Services, Labor, and Treasury Issue Regulation on "Grandfathered" Health Plans Under The ACA (June 14, 2010), *available at*

These changes will obviously impact employees as well as businesses since nearly two-thirds of the working population obtain their insurance coverage from their employer. Although difficult to predict, the Congressional Budget Office expects that as many as 3 million people are expected to lose employer-based coverage entirely as a result of the Act.[6] Others have estimated that the number of employees similarly affected will be much higher.[7]

The expected loss in employer based-coverage is largely due to the penalty provisions that employers face if they fail to provide health care coverage for full-time employees. The ACA's penalty provision for employers requires businesses with fifty or more full-time workers to provide "affordable" health care to their employees or pay a $2,000 penalty for each employee beyond the first thirty workers who qualify for subsidies and do not have employer coverage. *See* 26 U.S.C. § 4980H. The Congressional Budget

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http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (estimating that as few as 20% of health care plans will remain grandfathered, i.e. unchanged, by 2013).

[6] *See* Letter from Douglas W. Elmendorf, Director, Congressional Budget Office to House Speaker Nancy Pelosi 10 (Mar. 20, 2010), *available at* http://www.cbo.gov/ftpdocs/113xx/doc11379/AmendReconProp.pdf.

[7] Douglas Holtz-Eakin, The Patient ACA: Labor Market Incentives, Economic Growth, and Budgetary Impacts (Jan. 26, 2011), *available at* http://waysandmeans.house.gov/UploadedFiles/HoltzEakin_Testimony_1_5.pdf (noting that perhaps as many as 43 million low wage employees will be dropped from coverage).

Office, however, estimates that the national cost of providing such coverage by employers will be $5,000 for single coverage per employee and $12,500 for family coverage.[8]

Because the penalty is lower than the cost to provide health care coverage, surveys of employers suggest that at least 30% of employers may decide to drop health care coverage as a result of the ACA's relatively low penalty.[9] For example, one large corporate employer reportedly has determined that if it eliminated its health care coverage and paid penalties, it could reduce its health care costs by 70%, while another large corporate employer reportedly has estimated that its 2.4 billion dollars in health care coverage costs would fall to just 600 million dollars if it simply paid the penalties imposed by legislation.[10] While most employers want to

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[8] Letter from Douglas Elmendorf, Director, Congressional Budget Office, to Senator Olympia Snowe (Jan. 11, 2010), *available at* http://www.cbo.gov/ftpdocs/108xx/doc10884/01-11-Premiums_for_Bronze_Plan.pdf.

[9] *See* Shubbam Singhal, Jeris Stueland, and Drew Ungerman, *How US Health Care Reform Will Affect Employee Benefits,* MCKINSEY QUARTERLY, June 2011, *available at* http://www.mckinseyquarterly.com/How_US_health_care_reform_will_affect_employee_benefits_2813; *see also* SMALL BUSINESS AND HEALTH INSURANCE: ONE YEAR AFTER ENACTMENT OF PPACA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS RESEARCH FOUNDATION 10 (July 2011), *available at* http://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/ppaca/NFIB-healthcare-study-201107.pdf (survey of NFIB members found that 57 percent are very or somewhat likely to drop coverage once the law takes effect).

[10] Shaun Tully, *Documents Reveal AT&T, Verizon, Others, Thought About Dropping Employer-Sponsored Benefits*, CNN,

provide health care coverage to their employees, because of exigent circumstances, some employers will no doubt be forced to drop their coverage and pay the penalty.

Without direction from the Court on the constitutionality of the ACA, employers will be unable to decide with any degree of certainty what health care coverage they should provide. Businesses will have to model not only how the ACA would impact their operations in its current form, but also the impact of a ruling striking the ACA down as unconstitutional.

If the Court rules the mandates unconstitutional, then many employers may reverse their plans to drop coverage. A ruling upholding part or all of the ACA's constitutionality, on the other hand, would cause many employers to consider dropping coverage—and the uncertainty will last for years.

A delayed ruling by this Court will only compound the uncertainty employers currently face and exacerbate their costs by drawing out the entire process further. The Court should reach the merits in order to provide businesses with clear direction on what scope of health care coverage will be required

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(May 6, 2010), http://money.cnn.com/2010/05/05/news/companies/dropping_benefits.fortune/ (Caterpillar determined that if it eliminated its healthcare coverage and paid penalties, it could reduce its health care costs by 70%, while AT&T has estimated that its 2.4 billion dollars in health care coverage costs would fall to just 600 million dollars if it simply paid the penalties imposed by legislation.); Letter from Senator Orrin Hatch to President Barack Obama (June 14, 2010), *available at* 2010 WLR 12150669.

under the law and to avoid the impact a delayed ruling will have on both employers and employees.

B. The Uncertainty Created By A Delayed Ruling Will Also Harm Employers' Ability To Hire Workers.

Already, the general uncertainty created by the ACA has affected new hiring in a sluggish economy. In its most recent quarterly small business survey, the U.S. Chamber of Commerce found that 30% of small business owners cited uncertainties about the health law as the reason they are not hiring new workers, and 74% cited the ACA as making it more difficult to hire.[11] Other organizations have voiced similar concerns that the uncertainty created by the ACA has either slowed hiring or in some cases, stopped it altogether.[12]

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[11] *See* UNITED STATES CHAMBER OF COMMERCE Q4 SMALL BUSINESS STUDY 3 (2012), *available at* http://www.uschambersmallbusinessnation.com/uploads/Chamber%20Q4_Summary%20Memo_Final%20.pdf.

[12] *See, e.g.*, Dennis Lockhart, Chair, Atlanta Federal Reserve Bank "Business Feedback on Today's Labor Market," Federal Reserve Bank of Atlanta (Nov. 11, 2010), *available at* http://www.frbatlanta.org/news/speeches/lockhart_111110.cfm ("We've frequently heard strong comments to the effect of 'My company won't hire a single additional worker until we know what health-insurance costs are going to be'."); JAMES SHERK, THE HERITAGE FOUND., RECOVERY STALLED AFTER OBAMACARE PASSED (2011), http://www.heritage.org/research/reports/2011/07/economic-recovery-stalled-after-obamacare-passed (review of monthly job creation statistics published by the Department of Labor shows that net private sector job creation stalled after passage of the ACA, dropping from an average of +67,000 jobs a month to just +6,500 jobs a month); *The Pressures of Rising Costs on Employer Provided Healthcare*, Serial No. 112th Cong. 10

In addition to the general uncertainty of the legislation and its enforceability, the costs imposed by the ACA may affect hiring as well. The ACA substantially increases the cost per worker that an employer must pay, particularly the cost of low wage and low skilled workers, by raising labor costs for such individuals between $1.79 to $5.51 per hour.[13] Any employers who rely primarily on minimum wage or low skill workers may find that they are unable to hire more workers or to justify their cost in light of the additional labor expense created by ACA's health care coverage requirement. As a result of such additional costs, the Congressional Budget Office estimates that the ACA will reduce labor in the U.S. by approximately .5 percent, primarily because it will affect some individuals' decisions about whether and how much to work, and employer decisions about hiring workers.[14]

(2011), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112_house_hearings&docid=f:64941.pdf (testimony by Thomas Miller, Health Policy Research at the American Enterprise Institute, that "the unpredictability of what will be enforced under the regulatory domain of the ACA, and how its complex and often inconsistent provisions will be interpreted, leaves many employers frozen in uncertainty in their health benefits planning").

[13] JAMES SHERK, THE HERITAGE FOUND., OBAMACARE WILL PRICE LESS SKILLED WORKERS OUT OF FULL-TIME JOBS (2011), http://www.heritage.org/research/reports/2011/10/obamacare-will-price-less-skilled-workers-out-of-full-time-jobs (employer premiums will add $1.79 per hour to labor costs for single plan coverage, and $5.51 per hour for family plan coverage).

[14] *See* Congressional Budget Office Director's Blog, http://cboblog.cbo.gov/?p=1478 (Oct. 22, 2010, 12:35 EST).

Alternatively, because the penalty provisions for employers do not apply to part-time workers, many employers may replace existing full-time workers with part-time positions.[15] Additionally, many small businesses may consider not adding employees at all until they know whether the ACA, which only applies to businesses with more than fifty employees, will be upheld as constitutional.

C. A Delayed Ruling Will Also Result In The Imposition Of Direct Costs On Employers That May Ultimately Be Unnecessary.

A delayed ruling on the ACA's constitutionality will also impose many direct costs on businesses in the form of penalties and taxes that would otherwise not be levied if the legislation were struck down. Billions of dollars in taxes and penalties will be collected by the IRS which, if the ACA is found to be unconstitutional, will presumably be returned to the original taxpayers at further taxpayer expense.

The Congressional Budget Office estimates that the ACA will raise approximately 536 billion dollars in revenue over the next seven years through various taxes and penalties.[16] The requirement that employers provide a certain level of health care coverage to their employees is expected to cost

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[15] *See* JAMES SHERK, *supra* note 13.

[16] Douglas W. Elmendorf, *CBO's Analysis of the Major Health Care Legislation Enacted in March 2010* (Mar. 30, 2011), *available at* http://www.cbo.gov/ftpdocs/121xx/doc12119/03-30-HealthCareLegislation.pdf (Table 1 showing estimate that ACA will raise 536 billion dollars in revenue between 2012-2019).

businesses 52 billion dollars in penalties alone from 2014 to 2019.[17] The collection of these funds represents a direct cost to employers, who will be forced to pay potentially unconstitutional taxes and penalties. The imposition of such taxes and penalties also results in lost opportunities for businesses, since those funds cannot be invested in the growth of their companies.

A ruling by this Court in the instant case would address the validity of these direct costs immediately by resolving whether the charges imposed by the ACA are constitutional. Instead of tying up billions of dollars of business capital in limbo for years, a resolution now will provide businesses with the certainty needed to properly allocate that capital and adequately plan for the future.

CONCLUSION

The uncertainty created by the ACA is already a burden on businesses which would only be exacerbated if this Court delays ruling on the constitutionality of this legislation. Any delay would force employers to waste several years making contingency plans while they anticipate this Court's ruling instead of growing their businesses, or in the alternative, planning for the realities of compliance with the Act. All parties to this litigation recognize the extraordinary cost of a delay in the resolution of the issues in this case. None seek to impose the Anti-Injunction Act's strictures on this unique set of

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[17] Letter from Douglas W. Elmendorf, *supra* note 6 (Table 4 estimating that employers will pay 52 billion dollars in penalties between 2014 and 2019).

facts. Further, strong and undeniable policy reasons exist for addressing the issues in the case now.

Therefore, this Court should hold that the Anti-Injunction Act is not a bar to this Court ruling on the constitutionality of the ACA.

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