



PACIFIC LEGAL FOUNDATION

May 31, 2011

The Honorable Judge Diana Gribbon Motz
The Honorable Judge Andre M. Davis
The Honorable Judge James A. Wynn, Jr.
United States Court of Appeals for the Fourth Circuit
1100 East Main Street
Richmond, VA 23219

Re: *Commonwealth of Virginia v. Sebelius*, No. 11-1057
Supplemental Amici Curiae Letter Brief of Pacific Legal Foundation
and Steven J. Willis re Tax and Jurisdiction Related Questions

Dear Judge Motz, Judge Davis, and Judge Wynn:

Amici Pacific Legal Foundation (PLF) and Professor Steven J. Willis offer this letter brief amicus curiae in response to the Court's May 23, 2011 order for supplemental briefing. This letter brief complies with all applicable rules and a motion to file this brief is filed concurrently herewith. PLF and Prof. Willis filed briefs amicus curiae in this matter previously, and their interest of amicus statements appear in their respective briefs.

**1. (a) When applicable, does the Anti-Injunction Act, 26 U.S.C. § 7421(a),
deprive a federal court of subject-matter jurisdiction?
See J.L. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 5-8 (1962).**

Answer: Yes, but *only* with regard to the tax issues. Application of the Anti-Injunction Act (AIA) would have nothing to do with and would not deprive the Court of jurisdiction regarding *non-tax* issues. In particular, it has no connection to the Individual Mandate in Section 5000A(a) of the Patient Protection and Affordable Care Act (PPACA), which is neither a tax nor a constitutional exercise of the Taxing Power. At most, the AIA would deprive the Court of jurisdiction over the penalty provided in Section 5000A(b). This Court should separate the Mandate from the Penalty when analyzing their respective constitutional bases. If *either* fails, all of PPACA must be held invalid because the Act lacks a severability clause. *See Florida v. U.S. Dep't Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 U.S. Dist. LEXIS 8822, at *122-36 (N.D. Fla. Jan. 31, 2011).

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The Constitution grants Congress the power to lay and collect taxes, and these taxes may be regulatory so long as they also raise revenue. *Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937); *Hampton & Co. v. United States*, 276 U.S. 394, 413 (1928). No court, however, has allowed Congress to exploit the taxing power for *primarily* regulatory purposes. All regulatory taxes apply to—may discourage, encourage, or “regulate”—the activities that a taxpayer undertakes. But they do not first *mandate* the activity. Instead, the activity comes first; then the tax applies, and only then does the regulatory effect ensue. Or, the taxpayer is dissuaded by the potential tax, does not engage in the activity, and no tax applies. *See, e.g., United States v. Sanchez*, 340 U.S. 42 (1950) (taxing the possession of marijuana); *Sonzinsky*, 300 U.S. at 513-14 (taxing firearms dealing); *Hampton*, 276 U.S. at 413 (taxing various products importation); *A. Magnano Co. v. Hamilton*, 292 U.S. 40 (1934) (taxing oleomargarine differently from butter); *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974) (taxing racially discriminatory schools).

Section 5000A differs dramatically. It *first* imposes the Mandate—compelling the person to act—and then imposes a Penalty on the failure to comply. The Section 5000A(b) Penalty penalizes no event, no transaction, no derived income, no use of property, nor any exercise of any privilege. Instead, the Section 5000A(a) Mandate compels the predicate action. That is unlike all regulatory taxes, which apply once the taxpayer *chooses* to do something. Nothing in the power to lay and collect taxes authorizes the mandate of anything other than the maintenance of records, preparation of forms, and transmission of the tax itself.

Congress arguably could have imposed a constitutional uniform excise on persons who self-pay for medical services. Congress could have imposed a uniform excise on the *activity* of receiving health care without paying for it; or, under the Sixteenth Amendment, it could have taxed the accession to wealth created by the passing-on of costs to others. But very limited authority exists for Congress to tax something which has neither occurred nor accrued, which involves no “undeniable accessions to wealth, clearly realized,” *Comm’r of Internal Revenue v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955), and which involves no event, transaction, property use, or privilege exercise other than the taxpayer simply being alive. That limited authority is the power to exact a Direct or Capitation tax, and such a tax must be apportioned. U.S. Const. art. I, § 9. Section 5000A is not apportioned.

Some tax provisions do appear to tax specific failures to act, but all are distinguishable from the present case. *See* Amicus Brief of Steven J. Willis, *Susan Seven-Sky v. Holder*, Case No. 11-5047 (D.C. Cir. filed May 23, 2011) (herein Willis Br.) at 4-8. Hence, if this Court were to find the Mandate unconstitutional under the Commerce Clause, it cannot appropriately uphold its constitutionality under the Taxing Power, which does not allow Congress to mandate activity. As a result, although the AIA may apply to the Section 5000A(b) Penalty and deprive the court of

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jurisdiction over *that* subsection, it cannot apply to the Section 5000A(a) Mandate, which is not a tax and which cannot be authorized under the Taxing Power.

1. (b) If so, does it divest federal courts of jurisdiction in this case?

See Bob Jones University v. Simon, 416 U.S. 725, 736-48 (1974).

Answer: No, for two reasons.

(1) The key language in *Bob Jones* is:

[T]he Court in its most recent reading gave the Act almost *literal* effect. In *Williams Packing*, an employer sought to enjoin the collection of FICA and FUTA taxes that the employer alleged were not owed and would destroy its business. The Court held unanimously that the suit was barred by the Act. Only upon proof of the presence of two factors could the *literal* terms of § 7421 (a) be avoided: first, *irreparable injury*, the essential prerequisite for injunctive relief in any case; and second, *certainty of success on the merits*. An injunction could issue only “if it is clear that under no circumstances could the Government ultimately prevail . . .” *And this determination would be made on the basis of the information available to the Government at the time of the suit.*

416 U.S. at 737 (quoting *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962) (emphasis added)). The Court was concerned with the multiplicity of cases distinguishing or finding exceptions to and nuances in the AIA. The Court emphatically expressed its intent to end such distinctions and varying rules. To accomplish this, the Court announced in *Williams Packing* and re-affirmed in *Bob Jones* the narrow, specific test for AIA exceptions: irreparable injury accompanied by certainty of success.

The *Williams Packing* Company failed that test because of legitimate factual issues regarding whether the fishermen involved were “employees” of the taxpayer for purposes of Social Security and unemployment taxes. The Court did not reach the issue of irreparable injury because of the disputed factual questions upon which the government might reasonably prevail.

Bob Jones University also failed the test. Again, the Court did not reach the issue of irreparable injury because “[w]ithout deciding the merits, we think that petitioner’s First Amendment, due process, and equal protection contentions are sufficiently debatable to foreclose any notion that ‘under no circumstances could the Government ultimately prevail.’” *Bob Jones*, 416 U.S. at 748-49 (citation omitted). The First Amendment issue involved legitimate questions

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regarding whether the discriminatory practices were “religious” practices or whether they merely involved the operation of the school. As various courts have explained, procedural due process issues involve factual matters specific to each case. In addition, the Court specifically cited numerous cases approving, for due process analysis, the pre-collection and post-collection remedies available to the entity with regard to the specific taxes involved. *Id.* at 746-47. Further, the Court has long held equal protection restrictions inapplicable to Congress’ use of the Taxing Power. *A. Magnano Co.*, 292 U.S. at 44. Hence, the *Bob Jones* Court could find no certainty of success.

In the instant matter, the Court should apply the *Williams Packing/Bob Jones* exception; even if the AIA is applicable to the Section 5000A(b) Penalty, it would not deprive the Court of subject matter jurisdiction.

First, collection of the penalty would be an irreparable injury for many individuals. They could be liable for thousands of dollars of penalties under Section 5000A(b), interest under Section 6601, and further penalties under Section 6722 for failing to pay the Section 5000A(b) penalty. Their only opportunity for redress would involve a refund suit, which would exceed the resources of many individuals. The Supreme Court has found similar economic harm “irreparable” in several cases. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). This limited redress differs from that which existed in both *Williams Packing* and in *Bob Jones*.

In *Bob Jones*, the entity—if subject to an income tax under either 26 U.S.C. § 511 or § 514—would receive a notice of deficiency, and therefore opportunities for pre-collection review, either judicial or administrative in nature, under 26 U.S.C. § 6212. In both *Bob Jones* and *Williams Packing*, the entity subject to the Federal Insurance Contributions Act or the Federal Unemployment Tax would not have these opportunities for review under Section 6212, but would still have had an opportunity to obtain an administrative hearing, and judicial review before the collection (though after the assessment) of the tax. The entity would also have had administrative and judicial review prior to a notice of lien filing under 26 U.S.C. § 6320. But under PPACA—26 U.S.C. § 5000A(g)(2)(B)(ii), specifically—the levy process *does not apply*. This effectively eliminates the possibility of the CDC hearing, and Section 5000A(g)(2)(B)(i) makes the notice of lien process inapplicable, thus eliminating the possibility of a lien hearing.

The Section 6330 CDC hearing and the Section 6320 lien hearing that were at issue in *Bob Jones* and similar cases exist to satisfy the requirements of due process. But Congress *eliminated* the levy and lien procedures from the Health Care Penalty in PPACA, thus eliminating even the meager due process opportunities that might otherwise have been available in relation to “assessable penalties.”

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The *Bob Jones* Court expressed concern regarding the limited procedural due process available in that case. 416 U.S. at 748. The procedures available for redress of the Section 5000A Penalty at issue here, as well as the related interest and other penalties, are far less than that accorded the taxpayer in *Bob Jones*. This lack of due process accentuates the irreparable nature of the injury.

Second, the Court should find that the appellees meet the certainty of success test. If the Court finds the Penalty to be a tax, it must then find it unconstitutional. It is not an excise, let alone a uniform excise as permitted by Article I, Section 8, clause 1. No one claims it is a duty or an impost. Nor is it a tax on “gross income” “derived” “from” a “source,” as required by the Sixteenth Amendment. See *Glenshaw Glass*, 348 U.S. at 431. It taxes no accession to wealth *per Glenshaw* because the “wealth” involved results either from the use of the health care system without insurance and without paying (hence passing on costs) or from the purchase of insurance with a pre-existing condition (and thus accruing wealth). However, the first type of potential wealth will not inevitably occur with regard to persons responsible for the Penalty, in contravention of the Court’s test in *Comm’r of Internal Revenue v. Indianapolis Power & Light Co.*, 493 U.S. 203, 210-12 (1990). The second type of potential wealth cannot possibly occur because the Penalty applies to persons who lack insurance. Without an “accession to wealth,” the Sixteenth Amendment does not authorize an income tax. Also the “potential” wealth accession would not be “derived” as the cases have consistently required. *Eisner v. Macomber*, 252 U.S. 189, 207 (1920); Steven J. Willis & Nakku Chung, *Of Constitutional Decapitation & Healthcare*, 128 Tax Notes 169, 172-74, 186-92 (2010). Further, even if “derived,” the wealth would not result “from” a “source,” but only from the taxpayer’s own personal choices. *Helvering v. Indep. Life Ins. Co.*, 292 U.S. 371, 379 (1934).

If the Court finds the Penalty to be a tax, it still cannot find the Penalty to be a uniform excise, duty, impost, or constitutionally authorized income tax. The only other form of tax permitted by the Constitution is a Direct Tax, which must be apportioned. The Section 5000A(b) Penalty, however, cannot be apportioned. Hence, the Court must find the Penalty to be an unconstitutional Direct Tax if it does find it to be a tax. Because collection of this “tax” through set-off or through re-direction of tax payments would be irreparable for many individuals, the court should find it fits within the narrow *Williams Packing/Bob Jones* exception to the Anti-Injunction Act.

(2) Amici also answer this question No for an alternative reason. As explained in *South Carolina v. Regan*, 465 U.S. 367 (1984):

When enacted in 1867, the forerunner of the current Anti-Injunction Act provided that “no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court.” Although the Act apparently has no recorded legislative history, the circumstances of its enactment strongly suggest that Congress intended

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the Act to bar a suit only in situations in which Congress had provided the aggrieved party with an alternative legal avenue by which to contest the legality of a particular tax.

Id. at 373 (citations omitted). Three very different points are relevant to the quoted language. First, the only “alternative legal avenue” available to individual or entity taxpayers with regard to PPACA violates due process, as noted in the answer to question three below. Also, the State of Virginia has no alternative legal avenue because it is not responsible for the Section 5000A Penalty.

Finally, the AIA only bars suits brought by “persons,” and the State of Virginia is not a person. Although the AIA’s original language broadly prohibited suits for the restraint, assessment, or collection of a tax, the *current* language of 26 U.S.C. § 7421 holds only that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court *by any person*, whether or not such person is the person against whom such tax was assessed.” As Justice O’Connor observed in *Regan*, 465 U.S. at 394 (O’Connor, J., concurring), a state is not a “person” for purposes of due process. 26 U.S.C. § 7701(a)(1) defines “person” for purposes of the Internal Revenue Code: “The term ‘person’ shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.” The word “mean” makes this language is exclusive.¹ Congress specifically limited the AIA in 1966 to actions brought by “persons.” Reading the language literally, as *Bob Jones* requires, that term does not include a State, making the AIA inapplicable to this matter.

2. Can a court determine that a challenged exaction qualifies as a “tax” for purposes of the Anti-Injunction Act without reaching the question of whether the exaction qualifies as a “tax” for purposes of Art. I, § 8, cl. 1? Compare *Bailey v. George*, 259 U.S. 16 (1922), with *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

Answer: No. Neither *George* nor *Drexel Furniture* is controlling. Both long pre-date the *Williams Packing/Bob Jones* tests. *George* approved, for due process purposes, post-collection review that *Bob Jones* found dubious. *See, e.g., Bob Jones*, 416 U.S. at 746 (“This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different.”). To the extent *George* suggested that a constitutional attack is insufficient to fit within the AIA, that decision is inconsistent with the later test and indeed even *George* acknowledged that “extraordinary and exceptional circumstance[s]” might justify constitutional

¹ Nor do Section 7701(a)(10), which defines “state,” or Section 7701(a)(9), which defines “United States,” suggest that states are to be included in the definition of “persons.”

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review—thus foreshadowing the *Williams Packing/Bob Jones* test. 259 U.S. at 20. *Drexel* found the *George* statute unconstitutional, but in a post-collection review. See 259 U.S. at 38

Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over . . . the great number of subjects . . . reserved to [states] by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word ‘tax’ would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.

The entire decision in *George* is therefore effectively dicta, since the very day the case was decided the Court also agreed with the *George* petitioner’s argument in *Drexel*—the very issue it chose not to decide in *George*. And to the extent *George* adopted a broad definition of “tax” for purposes of the AIA, it was contrary to the purpose of that Act, as well as the later *Bob Jones* requirement of a literal reading.

Congress could amend the AIA to apply to non-tax penalties such as imposed by PPACA, but there is no evidence that it has done so. Legislative history of the AIA is non-existent. *Bob Jones*, 416 U.S. at 736. A court might construe the statute to apply to non-tax penalties, or find that the PPACA penalty is “treated as” a tax without actually being a tax. But while this might squeeze the PPACA penalty into a forced conformity with the AIA, that kind of expansive reading is forbidden by *Bob Jones*’ emphasis on the need for a “literal” interpretation.²

As *Bob Jones* explained, the purpose of the Anti-Injunction Act is to enable the government to “assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference.” *Id.* at 736. To apply the AIA to something which is not constitutionally a tax would exceed the AIA’s fundamental purpose. If the Section 5000A(b) Penalty is intended merely to be regulatory under the Commerce Clause and not an assertion of the Taxing Power, then applying the AIA to it does not preserve the Government’s need to assess and collect taxes. This Court cannot, therefore, apply the AIA to this case consistently with *Bob Jones* unless it also finds the penalty to be a tax as defined in the Constitution.

² The *Bob Jones* Court used the word “literal” seven times for emphasis. See *id.* at 732, 737, 739, 742, 743, 744, and 748.

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**3. Assuming the Anti-Injunction Act does apply in this case, does a plaintiff have the ability to challenge the exaction provided by § 5000A in a refund suit or otherwise?
See 26 U.S.C. § 7422(a); 28 U.S.C. §§ 1331, 1340, 1346.**

Answer: Yes, but only in a refund action preceded by an administrative claim as authorized by 26 U.S.C. § 7422. The taxpayer would have the burden of proof and would potentially be responsible for the government's administrative and litigation costs under Section 7430. If the Penalty in Section 5000A(b) of PPACA is a tax (in which case it would be a unconstitutional un-apportioned direct tax) that limited procedural remedy would still not satisfy Due Process. Unlike the situation involved in *Bob Jones*, there is no opportunity for administrative hearings or Tax Court jurisdiction with regard to the Penalty. There is no opportunity for a 26 U.S.C. § 6303 Collection Due Process hearing or Section 6320 notice of lien filing hearing. There would only be Section 6203 assessment, Section 6303 notice and demand, and Section 6402(a) or (d) set-off collection (or potential collection through the re-direction of tax payments or through the use of a silent lien). Daniel L. Mellor, *The Individual Mandate Tax: Healthcare's Toothless Watchdog*, 130 Tax Notes 105, 111 (2011). The taxpayer would then be entitled *only* to post-collection review, which is woefully inadequate. Therefore even if the Penalty is indeed a tax, that very limited opportunity for redress is suspect. And since it is not a tax, that procedure cannot possibly satisfy the demands of procedural due process. See *further* Willis Br. at 24-29.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 31, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Timothy Sandefur
TIMOTHY SANDEFUR