IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

STEVEN F. HOTZE, M.D. and BRAIDWOOD MANAGEMENT, INC., Plaintiffs, v. KATHLEEN SEBELIUS, U.S. SECRETARY OF HEALTH AND HUMAN SERVICES, and JACOB J. LEW, U.S. SECRETARY OF THE TREASURY, in their official capacities, Defendants.	Case No. 4:13-cv-01318

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendants Kathleen Sebelius, Secretary of Health and Human Services, and Jacob J. Lew, Secretary of the Treasury, through the undersigned counsel, hereby move to dismiss Plaintiffs' complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In support of this motion, Defendants respectfully refer the Court to the accompanying memorandum of points and authorities.[1]

Dated: August 6, 2013.

Respectfully submitted,

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Assistant Attorney General

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[1] Defendants are simultaneously filing an Unopposed Motion for Page Extension for Defendants' Motion to Dismiss. *See* Dkt. 13.

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

INTRODUCTION

The Patient Protection and Affordable Care Act ("Affordable Care Act," or "ACA") includes a series of measures that will expand the availability of affordable health coverage. Plaintiffs Steven F. Hotze, M.D. and Braidwood Management, Inc. bring this case to challenge the validity of two such provisions: the minimum coverage provision and the employer responsibility provision. Before presenting the merits of their claims, however, Plaintiffs must establish that the Court has jurisdiction. Both Plaintiffs lack standing to bring their pre-enforcement challenges, given their failure to allege that they will actually be subject to the provisions when the provisions take effect, and Braidwood's challenge to the employer responsibility provision is also barred by the Anti-Injunction Act and not ripe for review. Their claims should thus be dismissed under Federal Rule of Civil Procedure 12(b)(1). Even assuming the Court reaches the substance of their claims, though, Plaintiffs' claims are based on theories that have been rejected by courts up to and including the Supreme Court itself. Plaintiffs' complaint fails to state a claim upon which relief can be granted, and should thus be dismissed under Federal Rule of Civil Procedure 12(b)(6).

ISSUES PRESENTED

1. Does Plaintiff Hotze have standing to challenge the constitutionality of the minimum coverage provision, 26 U.S.C. § 5000A?

2. Does Plaintiff Braidwood have standing to challenge the constitutionality of the employer responsibility provision, 26 U.S.C. § 4980H?
3. Does the Anti-Injunction Act, 26 U.S.C. § 7421(a), bar Plaintiff Braidwood's pre-enforcement challenge to the employer responsibility provision?
4. Is Plaintiff Braidwood's pre-enforcement challenge to the employer responsibility provision ripe for review at this time?
5. Do the minimum coverage provision and the employer responsibility provisions violate the Takings Clause of the Fifth Amendment, U.S. Const. amend. V?
6. Does the minimum coverage provision constitute an unconstitutional direct tax, in violation of U.S. Const. art. I, § 9, cl. 4?
7. Does the minimum coverage provision violate the Uniformity Clause, U.S. Const. art. I, § 8, cl. 1?
8. Was the enactment of the Affordable Care Act consistent with the Origination Clause, U.S. Const. art. I, § 7?

STATUTORY BACKGROUND

The Affordable Care Act[2] amends the Internal Revenue Code in two ways relevant to this case. First, the Act provides that, beginning in 2014, non-exempted individuals who fail to maintain minimum essential coverage must make a specified payment to the Internal Revenue Service ("IRS") with their annual income tax returns. *See* 26 U.S.C.

[2] The "Affordable Care Act" refers to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, and as further amended by the Department of Defense Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat. 38.

§ 5000A ("Section 5000A" or the "minimum coverage provision").[3] In *Nat'l Fed'n of Indep. Business v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*"), the Supreme Court held that individuals have the "lawful choice" to make a payment to the IRS under Section 5000A "in lieu of buying health insurance," *id.* at 2597, 2600, and the Court upheld Section 5000A as a valid exercise of Congress's taxing power. *See id.* at 2593-2600.

Second, the Affordable Care Act added Section 4980H to the Internal Revenue Code, under which an applicable employer will be liable for an assessment if it either fails to offer health coverage to its full-time employees (and their dependents) or if it offers health coverage but one or more of its full-time employees "has been certified to the employer under [42 U.S.C. § 18081] as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee."[4] *See* 26 U.S.C. § 4980H ("Section 4980H" or the "employer responsibility provision"). An employee who is eligible for employer-sponsored health coverage is eligible to receive these subsidies only if the coverage offered by the employer fails to meet certain standards for affordable,

[3] An individual may satisfy this provision through enrollment in an employer-sponsored health plan, an individual market plan, a grandfathered health plan, certain government-sponsored programs (such as Medicare, Medicaid, or TRICARE), or other coverage recognized by the Secretary of Health and Human Services in coordination with the Secretary of the Treasury. 26 U.S.C. § 5000A(f). The provision does not apply to, among others, individuals whose household income is insufficient to require them to file a federal income tax return, who would need to contribute more than 8% of their household income toward coverage, who establish that the requirement imposes a hardship, or who satisfy certain religious exemptions. *Id.* § 5000A(d), (e).

[4] The Department of the Treasury announced that Section 4980H, which was due to take effect on January 1, 2014, will not take effect until January 1, 2015. *See* IRS Notice 2013-45, 2013-31 I.R.B. 116.

minimum value coverage, among other requirements. *See id.* § 36B(c)(2)(C). Accordingly, an applicable large employer that offers coverage to its full-time employees (and their dependents) that meets these standards will not be subject to the Section 4980H assessable payment.

STANDARDS OF REVIEW

Defendants move to dismiss Plaintiffs' claims for lack of jurisdiction under Rule 12(b)(1). Plaintiffs bear the burden of showing that jurisdiction exists, including the burden of establishing their standing to raise each of their claims. *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 635 (5th Cir. 2012). "[S]tanding cannot be inferred argumentatively from averments in the pleadings, but rather . . . it is the burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990).

Defendants also move to dismiss Plaintiffs' claims under Rule 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

SUMMARY OF ARGUMENT

Plaintiffs' complaint is a confusing amalgamation of contentions that give little clear notice of the nature of their claims. The complaint seems to challenge the minimum coverage provision and the employer responsibility provision, yet many of its allegations avoid citations or specificity and simply attack "ACA." The complaint includes only two counts – one under the Origination Clause and the other under the Fifth Amendment – but then argues that portions of the Act violate the Uniformity Clause and the Direct Tax Clause, and for good measure the prayer for relief says Congress lacked the authority to enact the minimum coverage provision in the first place. Plaintiffs' scattershot pleading cannot mask their lack of a valid claim, as an analysis of their complaint shows that they fail to establish jurisdiction or a legal basis for any of their arguments.

First, Hotze challenges the validity of the minimum coverage provision. That provision, 26 U.S.C. § 5000A, amends the Internal Revenue Code to require non-exempted individuals to maintain a minimum level of health insurance or else include a penalty under the Internal Revenue Code with their annual income tax return. The Supreme Court recently sustained the constitutionality of Section 5000A, holding the provision to be a lawful exercise of Congress's authority to lay and collect taxes. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2594-2600 (2012). Hotze asserts that he has identified additional constitutional provisions that he believes Congress violated in enacting Section 5000A. Hotze may not present his arguments here, however, because he fails to allege that he is subject to Section 5000A at all, and this Court lacks jurisdiction to grant his request for a purely advisory opinion.

While Hotze challenges the minimum coverage provision, Braidwood brings a pre-enforcement challenge to the employer responsibility provision, 26 U.S.C. § 4980H. This provision imposes an assessable payment on applicable large employers that fail to offer affordable, minimum value health coverage to their full-time employees (and their dependents) if at least one full-time employee receives a premium tax credit. Because it is speculative whether Braidwood will owe a tax under Section 4980H, Braidwood cannot establish the "*certainly* impending" injury that is required to demonstrate an actual case or controversy under Article III. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (Supreme Court's emphasis). Moreover, Braidwood's challenge is barred by the Anti-Injunction Act, which divests the Court of jurisdiction to restrain the assessment or collection of a tax. The assessment that is authorized by Section 4980H is repeatedly described as a "tax," *see, e.g.*, 26 U.S.C. § 4980H(c)(7), and Braidwood's challenge is thus barred by the "text of the pertinent statutes," *NFIB*, 132 S. Ct. at 2582.

Even if the pre-enforcement challenges to Sections 5000A and 4980H are properly before the Court, Plaintiffs' claims are without merit. Plaintiffs contend that the "taxes" imposed by the minimum coverage provision and the employer responsibility provision constitute uncompensated takings, but "[i]t is beyond dispute that '[t]axes . . . are not 'takings.'" *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (quoting *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 232 (2003)). They claim that the minimum coverage provision imposes an unconstitutional direct tax, yet the Supreme Court expressly rejected that argument in *NFIB*, 132 S. Ct. at 2599. They argue that the provision violates the Uniformity Clause, but that argument is plainly foreclosed

by the Supreme Court's recognition that the Clause is satisfied when a tax "'operates with the same force and effect in every place where the subject of it is found.'" *United States v. Ptasynski*, 462 U.S. 74, 82 (1983) (quoting *Head Money Cases*, 112 U.S. 580, 594 (1884)). And they contend that the ACA was enacted in violation of the Origination Clause of the Constitution, yet their argument fails to satisfy either element of such a claim. *See Sissel v. U.S. Dep't of Health & Human Servs.*, __ F. Supp. 2d __, 2013 WL 3244826, at *6 (D.D.C. June 28, 2013), *appeal docketed as* 13-5202 (D.C. Cir.) (holding that the ACA originated in the House and is not a "Bill for raising Revenue" within the particular meaning of the Origination Clause).

ARGUMENT

I. The Court Lacks Jurisdiction Over Hotze's Challenges to the Minimum Coverage Provision Because He Lacks Standing

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (internal quotation omitted). "One element of the case-or-controversy requirement" is that plaintiffs "must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper*, 133 S. Ct. at 1146.

To establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a

favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010). A plaintiff may not establish standing by speculating that he may be subject to some injury in the future. As the Supreme Court recently stated:

> Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is *certainly* impending. Thus, [the Supreme Court has] repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient.

Clapper, 133 S. Ct. at 1147 (Supreme Court's emphasis; internal quotations omitted).

Under these standards, Hotze has failed to allege that he faces any actual or imminent injury from the operation of Section 5000A. The complaint does not allege that Hotze will be uninsured or that he will lack minimum coverage in 2014 or later years, and thus the complaint fails to plead any basis for his standing to challenge the provision. *See Kinder v. Geithner*, 695 F.3d 772, 778 (8th Cir. 2012) (finding lack of standing when the plaintiff failed to allege "that he will be uninsured or lack 'minimum essential coverage'"). The complaint contends that the minimum coverage provision will apply to him, *see* Compl. ¶ 17, but does not allege that he will be non-compliant with the provision when it takes effect.

To the contrary, Hotze's allegations suggest that he likely will satisfy the requirements of Section 5000A. The complaint indicates that Hotze currently participates in his employer's health plan. *See id.* ¶ 11. Employer-provided coverage will generally, by definition, satisfy the minimum coverage provision. *See* 26 U.S.C. § 5000A(a) (requiring non-excepted individuals to be "covered under minimum essential coverage");

id. § 5000A(f)(1)(B) (coverage under "an eligible employer-sponsored plan" constitutes minimum essential coverage); *id.* § 5000A(f)(2) (defining "eligible employer-sponsored plan"). While there is an exception for employer-sponsored coverage "which consists of coverage of excepted benefits," *see id.* § 5000A(f)(3), Hotze's complaint does not allege that his coverage will consist only of excepted benefits.[5] Indeed, Hotze makes no allegations as to the insufficiency of the insurance he receives through his employer.

As a result, by virtue of his participation in his employer's plan, Hotze very likely will not be subject to the tax penalty assessed under the minimum coverage provision. The remaining allegations in his complaint do nothing to upset this conclusion. He never alleges that he will forgo insurance in 2014 and later years. The complaint contains no allegations with respect to Hotze's income or the range of health insurance options that will be available to him in 2014, or the cost of such coverage. Instead, it offers a conclusory statement that he is "not eligible for ACA-approved forms of 'minimum essential coverage.'" Compl. ¶ 26. That is incorrect; Hotze is "eligible" for private insurance (whether provided through his employer or purchased independently) that would satisfy the requirements of Section 5000A. As a consequence, there are many ways Hotze may satisfy or be exempted from the provision, and it is impossible to determine from the complaint that he will actually be subject to the tax penalty.

[5] "Excepted benefits" are defined in section 2791 of the Public Health Service Act, and include forms of limited coverage such as "coverage only for accident" and "workers' compensation or similar insurance." 42 U.S.C. § 300gg-91(c)(1). Hotze suggests that his plan is a "high-deductible" plan, *see* Compl. ¶¶ 3, 23, but without additional information it is far from clear that the plan would be considered coverage only for excepted benefits.

In the absence of any allegations that could demonstrate that Hotze faces an injury that is certainly impending from the minimum coverage provision, his challenge to that provision "is simply a generalized grievance, for which no standing lies." *Baldwin v. Sebelius*, 654 F.3d 877, 879 (9th Cir. 2011); *see also N.J. Physicians, Inc. v. President of the U.S.*, 653 F.3d 234, 240 (3d Cir. 2011) (finding that a plaintiff failed to establish standing where "the complaint is entirely silent" as to whether the plaintiff would be subject to Section 5000A in 2014 or later years); *Walters v. Holder*, Case No. 2:10-cv-76, 2012 WL 3644816, at *2 (S.D. Miss. Aug. 23, 2012) (finding that two plaintiffs failed to establish standing because they currently have insurance and "have not presented evidence that the individual mandate will affect them"). Because Hotze fails to allege an injury that is certainly impending from the operation of Section 5000A, he lacks standing to challenge the provision, and his claims should be dismissed for lack of jurisdiction.

II. The Court Lacks Jurisdiction Over Braidwood's Challenge to the Employer Responsibility Provision

Braidwood fails to establish jurisdiction over its challenge to the employer responsibility provision, for three independent reasons. First, Braidwood has failed to demonstrate that it has standing to challenge the provision; second, the challenge is barred by the plain language of the Anti-Injunction Act; and third, the challenge is not ripe for review.

A. Braidwood Lacks Standing

Braidwood, in its capacity as an employer, seeks to enjoin the assessment and collection of the tax on certain applicable large employers that is authorized by Section

4980H. But not every large employer will be subject to the Section 4980H assessable payment when it takes effect in 2015, and whether Braidwood will be turns on facts that are not pled in the complaint, including the future actions of Braidwood's employees. It is thus speculative whether Braidwood will owe any tax under Section 4980H, under which no payments will be assessed for any years prior to 2015. Braidwood thus cannot show the "*certainly* impending" injury that is necessary for Article III standing. *Clapper*, 133 S. Ct. at 1147 (Supreme Court's emphasis).

As explained above, if an applicable large employer offers health coverage to its full-time employees (and their dependents), it will be subject to the assessable payment only if at least one of its full-time employees is certified as having enrolled in a qualified health plan in an exchange and that full-time employee is allowed premium tax credits or cost-sharing reductions. 26 U.S.C. § 4980H(b)(1); *see also id.* § 4980H(a)(2) (same condition for assessment against applicable large employer that offers no coverage to its full-time employees and their dependents). An employee of an applicable large employer, however, will only receive a premium tax credit or cost-sharing reduction if the employer-sponsored coverage offered fails to meet certain standards for adequate coverage, that is, if it fails to cover at least 60% of the total allowed costs of benefits under the plan, or if the employee is required to pay more than 9.5% of his household income for that coverage, among other requirements. *Id.* § 36B(c)(2)(C). Accordingly, an applicable large employer that offers affordable, minimum value coverage to its full-time employees and their dependents cannot be subject to the Section 4980H assessable payment.

Braidwood indicates that it "currently provides coverage for medical expenses on a voluntary basis to Plaintiff Hotze and all its employees." Compl. ¶ 3. Specifically, it says that it provides "a voluntary 'high-deductible' health coverage plan for its employees, which directly covers them for medical expenses greater than about $4,000 per year." *Id.* ¶ 23. Braidwood says no more on this issue. Braidwood does not allege, for example, that the terms of the coverage that it will offer in 2015 will necessarily fall short of the standards for minimum essential coverage under Section 5000A. And it does not allege that any of its full-time employees will enroll in a qualified plan in an exchange, or that any of its employees will receive tax credits or cost-sharing reductions (nor could it without speculation). The complaint is entirely devoid of any allegations as to whether any of Braidwood's employees will obtain coverage on the exchanges. And if those employees do obtain such coverage, their eligibility for premium tax credits would turn on a variety of circumstances – such as their income, 26 U.S.C. § 36B(c)(1)(A); their filing status, *id.* § 36B(c)(1)(C), (D); and their eligibility for other qualifying coverage, such as eligibility for affordable coverage offered by the taxpayer's spouse's employer, *id.* § 36B(c)(2)(B) – yet the complaint says nothing about those issues either.

Because Braidwood's claim of an injury-in-fact depends on speculation as to "the acts of third parties not before the court," it has failed to allege an Article III injury. *See Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 176 (D.C. Cir. 2012). When a plaintiff's asserted injury depends on the acts and decisions of third parties, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner to produce causation and permit redressability of injury." *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 562 (1992). Braidwood has not attempted to meet this burden, and consequently has failed to plead a concrete injury.

Braidwood's complaint thus falls short of alleging that it will actually be subject to the employer responsibility provision. Because Braidwood cannot allege that it is likely, as opposed to speculative, that it will be subject to the Section 4980H assessable payment, it lacks standing to seek to litigate the potential application of provision to it as an employer.

B. Braidwood's Challenge Is Barred by the Anti-Injunction Act

Independent of the lack of standing, the Court lacks jurisdiction over Braidwood's pre-enforcement challenge to Section 4980H for an additional reason. Braidwood brings its claim for the purpose of precluding the assessment or collection of any Section 4980H tax assessment against it. The Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421, divests this Court of jurisdiction to award such relief. The AIA provides, with statutory exceptions inapplicable here, 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." 26 U.S.C. § 7421(a). "This statute protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes." *NFIB*, 132 S. Ct. at 2582. "Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund." *Id.*; *see also Bob Jones Univ. v. Simon*, 416

U.S. 725, 736 (1974). When the AIA applies, it divests the Court of subject-matter jurisdiction. *See Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 5 (1962).[6]

In *NFIB*, the Supreme Court held that the AIA does not bar a pre-enforcement challenge to the minimum coverage provision. In so ruling, the Court relied on the "text of the pertinent statutes." *NFIB*, 132 S. Ct. at 2582. The Court stressed that the AIA "applies to suits 'for the purpose of restraining the assessment or collection of any *tax*.'" *Id.* (quoting 26 U.S.C. § 7421(a)) (Supreme Court's emphasis). With respect to the minimum coverage provision, however, Congress "chose to describe the '[s]hared responsibility payment' imposed on those who forgo health insurance not as a 'tax,' but as a 'penalty.'" *Id.* at 2583 (quoting 26 U.S.C. § 5000A(b), (g)(2)). The Court reasoned that "Congress's decision to label this exaction a 'penalty' rather than a 'tax' is significant because the Affordable Care Act describes many other exactions it creates as 'taxes.'" *Id.* "Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally." *Id.*

This reasoning demonstrates that the AIA bars Braidwood's pre-enforcement challenge to Section 4980H. In contrast to the minimum coverage provision, the employer responsibility provision repeatedly uses the term "tax" to describe the amount that a large employer will owe the IRS. Section 4980H(b)(2) places a cap on the "aggregate amount of tax" that an applicable large employer may owe under that provision. Section 4980H(c)(7) provides that the "tax imposed by" Section 4980H is

[6] The Declaratory Judgment Act also excepts from its coverage suits for declaratory relief "with respect to Federal taxes." 28 U.S.C. § 2201. That exception "is at least as broad as the Anti-Injunction Act." *Bob Jones Univ.*, 416 U.S. at 732 n.7.

"nondeductible." And Section 4980H(c)(7) cross-references Section 275(a)(6) of the Internal Revenue Code, which provides that no tax deduction is allowed for "[t]axes imposed by chapters 41, 42, 43, 44, 45, 46, and 54." The "tax" imposed by the employer responsibility provision is nondeductible because it is one of the "[t]axes imposed by" chapter 43. *Id.* Moreover, elsewhere, in the Affordable Care Act, Congress again expressly referred to the "tax imposed by section 4980H of Title 26." 42 U.S.C. § 18081(f)(2). Given that the AIA applies to "any tax," 26 U.S.C. § 7421(a), the express characterization of the large employer tax as a "tax" shows that the AIA precludes Braidwood's claim here.

Section 4980H also uses the terms "assessable payments," and in one instance the term "assessable penalties," to refer to the amounts that may be owed under that provision. One court has relied on these terms to conclude that "Congress did not intend the exaction to be treated as a tax for purposes of the AIA." *Liberty Univ., Inc. v. Lew*, __ F. 3d __, 2013 WL 3470532, at *5 (4th Cir. July 11, 2013). But Congress's use of synonymous terms does not erase the fact that Congress explicitly described the Section 4980H exaction as a "tax," thereby demonstrating its understanding that the exaction would be treated as a "tax" for other statutory purposes under the Internal Revenue Code, including the AIA. The Fourth Circuit in *Liberty University* also stated that it could not find a reason why the minimum coverage provision and the employer responsibility provision should be treated differently for purposes of the AIA. *Id.* at *6. But Section 4980H, unlike Section 5000A, is enforceable by levies and by the filing of notices of liens. *Compare* 26 U.S.C. § 5000A(g) (limiting summary collection powers for the

minimum coverage provision) *with* 26 U.S.C. § 4980H(d) (imposing no similar limitations). Certainly, where Congress intended that an exaction be collectible by these summary administrative measures, it did not intend also to defeat that purpose by permitting pre-enforcement suits to restrain that collection. *See generally United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 10 (1974).

A ruling in Braidwood's favor "would necessarily preclude" the Department of the Treasury from assessing or collecting the Section 4980H assessable payment. *Bob Jones Univ.*, 416 U.S. at 731-32. Accordingly, the AIA bars Braidwood's premature effort here to restrain the enforcement of the Section 4980H tax assessment.

C. Braidwood's Challenge Is Not Ripe

This Court lacks jurisdiction over Braidwood's challenge for a third reason as well: Braidwood's claim is not ripe for review. "'[T]he ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and may never occur, from those cases that are appropriate for federal court action.'" *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 n.12 (5th Cir. 2008) (quoting Erwin Chemerinsky, Federal Jurisdiction § 2.4.1 (5th ed. 2007)). Ripeness is particularly at issue where, as here, a plaintiff asks the court for a declaratory judgment based on pre-enforcement review of a statute. *See id.* at 544. The "key considerations" in this inquiry are "'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Id.* at 545 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). "[E]ven where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness." *Id.* (internal quotation omitted).

Braidwood satisfies neither prong of the inquiry because it can sustain no possible injury before 2015, which is the first year that assessable payments will apply under the employer responsibility provision. Nor, as discussed above, can Braidwood establish with any reliability that it will be subject to the tax assessment associated with the provision at that time. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985) (claim not ripe if it rests on "contingent future events that may not occur as anticipated, or indeed may not occur at all" (internal quotation omitted)). No "administrative decision has been formalized" with respect to Braidwood, and it is possible that the question it seeks to litigate here will never arise with respect to the company. *Abbott Labs.*, 387 U.S. at 148-49. Braidwood already offers certain health coverage to its employees, *see* Compl. ¶ 3, and, for the reasons discussed above, it is unclear from the complaint whether Braidwood will be liable for an assessable payment under Section 4980H. Moreover, changes to Braidwood's business or the costs of available alternative forms of coverage between now and 2015 could lead the company to modify the coverage it provides. The future impact of the employer responsibility provision on Braidwood is thus uncertain, and its claim is unripe.

Braidwood also cannot demonstrate hardship. Braidwood contends that it "must make decisions soon about whether to incur the new penalties imposed by ACA or switch to more expensive and less desirable health insurance coverage." *Id.* ¶ 28. The assertion that a plaintiff will need to make such a decision at some point before the provision applies for the first time in 2015 does not ripen its claim, and Braidwood has articulated no hardship that would be suffered if review were withheld for its claim to ripen. In

Abbott Laboratories, the Supreme Court found that the plaintiffs had established a "direct effect on the[ir] day-to-day business," sufficient to support ripeness, because the regulated parties would "risk serious criminal and civil penalties" if they failed to make immediate changes in their labeling and promotional activities. 387 U.S. at 152-53. Here, in contrast, no imminent enforcement of the employer responsibility provision compels any changes Braidwood may choose to make in its current budgeting patterns. *See, e.g.*, *Texas v. United States*, 523 U.S. 296, 301 (1998) (distinguishing *Abbott Laboratories* because the plaintiff "is not *required* to engage in, or to refrain from, any conduct" to avoid criminal sanction (emphasis added)); *A. O. Smith Corp. v. FTC*, 530 F.2d 515, 524 (3d Cir. 1976) (rejecting "pre-enforcement judicial review of agency action if there is no immediate threat of sanctions for noncompliance, or if the potential sanction is de minimis"). Because the employer responsibility provision does not require Braidwood "to engage in, or to refrain from, any conduct" now, *Texas*, 523 U.S. at 301, Braidwood's claim is unripe.

III. Plaintiffs Fail to State a Claim Upon Which Relief Can Be Granted

Even if the Court determines that it can exercise jurisdiction over one or more of Plaintiffs' challenges, Plaintiffs' complaint should be dismissed because it fails to state any claim upon which relief can be granted.

A. Neither the Employer Responsibility Provision Nor the Minimum Coverage Provision Constitutes a "Taking" For Which Compensation is Due

Plaintiffs allege that "ACA constitutes a 'taking' within the meaning of the Takings Clause of the Fifth Amendment because ACA compels Plaintiffs to pay money

to other private entities: government-approved health insurance companies." Compl. ¶ 58. Like much of their complaint, this allegation speaks generally of the Affordable Care Act, without reference or citation to any particular provision. Even assuming that Plaintiffs seek to raise takings claims against both the minimum coverage provision and the employer responsibility provision, their claims lack merit.

As a starting point, both provisions are valid exercises of Congress's taxing power. In *NFIB*, the Supreme Court recognized that "[o]ur precedent demonstrates that Congress had the power to impose the exaction in § 5000A under the taxing power, and that § 5000A need not be read to do more than impose a tax. That is sufficient to sustain it." *NFIB*, 132 S. Ct. at 2598. The same is true for the employer responsibility provision, as "the *NFIB* taxing power analysis inevitably leads to the conclusion that the employer [responsibility provision], too, is a constitutional tax." *Liberty Univ., Inc.*, 2013 WL 3470532, at *12. Like the minimum coverage provision, the employer responsibility provision will "produce[] at least some revenue for the Government." *NFIB*, 132 S. Ct. at 2594. Moreover, the exaction is paid into the Treasury, "does not punish unlawful conduct, and leaves large employers with a choice for complying with the law – provide adequate, affordable health coverage to employees or pay a tax." *Liberty Univ., Inc.*, 2013 WL 3470532, at *14. The taxing power thus authorizes both provisions.

Because Sections 4980H and 5000A are authorized by Congress's taxing power, it necessarily follows that the exactions paid pursuant to those provisions do not constitute takings for purposes of the Fifth Amendment. As the Supreme Court recently explained, "[i]t is beyond dispute that '[t]axes . . . are not 'takings.'" *Koontz v. St. Johns River*

Water Mgmt. Dist., 133 S. Ct. 2586, 2600 (2013) (quoting *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 232 (2003)). Indeed, courts repeatedly recognize that exercises of the taxing power are not takings. *See, e.g.*, *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 24 (1916); *Quarty v. United States*, 170 F.3d 961, 969 (9th Cir. 1999); *Coleman v. Comm'r of Internal Revenue*, 791 F.2d 68, 70 (7th Cir. 1986); *Dye v. United States*, 516 F. Supp. 2d 61, 70 (D.D.C. 2007). *See also Swisher Int'l v. Schafer*, 550 F.3d 1046, 1054-55 (11th Cir. 2008) ("[T]he takings analysis is not an appropriate analysis for the constitutional evaluation of an obligation imposed by Congress merely to pay money.").[7]

As another court recognized in rejecting the argument now raised by Plaintiffs, "if the government were prohibited from using tax money for the benefit of the American people, or if it was required to give the money back, its taxation powers would be useless." *Assoc. of Am. Physicians & Surgeons, Inc. v. Sebelius*, 901 F. Supp. 2d 19, 38 (D.D.C. 2012), *appeal docketed as* 13-5003 (D.C. Cir.) (rejecting argument that the minimum coverage provision and the employer responsibility provision constitute takings). Article I, section 8, of the Constitution grants Congress the power to tax, and it would make no sense for the Constitution to give this power with one hand, and then take it away with the other – *i.e.*, the Just Compensation Clause of the Fifth Amendment. If

[7] An exercise of the taxing power can amount to a taking only if it is so "arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property." *Brushaber*, 240 U.S. at 24. Any such argument here is foreclosed by the Supreme Court's holding that Section 5000A is a valid exercise of the taxing power. *NFIB*, 132 S. Ct. at 2598. There is nothing arbitrary about enactments designed to encourage the purchase and provision of health insurance in a law – the Affordable Care Act – which is designed to, among other things, "increase the number of Americans covered by health insurance," *id.* at 2581, reduce uncompensated care, and improve public health. Rather, such exactions serve to directly further the law's goals.

the United States had to compensate taxpayers for their tax payments, then it would bring in no tax revenue. This is an absurd reading of the Constitution, and absurdity is to be avoided, not embraced, in constitutional interpretation. *See M'Culloch v. Maryland*, 17 U.S. 316, 355 (1819).

Because the minimum coverage provision and the employer responsibility provision are valid exercises of the taxing power, they do not constitute takings, and Plaintiffs thus cannot succeed in their claim.

B. The Minimum Coverage Provision Does Not Impose an Unconstitutional Direct Tax

Hotze also asserts that the "shared-responsibility tax is not a constitutional capitation or other direct tax because ACA does not apportion the tax among the States according to the census." Compl. ¶ 52.[8] The Constitution provides that: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." U.S. Const. art. I, § 9, cl. 4. "This requirement means that any 'direct Tax' must be apportioned so that each State pays in proportion to its population." *NFIB*, 132 S. Ct. at 2598. The Supreme Court recognized in *NFIB* that "[a] tax on going without health insurance does not fall within any recognized category of direct tax." *Id.* at 2599. As a result, the Court held that the minimum coverage provision

[8] This paragraph of Plaintiffs' complaint refers to "[t]he ACA shared-responsibility tax." Compl. ¶ 52. Plaintiffs' use of this term refers to the minimum coverage provision (rather than the employer responsibility provision). *See id.* ¶¶ 40-41 (using the same term in a discussion of *NFIB*'s analysis of the minimum coverage provision); *see also* 26 U.S.C. § 5000A (b) (referring to the minimum coverage provision's "shared responsibility payment"). In any event, the employer responsibility provision is not a direct tax either under *NFIB*'s reasoning.

"is thus not a direct tax that must be apportioned among the several states." *Id.* Hotze's attempt to restate a claim expressly rejected by the Supreme Court fails.

C. The Minimum Coverage Provision Does Not Violate the Uniformity Clause

Next, Hotze contends that the minimum coverage provision violates the Uniformity Clause of the Constitution. He argues that the tax "is not a constitutional duty, impost, or excise tax because Congress intended the tax to be non-uniform throughout the United States to account for the differing costs of medical care in different parts of the United States." Compl. ¶ 53. This does not state a claim under the Uniformity Clause, which provides, simply, that "all duties, imposts and excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. The clause was added to the Constitution in response to concerns that the new national government would use its powers "to the disadvantage of particular States." *United States v. Ptasynski*, 462 U.S. 74, 81 (1983). The Supreme Court has never found a tax to be in violation of the Uniformity Clause, *see Rosenberg v. United States*, 72 Fed. Cl. 387, 395 (Fed. Cl. 2006), and Section 5000A easily passes constitutional muster. The Supreme Court has explained that a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." *Head Money Cases*, 112 U.S. 580, 594 (1884). More recently, the Court has recognized that, "[w]here Congress defines the subject of a tax in nongeographic terms, the Uniformity Clause is satisfied." *Ptasynski*, 462 U.S. at 84; *see also id.* at 86 ("Had Congress described this class of oil in

nongeographic terms, there would be no question as to the Act's constitutionality").[9] Section 5000A does not define its subject in geographic terms, and it operates with the same effect in all places.[10] The minimum coverage provision thus does not implicate, let alone violate, the Uniformity Clause.

D. The ACA's Enactment Was Consistent With the Origination Clause

Plaintiffs also contend that the ACA violates the Origination Clause. The clause provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. Const. art. I, § 7. The Supreme Court has never invalidated an Act of Congress on this ground, and Plaintiffs present no reason to break new ground. Plaintiffs' claim should be dismissed for two simple, independent reasons: the ACA originated in the House as H.R. 3590 and, even if this Court determines otherwise, the ACA is not a "Bill for raising Revenue" within the particular meaning of the Origination Clause. *See Sissel v. U.S. Dep't of Health & Human Servs.*, __ F. Supp. 2d __, 2013 WL 3244826, at *6 (D.D.C. June 28, 2013) (rejecting similar challenge on both grounds), *appeal docketed as* 13-5202 (D.C. Cir.).

First, as Plaintiffs themselves acknowledge, the bill that became the ACA originated in the House as H.R. 3590, a bill that modified certain tax-credit, tax-penalty,

[9] Even where Congress defines the subject of a tax in geographic terms, the Uniformity Clause is satisfied so long as Congress had a rational, non-discriminatory basis to do so. *See Ptasynski*, 462 U.S. at 85-86.

[10] The statutory cites in Plaintiffs' complaint do not show otherwise. *See* Compl. ¶ 53 (citing 26 U.S.C. § 5000A(e)(1)(B)(ii), (f)(1)(C), (f)(2)(A)-(B); 42 U.S.C. § 300gg-91(d)(8); 29 U.S.C. § 1002(32)).

and estimated-tax provisions of the Internal Revenue Code. *See* Compl. ¶ 43. After the bill passed the House on October 8, 2009, the Senate amended it by striking its text and substituting the provisions that ultimately became the Act. After passage in the Senate on December 24, 2009, the House agreed to the bill as amended on March 21, 2010. The enrolled bill was submitted to the President, who signed it into law on March 23, 2010.

This procedure satisfied the Origination Clause. It makes no difference that the Senate amendments to H.R. 3590 were expansive, or that a particular provision of the final bill itself originated in the Senate. Article I, Section 7 provides that "the Senate may propose or concur with Amendments as on other Bills." The Senate may amend a House bill in any way it deems advisable, even by amending it with a total substitute, without running afoul of the Origination Clause. *See Sissel*, 2013 WL 3244826, at *9 (recognizing that a rule requiring particular provisions to originate in the House "would substantially limit the Senate's explicit power to 'propose or concur with Amendments'"). Indeed, the commonplace procedure of the Senate adopting an amendment that substitutes the entire text of a House-originated bill continues to this day, and has been upheld by the courts that have considered this issue.[11] *See, e.g.*, *Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911) (holding that the Origination Clause was

[11] For example, Congress followed this procedure in enacting the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), which was then upheld in the face of Origination Clause challenges. *See Boday v. United States*, 759 F.2d 1472, 1476 (9th Cir. 1985). *See also* Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2085 (major tax-reform legislation originated in the House as H.R. 3838 before being signed into law by President Reagan); American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (legislation enacted to avert the so-called "fiscal cliff" originated in the House as H.R. 8 before being signed into law by President Obama).

satisfied by a Senate amendment substituting a corporation tax for an inheritance tax); *Armstrong v. United States*, 759 F.2d 1378, 1381-82 (9th Cir. 1985) (holding that the Origination Clause was satisfied where the Senate replaced the "entire text of the House bill except for its enacting clause"); *Rowe v. United States*, 583 F. Supp. 1516, 1519 (D. Del.), *aff'd mem.*, 749 F.2d 27 (3d Cir. 1984) ("Although the Senate amendment substituted an entirely new text for the House version, the bill began in the House for Origination Clause purposes." (citation omitted)).

Second, the ACA in any event is not a "Bill for raising Revenue" within the particular meaning of Article I, Section 7, so its enactment would be consistent with the Origination Clause even assuming that it had originated in the Senate. Although Congress exercised its taxing power when it enacted the minimum coverage provision and the employer responsibility provision, that use of authority did not convert the provisions into a "Bill for raising Revenue" for purposes of the Origination Clause. For the Clause to apply, it is not sufficient to show that a bill generates proceeds or was an exercise of Congress's taxing power. Rather, unlike the taxing power, the Origination Clause applies only if generating revenue is the legislation's key purpose. *See Sissel*, 2013 WL 3244826, at *7 ("Under the Supreme Court's precedents – sparse as they may be on this subject – so long as the primary purpose of the provision is something other than raising revenue, the provision is not subject to the Origination Clause.").

As the Supreme Court has stated, "revenue bills are those that levy taxes, in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Twin City Bank v. Nebeker*, 167 U.S. 196, 202-03 (1897); *see also Millard v.*

Roberts, 202 U.S. 429, 437 (1906). Thus, a statute that is a valid exercise of the taxing power because it is productive of some revenue need not originate in the House of Representatives under the Origination Clause if that revenue is incidental to the overall purpose of the statute. *See Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 427 (5th Cir. 1999) (observing that "Taxing Clause and Origination Clause challenges . . . represent separate lines of analysis"). The different scope of the constitutional provisions is underscored by their language: Congress's tax power authorizes it to "lay and collect Taxes, Duties, Imports, and Excises," Const. Art. I, § 8, cl. 1, while the Origination Clause uses a different term ("Revenue") and applies only to "Bills *for* raising Revenue," Const. Art. I, § 7, cl. 1 (emphasis added).

In both *Nebeker* and *Millard*, the Supreme Court held that an assessment that Congress had labeled as a "tax" was not subject to the Origination Clause, because each bill was designed primarily to serve other purposes, even though it incidentally generated revenue. In *Nebeker*, the challenged provision of the National Bank Act taxed the circulating notes of banking associations. 167 U.S. at 202-03. The Court concluded that the provision was not a bill for raising revenue within the meaning of the Origination Clause because "the tax was a means . . . of giving to the people a currency," rather than "to raise revenue to be applied in meeting the expenses or obligations of the government." *Id*. at 203. Similarly, in *Millard*, the Court rejected an Origination Clause challenge to provisions levying taxes on property within the District of Columbia to finance railroad construction. 202 U.S. at 437. Again, the Court determined that the

challenged measures were not subject to the Clause because "[w]hatever taxes are imposed are but means to the purposes provided by the act." *Id*.

Most recently, in *United States v. Munoz-Flores*, 495 U.S. 385 (1990), the Court rejected an Origination Clause challenge to a provision of the Victims of Crime Act of 1984 that required courts to impose a monetary "special assessment" on any person convicted of a federal misdemeanor offense. 495 U.S. at 401. The Court concluded that the provision was not a bill for raising revenue, even though the challenged statute provided a mechanism for some of the funds collected to be deposited into the general fund of the Treasury. *Id.* at 398-400. The Court reasoned that "[a]ny revenue for the general Treasury that [the special assessment provision] creates is . . . incidental to that provision's primary purpose" of compensating and assisting crime victims. *Id*. at 399.

Under this standard, the ACA is not a "Bill[] *for* raising Revenue." U.S. Const. art. I, § 7 (emphasis added). The provisions of the Act that generate revenue, *see, e.g.*, Pub. L. No. 111-148, §§ 1501, 10106 (minimum coverage provision); *id*. § 1513 (employer responsibility provision), are not designed with a primary purpose "to raise revenue to be applied in meeting the expenses or obligations of the government," *Nebeker*, 167 U.S. at 203; they are "but means to the purposes provided by the act." *Millard*, 202 U.S. at 437. *See also Sissel*, 2013 WL 3244826, at *8 ("It is unavoidable, in light of this clear congressional purpose, that any revenue created by the [minimum coverage provision] is merely incidental."). A central purpose of the ACA, and of the minimum coverage provision and employer responsibility provision in particular, is to

improve the nation's health care system by reforming insurance markets, reducing the number of Americans without health coverage, and controlling costs.

With respect to the payment associated with the minimum coverage provision, the Supreme Court recognized that, "[a]lthough the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage." *NFIB*, 132 S. Ct. at 2596. This is reflected in Congress's finding that the minimum coverage provision, "together with the other provisions of this Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services." Pub. L. No. 111-148, § 1501(a)(2)(C). According to Congress, the provision will "achieve[] near-universal coverage by building upon and strengthening the private employer-based health insurance system," "improve financial security for families," and "broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." *Id.* § 1501(a)(2)(D), (E), (G).

The employer responsibility provision will serve similar purposes. By creating a tax incentive for applicable large employers to offer insurance coverage to full-time employees and their dependents, the provision "implement[s] a 'pay or play' requirement" that "will stabilize the employer-based health care system." H.R. Rep. No. 111-443 (II), at 985 (2010). The primary purpose of the provision is not to raise revenue but rather to end conditions under which "employers who do not offer health insurance to their workers gain an unfair economic advantage relative to those employers who do provide coverage, and millions of hard-working Americans and their families are left without health insurance." *Id.* at 985-86. Like the minimum coverage provision, the

exaction imposed on applicable large employers that do not offer affordable, minimum value coverage "is plainly designed to expand health insurance coverage." *NFIB*, 132 S. Ct. at 2596. Indeed, the very purpose of the employer responsibility provision is to encourage applicable large employers to provide sufficient health coverage and thus to avoid paying the associated tax. As with Section 5000A, Section 4980H will thus operate most successfully by generating even less revenue.

The fact that revenue-raising was not Congress' primary purpose in enacting the minimum coverage provision or the employer responsibility provision is immaterial when determining whether they are proper exercises of Congress's taxing power because it is settled that "the taxing power is often, very often, applied for other purposes, than revenue." *NFIB*, 132 S. Ct. at 2596 (quoting 2 J. Story, *Commentaries on the Constitution of the United States* § 962, p. 434 (1833)). The absence of such a primary revenue-raising purpose, however, is dispositive for purposes of the Origination Clause. *See Millard*, 202 U.S. at 437.

Finally, the ACA's compliance with the Origination Clause is underscored by the House's acceptance of the Senate's amendment. The House enforces the Origination Clause through a procedure known as "blue slipping." "When a Senate bill or amendment to a House bill infringes on the constitutional prerogative of the House to originate revenue measures, that infringement may be raised in the House as a matter of privilege." H.R. Rep. No. 111-708, at 92 (2011). Any Member may raise the issue, by the introduction of a "blue slip" resolution, and following passage of a resolution by the

full House the measure is returned to the Senate.[12] *Id.* at 92-93; *see also* Cong. Research Serv., RL 31399, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement* (2011) at 9. Alternatively, rather than return the measure, the House could pass a similar or identical House bill. *See* H.R. Rep. No. 111-708, at 93. During the 111th Congress, the House returned six bills to the Senate due to concerns regarding the Origination Clause, but the House did not pass a blue slip resolution in response to the Senate's passage of H.R. 3590. It is telling that the House of Representatives, which has a strong institutional interest in enforcing its prerogatives under the Origination Clause, did not believe there was any Origination Clause defect with the enactment of the ACA.

CONCLUSION

For the reasons stated herein, the Court lacks jurisdiction over Plaintiffs' complaint and Plaintiffs fail to state a claim upon which relief can be granted.[13] Plaintiffs' complaint should therefore be dismissed with prejudice.

Dated: August 6, 2013.

Respectfully submitted,

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[12] "This practice is referred to as 'blue slipping' because the resolution returning the offending bill to the Senate is printed on blue paper." H.R. Rep. No. 111-708, at 93.

[13] Because Hotze's challenges to the minimum coverage provision are without merit, he is entitled to no relief whatsoever. It is worth noting, however, that the complaint's prayer for relief asks the Court to declare that the minimum coverage provision exceeds the authority granted to Congress by the Commerce Clause. Compl., p. 12. Even if it were proper for Plaintiffs to present a claim only in a prayer for relief, the claim is plainly foreclosed by the Supreme Court's determination that Section 5000A is a constitutional exercise of the taxing power. *See NFIB*, 132 S. Ct. at 2598. *See also Sissel*, 2013 WL 3244826, at *4-6 (rejecting similar post-*NFIB* argument that the provision is unauthorized by the Commerce Clause).

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2013, I filed the foregoing document via the court's ECF system, which will cause service to be made on the following counsel:

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