[ORAL ARGUMENT SCHEDULED FOR MARCH 25, 2014]

Case No. 14-5018

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JACQUELINE HALBIG, ET. AL.,
Appellants,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET. AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CORRECTED BRIEF OF *AMICUS CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL CENTER IN SUPPORT OF APPELLANTS INNOVARE HEALTH ADVOCATES; GC RESTAURANTS SA, LLC; OLDE ENGLAND'S LION & ROSE, LTD; OLDE ENGLAND'S LION & ROSE AT CASTLE HILLS, LTD; OLDE ENGLAND'S LION & ROSE FORUM, LLC; OLDE ENGLAND'S LION & ROSE AT SONTERRA, LTD; OLDE ENGLAND'S LION & ROSE AT WESTLAKE, LLC; AND COMMUNITY NATIONAL BANK (THE EMPLOYER-APPELLANTS)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), NFIB Legal Center certifies as follows:

(A) Parties and Amici

In addition to the parties and amici listed in the Appellants' Opening Brief, the following amici have filed notices of intent pursuant to Circuit Rule 29(b):

Pacific Research Institute
Cato Institute
Jonathan Adler
Michael Cannon
State of Oklahoma
State of Alabama
State of Georgia
State of West Virginia
State of Nebraska
State of South Carolina
Consumer's Research
America's Health Insurance Plans

(B) Rulings under Review

References to the rulings at issue appear in the Appellants' Opening Brief.

(C) Related Cases

References to the related cases appear in the Appellants' Opening Brief.

RULE 26.1 STATEMENT

Pursuant to Federal Rule 26.1 and Circuit Rule 29(b), undersigned counsel certifies that the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a 501(c)(3) public interest law firm. It is affiliated with the National Federation of Independent Business, a 501(c)(6) business association, which supports the NFIB Small Business Legal Center through grants and exercises common control of the NFIB Small Business Legal Center through officers and directors. No publicly-held company has 10% or greater ownership of the NFIB Small Business Legal Center.

STATEMENT PURSUANT TO FED. R. APP. P. 29(c)(5)

No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person (other than the *amicus curiae*, its members, or its counsel) contributed money that was intended to fund preparing or submitting this brief.

CERTIFICATION PURSUANT TO D.C. CIR. RULE 29(d)

The undersigned certifies that joinder in a single amicus brief is not practicable and separate brief is necessary for the following reasons: (1) NFIB Legal Center expresses no views on the merits, *i.e.*, on the validity or invalidity of 45 C.F.R. § 155.20 and the portions of 26 C.F.R. § 1.36B (the IRS Rule), does not want to join in an amicus brief that expresses the views of others on the merits (so as to avoid association with those views), and is aware that at least one other amicus intends to file a brief in support of Appellants that will address the merits issues; (2) this brief is limited to a single issue, *i.e.*, whether the District Court erred in its disposition of the claims of Innovare Health Advocates; GC Restaurants SA, LLC; Olde England's Lion & Rose, LTD; Olde England's Lion & Rose at Castle Hills, LTD; Olde England's Lion & Rose Forum, LLC; Olde England's Lion & Rose at Sonterra, LTD; Olde England's Lion & Rose at Westlake, LLC; and Community National Bank (the employer-appellants), based on the District Court's opinion that the Anti-Injunction Act, 26 U.S.C. § 7421(a), required dismissal of the employer-appellants' claims, and *Amicus* is unaware after inquiry of any other amicus whose brief will be so limited; and (3) this brief is filed in support of a subset of the Appellants, *i.e.*, the employer-appellants, (the employer-appellants), and NFIB Legal Center is unaware after inquiry of any other amicus whose brief will be filed in support of that subset of Appellants.

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IDENTITY AND INTEREST OF THE *AMICUS*

1. The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and to be the voice for small businesses in the nation's courts. It pursues the second of these goals through representation on issues of public interest affecting small businesses.

The NFIB Legal Center has unique access to the small business community's concerns regarding cases in which the NFIB Legal Center is a party or counsel for a party. To fulfill its role as the voice for small business, and to provide courts with the views of the small business community that might not otherwise be placed before them, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses,[1] including cases pending in this Court.[2]

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[1] Perhaps of most significance in the context of this case, *see Sackett v. E.P.A.*, 132 S. Ct. 1367 (2012) (concerning access to the courts for individuals facing ruinous civil penalties for alleged violations of federal regulation). *See also, e.g., Arkansas Game & Fish Comm'n v. United States*, 736 F.3d 1364 (Fed. Cir. 2013) (concerning takings liability for foreseeable government actions that damages or destroys private property); *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013) (holding that employers may enforce arbitration agreements with employees); and *Am. Trucking Associations, Inc. v. City of Los Angeles, Cal.*, 133 S. Ct. 2096 (2013) (addressing federal preemption challenge to local environmental regulation of truckers).

[2] *See, e.g., AKM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752 (D.C. Cir. 2012) (concerning time-limits for employer record-keeping obligations under labor law), and *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C.

2. The small business community has a particular interest that could be advanced or set back by the outcome of this case. That interest is insuring that employers have meaningful access to the courts, which includes timely access to the courts. That interest is jeopardized by the District Court's disposition of the claims of the employer-appellants in this matter, because that disposition was based on the District Court's holding that the Anti-Injunction Act, 26 U.S.C. § 7421(a), required dismissal of their claims. As a result, each employer-appellant will have only one avenue to obtain the relief it seeks in this case: it must fail to satisfy one of the coverage requirements of Section 4980H; pay an assessable payment for which Section 4980H makes it liable; and then file a claim for a refund (which is then subject to administrative review by the Service before the employer-appellant finally is able to seek relief from an Article III court).

Thus, if this District Court's AIA ruling stands, there will be a new basis for impeding a business's access to a federal court on a claim in which justice delayed easily could be justice denied.

3. The matters asserted in this brief are directly and immediately relevant to the disposition of this case on appeal as to the employer-appellants, because the final order in the District Court is not a dismissal on the merits as to them. The

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Cir. 2013) (concerning the right of interested parties to intervene in challenge to federal settlements that will affect an entire regulated community).

NFIB Legal Center believes that the filing of this brief is desirable because the discussion of the AIA issue that follows adds three important observations regarding the proper interpretation of Section 4980H for purposes of an analysis under the AIA.

PRELIMINARY STATEMENT

The District Court's decision in this case indicates that it was led astray in its disposition of the employer-appellants' claims by a failure to consider the exaction described in Code Section 4980H(a) separately from the exaction described in Code Section 4980H(b)(1). *Amicus* submits that parsing the language of Section 4980H compels the recognition that the assessable payment described in Section 4980H(a) and the assessable payment described in Section 4980H(b)(1) are mutually exclusive, requiring each of them to by analyzed separately for purposes of AIA coverage.

Section 4980H(b)(1) cannot apply to an employer unless the employer has offered every one of its full time employees the opportunity to enroll in some form of employer sponsored coverage (whether or not affordable and/or of minimum value). By contrast, Section 4980H(a) applies only if the employer has failed to offer one or more of its full time employees the opportunity to enroll for at least some form of employer-sponsored coverage. In addition, parsing the language of Section 4980H demonstrates that the assessable payments described in Section 4980H(a) are never referred to as a "tax;"

In addition, by comparing the assessable payment formula and the assessable payment trigger in Section 4980H(a) with the assessable payment formula and the assessable payment trigger in Section 4980H(b) shows conclusively that payment

of the amounts for which an employer may be liable under Section 4980H(a) are an enforcement mechanism for regulatory requirements and lack any genuine revenue-raising purpose. The assessable payment under 4980H(b)(1) is calibrated to the number of full time employees who actually receive advanced payment of a premium tax credit under 42 U.S.C. § 18081 and Section 36B. By contrast, the formula for calculating the assessable payment under Section 4980H(a) is proportional with the number of employees who are granted advance payment of a premium tax credit as the result of any act or omission of the employer.

In fact, when compared with the calculation under Section 4980H(b)(1), the formula in Section 4980H(a) is a massive and blunt instrument. In every circumstance where it applies – and it applies in some counter-intuitive circumstances – the Section 4980H(a) formula requires multiplying a dollar amount (currently $166.67 per month) by the entire number of the employer's full time employees after the first thirty. The formula applies in precisely the same way if an employer fails to offer a large cohort of its full time employees an opportunity to enroll for coverage under its group health plan, or if a single oversight results in excluding just one full time employee.

Properly understood, then, Section 4980H(a) provides for an exaction that is wildly disproportionate to the minimum (and minimal) employer behavior necessary to trigger it. Section 4980H(a) is punitive and intentionally so. There

can be no doubt that Section 4980H(a) is intended to guaranty employer willingness to comply with regulatory standards by employing the *in terrorem* effect of such huge liabilities. Thus, Section 4980H(a) attains its objectives precisely in those instances where it raises no revenue.

To illustrate that Section 4980H(a) is nothing other than a punishment for an employer's failure to conform its behavior to a regulatory norm, consider the application of the formula to an employer with as few as 750 full time employees that fails to distribute an enrollment packet to just one of them. The formula yields a monthly exaction of $166.67 times 720, which equals just over $120,000. On an annualized basis, this is slightly more than $1.44 million -- all as a consequence of one isolated mistake, the effect of which is confined to one individual.

Further proof of the regulatory intent that animates Section 4980H(a) is found in the triggering language for the assessable payment under that section. An employer can be liable to pay an assessable payment under Section 4980H(a) if it fails to make the required coverage offer to just one of its full time employees and a full time employee is determined to be eligible for advance payment of a premium tax credit. *See* Section 4980H(a)(1)-(2). Thus, an employer can be liable for an assessable payment under Section 4980H(a) even if the full time employee who was omitted from the offer of coverage is someone other than the full time employee receiving the premium tax credit (for example, a full time employee for

whom the coverage offered is unaffordable). One implication of the trigger language is that Section 4980H(a) controls the conduct of employers *even with respect to full time employees whose adjusted household income is high enough to render them ineligible for premium assistance*.

For example, an employer might fail to distribute open enrollment materials to only one of its 2,000 full time employees (Employee A, whose adjusted household income exceeds 400% of the federal poverty level). The remaining 1,999 full time employees were offered the enrollment option timely, but for one of them (Employee B), the coverage offered is unaffordable.

As difficult to accept as such unfairness may be, if Employee B is awarded an advance payment of a premium tax credit, the employer's assessable payment will be calculated under, not Section 4980H(b). Thus, the monthly exaction for one instance in which the cost of coverage was unaffordable for one full time employee is $328,339.90 instead of $250 *solely because the employer omitted from open enrollment one full time employee who is treated under Section 36B as perfectly able to fend for him- or herself when it comes to obtaining coverage.* This feature of Section 4980H(a) forces one to conclude that Section 4980H is intended to control employers' behavior, and therefore the assessable payment under Section 4980H(a) is not a "tax" for purposes of the AIA.

ARGUMENT

Congress got it right when it described the purpose and function of Section 4980H as "requirements," and when it described the force of those requirements on employers.

> Every applicable large employer *required to meet the requirements of section 4980H* with respect to its full-time employees during a calendar year shall, at such time as the Secretary may prescribe, make a return described in subsection (b).

See Code § 6056(a), as added by P.L. 111-148, Sec. 1514(a) (2010) and subsequently amended (emphasis added). *Cf.* Prop. Treas. Reg. § 301.6056-1 (referring to "the requirements of section 4980H").

The language Congress chose in Section 6056(a) does not explain how it comes to be that an employer is "required" to meet the requirements of Section 4980H. However, the answer to that question is easy to find in the text of Sections 4980H(a) and (b)(1). The "requirements" of Sections 4980H(a) and (b)(1) are avoiding the conditions triggering assessable payments thereunder. This assessable payments themselves, *i.e.*, the prospect of exacting sums of money from the employer for a regulatory transgression, causes an employer to be "required to meet the requirements of section 4980H." The prospect of an assessable payment is just the means by which regulatory compliance is assured.

Defendants Treasury and the Internal Revenue Service ("the Service") got it right when they referred to the exaction described in Section 4980H(b) as a

"penalty" after the final regulations under Section 36B were published. *See* Prop. Treas. Reg. § 54.4980H-2, 78 Fed. Reg. 218, 233, 238 (Jan. 2, 2013).

By contrast, the District Court erred in its analysis of Section 4980H(a) and (b)(1). The flaws are reflected in the District Court's conclusion that the assessable payments described in Section 4980H(a) and (b)(1) are taxes for purposes of the Anti-Injunction Act, and thus not subject to pre-enforcement challenge. The District Court made three distinct errors of law that resulted in the flawed disposition of employer-appellants' case.

First, the District Court failed to recognize that there is no basis in Section 4980H for equating the regulatory assessment with a "tax." Parsing the statutory text results in a harmonious construction of all the pertinent statutory language, without adopting a presumption that Congress used two distinct statutory phrases as synonyms, as the District Court did in this case. (Dist. Ct. Op. 19 (J.A. 343).)

Second, the District Court's analysis of the AIA issue failed to consider the Section 4980H(a) exaction on a stand-alone basis, as the text of the statute requires. This caused or contributed to the erroneous conclusion that Congress intended both Section 4980H(a) and Section 4980H(b)(1) as revenue-raising measures. (Dist. Ct. Op. 20 (J.A. 344).)

Third, the District Court utilized a novel motive-based theory to find the AIA applicable, even though the object to this litigation is to invalidate the IRS

Rule providing subsidies to certain participants in federally-run Exchanges. (Dist. Ct. Op. 17-18 (J.A. 341-42).)

I. THE DISTRICT COURT'S TEXTUAL ANALYSIS OF SECTION 4980H IS ERRONEOUS

The Anti-Injunction Act (AIA) 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, whether or not such person is the person against whom such tax was assessed." 26 U. S. C. § 7421(a).

The AIA cannot be applied with any degree of confidence in the outcome if the phrase "for the purpose of" refers to the motive of the suitor. Motives can be repudiated in a way that requests for relief cannot.

Looking at the employer-appellants' request for relief in this case shows that this is not a suit "for the purpose of restraining or collecting [a] tax." To be sure, the relief requested (if granted) would cause some employers not to be subject to the requirements of Section 4980H. Whether or not an exaction will be treated by the courts as a "tax" for purposes of the AIA depends on how the statute creating the exaction characterizes the exaction in relation to the AIA. "The Anti-Injunction Act and the Affordable Care Act . . . are creatures of Congress's own creation. How they relate to each other is up to Congress, and the best evidence of Congress's intent is the statutory text." *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2582-84 (2012) ("*NFIB*").

Analysis of the statutory text of 4980H must start with the exactions themselves, of which there are two. The first is an "assessable payment" equal to an "applicable payment amount" (currently $2,000 on an annualized basis) times each of the employer's full time employees after the first 30 full time employees. Section 4980H(a). Liability for payment of the "assessable payment" described in Section 4980H(a) is triggered if the employer fails to offer one or more of its full time employees the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan, and one or more of its full time employees is determined to be entitled to a premium tax credit under Section 36B or the advance payment of a Section 36B premium tax credit under 42 U.S.C. § 18082.

The second exaction appears in Section 4980H(b)(1), and applies only if the employer has offered each of its full time employees the opportunity to enroll for minimum essential coverage under an eligible employer-sponsored plan. Subject to a limitation described in Section 4980H(b)(2), the amount of the assessable payment under Section 4980H(b)(1), on an annualized basis, equals $3,000 times each of the employer's full time employees who is certified as having enrolled for Exchange coverage and as to whom a Section 36B premium tax credit is allowed or paid. The Section 4980H(b)(1) assessable payment is triggered only if one or more of those full time employees has been determined to have enrolled in a

qualified health plan and to be eligible for a Section 36B premium tax credit or advance payment.

Neither Section 4980H(a) nor (b)(1) includes the term "tax"; each exaction is identified instead exclusively as an "assessable payment." *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 88 (4th Cir. 2013) ("Because Congress initially and primarily refers to the exaction as an 'assessable payment' and not a 'tax,' the statutory text suggests that Congress did not intend the exaction to be treated as a tax for purposes of the AIA.") This fact is noteworthy for several reasons. First, numerous other exactions throughout the ACA are described as "taxes," including exactions the government has conceded are not subject to the AIA (*see, Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1126 (10th Cir. 2013)). Second, even after the final regulations under Section 36B were issued, Treasury and the Service referred to the exaction under Section 4980H(b) as the "4980H(b) penalty" in the preamble to the Proposed Regulations under Section 4980H. *See* Prop. Treas. Reg. § 54.4980H-2, 78 Fed. Reg. 218, 233, 238 (Jan. 2, 2013).

The first use of the term "tax" in Section 4980H is in Section 4980H(b)(2):

> The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

The term "applicable payment amount" refers to the dollar amount used as a multiplier in calculating the assessable payment described in Section 4980H(a), which as noted above currently is $2,000 on an annualized basis. The entire purpose of Section 4980H(b)(2) is to clarify that the sum of assessable payments under Section 4980H(b)(1) cannot exceed the sum of assessable payments under Section 4980H(a). Thus, the reference to a "tax" in Section 4980H(b)(2) obviously does not encompass the exaction described in Section 4980H(a). The limitation is only a measuring stick for gauging the maximum exaction permissible under Section 4980H(b)(1). The fact that the limitation equals the 4980H(a) amount likely reflects the sentiment that an employer that has tried but failed to comply should not be exposed to a greater penalty than an employer that failed to comply with the basic requirement of Section 4980H(a).

The only other reference to "tax" in Section 4980H appears in Section 4980H(c)(7): "[f]or denial of deduction for the tax imposed by this section, see section 275(a)(6)." However, this is not a statement that either of the exactions described in Sections 4980H(a) and (b)(1) has been designated as a "tax" for purposes of the Anti-Injunction Act. Because the statutory language of Section 4980H(c)(7) suggests a reference to something that has already been designated elsewhere as a "tax," Section 4980H(c)(2) could be perceived to refer to the exaction described in Section 4980H(b)(1), and only that exaction, because Section

4980H(a) is described exclusively as an "assessable payment." However, given that neither Section 4980H(a) nor Section 4980H(b)(1) is described as a tax in the first instance, it is far more likely that the use of the term "tax" in both Section 4980H(b)(2) and Section 4980H(c)(7) are for purposes other than signifying the applicability of the AIA.

Needless to say, even if Section 4980H(c)(7) labels the Section 4980H(b)(1) amount a "tax" for purposes of a statutory cross reference, that fact alone would not necessarily support the conclusion that Congress intended the Section 4980H(b)(1) amount to be a "tax" for purposes of the AIA. In fact, the very existence of Section 4980H(c)(7) suggests that the assessable payments are not taxes. Section 275(a)(6) sets forth a list of taxes that are not deductible. Section 4980(c)(7)'s direction that the assessable payments should be treated as if they were covered by Section 275(a)(6) presupposes that they are not taxes already covered.

Although missing from the District Court's analysis, it is also noteworthy that Section 4980H(d)(1) does not use the word "tax" to describe any exaction under Section 4980H. Instead, it uses the phrase "assessable payment," which is the term used in Sections 4980H(a) and (b)(1), the provisions creating both exactions. Section 4980H(d)(1)'s failure to use the word "tax" instead of the phrase "assessable payment" is the first of two ways in which the text of Section

4980H(d)(1) is incompatible with the view that Congress intended the AIA to apply to actions involving the bases for imposing any exaction under Sections 4980H(a) or (b)(1).

The second way in which Section 4980H(d)(1) is incompatible with treating the exactions under Sections 4980H(a) and (b)(1) as taxes for purposes of the AIA is the Court's interpretation of the parallel language of Section 5000A(g)(1) in *NFIB*. There, the Court adopted the Solicitor General's interpretation of Section 5000A(g)(1), according to which Subchapter 68B does no more than to instruct the Secretary of the Treasury to use the same collection methods the Secretary is authorized to use in the case of taxes (subject, of course, to the Section 5000A(g)(2) exceptions). *NFIB*, 132 S.Ct. at 2583-84. Nothing in Section 4980H(d)(1) would support a determination that Congress intended the exactions described in Sections 4980H(a) or (b)(1) to be treated as "tax[es]" for purposes of the AIA.

In addition, the very inclusion of Section 4980H(d)(1) in Section 4980H is affirmative evidence that Congress did not interpret either Sections 4980H(a) or (b)(1) as imposing a "tax." If Congress had been under the impression that the exactions it referred to as "assessable payments" were taxes, there would be no need for Section 4980H(d)(1) to prescribe modes of collection and assessment. The pre-ACA Code already included provisions for the assessment and collection

of taxes.[3] The very existence of Section 4980H(d)(1) therefore shows that (1) Congress believed it was necessary to prescribe a mode of assessment and a mode of collection for exactions under Section 4980H, notwithstanding the existence of Chapters 63 and 64; and (2) Congress chose modes of assessment and collection other than those applicable in the case of taxes, *i.e.*, that Congress did not consider "assessable payments" sufficiently "tax-like" to justify borrowing the modes of assessment and collection prescribed for taxes.

The District Court also found significance in the reference to a "tax" in 42 U.S.C. § 18081(f)(2), as added by the ACA. Specifically, The District Court regarded that Section as significant for determining whether assessable payments under Section 4980H(a)-(b). (Dist. Ct. Op. 19 (J.A. 343).) With respect, the District Court was mistaken in treating 42 U.S.C. § 18081(f)(2) as a gloss on the Internal Revenue Code.

To be sure, that provision states in part, "The Secretary [of HHS] shall establish a separate appeals process for employers who are notified under subsection (e)(4)(C) that the employer may be liable for a tax imposed by section 4980H of Title 26[.]"). However, the Secretary of HHS is not charged with

[3] Chapter 63 of the Code provides a mode of assessment for taxes, Code § 6201 requires the Secretary to assess all taxes imposed under the Code. Chapter 64 of the Code provides a mode of collection of taxes, and Code § 6301 requires the Secretary to collect all taxes imposed under the Code.

enforcement of the Internal Revenue Code. Her belief that a given exaction is a tax cannot be taken as the last word (or even the first word) on the subject.

Moreover, 42 U.S.C. § 18081(e) makes no mention whatsoever of an Exchange's duty to notify an employer that it may be liable for a *tax* under Section 4980H. 42 U.S.C. § 18081(e)(4)(C) itself merely requires that "[t]he Exchange shall also notify each person receiving notice under this paragraph of the appeals processes established under subsection (f)."

42 U.S.C. § 18081(e)(4)(B)(iii) describes the contents of the notice to be provided by the Exchange to the employer:

> Employer affordability If the Secretary notifies an Exchange that an enrollee is eligible for a premium tax credit under section 36B of title 26 or cost-sharing reduction under section 18071 of this title because the enrollee's (or related individual's) employer does not provide minimum essential coverage through an employer-sponsored plan or that the employer does provide that coverage but it is not affordable coverage, the Exchange shall notify the employer of such fact and that the employer may be liable for the *payment assessed* under section 4980H of title 26.

Id. (emphasis added). Thus, the analysis of 42 U.S.C. § 18081(f)(2) comes full circle. The Exchange does not characterize and is not required to characterize as a "tax" the potential exaction under Section 4980H(a) or even under some circumstances under Section 4980H(b)(1). Instead, 42 U.S.C. § 18081 refers to those exactions as "payments assessed." Thus, an isolated reference to the word

"tax" in Title 42 of the U.S. Code is not sufficient to trump the plain language of Section 4980H.

II. THE DISTRICT COURT'S ANALYSIS OF THE CHARACTER OF THE EXACTIONS IN SECTION 4980H FAILED TO RECOGNIZE THAT THE EXACTIONS SERVE NO GENERAL REVENUE-RAISING PURPOSE

Even if the textual analysis did not so decisively weigh against application of the AIA, courts determining the applicability of the statute look to the circumstances of the legal challenge at issue. *Cohen v. United States*, 650 F.3d 717, 727 (D.C. Cir. 2011) (the AIA does not "reach all disputes tangentially related to taxes" but instead "requires a careful inquiry into the remedy sought, the statutory basis for that remedy, and any implication the remedy may have on assessment and collection"); *Pendleton v. Heard*, 824 F.2d 448, 451-452 (5th Cir. 1987) (litigation seeking to enjoin issuance of public bonds due to procedural flaw in bond issuance not barred by AIA despite impact of restraining collection of property taxes that would have been used to finance bonds).

The District Court employed what it referred to as the "duck test" to support its conclusion that the AIA applies in this case, concluding that "[t]he Section 4980H assessment *acts* like a tax and *looks* like a tax." (Dist. Ct. Op. 20 (J.A. 344).) Specifically, the District Court concluded that Section 4980H "serves a revenue-raising function" and did not appear to be a "regulatory penalty." *Id.* However, it appears that the District Court considered only the Section

4980H(b)(1) assessable payment, and not the Section 4980H(a) assessable payment. (Dist. Ct. Op. 20 (J.A. 344) (concluding that Section 4980H payments "are based on, and presumably used to offset, tax credits dispensed to individuals purchasing their own insurance on the Exchanges.")).

The proportionality the District Court imagined doesn't exist. In fact, the word "proportionality" simply does not come to mind after becoming familiar with the assessable payment formula is Section 4980H(a). By its very terms, the Section 4980H(a) formula charges an employer a penalty calculated by reference to *every one of the employer's full time employees after the first thirty* if as few as one such employee participates, on a subsidized basis, in an Exchange. The size of the penalty is entirely dependent on the size of the employer, and not on the amount the government must spend on subsidies. This is obviously designed as a penalty and a deterrent to employers, and not as a means of cost shifting. The amount of the assessable payment is completely unrelated to the amount of subsidies that are necessitated by the employer's non-coverage of an employee.

The assessable payment provision of Section 4980H(a) in particular is exactly the type of penalty contemplated by the Seventh Circuit Court of Appeals in *Korte v. Sebelius*, 735 F.3d 654, 669 (7th Cir. 2013). Analyzing Section 4980D, the court noted that the provision was "meant to penalize employers for noncompliance" and observed that "[t]he sheer size of the required payment fairly

screams 'penalty.'" *Id.* The court concluded that when an exaction "makes noncompliance painful by exacting severe and disproportionate monetary consequences, the primary purpose of the scheme must be understood as regulatory and punitive rather than revenue raising." *Id.* The same conclusion must be reached with respect to Section 4980H(a), which imposes on employers an assessment that is clearly punitive.

Moreover, even applied to Section 4980H(b)(1) only, the District Court's analysis is based on a misapprehension of the nature of the legal challenge in this case. The Employer-Plaintiffs here seek to invalidate the subsidy itself. The purpose of Section 4980H(b)(1), in the District Court's view, is to pay for the subsidy. (Dist. Ct. Op. 20 (J.A. 344).) If the subsidy is invalidated, the Section 4980(b)(1) payment will not be necessary, and the government will not be deprived of anything. Far from depriving the government of revenue, a successful challenge to Section 4980(b)(1) would merely couple the elimination of a government subsidy with relief to private employers who otherwise would have to finance that subsidy. Without the former, the government has no need for the latter.

The Fourth Circuit Court of Appeals permitted a challenge to a comparable legislative scheme, in which an exaction was used to nudge employers toward greater healthcare spending. In *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007), a state statute called for an exaction from employers that did

not meet certain minimum healthcare spending thresholds. The Fourth Circuit Court of Appeals had little difficulty concluding that the Tax Injunction Act[4] did not bar an employer challenge:

> There is overriding evidence that the Fair Share Act's primary purpose is to regulate employers' healthcare spending, not to raise revenue. This becomes especially demonstrable in light of the improbability that the Act will generate any revenue. . . . [T]he official description of the Act as presented to the General Assembly represented that it mandated that employers provide a certain level of benefits, and only if they violated that mandate would the State collect monies. Such a mechanism is a quintessential fee or penalty, not a tax.

Id. at 189.

The bottom line is that Section 4980H(a) is clearly designed as a regulatory penalty, imposing a cost on employers far out of proportion to any revenue-raising rationale. Even if Section 4980H(b)(1) is considered an assessment closely tied to the regulatory goal of reimbursing the government for Exchange subsidies, there is no general revenue-raising purpose associated with Section 4980H. Accordingly, application of the what the District Court called the "duck test" coupled with misapprehending the substance of Section 4980H(a) resulted in misapplying the AIA to the employer-appellants.

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[4] The applicable test under the Tax Injunction Act, 28 U.S.C. § 1341, is "parallel" to that under the AIA. *Korte v. Sebelius*, 735 F.3d 654, 670 (7th Cir. 2013).

III. THE DISTRICT COURT ERRED IN ADOPTING A NOVEL MOTIVE-BASED THEORY TO APPLY THE AIA TO A LEGAL CHALLENGE TO A REGULATION

This case does not seek to restrain the collection of any assessment. It is a challenge to a regulatory action, a consequence of which would force upon the Employer-Plaintiffs a choice: take costly compliance action or pay an exaction. The District Court and the government contend that all this boils down to an attempt to restrain the assessment and collection of a tax, relying on *Bob Jones University v. Simon*, 416 U.S. 725 (1974), and *Alexander v. 'Americans United' Inc.*, 416 U.S. 752 (1974), both of which concerned organizations' challenges to the revocation of their own tax-exempt status. (Dist. Ct. Op. 17-18 (J.A. 341-42).) In both cases, the direct purpose of the litigation was to restrain the collection of taxes – exempt status had no consequence to the organizations other than to eliminate the tax liability of their donors. In *Bob Jones University*, the Court stated that the AIA was designed to protect "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference, and to require that the legal right to the disputed sums be determined in a suit for refund." *Id.* at 736 (citations omitted).

Here, there are no "disputed sums"; the challenge is to a regulation that forces employers to choose whether to undertake costly revisions to their health insurance plans or expose themselves to unpredictable and potentially ruinous

penalties. This case is unlike the exempt status cases because the Employer-Plaintiffs are seeking not to evade tax liability but to gain relief from a regulation that imposes a host of compliance costs, one of which is a severe penalty provision. *Korte v. Sebelius*, 735 F.3d 654, 669 (7th Cir. 2013) (declining to apply the AIA to a challenge to Section 4980D "taxes" that were "meant to penalize employers for noncompliance").

The District Court's ruling that the AIA barred this action as to the employer-appellants' claims calls to mind the category of cases typified by the Ninth Circuit's disposition of *Sackett v. E.P.A.*, 622 F.3d. 1139 (9th Cir., 2010), *reversed and remanded*, *Sackett v. E.P.A.*, 566 U.S. 145 (2012). In that case, the plaintiff homeowners had been served with a compliance order under the Clean Water Act. The order required remediation of dampness in the homeowners' basement, on a preliminary finding that the dampness was part of the navigable waters of the United States (owing to the house's proximity to a pond). Every day of non-compliance could result in a penalty of up to $25,000, which would become due when the Environmental Protection Agency sued to enforce the compliance order.

Because the date of an enforcement suit was entirely within the control of the agency, the homeowners requested an opportunity to contest the validity of a compliance order regarding dampness in a basement. The agency characterized

the compliance order as non-final, and therefore found that no agency proceeding for review was available. Thus, throughout the progress of their case, the Sacketts remained potentially liable for a huge and ever-mounting penalty.

This case out-*Sackett*s the result in the District Court and the Ninth Circuit in *Sackett* itself. When the Anti-Injunction Act is applied to bar a claim relating to the validity of imposing an assessable payment under Sections 4980H(a) or (b)(1) under given circumstances, the claimant is relegated to the world of "pay first, litigate later," where the substantive issue on which the claimant's liability hinges can be raised only in an application for a refund. Thus, while the Sacketts continued to *accrue* fines under the compliance order at issue in their case, assuming the disposition of the employer appellants' claims is not reversed, the employer-appellants will be required to *pay* assessable amounts imposed on them as a pre-condition to having the substance of their claims heard. Given the formula for calculating the penalty under Section 4980H(a), in some cases, the "pay first, litigate later" rule will become the business equivalent of a death warrant.[5]

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[5] Because the Supreme Court interpreted the Clean Water Act to afford the homeowners in *Sackett* a hearing as to the jurisdictional basis for issuing the compliance order in that case, the Court was not required to address the due process implications of the case. However, the presence of those due process implications in this case is unmistakable. Due process "fundamental[ly]" requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). As Justice O'Connor wrote for the plurality in *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004):

The essence of this litigation is an employer's right to challenge an agency regulatory decision that, in the view of the challengers, conflicts with the text of the underlying statute. That the agency might someday be able to collect a penalty from such employer for non-compliance does not mean that a challenge to the regulation is an attempt to "restrain" the collection of taxes. This Court should decline the government's attempt to expand the scope of the AIA to serve as a means of immunizing regulatory action from judicial review whenever non-compliance results in a financial penalty.

CONCLUSION

For the foregoing reasons, the NFIB Legal Center respectfully submits that the District Court's ruling that the AIA bars the claims of employers-appellants should be reversed.

> For more than a century the central meaning of procedural due process has been clear: . . . It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (quoting *Baldwin v. Hale*, 1 Wall. 223, 233, 17 L.Ed. 531 (1864); *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) (other citations omitted)). These essential constitutional promises may not be eroded.

Respectfully submitted,

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February 6, 2014

CERTIFICATE OF SERVICE

I hereby certify that, on February 6, 2014, I electronically filed the foregoing using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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