No. 11-398

# In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

v.

FLORIDA, ET AL.,

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

## BRIEF FOR PRIVATE RESPONDENTS ON THE ANTI-INJUNCTION ACT


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## QUESTION PRESENTED

Congress effected a sweeping and comprehensive restructuring of the Nation's health-insurance markets in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 109 (2010) (collectively, the "Act" or the "ACA"). The Act contains a "minimum coverage" provision, which mandates that virtually every individual American must obtain health insurance. 26 U.S.C.A. § 5000A(a). Here, the question presented is:

Whether the suit brought by respondents to challenge the minimum coverage provision is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a) ("AIA").

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Three private individuals or organizations were Plaintiffs-Appellees below and are Respondents here: National Federation of Independent Business ("NFIB"); Kaj Ahlburg; and Mary Brown. Two other private individuals were made Respondents here by this Court's order of January 17, 2012: Dana Grimes and David Klemencic. NFIB is a nonprofit mutual benefit corporation that promotes and protects the rights of its members to own, operate, and grow their businesses across the fifty States and the District of Columbia. NFIB is not a publicly traded corporation, issues no stock, and has no parent corporation. There is no publicly held corporation with more than a 10% ownership stake in NFIB.

26 States, by and through their Attorneys General or Governors, were Plaintiffs-Appellees/Cross-Appellants below and are Respondents here: Alabama; Alaska; Arizona; Colorado; Florida; Georgia; Idaho; Indiana; Iowa; Kansas; Louisiana; Maine; Michigan; Mississippi; Nebraska; Nevada; North Dakota; Ohio; Pennsylvania; South Carolina; South Dakota; Texas; Utah; Washington; Wisconsin; and Wyoming.

Six federal officers or agencies were Defendants-Appellants/Cross-Appellees below and are Petitioners here: Kathleen Sebelius, in her official capacity as Secretary of Health and Human Services; Timothy F. Geithner, in his official capacity as Secretary of the Treasury; Hilda L. Solis, in her official capacity as Secretary of Labor; and the United States Departments of Health and Human Services, of the Treasury, and of Labor.

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## BRIEF FOR PRIVATE RESPONDENTS ON THE ANTI-INJUNCTION ACT

Private Respondents respectfully submit this brief arguing that the AIA does not bar their challenge to the ACA's individual mandate.

## RESTATEMENT OF THE CASE

Having already comprehensively described the ACA and this litigation, Private Petrs. Severability Br. 1-26, we focus here on why this challenge to the ACA's mandate to obtain health insurance (26 U.S.C.A. § 5000A(a)) is not barred by the AIA's prohibition on "suit[s] for the purpose of restraining the assessment or collection of any tax," 26 U.S.C. § 7421(a).

**1.** The individual mandate is a free-standing legal requirement obligating virtually every American to obtain health insurance. It is enforced through a monetary penalty on a certain subset of the individuals who unlawfully remain uninsured. The text, structure, and context of the ACA all show that the mandate is *separate and independent* from the penalty. Specifically, individuals covered by the mandate have an unconditional legal duty to obtain insurance, such that an uninsured individual's payment of the penalty—unlike payment of a "tax"—does not legally excuse his non-compliance with the mandate, let alone constitute legal satisfaction of his federal duty to obtain insurance.

**a.** The ACA mandates that every "applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month." 26 U.S.C.A. § 5000A(a);

*see also id.* § 5000A(f) (defining minimum essential coverage). For purposes of this legal "[r]equirement to maintain minimum essential coverage" (*id.* § 5000A(a)), every "individual" in this country is an "applicable individual," with three narrow exceptions: (1) individuals covered by specified "[r]eligious exemptions"; (2) "[i]ndividuals not lawfully present"; and (3) "[i]ncarcerated individuals." *Id.* § 5000A(d).

The individual mandate in § 5000A(a) is enforced through a "penalty" for non-compliance, which is imposed on most "taxpayer[s]" who "fail[] to meet the requirement" to obtain insurance. *Id.* § 5000A(b)(1); *see also id.* § 5000A(c) (providing the amount of the penalty). Five classes of individuals are subject to the mandate yet exempt from the penalty: (1) individuals who, under a statutory formula, "cannot afford coverage"; (2) "[t]axpayers with income below [a specified] filing threshold"; (3) "[m]embers of [defined] Indian tribes"; (4) individuals uninsured during certain "short coverage gaps"; and (5) individuals "determined by the Secretary of Health and Human Services … to have suffered a hardship." *Id.* § 5000A(e).

With certain limitations, the penalty for non-compliance with the mandate "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68" of the Tax Code. *Id.* § 5000A(g)(1). Such penalties, in turn, are "assessed and collected in the same manner as taxes." 26 U.S.C. § 6671(a). The mandate's penalty, however, is not *itself* a penalty located in Chapter 68 of the Code: Congress instead placed it in Chapter 48 of the Code. *See* 26 U.S.C.A. § 5000A(b). That is noteworthy, because "penalties … provided by"

Chapter 68 are statutorily "deemed" to be "tax[es]" for *all* Tax Code purposes, including the AIA. 26 U.S.C. §§ 6665(a)(2), 6671(a). There is no analogous "deemer" provision in Chapter 48 or the ACA.

**b.** Every relevant aspect of the ACA's text, structure, and context confirms that the mandate in § 5000A(a) is a free-standing legal duty to obtain insurance—*i.e.*, compliance with the mandate is neither satisfied nor excused by paying the penalty in § 5000A(b) for failure to obtain insurance, as would be the case if the mandate merely described the voluntary predicate for avoiding a tax on being uninsured.

*First*, the mandate in § 5000A(a) is an *unconditional* "[r]equirement" with which covered individuals "shall" comply. Likewise, the monetary sanction in § 5000A(b) is imposed, not as a *conditional* "tax" on individuals who *lawfully choose* to remain uninsured, but as a "penalty" on those who *unlawfully* "fail[] to meet the requirement" to obtain insurance.

*Second*, § 5000A(d) exempts three classes of individuals from the mandate, but § 5000A(e) exempts five other classes of individuals *solely* from the penalty. *Supra* at 2. The only conceivable reason to create two separate sets of exemptions is that Congress intended and expected that individuals who are exempt from the penalty but subject to the mandate must nonetheless comply, even absent a sanction for non-compliance.

*Third*, Congress decided *not* to structure § 5000A as a provision that affords individuals the *voluntary choice* whether to obtain insurance or pay a tax. For

example, the statutory predecessors to § 5000A that were initially proposed and passed in the House were structured that way. *See* Private Petrs. Severability Br. 7-8. Likewise, immediately following the "individual responsibility" mandate in the ACA is the employer "responsibility" assessment, which gives large employers the choice whether to offer insurance to their employees or pay a monetary exaction. *See id.* 21; *see also* 26 U.S.C.A. § 4980H. Yet Congress eschewed those structures in § 5000A, instead adopting an unconditional "requirement" enforced through a "penalty" for non-compliance.

*Fourth*, Congress' decision to impose a legal "requirement" to obtain insurance, rather than a "tax" on the uninsured, is easily explained on grounds of both substantive policy and strategic politics. As for policy, having deemed it "essential to creating effective health insurance markets" to "broaden the health insurance risk pool," 42 U.S.C.A. § 18091(a)(2)(I), Congress was well aware that more people would likely obtain insurance if doing so was a formal legal requirement, rather than merely the voluntary predicate for avoiding a tax. CBO, for example, has explained that "[m]any individuals … would comply with a mandate, even in the absence of penalties, because they believe in abiding by the nation's laws."[1] As for politics, President Obama had pledged during the campaign not to raise taxes on families earning less than $250,000 per year. *See* Private Petrs. Severability Br. 8. Structuring

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[1] CBO, *Key Issues in Analyzing Major Health Insurance Proposals*, at 53 (Dec. 2008), http://www.cbo.gov/ftpdocs/99xx/doc9924/12-18-KeyIssues.pdf.

§ 5000A as a legal requirement enforced through a penalty allowed the President to claim that the mandate, which applies to individuals in almost every such family, was "absolutely not a tax." Pet.App. 408a n.5.

*Finally*, having structured § 5000A(a)'s mandate as a legal requirement rather than a voluntary predicate for avoiding a tax, Congress consistently refrained from treating § 5000A(b)'s sanction for non-compliance like a tax. Specifically, as the courts below explained, not only does the ACA repeatedly characterize the sanction as a "penalty" rather than a "tax," *id.* 159a-161a, but the Act justifies the mandate solely under Congress' commerce power, *id.* 163a-164a, while designating numerous monetary exactions on lawful conduct as "taxes" intended to generate revenue, *id.* 162a-163a, 416a-418a.

**2.** Private Respondents NFIB, Ahlburg, and Brown, along with 26 States, brought this action challenging the ACA's facial validity. *Id.* 2a. As relevant here, they argued that the Act's individual mandate exceeds Congress' Article I authority. *Id.* 3a.

In the district court, the Government argued that the AIA barred a pre-enforcement challenge to the mandate, but the court rejected that argument. *Id.* 278a n.4, 401a-430a. On the merits, the court concluded that the mandate is unconstitutional. *Id.* 350a. Although Respondents had requested both declaratory and injunctive relief against the mandate, JA 124, the court concluded that declaratory relief was sufficient, Pet.App. 364a, 367a.

In the Eleventh Circuit, the Government declined to appeal the ruling that the AIA does not bar this suit. Govt. Cert. Pet. 32. To the contrary, in two parallel challenges, the Government formally adopted the position that the AIA is inapplicable. *Id.* 32-33. On the merits, the Eleventh Circuit affirmed the district court's declaratory judgment to the extent that it held that the mandate is unconstitutional. Pet.App. 188a.

## SUMMARY OF ARGUMENT

**I.** The AIA is clearly inapplicable here. Whether one focuses (correctly) on the ACA's mandate "[r]equir[ing]" individuals to obtain insurance, 26 U.S.C.A. § 5000A(a), or (incorrectly) on the ACA's "penalty" for failure to comply with the mandate, *id.* § 5000A(b), this is not a "suit for the *purpose* of restraining the assessment or collection of any *tax*." 26 U.S.C. § 7421(a) (emphases added).

*First*, the threshold and dispositive reason that the AIA does not apply is that Private Respondents' "purpose" is to invalidate the ACA's mandate that they must purchase costly insurance from private companies, not to restrain "assessment or collection" of the "penalty" for non-compliance. The individual mandate is a substantive legal requirement that cannot possibly be characterized as a "tax" and that exists independently of the ACA's non-compliance penalty. *Amicus* Long thus errs by fixating on whether that penalty should be treated as a "tax" under the AIA. As law-abiding citizens, Private Respondents are not challenging the penalty, but rather the antecedent legal duty to purchase insurance, with which they must comply unless the

mandate is invalidated. It is therefore legally irrelevant that the "necessary effect" of eliminating their duty to comply with the mandate will be to invalidate the penalty for non-compliance. Indeed, accepting *Amicus*'s contrary interpretation of the AIA would have the perverse consequence of compelling law-abiding citizens to break the law in order to challenge it. Specifically, because the AIA requires that challenges to "taxes" be brought only in post-enforcement "refund" actions—rather than pre-enforcement suits for equitable relief—applying the AIA to a substantive legal requirement enforced through the Tax Code would force putative plaintiffs to violate the requirement just to incur the "tax" that would be the prerequisite to suit. More concretely, here, Private Respondents would have to violate the mandate in 2014 by refraining from purchasing insurance, precisely contrary to Congress' intent.

*Second*, not even the mandate's "penalty" is a "tax." This Court has never deviated, under the AIA or in any other context, from the traditional and intuitive definition of a non-tax "penalty" as a monetary sanction imposed as punishment for an unlawful act or omission. The mandate's penalty clearly fits that definition, and Congress clearly intended to adhere to it. Yet *Amicus* ignores it completely, arguing instead that any monetary exaction contained in the Tax Code and enforced by the IRS is a "tax." That expansive definition, however, is contradicted by this Court's precedent and the Tax Code itself, both of which make abundantly clear that "taxes" and "penalties" are legally distinct. *Amicus* likewise errs in arguing that, because Congress instructed the IRS to assess

and collect the mandate's "penalty" under the same authority, and in the same manner, as a "tax," *see* 26 U.S.C. § 6201(a); 26 U.S.C.A. § 5000A(g)(1), federal courts should treat the mandate's "penalty" as a "tax" under the AIA. Just as there is an obvious and fundamental difference between "taxes" and "penalties," there is an obvious and fundamental difference between the Executive Branch's "assessment and collection" of an exaction and the Judicial Branch's review of that exaction's "assessment and collection." That Congress instructed the IRS to treat the mandate's "penalty" like a "tax" for enforcement purposes does not remotely mean that Congress instructed federal courts to treat the "penalty" like a "tax" for purposes of the AIA's bar on pre-enforcement review.

**II.** In any event, this Court need not decide whether the AIA applies, because the Solicitor General has expressly agreed that the AIA does not bar this suit. That concession can and should be accepted, because the AIA is not jurisdictional under this Court's recent cases establishing a principled framework for determining jurisdictional status.

*First*, Congress did not clearly rank the AIA as jurisdictional. Unlike related statutes, the AIA does not speak to the power of the courts, is not located in the jurisdictional section of the U.S. Code, and is a mere claim-processing rule that governs the timing of federal-tax challenges that indisputably fall within the subject-matter jurisdiction of federal courts.

*Second*, despite some less-than-meticulous language in its older cases, this Court has consistently treated the AIA as non-jurisdictional

whenever it actually mattered. It has accepted an express waiver of the AIA by the Government, and it has created an equitable exception to the AIA for legally indefensible taxes, neither of which would have been permissible if the AIA were truly jurisdictional. Indeed, given that this Court has previously accepted an express waiver by the Solicitor General of the putatively jurisdictional AIA, the Solicitor General's express assertion that the AIA is inapplicable in this case is sufficient basis not to apply it here, *whether or not* it is jurisdictional.

## ARGUMENT

### I. THE AIA DOES NOT APPLY TO THIS CHALLENGE TO THE INDIVIDUAL INSURANCE MANDATE

The AIA bars "suit[s] for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). *Amicus* Long is correct that "[this] text … 'could scarcely be more explicit.'" *See* Long AIA Br. 22. But it is *Amicus* who advocates an interpretation of the AIA that is irreconcilable with its "explicit" language. Textually, there are two independent reasons why the AIA's restriction on pre-enforcement challenges to the federal assessment and collection of taxes is clearly inapplicable to this pre-enforcement challenge to a federal requirement to obtain health insurance. *First*, the "purpose" of this suit is to invalidate the ACA's individual mandate, which is a *substantive legal requirement* to purchase costly insurance from private companies, not a "tax" that is paid to the federal treasury. *See* 26 U.S.C. § 7421(a). *Second*, even focusing (erroneously) on the ACA's monetary

sanction rather than the mandate itself, that sanction also is not a "tax," but instead a *penalty* for the failure to comply with the statutory mandate. *See id.* *Amicus* seeks to evade these points by essentially amending the AIA's clear language to bar any "suit ~~for~~ [*with*] the ~~purpose~~ [*necessary effect*] of restraining the assessment or collection of any ~~tax~~ [*monetary sum that is assessed and collected under the same authority, or in the same manner, as a tax*]." *Contra* 26 U.S.C. § 7421(a). Because such extensive revision is not permissible interpretation, *Amicus*'s position must be rejected.

### A. Under The AIA, The "Purpose" Of This Suit Is To Invalidate The Mandate, Not To "Restrain" A "Tax"

The AIA is obviously inapplicable where, as here, plaintiffs challenge a federal statute that renders unlawful their substantive conduct unrelated to the tax-enforcement process. The "purpose" of Private Respondents' suit is to invalidate the legal requirement that they must purchase costly insurance. Whether the monetary sanction for failure to comply with that mandate constitutes a "tax" for AIA purposes is entirely irrelevant. Respondents are attacking the insurance mandate that Congress intentionally created as a free-standing legal duty, not preemptively defending against the sanction that would be imposed for any non-compliance with that binding obligation. Indeed, as law-abiding citizens, they intend to comply with the mandate so long as it remains on the books, which underscores that "restraining" enforcement of the sanction is not the "purpose" of their suit, but will merely be an incidental effect if

they successfully invalidate the underlying mandate. Accordingly, construing the AIA to bar pre-enforcement challenges to substantive legal requirements, simply because those requirements are enforced through the Tax Code, would perversely compel individuals to break the law in order to challenge the law. The AIA does no such thing.

### 1. The Mandate Itself Is A Substantive Legal Requirement To Obtain Insurance

With exceptions not relevant here, the AIA bars "suit[s] for the *purpose* of restraining the assessment or collection of any *tax*." 26 U.S.C. § 7421(a) (emphases added). That prohibition primarily serves "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference," by "requir[ing] that the legal right to the disputed sums be determined in a suit for refund." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-37 (1974).

This suit, however, is not about "disputed sums" that Private Respondents allegedly must pay the Government. Rather, Private Respondents are challenging Congress' authority to mandate that they purchase health insurance from private businesses. Specifically, they claim that Congress exceeded its enumerated powers by adopting a free-standing substantive "[r]equirement" that every "applicable individual shall … ensure that the individual … is covered under minimum essential coverage." 26 U.S.C.A § 5000A(a).

Private Respondents' "purpose" in challenging that mandate, of course, is to eliminate their *legal duty to purchase costly insurance*. *E.g.*, JA 152 ("I do

not wish to have [qualifying health] insurance and I do not believe that the costs associated with health insurance are a wise or acceptable use of my financial resources."); *accord id.* 141, 143-44, 155 (similar). And that substantive "[r]equirement" obviously is not *itself* a "tax" shielded by the AIA directly or through any conceivable statutory cross-reference. *See* 26 U.S.C. § 7421(a); 26 U.S.C.A. § 5000A. Tellingly, neither *Amicus* nor anyone else has argued otherwise, let alone cited even a single non-ACA case holding that the AIA bars a suit brought for the purpose of invalidating a legal requirement that proscribes substantive conduct unrelated to the tax-enforcement process.

This simple analysis, standing alone, establishes that the AIA does not apply to this suit. *See Seven-Sky v. Holder*, 661 F.3d 1, 8-10, 12-13 (D.C. Cir. 2011) (relying in part on this reasoning when holding the AIA inapplicable to the mandate); *cf. Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 552, 554 (6th Cir. 2011) (stressing that the mandate is a distinct "substantive provision" when analyzing whether it is a "tax" for constitutional purposes, which "inquiry" is "a kissing cousin" to the "statutory question[] … under the [AIA]"); Pet.App. 161a (similar constitutional analysis by the Eleventh Circuit).

### 2. In A Suit Challenging The Mandate, The Monetary Sanction For Non-Compliance Is Irrelevant

Eschewing the analysis above, *Amicus* fixates on the "tax"-related means that Congress adopted to enforce compliance with the mandate. In particular, because Congress placed the mandate's substantive

"[r]equirement" in the Tax Code, 26 U.S.C.A. § 5000A(a), then imposed a "penalty" on certain "taxpayer[s] who … fail[] to meet the requirement," *id.* § 5000A(b)(1), and finally directed the IRS to "assess[] and collect[]" that "penalty" "in the same manner" as a "tax," *id.* § 5000A(g)(1); 26 U.S.C. § 6671(a), *Amicus* devotes most of his analysis to an intricate parsing of whether that "penalty" should be *treated like a* "tax" for AIA purposes. *See* Long AIA Br. 23-43; *see also Seven-Sky*, 661 F.3d at 29-40 (Kavanaugh, J., dissenting); *Liberty Univ., Inc. v. Geithner*, No. 10-2347, --- F.3d ----, 2011 WL 3962915, at *5-11 (4th Cir. Sept. 8, 2011).

But that whole line of inquiry is fundamentally misdirected. Regardless of whether the "penalty" is a "tax" under the AIA—either directly by its text or indirectly because it is "assessed and collected" as, or like, a "tax"—the "purpose" of this suit is not to restrain the enforcement of that monetary sanction, but to eliminate the *antecedent legal duty* to comply with the costly insurance mandate itself. Indeed, no such "penalty" for non-compliance with the mandate has been, or will likely ever be, incurred by Private Respondents, because they intend to comply if the mandate is not invalidated.

**a.** Under the AIA, there is a textual and common-sense distinction between challenging a substantive legal requirement and challenging a monetary non-compliance sanction that is deemed a "tax." For example, the Tax Code imposes a "penalty" for violations of "EPA regulations" governing diesel fuels, 26 U.S.C. § 6720A(a), and that penalty is unambiguously "deemed" a "tax" for purposes of the AIA and the rest of the Code, *id.* §

6671(a). But, while the AIA therefore bars a pre-enforcement challenge to the IRS' imposition of the "penalty" on a non-compliant diesel-fuel seller, no one could possibly think that the AIA also bars a pre-enforcement challenge to the validity of the diesel-fuel regulations themselves. The reason, of course, is that the "purpose" of the latter suit is to attack the substantive regulations, not to preemptively defend against the monetary penalty that would be incurred by non-compliance.

Here, likewise, Private Respondents are not preemptively defending against the "penalty" that § 5000A(b) would impose *if* they were to violate the mandate, but instead are attacking § 5000A(a)'s *unconditional* legal "[r]equirement" to purchase insurance in the first place. In fact, Private Respondents are challenging the mandate rather than the penalty precisely because they are *law-abiding citizens* who intend to comply with the mandate unless it is invalidated. As the district court found, they "are needing to take investigatory steps and make financial arrangements now *to ensure compliance* [in 2014]." Pet.App. 292a (emphasis added); *accord* JA 153 ("I must investigate what impact the costs of compliance with the individual insurance mandate will have on my priorities, and especially whether, in light of those costs, my independent business can continue to be a viable going concern, or whether to comply I would have to close my business and seek employment that provides qualifying health insurance coverage as a benefit."); *id.* 142, 144-45, 156 (similar).

Indeed, Congress acknowledged that "[m]any individuals … would comply with a mandate, even in

the absence of penalties, because they believe in abiding by the nation's laws." *Supra* at 4. That finding readily confirms the common-sense proposition that the interest of law-abiding citizens in challenging burdensome legal requirements exists independently of the sanction that would be imposed for non-compliance. While the Government's interest in enforcing that sanction ensures a justiciable controversy, *see Seven-Sky*, 661 F.3d at 13, Private Respondents' interest is focused on eliminating the legal duty imposed by the mandate itself.

This challenge to the mandate is thus critically different from the tax challenges that are barred by the AIA. There, unlike here, a federal law merely attaches adverse tax consequences to conduct rather than flatly prohibiting it. In such cases, the "obvious purpose" in bringing a pre-enforcement challenge is necessarily to "restrain the taxation," because the plaintiff is *already free* to engage in the conduct if it is willing to bear the tax consequences. *See, e.g.*, *Alexander v. 'Americans United' Inc.*, 416 U.S. 752, 754-755, 760-61 (1974) (barring suit by nonprofit that lost its tax-exempt status because it had engaged in lobbying). But that is not true where, as here, a federal law proscribes conduct through an absolute ban, which happens to be enforced through a monetary exaction in the Tax Code. In such cases, as the D.C. Circuit held, the "purpose of enjoining [the] regulatory command" is for the plaintiff to avoid the "legal obligation," wholly "irrespective of the means Congress cho[se]" to sanction non-compliance. *See Seven-Sky*, 661 F.3d at 8-9.

**b.** *Amicus* and the Government have three rejoinders. They are all meritless.

*First*, *Amicus* argues that Private Respondents in fact have challenged the penalty as well as the mandate, because their complaint referenced the penalty and also sought an injunction against "enforcement" of the mandate, which will occur only through the penalty. *See* Long AIA Br. 44-45; *see also Seven-Sky*, 661 F.3d at 41 n.29 (Kavanaugh, J., dissenting). This argument is doubly wrong.

Dispositively, even if the AIA would have barred an *injunction* against enforcement of the *penalty*, no such remedy is at issue here. Respondents specifically requested a *declaration* that the *mandate* is unconstitutional, *see* JA 124, and that is the *only* relief they obtained, *see* Pet.App. 364a, 367a; *see also id.* 188a. The AIA thus poses no bar to the judgment under review in this Court.

More fundamentally, even if an injunction against enforcement of the penalty had been obtained, the *purpose* of this suit would still be the invalidation of the mandate. The fact that this purpose would be *effectuated* through an injunction against the Secretary of the Treasury does not alter that purpose; it merely reflects the practical reality that the named defendant in a challenge to a federal law is the officer designated to enforce that law. Any injunction against the penalty's enforcement thus would be at most an *effect* of accomplishing this suit's purpose to invalidate the mandate.

*Second*, *Amicus* asserts that, under *Bob Jones* and *'Americans United'*, it is "circular" to claim that the *purpose* of this suit is to invalidate § 5000A(a)'s mandate, because the inevitable *effect* would be to invalidate § 5000A(b)'s penalty. *See* Long AIA Br.

45-48; *see also* Govt. Cert. Resp. 18 (similarly interpreting *Bob Jones* to bar any suit that "would necessarily preclude" tax enforcement); *Seven-Sky*, 661 F.3d at 41-43 (Kavanaugh, J., dissenting); *Liberty Univ.*, 2011 WL 3962915, at *14 n.14. But *Bob Jones* and *'Americans United'* held only that the "purpose" of the suits at issue was to restrain the collection of "taxes" on third parties, in order to avoid the adverse financial consequences to the plaintiffs flowing from those third-party taxes. The cases nowhere suggested that the AIA also reaches suits with the non-tax-related purpose of eliminating a legal requirement, whenever such suits merely will have the "effect" of restraining enforcement of a "tax" triggered by noncompliance with the requirement.

*Bob Jones* and *'Americans United'* were not challenges to substantive legal duties, but rather were straightforward challenges to the IRS' revocation of the *tax-exempt status* of two non-profit organizations. *Bob Jones*, 416 U.S. at 726-27. To evade the AIA's bar, the organizations asserted that their "purpose" in seeking pre-enforcement relief was to avoid the inevitable reduction in charitable contributions that would occur while they were contesting the loss of their tax-exempt status in a post-enforcement refund action. *Id.* at 738-39; *'Americans United'*, 416 U.S. at 760-61. As this Court observed, however, the decrease in the organizations' charitable receipts was the consequence of the loss of "tax deductible" status for "contributions" by their "donors," which meant that the organizations were simply "seek[ing] to lower the taxes of those other than [themselves]." *Bob Jones*, 416 U.S. at 739. Indeed, that tax-reducing "purpose"

was "obvious," because their tax-exempt status had no consequences *other* than on the amount of taxes paid by them and their donors: the organizations indisputably "would not be interested in obtaining the declaratory and injunctive relief requested if that relief did not effectively restrain the taxation of [their] contributors." *'Americans United'*, 416 U.S. at 760-61.

Accordingly, the reason that the organizations' arguments were "circular" was that their professed "goal" of preserving the flow of donations "c[ould] be accomplished only by restraining the assessment and collection of [their donors'] tax[es]." *Id.* at 761. That circular connection was the fatal way in which the suit "would necessarily preclude the collection of … taxes." *Bob Jones*, 416 U.S. at 732; *see also Seven-Sky*, 661 F.3d at 10 (explaining that "tax-exempt status [is] *inextricably linked* to the assessment and collection of taxes"). That connection, however, completely distinguishes *Bob Jones* and *'Americans United'* from this case. Private Respondents' suit does not "necessarily preclude" tax enforcement in the way that those cases did, because Respondents' non-tax "purpose" of avoiding the costly mandate to purchase insurance is not "circular": their financial injury lacks any connection to the non-compliance penalty and instead *flows directly* from compliance with the mandate itself.

By construing *Bob Jones* and *'Americans United'* more expansively, *Amicus* and the Government are essentially interpreting those cases to have replaced the AIA's "purpose" element with an "effect" element, thereby rewriting the statute to read: "no suit [*with the necessary effect*] of restraining the assessment or

collection of any tax." Yet *Bob Jones* emphasized that the suit there fell "within the literal scope … of the [AIA]," 416 U.S. at 732, 739, and, unlike in '*Americans United*', it is decidedly not "a[] reasonable construction of the statutory term 'purpose[]'" to simply substitute "necessary effect," *compare* 416 U.S. at 760. The legal distinction between "purpose" and "effect" is "well established in a variety of contexts," *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977), and Congress thus has enacted "innumerable statutes" treating the two separately, *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 331-32 (2000), including in the Tax Code, *e.g.*, 26 U.S.C. § 302(b)(2)(D) ("any redemption made pursuant to a plan the purpose or effect of which is …"). Indeed, replacing the AIA's "purpose" requirement with a "necessary effect" test would cause absurd results. For example, as previously noted, a successful APA challenge to the EPA's diesel-fuel regulations would "necessarily preclude" collection of the "penalty" for violating those regulations, which is deemed a "tax" under the AIA. 26 U.S.C. §§ 6671, 6720A(a).

In sum, *Bob Jones* and *'Americans United'* simply held that the AIA's plain text bars suits brought for the "purpose of" restraining the "collection of any tax" paid by third parties. That straightforward interpretation of the AIA in no way supports amending the statute's plain text to reach suits brought for the purpose of invalidating underlying legal duties, just because their *effect* is to restrain Treasury collections.

*Finally*, the Government argues that the mandate in § 5000A(a) does not actually "create[] an

independent legal obligation," but rather "serves only as the predicate for [avoiding] tax consequences imposed by the rest of the section." *See* Govt. Mandate Br. 60-62. Tellingly, not even *Amicus* is willing to embrace that remarkable position. *Cf.* Long AIA Br. 48 ("As a *practical* matter, taxpayers could choose whether to obtain minimum coverage" "[a]bsent the penalty provision." (emphasis added)). His reluctance is understandable, for the Government's position is literally lawless.

The mandate imposes an *unconditional* "[r]equirement" that applicable individuals "shall … ensure" that they are "covered under minimum essential coverage." 26 U.S.C.A. § 5000A(a). Nowhere does it say that individuals need not comply so long as they pay the "penalty." To the contrary, the "penalty" is imposed on "taxpayer[s]" who "fail[] to meet the requirement" to obtain insurance. *Id.* § 5000A(b)(1). It is startling that the federal Government asserts that individuals can freely ignore a "requirement" imposed by federal law, so long as they pay the statutory "penalty."

The Government responds that the mandate "serves no other purpose in the statutory scheme" than describing "the predicate for [avoiding] tax consequences." *See* Govt. Mandate Br. 60. That is false. Not only did imposing a legal mandate allow the President to keep his pledge *not* to raise "taxes," *supra* at 4-5, but, more substantively, Congress knew that there are countless uninsured individuals who would incur the monetary "penalty" if given a *choice*, but who will "comply with [the] mandate" simply "because they believe in abiding by the nation's laws." *Supra* at 4; *see also United States v. Norton*,

97 U.S. 164, 168 (1877) ("It is a presumption of law that … citizens obey the law and do their duty.").

Moreover, if Congress had intended § 5000A(a) to be a mere predicate for avoiding a "tax" rather than an independent legal duty, then Congress would have retained the structure of the initial House versions of § 5000A, which afforded individuals a choice whether to purchase insurance or pay a "tax," particularly because Congress used that same structure in the final version of the employer "responsibility" assessment in § 4980H, which likewise gives large employers the choice whether to offer insurance to their employees or pay a monetary exaction. *Supra* at 3-4; *see also Russello v. United States*, 464 U.S. 16, 23-24 (1983) (drawing inferences of intent from Congress' decisions to "delete[] [language] prior to enactment" and to "include[] particular language in one section of a statute but omit[] it in another"). Indeed, there is dispositive proof that Congress intended the mandate to be legally distinct from the penalty: it created *separate* sets of exemptions for the mandate and the distinct penalty, such that *some* individuals are subject to the mandate but not the penalty. *Supra* at 2.

Accordingly, this case is nothing like *New York v. United States*, 505 U.S. 144 (1992). There, a federal law announced that "each State shall be responsible for providing … for the disposal of … low-level radioactive waste," but then set forth a detailed "set[] of incentives" for States to do that very thing. *See id.* at 169-70 In that specific context, the law "could plausibly be understood *either* as a mandate [for States] to regulate *or* as a series of *incentives*," and so this Court adopted the latter "interpretation,"

particularly given the need for "certain[ty]" before regulating sovereign states. *See id.* (emphases added). Here, in stark contrast, "[c]onstr[uing] [the ACA] as a whole" (*id.* at 170) underscores that § 5000A(a) *unambiguously* imposes an independent legal "[r]equirement" to obtain insurance.

### 3. Applying The AIA To Substantive Legal Requirements Would Have Perverse Consequences For The Rule Of Law

Cognizant of the serious Due Process concerns that typically would be presented if the AIA "entirely deprive[d] [a party] of any opportunity to obtain review of its claims," this Court has held that "Congress intended the [AIA] to bar a suit only in situations in which Congress ha[s] provided the aggrieved party with an alternative legal avenue by which to contest the legality of a particular tax." *See South Carolina v. Regan*, 465 U.S. 367, 373, 375, 381 (1984); *see also Bob Jones*, 416 U.S. at 746-47 & n.21. Yet construing the AIA to bar pre-enforcement challenges to substantive legal requirements merely because they are enforced through the Tax Code would conflict with *South Carolina*'s holding, because there generally would not be any "alternative *legal way* to challenge" such requirements. *See* 465 U.S. at 373 (emphasis added). Specifically, under *Amicus*'s position that the AIA requires that challenges to the mandate must be brought in a refund action, Private Respondents would be forced *to violate the legal requirement* imposed by the mandate in order to incur the *non-compliance* sanction that supposedly is the necessary prerequisite to suit.

This Court "should not lightly attribute to Congress" the perverse intent of conditioning access to judicial review on *becoming a law-breaker*. *See id.* at 381. Indeed, this Court has long recognized that an individual should not be forced to "expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Yet, under the approach advanced by *Amicus* and the Government, a pre-enforcement challenge to a substantive legal requirement would appear to be barred so long as at least one non-compliance sanction was statutorily treated as a "tax" for AIA purposes, *even if* there existed additional *criminal* or *civil non-tax* penalties for non-compliance. And regardless, even assuming their interpretation somehow could be limited to substantive requirements enforced *solely* through AIA-protected "taxes," that still would require Private Respondents to "alter[] [their] legal status" as law-abiding citizens, with the attendant "stigma" that rightly attaches to scoff-laws. *Cf. Paul v. Davis*, 424 U.S. 693, 707-09 (1976) (recognizing that such circumstances present Due Process concerns).

Applying the AIA to challenges against legal requirements would not only be fundamentally unfair to citizens, but would also perversely undermine *Congress'* intent by forcing prospective plaintiffs *to engage in the very conduct* that Congress deemed harmful enough to ban. Here, for example, Congress thought it was "essential to creating effective health insurance markets" to "require[]" that virtually every American purchase insurance. *See* 42 U.S.C.A. § 18091(a)(2)(I). Yet if

putative plaintiffs could challenge the mandate only in a refund action for the penalty, then they would be compelled to remain uninsured in order to trigger that penalty, directly contrary to Congress' goal. Similarly, returning to an earlier example, Congress presumably prefers that would-be challengers of the EPA's diesel-fuel regulations continue selling compliant fuel while bringing a conventional APA challenge, rather than being compelled to sell non-compliant fuel just to incur the penalty-deemed-tax as a prerequisite to suit under the AIA. *Supra* at 13-14. Such perverse results would be the direct opposite of the normal effect of the AIA, which furthers Congress' goal of "expeditious[]" *adherence to the law*, by requiring that citizens comply first and sue second. *See Bob Jones*, 416 U.S. at 736.

Furthermore, construing the AIA to cause all these perverse consequences is particularly unwarranted in the context of the ACA's mandate, because doing so would not even ensure the professed goal of preventing judicial interference with the IRS' enforcement of the mandate's penalty. After all, numerous law-abiding individuals are subject to the mandate's requirement but *exempt from its penalty*, *supra* at 2, and the AIA would not bar them from bringing an immediate pre-enforcement challenge to the mandate, since they have no "alternative remedy" given the unavailability of a refund action. *South Carolina*, 465 U.S. at 378; *but see* Long AIA Br. 48 (overlooking *South Carolina* when contending that even penalty-exempt individuals are barred by the AIA). Admittedly, there is a question whether all such individuals would have standing to challenge

the mandate absent any statutory sanction. *Seven-Sky*, 661 F.3d at 12-13. Regardless, however, collateral consequences from failure to comply with the mandate undoubtedly will support standing to challenge the mandate, *see Spencer v. Kemna*, 523 U.S. 1, 7-8 (1998), and some individuals subject to the mandate but exempt from the penalty will clearly suffer such consequences.[2]

Accordingly, rather than preventing pre-enforcement review of the mandate altogether, applying the AIA here would mean that pre-enforcement challenges could be brought only by individuals who are *least directly injured*. As the D.C. Circuit correctly concluded, courts should "be quite reluctant to endorse such a strange scheme for judicial review." *Seven-Sky*, 661 F.3d at 13.

In sum, this Court need not and should not consider the mandate's sanction when deciding whether the AIA bars Private Respondents' challenge to the mandate. Instead, this Court should focus on the mandate itself, which imposes an unconditional legal duty to obtain insurance that is not even arguably protected from pre-enforcement judicial review by the AIA.

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[2] *E.g.*, 28 C.F.R. § 2.204(a)(5)(i) (condition of federal supervised release that "[t]he releasee shall not violate any law"); *see also, e.g.*, 8 C.F.R. § 316.10(b)(3)(iii) (whether applicant for naturalization has "[c]ommitted unlawful acts" may "adversely reflect upon the applicant's moral character"); *United States v. Rubashkin*, 655 F.3d 849, 855 (8th Cir. 2011) (describing an indictment for fraud premised on the representation that a corporation was not "in violation of any law").

### B. Under The AIA, The "Penalty" For Non-Compliance With The Mandate Is Not A "Tax" And Should Not Be Treated As A "Tax"

Even assuming that the AIA barred "suits [*with*] the [*necessary effect*] of restraining the assessment or collection of any tax," it still would not apply here, because this suit will have the effect of restraining only a "penalty," not "any tax." The classic definition of a non-tax "penalty" is an exaction imposed for failure to comply with a legal requirement. The mandate's sanction clearly falls within that "penalty" definition, and Congress clearly intended to adhere thereto. Nor does any other provision of the Tax Code somehow subject the mandate's "penalty" to the AIA's bar on pre-enforcement review of "any tax."

#### 1. A Sanction Imposed For An Unlawful Act Or Omission Is Not A Tax

The mandate's sanction is squarely covered by the core definition of a non-tax "penalty." Yet *Amicus* ignores that definition, urging an expansive definition that is unprecedented and untenable.

**a.** In a variety of contexts, this Court has been required to determine whether a monetary sanction is a "tax" or a "penalty." One constant in that jurisprudence is the basic principle that, "if the concept of penalty means anything, it means punishment for an unlawful act or omission." *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996). That fundamental distinction between "taxes" and "penalties" is entirely consistent with the ordinary understanding of those terms—*e.g.*, a $5-per-pack "tax" on lawful cigarettes cannot possibly be equated with a legal

prohibition on cigarettes enforced through a $5-per-pack "penalty." *See United States v. La Franca*, 282 U.S. 568, 572 (1931) ("The two words are not interchangeable.") To be sure, there may be room for debate over precisely when an "enforced contribution to provide for the support of government" is a "tax" *if* the exaction is not formally imposed as a sanction for an unlawful act. *See Reorganized CF&I Fabricators*, 518 U.S. at 224. But what is beyond dispute is that "an exaction imposed by statute as punishment for an unlawful act" is necessarily a "penalty." *Id.*

Indeed, in the D.C. Circuit, the Government *admitted* that "the taxing power may not be used to impose 'punishment for an unlawful act.'" *See* Govt. *Seven-Sky* C.A. Br. 58 (quoting *LaFranca*, 282 U.S. at 572). And that was consistent with its earlier concession in *Child Labor Tax Case*, 259 U.S. 20 (1922), which remains perhaps the clearest formulation of this core distinction: where an exaction "is imposed" for "the privilege of doing" a lawful act, that is "an excise tax," but "where the statute prohibits the doing of an act and as a sanction imposes a pecuniary punishment for violating the [statute], then it is a penalty, and not a tax at all." *Id.* at 21-22.

This Court has applied that bedrock distinction in its AIA cases. Even where a monetary exaction was in the form of a "tax"—*i.e.*, it was *not* formally triggered as a sanction for an unlawful act—this Court still has inquired whether the exaction is *effectively* "a penalty in the form of a tax," an inquiry undertaken precisely because the AIA reaches only "taxes," not "penalties." *Compare Graham v. Dupont*, 262 U.S. 234, 257-58 (1923) (citing several

cases holding that formal "taxes" were "penalties" for AIA purposes), *with Bailey v. George*, 259 U.S. 16, 19-20 (1922) (holding that a formal "tax" was subject to the AIA, despite the fact that it was an unconstitutional "penalty" under *Child Labor Tax Case*). More importantly, this Court has *never* suggested, let alone held, that a monetary exaction that *is* formally imposed as a sanction for an unlawful act can somehow be a "tax." Accordingly, neither *Amicus* nor anyone else has cited even a single non-ACA case holding that a "penalty" for a non-tax-related substantive legal violation is directly covered as a "tax" under the AIA's plain text.[3]

**b.** *Amicus* has two responses to the foregoing caselaw. They are both meritless.

*First*, like the Fourth Circuit, *Amicus* asserts that the word "tax" in the AIA broadly encompasses any monetary exaction "codified in the [Tax] Code" and enforced "by revenue officers." *See* Long AIA Br. 37-38; *see also Liberty Univ.*, 2011 WL 3962915, at *5-6 ("any exaction imposed by the [Tax] Code"). But that sweeping definition is contradicted, not just by the precedent above, but by the Tax Code itself.

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[3] Unable to cite any such decision by this Court, the closest anyone has come is *Mobile Republican Assembly v. United States*, 353 F.3d 1357 (11th Cir. 2003), which applied the AIA to "penalties imposed for violating the conditions of [a certain] tax status." *Id.* at 1362 & n.5. Yet even that case expressly distinguished such tax-law-related penalties from "penalties imposed for substantive violations of laws not directly related to the tax code." *Id.* Thus, whether or not *Mobile Republican* was correct about tax-law-related penalties, it provides no support for the non-tax-law-related penalty imposed by the ACA, which is triggered by the failure to obtain adequate health insurance.

At the outset, *Amicus*'s proposed definition is irreconcilable with various provisions of the Tax Code that unambiguously treat "penalties" as distinct from "taxes." For example, 26 U.S.C. § 7422(a), which immediately follows the AIA in the Tax Code, provides that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue *tax* alleged to have been erroneously or illegally assessed or collected, or of *any penalty* claimed to have been collected without authority, … until a claim for refund or credit has been duly filed with the [IRS]." *Id.* (emphases added). The separate references to "any … tax" and "any penalty" in § 7422(a) make crystal clear that the two terms are not synonymous in § 7421(a). Likewise, as noted, *some* "penalties" are expressly "deemed" "tax[es]" for purposes of the Tax Code. *Id.* §§ 6665(a)(2), 6671(a). That would be unnecessary if *all* "penalties" fell within the ordinary meaning of the word "tax." Admittedly, the "complex" Tax Code does occasionally contain surplusage. *See* Long AIA Br. at 31-32. But even the Code should not *needlessly* be interpreted to contain such obvious, significant, and inexplicable surplusage. *See, e.g.*, *Arkansas Best Corp. v. Comm'r of Internal Revenue*, 485 U.S. 212, 218 (1988) ("[W]e are unwilling to read [a Code provision] in a manner that makes surplusage" of other Code provisions.).

*Amicus* defends his proposal by observing that the 1860 version of Webster's dictionary defined a "tax" as virtually any monetary sum "for the use of the nation or state" or "for supplying the public treasury." *See* Long AIA Br. 37. But that dictionary definition is entirely consistent with this Court's

classic definition of a "penalty," which specifically distinguished "enforced contribution[s] *to provide for the support of government*" from "an exaction imposed by statute as punishment *for an unlawful act*." *La Franca*, 282 U.S. at 572 (emphases added).

*Amicus* and other proponents of his position also cite a few cases, but, as noted above, not a single one actually applied the AIA to a "penalty" formally imposed for non-compliance with a substantive legal requirement unrelated to taxes. *See* Long AIA Br. 37-38 (citing cases involving monetary exactions that were not formally imposed as sanctions for unlawful acts); *Liberty Univ.*, 2011 WL 3962915, at *5-6 (citing similar cases, and the *Mobile Republican* penalty for violating a tax law); Caplin/Cohen AIA Br. 16-18 (citing various "penalties" expressly "deemed" taxes by 26 U.S.C. §§ 6665(a)(2), 6671(a), plus *Mobile Republican*); *see also* Cato AIA Br. 8-22 (distinguishing every case cited by proponents of the position that the AIA applies here). In short, *Amicus* does not and cannot dispute that no non-ACA case has ever held that a pure "penalty" is directly covered as a "tax" under the AIA's plain text.

*Second*, *Amicus* also argues that *Bob Jones* abrogated the settled distinction between "taxes" and "penalties," because it applied the AIA while refusing to consider whether the monetary exactions at issue were imposed with a regulatory motive. *See* Long AIA Br. 5-6, 47; *see also Seven-Sky*, 661 F.2d at 33-34 (Kavanaugh, J., dissenting); *Liberty Univ.*, 2011 WL 3962915, at *15. But *Bob Jones* merely rejected certain arguments that atextually tried to exempt from the AIA's scope exactions that indisputably were in the form of a "tax." That case never

suggested that the AIA atextually covers "penalties" formally imposed as sanctions for unlawful acts.

The "penalty" definition was not implicated in *Bob Jones*, because that case involved a dispute over a university's loss of tax-exempt status due to its lawful admissions policy, rather than a challenge to a sanction for an unlawful act. *See* 416 U.S. at 734-35. Even though the dispute was purely about "taxes"—*i.e.*, the university's and its donors', *supra* at 17-18—the university argued for an exception to the AIA because the IRS' alleged "motive[]" in revoking its tax-exempt status was "to regulate [its] admissions policies" rather than "protect the revenues." *See id.* at 739-40. This Court rejected that effort to carve out a subset of "taxes" from the AIA's coverage, observing that it had "abandoned" the "distinction[] between regulatory and revenue-raising taxes." *Id.* at 740-41 & n.12 (citing *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)). That distinction was forsaken because it required a hopeless inquiry into the "hidden motives which may move Congress" and the "deterrent effect on the activities taxed." *Sonzinsky*, 300 U.S. at 513-14.

But this Court's repudiation of that futile effort to distinguish *among* "taxes," based on the asserted motive of Congress or the IRS in any particular case, in no way suggests that it has abandoned the core distinction reflected in its cases between "taxes" and "penalties," thereby categorically extending the AIA to reach the latter. To the contrary, *Sonzinsky* itself stressed that the tax at issue there was "not attended by an offensive regulation" and thus was not "a penalty resorted to as a means of enforcing [a] regulation[]." *Id.* (citing, *inter alia*, *Child Labor Tax*

*Case*). Likewise, *Bob Jones* described the AIA cases involving "penalties in the form of a tax" (*see supra* at 27-28) as being "of narrow scope," without ever suggesting that they had been overruled in this particular respect, let alone that the AIA applies to a pure penalty for an unlawful act. 416 U.S. at 743.

Thus, neither *Sonzinsky* nor *Bob Jones* can plausibly be read to have rejected the fundamental "penalty" definition. That is particularly true because, even in the wake of each decision, this Court continued to cite that definition favorably. *See United States v. Kahriger*, 345 U.S. 22, 31 (1953) (citing *Child Labor Tax Case* for the invalidity of "provisions in [federal] tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation"); *Reorganized CF&I Fabricators*, 518 U.S. at 224 ("penalty … means punishment for an unlawful act or omission").

### 2. Congress Clearly Designed The Mandate's Sanction As A Penalty

The mandate's monetary sanction falls within the core definition of a "penalty." To repeat, the ACA imposes a legal "[r]equirement" that every "applicable individual shall … ensure that the individual … is covered under minimum essential coverage," 26 U.S.C.A § 5000A(a), and then imposes a "penalty" on some taxpayers who unlawfully "fail[] to meet th[at] requirement," *id.* § 5000A(b)(1). This indisputably constitutes "punishment for an unlawful act or omission." *Reorganized CF&I Fabricators*, 518 U.S. at 224; *cf.* Pet.App. 161a (so holding for constitutional purposes); *Thomas More*, 651 F.3d at 552 (same).

The critical structure of the "penalty" cannot be dismissed as a meaningless formality, because it is quite clear that Congress selected it deliberately. *Supra* at 20-21 (discussing the separate exemptions for the mandate and the penalty, the policy and political reasons why Congress used this structure, and the different provisions that did not use this structure). Indeed, having declined to structure the mandate as a "tax," Congress justified the mandate solely under its commerce power, and it repeatedly and exclusively described the mandate's sanction as a "penalty," while listing other exactions as revenue-raising "taxes." *Supra* at 5. And that consistent Congressional treatment as a "penalty" mirrored the President's emphatic position that the mandate was "absolutely not a tax." *Id.*

In sum, it is beyond reasonable dispute that the mandate's sanction is a "penalty" rather than a "tax" under the plain terms of both the ACA and the AIA. The AIA thus does not bar this suit even if one focuses on the sanction rather than the mandate.

### 3. The Tax Code Does Not Extend The AIA To Cover The Mandate's Penalty

*Amicus* also contends that, due to certain statutory cross-references in the Tax Code that govern how the IRS will assess and collect the mandate's "penalty," the AIA's bar on pre-enforcement federal-court review of "any tax" must be extended to that "penalty." In effect, *Amicus* contends that the AIA has been rewritten through cross-reference to read: "no suit for the purpose of restraining the assessment or collection of any tax*,* [*or of any penalty that is assessed or collected under*

*the same authority, or in the same manner, as a tax*], shall be maintained in any court." It would be extraordinary had Congress so drastically expanded the AIA's bar on *pre-enforcement judicial review* through such indirect references in provisions that instead regulate the *executive enforcement process*. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Not surprisingly, it turns out that Congress did nothing of the sort.

**a.** *Amicus* argues that the mandate's "penalty" should be *deemed* a "tax" under the AIA, simply because the IRS' authority to assess penalties is *included* within its power to assess taxes. *See* Long AIA Br. 39-41; *see also Seven-Sky*, 661 F.3d at 38-40 (Kavanaugh, J., dissenting); *Liberty Univ.*, 2011 WL 3962915, at *6. This argument essentially proceeds in two steps: *first*, the IRS "is authorized and required to make … *assessments* of all *taxes* (*including* interest, additional amounts, additions to the tax, and *assessable penalties*) imposed by [title 26]," 26 U.S.C. § 6201(a) (emphases added); and *second*, because the mandate's penalty and other such "assessable penalties" are "included" within the IRS' authority to assess taxes, they likewise must be "included" within the AIA's bar on "restraining the assessment …of any tax," *id.* § 7421(a). In short, the "§ 6201(a) argument" is that the AIA should be construed to read: "restraining the assessment … of any tax [*or any non-tax assessed under the same authority as a tax*]."

This argument is irreconcilable with the relevant statutory language: (1) under the AIA, "tax" does not include "non-taxes assessed under the same authority as taxes"; and (2) under § 6201(a), the directive that the IRS *assess* penalties under its tax assessment authority hardly means that "penalties" *are* "taxes" for purposes of the AIA's restriction on federal-court review. Specifically, the fact that "penalties" are explicitly included within "taxes" in the provision governing assessment *authority* does not even remotely suggest that "penalties" are therefore implicitly "included" within "taxes" in all other provisions that are somehow related to assessment, let alone a provision like the AIA that regulates judicial review of assessment rather than executive assessment itself. *See Seven-Sky*, 661 F.3d at 10; *see also Thomas More*, 651 F.3d at 539-40. To the contrary, § 6201(a) confirms that, when Congress wants "penalties" to be included as "taxes" in a certain Tax Code provision, it says so explicitly. Likewise, when Congress wants "penalties" to be included as "taxes" in multiple Tax Code provisions, it says so explicitly, as it did for penalties codified in Chapter 68. 26 U.S.C. §§ 6665(a)(2), 6671(a) (those penalties "deemed" taxes for all Tax Code purposes). Yet *nowhere* did Congress say that the mandate's penalty in Chapter 48 should be "included" as a tax *under the AIA*.

Moreover, reading § 6201(a) as having equated "penalties" with "taxes" for all assessment-related provisions renders superfluous those assessment-related provisions that reference both "taxes" and "penalties." For example, while § 6671(a) provides that the "penalties" in Subchapter B of Chapter 68

"shall be assessed and collected in the same manner as taxes," that *already* would be the case if § 6201(a) had "included" "penalties" within "taxes" for *all* assessment-related purposes. Tellingly, *Amicus* does not cite a single non-ACA case adopting his position that § 6201(a) automatically renders all "assessable penalties" equivalent to "taxes" for all assessment-related purposes, even where that "penalty" is not codified in Chapter 68 (and thus not "deemed" a tax by §§ 6665(a)(2), 6671(a)).

Finally, even if the § 6201(a) argument were correct, it still would not bar this suit, because it would not prohibit relief restraining *collection* of the mandate's penalty. Importantly, unlike the general grant of assessment authority in § 6201(a), the general grant of collection authority *lacks* a parenthetical clause "including … penalties": it simply states that the IRS "shall collect the taxes imposed by the internal revenue laws." *Id.* § 6301. But the absence of that supposedly critical parenthetical in § 6301 eliminates the entire basis of the argument for construing the AIA to read: "restraining the … collection of any tax [*or any non-tax collected under the same authority as a tax*]."[4]

Thus, even accepting the § 6201(a) argument on its own terms, the IRS would be protected from pre-enforcement challenges to penalty *assessment*, but

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[4] *Amicus* elides this problem by claiming § 6301 requires the IRS "to collect the taxes that must be assessed under [§] 6201." *See* Long AIA Br. 39-40. But § 6301 does not reference "§ 6201" or "assessment." Without that reference, or an "including" parenthetical, the § 6201(a) argument that "penalties" are included within "taxes" for the AIA's bar on review of assessment does not extend to its bar on review of collection.

not penalty *collection*. And the latter form of review would be sufficient for this suit to proceed, since this Court could preclude collection of the penalty. Of course, the absurdity of that dichotomy between assessment and collection illustrates the more fundamental flaw with the argument. Congress clearly did not extend the bar on pre-enforcement judicial review in § 7421(a) through a parenthetical reference in § 6201(a) concerning the scope of the IRS' executive assessment authority.

**b.** *Amicus* also argues that the mandate's "penalty" should be *treated like* a "tax" under the AIA, because the IRS must assess and collect the "penalty" and "taxes" *in the same way*. *See* Long AIA Br. 24-29; *see also Seven-Sky*, 661 F.3d at 31-34 (Kavanaugh, J., dissenting). Here again, this argument proceeds in two steps: *first*, the mandate's "penalty … shall be assessed and collected *in the same manner* as an assessable penalty under subchapter B of chapter 68," 26 U.S.C.A. § 5000A(g)(1) (emphasis added), which in turn "shall be assessed and collected *in the same manner as taxes*," 26 U.S.C. § 6671(a) (emphasis added); and *second*, because the mandate's penalty must be assessed and collected *like a* tax, it likewise must fall within the AIA's bar on suits "restraining the assessment or collection of any tax," *id.* § 7421(a). In short, the "§ 5000A(g) argument" is that the AIA should be construed to read: "restraining the assessment or collection … of any tax [*or any non-tax assessed and collected in the same manner as a tax*]."

Once again, this argument is irreconcilable with the relevant statutory language: (1) under the AIA, "tax" does not include "non-taxes assessed and

collected like taxes"; and (2) under § 5000A(g), the directive that the IRS *assess and collect* penalties like taxes hardly means that "penalties" *are* "taxes" for purposes of the AIA's restriction on federal-court review. Specifically, the fact that Congress explicitly required that "the [IRS] employ[]" the "same manner" of *executive* "mechanisms … to enforce" both taxes and the mandate's penalty does not even remotely suggest that Congress implicitly decreed that the penalty also falls within the *judicial* "bar against pre-enforcement challenges to taxes." *Thomas More*, 651 F.3d at 540. Instead, enforcing the mandate's penalty "in the same manner as a tax" simply means that the IRS must use tax "methodology and procedures" when "recording the liability of the taxpayer" (*i.e.*, "assessment") and "impos[ing] … payment" (*i.e.*, "collection"). *Seven-Sky*, 661 F.3d at 11; *see also* Long AIA Br. 25 (acknowledging these settled definitions of "assessment" and "collection"). Indeed, to the extent that it is relevant at all, § 5000A(g)'s express requirement that the IRS assess and collect "penalties" like it does "taxes" confirms again that "penalties" are *different* than "taxes."

Tellingly, *Amicus* himself acknowledges that the AIA "addresses *restraints* on assessment and collection" of taxes, *not* "assessment and collection" themselves. *See* Long AIA Br. 30 (emphasis added). That is a fundamental concession, because the statutory provisions governing judicial restraints on enforcement are entirely distinct from the provisions governing enforcement itself. To instruct the IRS to assess and collect the mandate's "penalty" like it does "taxes" does not instruct federal courts to treat

that "penalty" like a "tax" under the AIA—the AIA does not reach "non-taxes assessed and collected like taxes," and the fact that the Tax Code requires that "penalties" be treated *like* "taxes" in some circumstances simply reinforces that "penalties" and "taxes" are different. Conversely, the mandate's "penalty" *will be* assessed and collected precisely like "taxes" by the IRS, pursuant to the statutory directive in § 5000A(g). To be sure, a citizen's lawsuit to *restrain* executive assessment and collection of that "penalty" will be treated differently than a citizen's lawsuit to restrain such enforcement of "taxes," but that in no way alters the fact that assessment and collection procedures are the same for both.

*Amicus*, however, insists that the mandate's penalty will not be "assessed and collected in the same manner as a tax" if the AIA does not protect it, objecting that the IRS either (1) will not have the opportunity to assess and collect the mandate's penalty at all—*i.e.*, if it loses in litigation, or (2) will assess and collect the mandate's penalty only at a later time—*i.e.*, after it prevails in litigation. *See* Long AIA Br. 26-29; *see also Seven-Sky*, 661 F.3d at 32-34 (Kavanaugh, J., dissenting). But this objection conflates executive assessment and collection with judicial restraints on assessment and collection. The mandate's "penalty" will be assessed and collected in precisely the same manner as taxes, because the IRS will use precisely the same "methodology and procedures" when "recording the liability of the taxpayer" and "impos[ing] … payment." *Seven-Sky*, 661 F.3d at 11 (majority opinion).

Again, that the judiciary reviews assessment and collection of the mandate's "penalty" differently than assessment and collection of "taxes" does not mean that the "penalty" and "taxes" are assessed and collected differently. It just means that citizens have not been deprived of their right to bring a pre-enforcement challenge to the former. All the differences identified by *Amicus* concerning the IRS' "timing" and "opportunity" for assessing and collecting the mandate's "penalty" simply reflect the fact that a pre-enforcement challenge to the "penalty" is available. In short, *Amicus*'s reasoning is circular: that the IRS' ability to assess and collect the mandate's "penalty" free from judicial review will be eliminated *if* the AIA does not apply hardly *proves* that the AIA does apply.

Once more, it is telling that *Amicus* does not cite a single non-ACA case adopting his position that a "penalty" is automatically rendered subject to the AIA merely because it is "assessed and collected in the same manner as taxes." The cases discussed in the treatise cited by *Amicus* (*see* Long AIA Br. 29), are inapposite: two of them involved Chapter 68 penalties, which, as noted, are separately "deemed" taxes, *see Warren v. United States*, 874 F.2d 280, 282 (5th Cir. 1989); *Sloan v. United States*, No. 4:90-cv-303, 1991 WL 311898, at *1 (N.D. Ga. Oct. 30, 1991), and the third is *Mobile Republican*, which, as noted, involved "penalties imposed for violating the conditions of [a certain] tax status," rather than "penalties imposed for substantive violations of laws

not directly related to the tax code," *see* 353 F.3d at 1362 & n.5.[5]

In sum, neither § 5000A(g) nor § 6201(a) even arguably extends the AIA to cover suits with the "purpose of restraining the assessment or collection of any [*penalty that is assessed or collected under the same authority, or in the same manner, as a*] tax." Instead, the AIA is limited to suits for the "purpose of restraining the assessment or collection of any tax." Thus, because neither the mandate nor its penalty is a "tax," the AIA is inapplicable.

## II. THE AIA SHOULD NOT BE CONSIDERED BECAUSE IT IS NON-JURISDICTIONAL AND HAS BEEN DISAVOWED BY THE GOVERNMENT

Ultimately, this Court need not decide whether the AIA applies in this case, given the Government's litigation concession that the AIA does not bar this suit. Under "the normal operation of our adversarial system, … courts are generally limited to addressing the claims and arguments advanced by the parties." *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011). Here, not only has the Solicitor General failed to advance the argument that the AIA bars this suit, but he has expressly agreed that it does not. Govt. Cert. Pet. 32-33.

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[5] Likewise, to the extent that certain penalties for violation of laws related to alcohol and tobacco taxation are subject to the AIA, *see* Long AIA Br. 35-36—a proposition that *Amicus* simply assumes without authority—those penalties are equivalent to the tax-law-related penalties in *Mobile Republican* and therefore distinguishable.

This Court may accept the Government's concession, because the AIA's application does not present a "jurisdictional question[]" that must be considered even when "the parties … elect not to press [it]." *Henderson*, 131 S. Ct. at 1202. To be sure, this Court has often described the AIA as "jurisdictional." *See* Long AIA Br. 16. But "[t]his Court, no less than other courts, has sometimes been profligate in its use of the term" "'[j]urisdiction,' … [which] is a word of many, too many, meanings." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006). "[I]n recent cases," therefore, this Court "ha[s] tried … to bring some discipline to the use of th[e] term." *Henderson*, 131 S. Ct. at 1202.

Under the framework established by those cases, there are two reasons why the AIA is properly characterized as non-jurisdictional: *first*, Congress did not clearly rank the AIA as a jurisdictional restriction on the power of the courts; and *second*, this Court has consistently treated the AIA as non-jurisdictional whenever that distinction has mattered, notwithstanding the loose language invoked by *Amicus*.

### A. Congress Did Not Clearly Rank The AIA As A Jurisdictional Restriction

This Court now requires that Congress must have provided "a[] 'clear' indication that [it] wanted [a] rule to be 'jurisdictional.'" *Henderson*, 131 S. Ct. at 1203 (citing *Arbaugh*, 546 U.S. at 515-16). This recent insistence on clarity regarding "the jurisdictional label" reflects the fact that "the consequences that attach … may be so drastic." *Id.* at 1202. Accordingly, "to capture Congress' likely

intent and also provide[] helpful guidance for courts and litigants," this Court has established a set of "'readily administrable bright line' rule[s]" for determining jurisdictional status. *See id.* at 1203 (citing *Arbaugh*, 546 U.S. at 514-16). Under those rules, Congress did *not* clearly "rank [the AIA] as jurisdictional." *Arbaugh*, 546 U.S. at 516.

### 1. The AIA's Text Is Non-Jurisdictional

As a threshold matter, the AIA's text "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 515. The textual object of the AIA's restriction is not "jurisdiction" or "the courts," but the plaintiff's *cause of action*: "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." 26 U.S.C. § 7421(a). The AIA is thus materially indistinguishable from the Copyright Act restriction that "no civil action for infringement … shall be instituted until preregistration or registration of the copyright claim has been made," 17 U.S.C. § 411(a), which this Court held "says nothing about whether a federal court has subject-matter jurisdiction to adjudicate claims for infringement of unregistered works." *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1245 (2010).

To be sure, the restrictions on the plaintiff's cause of action here and in *Reed Elsevier* are "cast in mandatory language." *Henderson*, 131 S. Ct. at 1205. But not "all mandatory prescriptions, however emphatic, are … properly typed jurisdictional." *Id.* Such labeling is especially inapt for the AIA, the "mandatory" nature of which is undermined by the "[e]xcept[ions]" that the Tax Code "provide[s] in

sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436." *See* 26 U.S.C. § 7421(a). As this Court has observed, "[i]t would be at least unusual to ascribe jurisdictional significance to a condition subject to these sorts of exceptions." *Reed Elsevier*, 130 S. Ct. at 1246.[6]

### 2. The AIA's Location Is Non-Jurisdictional

Likewise, the location of the AIA's "placement within the [U.S. Code]" "provides no clear indication that Congress wanted [the AIA] to be treated as having jurisdictional attributes." *Henderson*, 131 S. Ct. at 1205. The AIA is not codified in "Chapter 85 of Title 28, …[which] governs the jurisdiction of the United States district courts." *Key v. Doyle*, 434 U.S. 59, 66 n.12 (1977). Instead, it is codified within Subtitle F of the Tax Code, which governs "Procedure and Administration." More specifically, it is codified in Subchapter B of Chapter 76, which contains a variety of non-jurisdictional rules for "Judicial Proceedings" brought by "Taxpayers and Third Parties." *E.g.*, 26 U.S.C. § 7423 (authorizing reimbursement of federal officers for judgments and costs); *id.* § 7430 (authorizing certain litigation costs and fees for a prevailing party). Although Congress has instructed the courts not to draw a negative inference from the location of particular sections

[6] Accordingly, it is irrelevant that many of these exceptions reference the "jurisdiction" of the courts authorized to invoke them. *See* Long AIA Br. 18 & n.6. That does not overcome the fact that jurisdictional statutes typically are not rife with statutory exceptions, let alone does it provide a *clear* indication that the AIA itself is a jurisdictional bar despite the absence of any jurisdictional language.

within the Tax Code, *id.* § 7806(b), it remains the case that the AIA's codification among such patently non-jurisdictional provisions reveals no affirmative indication of jurisdictional status, much less a clear one. *Henderson*, 131 S. Ct. at 1205; *Reed Elsevier*, 130 S. Ct. at 1245-46.

### 3. The AIA's Character Is Non-Jurisdictional

The AIA also lacks an inherently jurisdictional character, as it does not restrict "the classes of cases" (or persons) over which courts possess "adjudicatory authority." *Reed Elsevier*, 130 S. Ct. at 1243. Rather than completely depriving federal courts of the "statutory or constitutional *power* to adjudicate" legal challenges concerning the "subject-matter" of federal taxes, *id.*, the AIA simply determines the *timing* of judicial review, by "requir[ing] that the legal right to the disputed sums be determined in a suit for refund" *after* the challenged tax has been paid under protest, *Bob Jones*, 416 U.S. at 736-37. The AIA thus imposes a "threshold requirement[] that claimants must complete, or exhaust, before filing a lawsuit," which is "a type of pre-condition to suit that supports nonjurisdictional treatment under [this Court's] precedents." *Reed Elsevier*, 130 S. Ct. at 1246-47; *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (holding non-jurisdictional the requirement in Title VII that discrimination claimants must file a timely EEOC charge before filing a civil action in federal court). In short, the AIA is nothing more than a non-jurisdictional "claim-processing rule[]" for federal tax challenges, which "seek[s] to promote the orderly progress of litigation by requiring that the parties

take certain procedural steps at certain specified times." *Henderson*, 131 S. Ct. at 1203.

Using jurisdictional language that nowhere appears in the AIA, *Amicus* alternatively describes the statute as a restriction on courts' "adjudicatory capacity" to award a pre-enforcement remedy in federal tax challenges. *See* Long AIA Br. 19. But even characterizing the AIA as a remedial restriction rather than a claim-processing rule does not make it jurisdictional. There is a well-settled distinction between "*jurisdiction*," which is the "question of whether a federal court has the power … to hear a case," and "*relief*," which is the "question of the various remedies a federal court may make available." *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). That is why, when Congress wants remedial restrictions to be jurisdictional, it says so expressly. *E.g.*, 29 U.S.C. § 104 ("No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit … any of the following acts.…"). The AIA contains no remotely comparable language.

#### 4. The AIA Is Distinguishable From Related Statutes That Are Jurisdictional

Finally, the non-jurisdictional nature of the AIA's text, location, and character is perhaps best demonstrated by the stark contrast between the AIA and the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, which provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts

of such State." Unlike the AIA, the TIA clearly ranks as jurisdictional: (1) it textually regulates the "district courts" themselves, by restricting their review of state taxes; (2) it is placed in Chapter 85 of Title 28, along with the other provisions governing the jurisdiction of federal district courts; and (3) it generally removes challenges to state taxes from the adjudicatory authority of federal district courts, because post-enforcement state-tax refund actions are brought in state court and reviewable only in this Court. *See id.*; *see also, e.g.*, 26 U.S.C. § 6305(b) ("No court of the United States … shall have jurisdiction of any action … brought to restrain or review the assessment and collection of [certain certified child-support obligations]."). Thus, "[i]f Congress had wanted the [AIA] to be treated as jurisdictional, it could have cast that provision … like" the TIA (or § 6305(b)). *Henderson*, 131 S. Ct. at 1204-05.

Turning this contrast on its head, *Amicus* argues that the TIA's clearly jurisdictional status instead bolsters the AIA's claim to jurisdictional status, simply because Congress "modeled" the TIA upon the AIA. *See* Long AIA Br. 17; *see also* Govt. Cert. Reply 3-4. But, while Congress used the AIA as a template for the TIA, the fundamental differences between the two show that Congress ranked *only* the TIA as a jurisdictional restriction on the power of federal courts. And it is readily apparent why Congress would have made the TIA more stringent than the AIA: judicial review presents unique federalism concerns in the state-tax context (and also in the child-support context at issue in § 6305(b)). *See Hibbs v. Winn*, 542 U.S. 88, 104-05 (2004).

### B. This Court Has Not Treated The AIA As A Jurisdictional Restriction

Jurisdictional status also will be recognized where "a long line of this Court's decisions left undisturbed by Congress … has *treated* a similar requirement as 'jurisdictional.'" *Henderson*, 131 S. Ct. at 1203 (emphasis added). Importantly though, "the relevant question here is not" merely "whether [the statute] itself has long been *labeled* jurisdictional." *Reed Elsevier*, 130 S. Ct. at 1248 (emphasis added). Such a simplistic approach would give undue weight to this Court's "drive-by jurisdictional rulings," which, without analysis, "have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations," *id.* at 1243-44, and thus caused lower courts to do the same, *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam). *But see* Long AIA Br. 16-17 & n.5 (relying upon such "drive-by" jurisdictional labels and lower-court opinions). Instead, the correct inquiry is whether this Court's precedents have treated "the type of limitation that [the statute imposes] [as] one that is properly ranked as jurisdictional," *Reed Elsevier*, 130 S. Ct. at 1248, such that it can be confidently "presume[d] that Congress intended to follow that course" when it enacted or recodified the statute at issue, *Henderson*, 131 S. Ct. at 1203. That inquiry reveals that this Court has "treated" the AIA as non-jurisdictional in the two situations where the characterization actually mattered.

### 1. The AIA Can Be Expressly Waived By The Government

Jurisdictional rules "can never be forfeited or waived," *Arbaugh*, 546 U.S. at 514, but this Court nonetheless has accepted an express waiver of the AIA by the Government. Specifically, in *Helvering v. Davis*, 301 U.S. 619 (1937), a shareholder brought suit to enjoin his corporation from paying allegedly unconstitutional Social Security taxes. *Id.* at 634, 637. After the IRS Commissioner intervened as a defendant and petitioned for certiorari, the Solicitor General proffered a "waiver of a defense under" the AIA's predecessor statute and made an "earnest request that [this Court] determine whether the law shall stand or fall." *Id.* at 638-39. Accepting that request, a majority of this Court chose to exercise "discretion" to decide the constitutional question given the "extraordinary features" of the case. *Id.* at 639-40. Indeed, it appears that this Court was *unanimous* in its view that the AIA was not a jurisdictional barrier to resolving the case on the merits. Although four Justices would have held that "the suit for an injunction should be dismissed," even they were relying *only* "upon th[e] ground" that "a cause of action in equity [was] neither pleaded nor proved," apparently due to "the absence of an adequate showing of irreparable injury." *See id.* at 639; *see also id.* ("[T]his course should be followed in adherence to the general rule that constitutional questions are not to be determined in the absence of strict necessity."); *but see* Long AIA Br. 22 (erroneously suggesting that four Justices would have dismissed the suit under the AIA).

A variety of arguments have been made to explain why the AIA is jurisdictional despite the Government's successful waiver in *Davis*. Those arguments all fail.

*First*, *Amicus* seeks to minimize *Davis* because this Court gave a "limited explanation" that did not *expressly* "indicate that five Justices had concluded … that the [AIA] is non-jurisdictional." *See* Long AIA Br. 21-22. But *Amicus* does not even attempt to provide any alternative explanation for how at least five Justices saw fit to resolve the case *on the merits*. As *Amicus* concedes, the Government in *Davis* argued that the AIA applied and made no argument for why the suit could be adjudicated *other* than its waiver. *See id.* 21. To the extent *Amicus* characterizes the decision as "an anomaly predating more stringent jurisdictional limitations," *see id.* 22 n.7, this Court's strict refusal to allow parties to waive jurisdictional limitations long predates *Davis*. *See, e.g.*, *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804) (vacating adverse judgment against plaintiff for lack of diversity jurisdiction even though plaintiff himself had initiated suit in federal court).

*Second*, the Government attempts to distinguish *Davis* on the ground that this Court's basis for declining to apply the AIA was a "waiver," rather than a "forfeiture." *See* Govt. Cert. Reply 6; *see also Seven-Sky*, 661 F.3d at 28 (Kavanaugh, J., dissenting). But any technical distinction between waiver and forfeiture is entirely irrelevant, because jurisdictional rules "can never be forfeited *or waived*." *Arbaugh*, 546 U.S. at 514 (emphasis added). Moreover, whatever theoretical distinctions between waiver and forfeiture might generally exist,

they are illusory where, as here, the Solicitor General *expressly agrees* that the AIA should not bar this suit.

*Third*, the Government also attempts to distinguish *Davis* on the theory that the case *interpreted* the AIA to implicitly permit Government waivers under the canon that "the Government is not bound by its own legislative restrictions on the exercise of remedial rights unless the intent to bind it is express." *See* Govt. Cert. Reply 6-7. But that canon reflects a presumption that Congress would not have intended a general jurisdictional statute (like the TIA) to restrict the Government's own rights in those cases where the Government *happens to be the plaintiff*. *See, e.g.*, *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 827 (1997). The canon is thus obviously inapplicable to jurisdictional statutes where Congress itself has specifically protected the Government's *unique* interests *as a defendant*. *See, e.g.*, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 132-34 (2008) (ignoring the Government's forfeiture of the statute of limitations for suits in the Court of Federal Claims, because that defense is jurisdictional). Put differently, where Congress bars a type of suit that can be brought *only against* the Government, Congress' "intent to bind [the Government] is express." *Farm Credit Servs.*, 520 U.S. at 827. Plus, again, even if Congress did implicitly intend to allow the Solicitor General to expressly waive the AIA in *Davis*, then it also would have wanted this Court to accept the Solicitor General's express concession here that the AIA should not bar this suit.

*Finally*, Judge Kavanaugh attempted to distinguish *Davis* on the theory that the AIA was facially inapplicable there because the suit was nominally brought by a shareholder against his corporation, rather than against federal tax officials. *See Seven-Sky*, 661 F.3d at 28 (dissenting opinion). But, despite that initial procedural posture, the shareholder's suit to bar his corporation from paying a federal tax had the indisputable "purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). After all, the *Davis* shareholder obviously "would not [have been] interested in obtaining the … injunctive relief requested if that relief did not effectively restrain the taxation of [his corporation]." *'Americans United'*, 416 U.S. at 760-61. And regardless, the suit in *Davis* ultimately was brought against a federal tax official, who had intervened as a party-defendant and was the sole litigating petitioner in this Court. 301 U.S. at 638-39; *see also* 26 U.S.C. § 7421(a) ("no [covered] suit … shall be *maintained in any court*" (emphasis added)).

In sum, the AIA was not a bar in *Davis* because this Court accepted the Solicitor General's waiver, which proves that this Court has not treated the AIA as a jurisdictional restriction.

### 2. The AIA Has A Judicially Created Equitable Exception

"[T]his Court has no authority to create equitable exceptions to jurisdictional requirements," *Bowles v. Russell*, 551 U.S. 205, 214 (2007), but it nonetheless has created such an exception to the AIA. Specifically, this Court has deemed the AIA inapplicable, notwithstanding its "literal terms," in

cases where a plaintiff seeking pre-enforcement relief from a tax can demonstrate "certainty of success on the merits." *Bob Jones*, 416 U.S. at 737. The genesis of that exception was in *Miller v. Standard Nut Margarine Co. of Fla.*, 284 U.S. 498 (1932), where this Court stated that "extraordinary and exceptional circumstances render[ed] [the AIA's predecessor statute] inapplicable," and then held that such "special" circumstances exist where "[a] valid … tax could by no legal possibility have been assessed against [the plaintiff]." *Id.* at 510-11. To be sure, in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), this Court cabined *Standard Nut* to the precise scenario where "it is clear that under no circumstances could the Government ultimately prevail." *Id.* at 6-7; *see also Bob Jones*, 416 U.S. at 744-45. Nevertheless, "the 'under no circumstances' test announced in *Williams Packing*" remains a "judicially created exception[]" to the AIA. *See Bob Jones*, 416 U.S. at 742.

*Amicus* and the Government, however, both contend that *Williams Packing* did not create an "exception" to the AIA, but merely construed the statute in light of its text and purpose. *See* Long AIA Br. 20-21; *see also* Govt. Cert. Reply 4-5. Although differing somewhat in the details, their revisionist readings of *Williams Packing* as garden-variety statutory interpretation are both wrong.

*First*, *Amicus* contends that *Williams Packing* declined to apply the AIA to indefensible taxes because that would not further the statute's purpose. *See* Long AIA Br. 20; *see also Seven-Sky*, 661 F.3d at 28 n.8 (Kavanaugh, J., dissenting). To the contrary, however, this Court itself has recognized that

*Williams Packing* was a "judicially created exception[]," consistent with its equitable genesis in *Standard Nut*. *See Bob Jones*, 416 U.S. at 742; *see also id.* at 745 ("*Williams Packing* switched the focus of [*Standard Nut*'s] extraordinary and exceptional circumstances test … to the requirement that it be established that the [Government's] action is plainly without a legal basis."). And that is telling, given that the sole reason that *Bob Jones* discussed *Williams Packing* was in order to reject the plaintiff's request for *another* "judicially created exception[]." *Id.* at 742. If this Court had believed that *Williams Packing* was *not* itself "a judicial departure from" "the plain meaning of the [AIA]," but instead a permissible construction of the AIA's text in light of its purpose, then it surely would have said so, rather than saying precisely the opposite. *See id.*

Furthermore, *Amicus* is simply wrong in contending that it would not further the AIA's purposes to bar pre-enforcement challenges to indefensible taxes. To be sure, where the challenged tax is indefensible, the "central purpose" of the AIA—*i.e.*, the "prompt collection of … lawful revenue"—"is inapplicable." *Williams Packing*, 370 U.S. at 7. But the AIA also has the "collateral objective" of "protect[ing] … the [individual] collector from litigation pending a suit for refund" against the IRS, *see id.* at 7-8, and *that* purpose is implicated even where the challenged tax is indefensible. This underscores that the true basis of *Williams Packing* was not a statutory construction of the AIA's text in light of its purpose, but instead a willingness to create equitable exceptions that trump both the statutory text and purpose.

*Second*, the Government argues that *Williams Packing* is consistent with the AIA's plain text, because if there are "no circumstances" where the challenged exaction could be a lawful "tax," then that "exaction is merely in 'the guise of a tax,'" rather than an actual "tax." *See* Govt. Cert Reply 4-5 (quoting *Williams Packing*, 370 U.S. at 7). But this Court has stated unambiguously that the "under no circumstances" rule of *Williams Packing* allows "the literal terms of § 7421(a) [to] be avoided." *Bob Jones*, 416 U.S. at 737. This Court's mere use of the "guise of a tax" phrase in *Williams Packing* does not somehow mean that the "under no circumstances" rule was a *textual interpretation* of the word "tax." This Court often uses that phrase when describing "taxes" without remotely suggesting that the exaction at issue is anything other than a "tax." *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 10 (2005) ("[M]ost domestic drug regulations prior to 1970 generally came in the guise of revenue laws."); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) ("The [state-law] tax here involved … is bad because … it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of [protected] information."). The irrelevance of the phrase likely explains why *Bob Jones* did not even mention it, let alone use it as a basis to recharacterize the foundation of the *Williams Packing* rule. *See* 416 U.S. at 737, 742-46. And, again, *Bob Jones* had ample reason to so hold if it were plausible, given that the plaintiff there was seeking *another* "judicial departure from" "the plain meaning of the [AIA]." *See id.* at 742.

Moreover, the Government's revisionist interpretation of *Williams Packing* is itself atextual. The Government concedes that an illegal or unconstitutional "tax" is protected by the AIA, *'Americans United'*, 416 U.S. at 759-60, but nevertheless contends that an indefensible "tax" is not. That distinction is irreconcilable with the definition of a "tax" under ordinary English and governing precedent, *supra* at 26-27, which in no way turns on whether the Government's legal defense is frivolous as opposed to meritless. For this reason, the Government errs by analogizing *Williams Packing* to *Bell v. Hood*, 327 U.S. 678, 682-83 (1946), which held that a "frivolous" federal claim does not "arise under" federal law for purposes of subject-matter jurisdiction. *See* Govt. Cert. Reply 5. It is at least textually possible that whether a claim actually "arises under" federal law turns on the strength of the claim's connection to federal law. But it is textually impossible that whether a monetary exaction in the form of a "tax" actually is a "tax" under the AIA turns on the strength of its legal justification. An indefensible "tax" is still a "tax."

Indeed, the notion that this Court would engage in such semantic gamesmanship to avoid a jurisdictional barrier is irreconcilable with *Bowles*. There, an appeal was dismissed as untimely because a habeas petitioner had relied on a district court order that mistakenly granted him an extra 17 days to file an appeal when the jurisdictional limit was a "14-day period." *See* 551 U.S. at 206-07. Given the district court's error, this Court surely could have held that the appeal was filed "within the guise of" a "14-day period"—indeed, that would have been far

*more* plausible than the Government's assertion here that an indefensible "tax" is an "exaction in the guise of a tax." Instead, however, this Court in *Bowles* unflinchingly applied the jurisdictional time-limit literally, refusing to consider the compelling policy argument for an exception. *Id.* at 213-15. That absolutist approach to a truly jurisdictional statute starkly contrasts with this Court's flexible and equitable approach to the AIA in *Miller Nut* and *Williams Packing*. This contrast underscores the non-jurisdictional reasoning used in the latter cases.

In sum, *Williams Packing* established an equitable exception to the AIA for indefensible taxes, which further proves that this Court has not treated the AIA as a jurisdictional restriction.

### C. This Court Should Accept The Government's Express Litigation Concession That The AIA Does Not Bar This Suit

As noted, in "our adversarial system," "[c]ourts do not usually raise claims or arguments on their own." *Henderson*, 131 S. Ct. at 1202. And this Court's *sua sponte* resolution of the non-jurisdictional AIA issue would be especially inappropriate in the context of this case. There exists an urgent national need for a prompt determination whether the ACA is invalid, in light of that statute's scope and significance. *See generally* Private Petrs. Severability Br. 2-6, 10-25. Yet dismissal under the AIA could potentially delay judicial resolution by roughly four years—*i.e.*, until an individual pays the penalty for non-compliance with the mandate in April of 2015 and then litigates the issue back up to this Court. There is no reason to

impose that harm on the Nation by forcing an unwanted and non-jurisdictional AIA defense on the Government, particularly given that the delayed effective date itself attenuates any conceivable interest that the Government would have under the AIA in expeditious collection of the mandate's penalty.

Indeed, even if the AIA were jurisdictional, the Government's litigating position is sufficient basis not to apply it in this case, under the authority of *Davis*. As previously discussed, there is no meaningful distinction between the Solicitor General's express waiver of the AIA in *Davis* and the Solicitor General's express assertion here that the AIA does not apply. In both cases, the Solicitor General expressly contended that the AIA should not bar the suit, despite full knowledge of all AIA arguments potentially available to him. Thus, even accepting the dubious premise that the AIA is jurisdictional despite the successful waiver in *Davis*, that case itself provides sufficient authority to accept the Government's virtually indistinguishable position here.

## CONCLUSION

This Court should hold that the AIA does not bar Private Respondents' suit and review the judgment below on the merits.

Respectfully submitted,

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Dated: February 6, 2012

# APPENDIX

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26 U.S.C. § 6201 provides:

**§ 6201. Assessment authority**

**(a) Authority of Secretary.—**The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

**(1) Taxes shown on return.—**The Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists are made under this title.

**(2) Unpaid taxes payable by stamp.—**

**(A) Omitted stamps.—**Whenever any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale or use by the manufacturer thereof or whenever any transaction or act upon which a tax is required to be paid by means of a stamp occurs without the use of the proper stamp, it shall be the duty of the Secretary, upon such information as he can obtain, to estimate the amount of tax which has been omitted to be paid and to make assessment therefor upon the person or persons the Secretary determines to be liable for such tax.

**(B) Check or money order not duly paid.—**In any case in which a check or money order received under authority of section 6311 as payment for stamps is not duly paid, the unpaid amount may be immediately assessed as if it were a tax

imposed by this title, due at the time of such receipt, from the person who tendered such check or money order.

**(3) Erroneous income tax prepayment credits.**—If on any return or claim for refund of income taxes under subtitle A there is an overstatement of the credit for income tax withheld at the source, or of the amount paid as estimated income tax, the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund may be assessed by the Secretary in the same manner as in the case of a mathematical or clerical error appearing upon the return, except that the provisions of section 6213(b)(2) (relating to abatement of mathematical or clerical error assessments) shall not apply with regard to any assessment under this paragraph.

**(4) Certain orders of criminal restitution.—**

**(A) In general.**—The Secretary shall assess and collect the amount of restitution under an order pursuant to section 3556 of Title 18, United States Code, for failure to pay any tax imposed under this title in the same manner as if such amount were such tax.

**(B) Time of assessment.**—An assessment of an amount of restitution under an order described in subparagraph (A) shall not be made before all appeals of such order are concluded and the right to make all such appeals has expired.

**(C) Restriction on challenge of assessment.**—The amount of such restitution may not be challenged by the person against whom assessed on the basis of the existence or amount of the underlying tax liability in any proceeding authorized under this title (including in any suit

or proceeding in court permitted under section 7422).

**(b) Amount not to be assessed.—**

**(1) Estimated income tax.—**No unpaid amount of estimated income tax required to be paid under section 6654 or 6655 shall be assessed.

**(2) Federal unemployment tax.—**No unpaid amount of Federal unemployment tax for any calendar quarter or other period of a calendar year, computed as provided in section 6157, shall be assessed.

**(c) Compensation of child.—**Any income tax under chapter 1 assessed against a child, to the extent attributable to amounts includible in the gross income of the child, and not of the parent, solely by reason of section 73(a), shall, if not paid by the child, for all purposes be considered as having also been properly assessed against the parent.

**(d) Required reasonable verification of information returns.—**In any court proceeding, if a taxpayer asserts a reasonable dispute with respect to any item of income reported on an information return filed with the Secretary under subpart B or C of part III of subchapter A of chapter 61 by a third party and the taxpayer has fully cooperated with the Secretary (including providing, within a reasonable period of time, access to and inspection of all witnesses, information, and documents within the control of the taxpayer as reasonably requested by the Secretary), the Secretary shall have the burden of producing reasonable and probative information concerning such deficiency in addition to such information return.

**(e) Deficiency proceedings.—**
For special rules applicable to deficiencies of income, estate, gift, and certain excise taxes, see subchapter B.

26 U.S.C. § 6301 provides:

**§ 6301. Collection authority**

The Secretary shall collect the taxes imposed by the internal revenue laws.

26 U.S.C. § 6665 provides:

**§ 6665. Applicable rules**

**(a) Additions treated as tax.**—Except as otherwise provided in this title—

**(1)** the additions to the tax, additional amounts, and penalties provided by this chapter shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes; and

**(2)** any reference in this title to "tax" imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter.

**(b) Procedure for assessing certain additions to tax.**—For purposes of subchapter B of chapter 63 (relating to deficiency procedures for income, estate, gift, and certain excise taxes), subsection (a) shall not apply to any addition to tax under section 6651, 6654, or 6655; except that it shall apply—

**(1)** in the case of an addition described in section 6651, to that portion of such addition which is attributable to a deficiency in tax described in section 6211; or

**(2)** to an addition described in section 6654 or 6655, if no return is filed for the taxable year.

26 U.S.C. § 6671 provides:

**§ 6671. Rules for application of assessable penalties**

**(a) Penalty assessed as tax.**—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

**(b) Person defined.**—The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

26 U.S.C. § 6720A provides:

**§ 6720A. Penalty with respect to certain adulterated fuels**

**(a) In general.**—Any person who knowingly transfers for resale, sells for resale, or holds out for resale any liquid for use in a diesel-powered highway vehicle or a diesel-powered train which does not meet applicable EPA regulations (as defined in section 45H(c)(3)), shall pay a penalty of $10,000 for each such transfer, sale, or holding out for resale, in addition to the tax on such liquid (if any).

**(b) Penalty in the case of retailers.**—Any person who knowingly holds out for sale (other than for resale) any liquid described in subsection (a), shall pay a penalty of $10,000 for each such holding out for sale, in addition to the tax on such liquid (if any).

26 U.S.C. § 7421 provides:

**§ 7421. Prohibition of suits to restrain assessment or collection**

**(a) Tax.**—Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, 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.

**(b) Liability of transferee or fiduciary.**—No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of—

**(1)** the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

**(2)** the amount of the liability of a fiduciary under section 3713(b) of title 31, United States Code[1] in respect of any such tax.

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[1] So in original. A comma should appear here.

26 U.S.C. § 7422 provides:

**§ 7422. Civil actions for refund**

**(a) No suit prior to filing claim for refund.**—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

**(b) Protest or duress.**—Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.

**(c) Suits against collection officer a bar.**—A suit against any officer or employee of the United States (or former officer or employee) or his personal representative for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected shall be treated as if the United States had been a party to such suit in applying the doctrine of res judicata in all suits in respect of any internal revenue tax, and in all proceedings in the Tax Court and on review of decisions of the Tax Court.

**(d) Credit treated as payment.**—The credit of an overpayment of any tax in satisfaction of any tax liability shall, for the purpose of any suit for refund of such tax liability so satisfied, be deemed to be a

payment in respect of such tax liability at the time such credit is allowed.

**(e) Stay of proceedings.**—If the Secretary prior to the hearing of a suit brought by a taxpayer in a district court or the United States Court of Federal Claims for the recovery of any income tax, estate tax, gift tax, or tax imposed by chapter 41, 42, 43, or 44 (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the United States Court of Federal Claims, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. If the taxpayer does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit, or intervene in the event of a suit as described in subsection (c) (relating to suits against officers or employees of the United States), within the period of the stay of proceedings notwithstanding that the time for such pleading may have otherwise expired. The taxpayer shall have the burden of proof with respect to the issues raised by such counterclaim or intervention of the United States except as to the issue of whether the taxpayer has been guilty of fraud with intent to evade tax. This subsection shall not apply to a suit by a taxpayer which, prior to the date of enactment of this title, is

commenced, instituted, or pending in a district court or the United States Court of Federal Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes).

**(f) Limitation on right of action for refund.—**

**(1) General rule.—**A suit or proceeding referred to in subsection (a) may be maintained only against the United States and not against any officer or employee of the United States (or former officer or employee) or his personal representative. Such suit or proceeding may be maintained against the United States notwithstanding the provisions of section 2502 of Title 28 of the United States Code (relating to aliens' privilege to sue) and notwithstanding the provisions of section 1502 of such Title 28 (relating to certain treaty cases).

**(2) Misjoinder and change of venue.—**If a suit or proceeding brought in a United States district court against an officer or employee of the United States (or former officer or employee) or his personal representative is improperly brought solely by virtue of paragraph (1), the court shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as a party for such officer or employee as of the time such action commenced, upon proper service of process on the United States. Such suit or proceeding shall upon request by the United States be transferred to the district or division where it should have been brought if such action initially had been brought against the United States.

**(g) Special rules for certain excise taxes imposed by chapter 42 or 43.—**

**(1) Right to bring actions.—**

(A) In general.—With respect to any taxable event, payment of the full amount of the first tier tax shall constitute sufficient payment in order to maintain an action under this section with respect to the second tier tax.

(B) Definitions.—For purposes of subparagraph (A), the terms "taxable event", "first tier tax", and "second tier tax" have the respective meanings given to such terms by section 4963.

(2) Limitation on suit for refund.—No suit may be maintained under this section for the credit or refund of any tax imposed under section 4941, 4942, 4943, 4944, 4945, 4951, 4952, 4955, 4958, 4971, or 4975 with respect to any act (or failure to act) giving rise to liability for tax under such sections, unless no other suit has been maintained for credit or refund of, and no petition has been filed in the Tax Court with respect to a deficiency in, any other tax imposed by such sections with respect to such act (or failure to act).

(3) Final determination of issues.—For purposes of this section, any suit for the credit or refund of any tax imposed under section 4941, 4942, 4943, 4944, 4945, 4951, 4952, 4955, 4958, 4971, or 4975 with respect to any act (or failure to act) giving rise to liability for tax under such sections, shall constitute a suit to determine all questions with respect to any other tax imposed with respect to such act (or failure to act) under such sections, and failure by the parties to such suit to bring any such question before the Court shall constitute a bar to such question.

(h) Special rule for actions with respect to partnership items.—No action may be brought for a refund attributable to partnership items (as defined

in section 6231(a)(3)) except as provided in section 6228(b) or section 6230(c).

**(i) Special rule for actions with respect to tax shelter promoter and understatement penalties.**—No action or proceeding may be brought in the United States Court of Federal Claims for any refund or credit of a penalty imposed by section 6700 (relating to penalty for promoting abusive tax shelters, etc.) or section 6701 (relating to penalties for aiding and abetting understatement of tax liability).

**(j) Special rule for actions with respect to estates for which an election under section 6166 is made.—**

**(1) In general.**—The district courts of the United States and the United States Court of Federal Claims shall not fail to have jurisdiction over any action brought by the representative of an estate to which this subsection applies to determine the correct amount of the estate tax liability of such estate (or for any refund with respect thereto) solely because the full amount of such liability has not been paid by reason of an election under section 6166 with respect to such estate.

**(2) Estates to which subsection applies.**—This subsection shall apply to any estate if, as of the date the action is filed—

**(A)** no portion of the installments payable under section 6166 have been accelerated;

**(B)** all such installments the due date for which is on or before the date the action is filed have been paid;

**(C)** there is no case pending in the Tax Court with respect to the tax imposed by section 2001 on the estate and, if a notice of deficiency under section 6212 with respect to such tax has been issued, the time for filing a petition with the Tax

Court with respect to such notice has expired; and

**(D)** no proceeding for declaratory judgment under section 7479 is pending.

**(3) Prohibition on collection of disallowed liability.—**If the court redetermines under paragraph (1) the estate tax liability of an estate, no part of such liability which is disallowed by a decision of such court which has become final may be collected by the Secretary, and amounts paid in excess of the installments determined by the court as currently due and payable shall be refunded.

**(k) Cross references.—**

**(1)** For provisions relating generally to claims for refund or credit, see chapter 65 (relating to abatements, credit, and refund) and chapter 66 (relating to limitations).

**(2)** For duty of United States attorneys to defend suits, see section 507 of Title 28 of the United States Code.

**(3)** For jurisdiction of United States district courts, see section 1346 of Title 28 of the United States Code.

**(4)** For payment by the Treasury of judgments against internal revenue officers or employees, upon certificate of probable cause, see section 2006 of Title 28 of the United States Code.

26 U.S.C.A. § 4980H provides:

**§ 4980H. Shared responsibility for employers regarding health coverage**

**(a) Large employers not offering health coverage.—** If—

**(1)** any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

**(2)** at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act 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,

then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

**(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.—**

**(1) In general.**—If—

**(A)** an applicable large employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

**(B)** 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act 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,

then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $3,000.

**(2) Overall limitation.—**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.

[**(3) Repealed.** Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169]

**(c) Definitions and special rules.—**For purposes of this section—

**(1) Applicable payment amount.—**The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000.

**(2) Applicable large employer.—**

**(A) In general.—**The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.

**(B) Exemption for certain employers.—**

(i) In general.—An employer shall not be considered to employ more than 50 full-time employees if—

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers.—The term "seasonal worker" means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including workers covered by section 500.20(s)(1) of title 29, Code of Federal Regulations and retail workers employed exclusively during holiday seasons.

(C) Rules for determining employer size.—For purposes of this paragraph—

(i) Application of aggregation rule for employers.—All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year.—In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) Predecessors.—Any reference in this subsection to an employer shall include a

reference to any predecessor of such employer.

**(D) Application of employer size to assessable penalties.—**

**(i) In general.—**The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating—

**(I)** the assessable payment under subsection (a), or

**(II)** the overall limitation under subsection (b)(2).

**(ii) Aggregation.—**In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated among such persons ratably on the basis of the number of full-time employees employed by each such person.

**(E) Full-time equivalents treated as full-time employees.—**Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

**(3) Applicable premium tax credit and cost-sharing reduction.—**The term "applicable premium tax credit and cost-sharing reduction" means—

**(A)** any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee.—

(A) In general.—The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service.—The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.—

(A) In general.—In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of—

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(B) Rounding.—If the amount of any increase under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions.—Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same

meaning as when used in such Act.

**(7) Tax nondeductible.**—For denial of deduction for the tax imposed by this section, see section 275(a)(6).

**(d) Administration and procedure.—**

**(1) In general.**—Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

**(2) Time for payment.**—The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

**(3) Coordination with credits, etc.**—The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

26 U.S.C.A. § 5000A provides:

**§ 5000A. Requirement to maintain minimum essential coverage**

**(a) Requirement to maintain minimum essential coverage.**—An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

**(b) Shared responsibility payment.—**

**(1) In general.**—If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).

**(2) Inclusion with return.**—Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

**(3) Payment of penalty.**—If an individual with respect to whom a penalty is imposed by this section for any month—

**(A)** is a dependent (as defined in section 152) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

**(B)** files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

**(c) Amount of penalty.—**

**(1) In general.**—The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of—

**(A)** the sum of the monthly penalty amounts determined under paragraph (2) for months in the taxable year during which 1 or more such failures occurred, or

**(B)** an amount equal to the national average premium for qualified health plans which have a bronze level of coverage, provide coverage for the applicable family size involved, and are offered through Exchanges for plan years beginning in the calendar year with or within which the taxable year ends.

**(2) Monthly penalty amounts.**—For purposes of paragraph (1)(A), the monthly penalty amount with respect to any taxpayer for any month during which any failure described in subsection (b)(1) occurred is an amount equal to 1/12 of the greater of the following amounts:

**(A) Flat dollar amount.**—An amount equal to the lesser of—

**(i)** the sum of the applicable dollar amounts for all individuals with respect to whom such failure occurred during such month, or

**(ii)** 300 percent of the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

**(B) Percentage of income.**—An amount equal to the following percentage of the excess of the taxpayer's household income for the taxable year over the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer

for the taxable year:

(i) 1.0 percent for taxable years beginning in 2014.

(ii) 2.0 percent for taxable years beginning in 2015.

(iii) 2.5 percent for taxable years beginning after 2015.

(3) Applicable dollar amount.—For purposes of paragraph (1)—

(A) In general.—Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $695.

(B) Phase in.—The applicable dollar amount is $95 for 2014 and $325 for 2015.

(C) Special rule for individuals under age 18.—If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall be equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.

(D) Indexing of amount.—In the case of any calendar year beginning after 2016, the applicable dollar amount shall be equal to $695, increased by an amount equal to—

(i) $695, multiplied by

(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year, determined by substituting "calendar year 2015" for "calendar year 1992" in subparagraph (B) thereof.

If the amount of any increase under clause (i) is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.

**(4) Terms relating to income and families.**—For purposes of this section—

**(A) Family size.**—The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year.

**(B) Household income.**—The term "household income" means, with respect to any taxpayer for any taxable year, an amount equal to the sum of—

**(i)** the modified adjusted gross income of the taxpayer, plus

**(ii)** the aggregate modified adjusted gross incomes of all other individuals who—

**(I)** were taken into account in determining the taxpayer's family size under paragraph (1), and

**(II)** were required to file a return of tax imposed by section 1 for the taxable year.

**(C) Modified adjusted gross income.**—The term "modified adjusted gross income" means adjusted gross income increased by—

**(i)** any amount excluded from gross income under section 911, and

**(ii)** any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax.

**[(D) Repealed.** Pub.L. 111-152, Title I, § 1002(b)(1), Mar. 30, 2010, 124 Stat. 1032]

**(d) Applicable individual.**—For purposes of this section—

**(1) In general.**—The term "applicable individual" means, with respect to any month, an individual

other than an individual described in paragraph (2), (3), or (4).

**(2) Religious exemptions.—**

**(A) Religious conscience exemption.—**Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act which certifies that such individual is—

**(i)** a member of a recognized religious sect or division thereof which is described in section 1402(g)(1), and

**(ii)** an adherent of established tenets or teachings of such sect or division as described in such section.

**(B) Health care sharing ministry.—**

**(i) In general.—**Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

**(ii) Health care sharing ministry.—**The term "health care sharing ministry" means an organization—

**(I)** which is described in section 501(c)(3) and is exempt from taxation under section 501(a),

**(II)** members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,

**(III)** members of which retain membership even after they develop a medical condition,

**(IV)** which (or a predecessor of which) has

been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and

(V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

(3) Individuals not lawfully present.—Such term shall not include an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.

(4) Incarcerated individuals.—Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

(e) Exemptions.—No penalty shall be imposed under subsection (a) with respect to—

(1) Individuals who cannot afford coverage.—

(A) In general.—Any applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act. For purposes of applying this subparagraph, the taxpayer's household income shall be increased by any exclusion from gross income for any portion of the required contribution made through a salary reduction arrangement.

**(B) Required contribution.**—For purposes of this paragraph, the term "required contribution" means—

**(i)** in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-employer-sponsored plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage, or

**(ii)** in the case of an individual eligible only to purchase minimum essential coverage described in subsection (f)(1)(C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified health plan through the Exchange), reduced by the amount of the credit allowable under section 36B for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

**(C) Special rules for individuals related to employees.**—For purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination under subparagraph (A) shall be made by reference to required contribution of the employee.

**(D) Indexing.**—In the case of plan years beginning in any calendar year after 2014,

subparagraph (A) shall be applied by substituting for '8 percent' the percentage the Secretary of Health and Human Services determines reflects the excess of the rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period.

**(2) Taxpayers with income below filing threshold.**—Any applicable individual for any month during a calendar year if the individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act is less than the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer.

**(3) Members of Indian tribes.**—Any applicable individual for any month during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6)).

**(4) Months during short coverage gaps.—**

**(A) In general.**—Any month the last day of which occurred during a period in which the applicable individual was not covered by minimum essential coverage for a continuous period of less than 3 months.

**(B) Special rules.**—For purposes of applying this paragraph—

**(i)** the length of a continuous period shall be determined without regard to the calendar years in which months in such period occur,

**(ii)** if a continuous period is greater than the period allowed under subparagraph (A), no exception shall be provided under this paragraph for any month in the period, and

**(iii)** if there is more than 1 continuous period

described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph shall only apply to months in the first of such periods.

The Secretary shall prescribe rules for the collection of the penalty imposed by this section in cases where continuous periods include months in more than 1 taxable year.

**(5) Hardships.**—Any applicable individual who for any month is determined by the Secretary of Health and Human Services under section 1311(d)(4)(H) to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

**(f) Minimum essential coverage.**—For purposes of this section—

**(1) In general.**—The term "minimum essential coverage" means any of the following:

**(A) Government sponsored programs.**—Coverage under—

**(i)** the Medicare program under part A of title XVIII of the Social Security Act,

**(ii)** the Medicaid program under title XIX of the Social Security Act,

**(iii)** the CHIP program under title XXI of the Social Security Act,

**(iv)** medical coverage under chapter 55 of title 10, United States Code, including coverage under the TRICARE program;

**(v)** a health care program under chapter 17 or 18 of title 38, United States Code, as determined by the Secretary of Veterans Affairs, in coordination with the Secretary of Health and Human Services and the Secretary,

(vi) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers); or

(vii) the Nonappropriated Fund Health Benefits Program of the Department of Defense, established under section 349 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337; 10 U.S.C. 1587 note).

(B) Employer-sponsored plan.—Coverage under an eligible employer-sponsored plan.

(C) Plans in the individual market.—Coverage under a health plan offered in the individual market within a State.

(D) Grandfathered health plan.—Coverage under a grandfathered health plan.

(E) Other coverage.—Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health and Human Services, in coordination with the Secretary, recognizes for purposes of this subsection.

(2) Eligible employer-sponsored plan.—The term "eligible employer-sponsored plan" means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is—

(A) a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act), or

(B) any other plan or coverage offered in the small or large group market within a State.

Such term shall include a grandfathered health plan described in paragraph (1)(D) offered in a group market.

(3) Excepted benefits not treated as minimum

**essential coverage.**—The term "minimum essential coverage" shall not include health insurance coverage which consists of coverage of excepted benefits—

**(A)** described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act; or

**(B)** described in paragraph (2), (3), or (4) of such subsection if the benefits are provided under a separate policy, certificate, or contract of insurance.

**(4) Individuals residing outside United States or residents of territories.**—Any applicable individual shall be treated as having minimum essential coverage for any month—

**(A)** if such month occurs during any period described in subparagraph (A) or (B) of section 911(d)(1) which is applicable to the individual, or

**(B)** if such individual is a bona fide resident of any possession of the United States (as determined under section 937(a)) for such month.

**(5) Insurance-related terms.**—Any term used in this section which is also used in title I of the Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

**(g) Administration and procedure.—**

**(1) In general.**—The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

**(2) Special rules.**—Notwithstanding any other provision of law—

**(A) Waiver of criminal penalties.**—In the case of

any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

**(B) Limitations on liens and levies.**—The Secretary shall not—

**(i)** file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

**(ii)** levy on any such property with respect to such failure.

28 U.S.C. § 1341 provides:

**§ 1341. Taxes by States**

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.