

Nos. 11-1057 & 11-1058

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COMMONWEALTH OF VIRGINIA, EX REL. KENNETH T. CUCCINELLI, II,
in his official capacity as Attorney General of Virginia,
Plaintiff-Appellee/Cross-Appellant,
v.

KATHLEEN SEBELIUS, Secretary of the Department of Health and
Human Services, in her official capacity,
Defendant-Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SUPPLEMENTAL BRIEF FOR APPELLANT

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In response to this Court's order of May 23, 2011, appellant respectfully submits that the Anti-Injunction Act (AIA) is not applicable to these proceedings.

1. The AIA provides, with statutory exceptions not implicated here, that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.” 26 U.S.C. § 7421(a). The purpose of the AIA is to preserve the government's ability to assess and collect taxes with “a minimum of preenforcement judicial interference, and to require 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 (1974) (internal quotation marks omitted). The AIA, when applicable, bars any suit seeking relief that “would necessarily preclude” the assessment or collection of taxes under the Internal Revenue Code, regardless of the plaintiff's professed motivation for the suit. *Id.* at 731-32.

a. Like other provisions that “govern[] a court's adjudicatory capacity,” *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011), the AIA limits the federal courts' subject-matter jurisdiction. See *Hansen v. Dep't of Treasury*, 528 F.3d 597, 600-01 (9th Cir. 2007); *Gardner v. United States*, 211 F.3d 1305, 1310 (D.C. Cir. 2000). Accordingly, if the AIA applied here, it would deprive the court of jurisdiction to hear a pre-implementation challenge to the

minimum coverage provision of the Affordable Care Act (ACA), 26 U.S.C.A. § 5000A.

b. In the district courts, the government argued for dismissal of these actions under the AIA. On further reflection, and on consideration of the decisions rendered thus far in the ACA litigation, the United States has concluded that the AIA does not foreclose the exercise of jurisdiction in these cases. Unique attributes of the text and structure of the ACA indicate that Congress did not intend to dictate a single pathway to judicial review of Section 5000A – *i.e.*, failure to maintain minimum essential coverage starting more than two and a half years from now, in January 2014; payment of the tax penalty starting nearly four years from now, in April 2015; and, only then, commencement of an action seeking a tax refund.

As noted, the AIA applies to a “suit for the purpose of restraining the assessment or collection of any tax.” 26 U.S.C. § 7421(a). Separate provisions of the Internal Revenue Code expressly provide that certain penalties will be deemed “tax[es]” for purposes of other parts of the Code, including the AIA. Thus, the second sentence of Section 6671(a) provides that, “[e]xcept 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*.” 26 U.S.C. § 6671(a)

(emphasis added). Thus, the AIA bars a suit to restrain assessment or collection of a “penalty” established in Subchapter B of chapter 68 (in which 26 U.S.C. § 6671(a) appears) because such penalties are deemed taxes for purposes of all of Title 26. Likewise, paragraph (2) of Section 6665(a) provides that “any reference in this title to ‘tax’ imposed by this title shall be deemed also to refer to . . . penalties provided by this chapter [68].” 26 U.S.C. § 6665(a)(2).

The minimum coverage provision penalty, however, appears in Chapter 48 of Subtitle D (“Miscellaneous Excise Taxes”), not Chapter 68. *See* 26 U.S.C.A. § 5000A. It is therefore not among the “penalties” that come within the ambit of the AIA by reason of Sections 6665(a)(2) or 6671(a).

To be sure, Congress provided in the ACA that “[t]he penalty provided by this section . . . 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). And the first sentence of 26 U.S.C. § 6671(a) (in subchapter B) provides that “[t]he penalties and liabilities provided by this subchapter [B] . . . shall be assessed and collected in the same manner as taxes.” (The Internal Revenue Code elsewhere specifies the manner in which taxes are assessed, 26 U.S.C. §§ 6201-6255, and collected, *id.* §§ 6301-6344.) But Congress differentiated in Section 6671(a) itself between assessment and collection of assessable penalties (the first sentence) and

other Internal Revenue Code-specific attributes applicable to assessable penalties (the second sentence). And Section 5000A(g)(1) mirrors only the former, and indeed does so without referring to Section 6671(a). The significance of that choice is illuminated by comparing the limited instruction in Section 5000A(g)(1) to other actual cross-references in the Code.

For example, several tax penalty provisions, *e.g.*, 26 U.S.C. §§ 5114(c)(3), 5684(b) & 5761(e), expressly cross-reference to Section 6665(a), which provides that “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,” 26 U.S.C. § 6665(a)(1), and, as noted, that “any reference in this title to ‘tax’ imposed by this title shall be deemed also to refer to . . . penalties provided by this chapter [68],” *id.* § 6665(a)(2). It is Section 6665(a)(2) that renders the AIA applicable to those penalties. In contrast to Section 5000A(g)(1), these cross-reference provisions also mention “taxes” and cite to (all of) Section 6665(a) – *i.e.*, they identically provide that the penalty “shall be assessed, collected, and paid in the same manner as taxes, as provided in section 6665(a).” 26 U.S.C. §§ 5114(c)(3), 5684(b), 5761(e).

Section 5000A(g)(1), by contrast, does not specifically cross-reference Section 6671 (or Section 6665(a)). Nor does Section 5000A(g)(1) state that the

penalty shall be assessed and collected in the same manner as “taxes.” Instead, it provides that the penalty will be assessed and collected in the same manner as an “assessable penalty.” Finally, Section 5000A(g)(1) does not provide that the penalty shall be “paid” in the same manner as an assessable penalty or (as noted above) refer to Section 6671(a), which provides that penalties and liabilities provided by subchapter B of Chapter 68 “shall be paid upon notice and demand” by the Secretary. Rather, Section 5000A(g)(1) includes its *own* directive that the penalty “shall be paid upon notice and demand by the Secretary.”

Given that Congress in other penalty provisions had included explicit cross-references to Section 6665(a), the distinctions discussed above indicate that the absence of such a specific cross-reference to that section or to Section 6671(a), and thus derivatively to the AIA, was deliberate.¹

The structure and legislative history of the ACA support this conclusion. First, in Section 5000(A)(g)(2)(B) (the provision immediately following the “assessed and collected” provision discussed above), Congress prohibited the IRS

¹ This conclusion is further reinforced by the contrast between Section 5000A(g)(1) and Section 9010 of the ACA, which establishes a penalty and provides that it “shall be subject to the provisions of subtitle F of the Internal Revenue Code . . . that apply to assessable penalties imposed under chapter 68 of such Code.” See ACA § 9010(g)(3)(C), as amended by the Health Care and Education Reconciliation Act of 2010, 26 U.S.C.A. Subt. D, note. In contrast to the limited direction in Section 5000A(g)(1), the broad cross-reference in Section 9010 incorporates all of Sections 6665(a) and 6671(a), both of which appear in Subtitle F.

from filing a notice of lien or levying on property in order to collect the penalty.² Those actions are among the principal tools the federal government uses to collect unpaid taxes, and, as a practical matter, resort to those tools is what a pre-enforcement challenge to a tax statute would typically “restrain” (26 U.S.C. § 7421(a)). Because those particular tools are unavailable in the context of the minimum coverage provision, it makes sense that Congress would regard it as unnecessary to apply the AIA to bar challenges to the minimum coverage provision prior to its effective date.

Second, and as the government has acknowledged, the minimum coverage requirement is “integral” to the ACA’s guaranteed-issue and community-rating provisions – *i.e.*, Sections 2701, 2702, 2704 (with respect to adults), and 2705(a) of the Public Health Service Act, as added by Section 1201 of the ACA – which go into effect in 2014 along with that requirement and cannot be severed from it. *See* U.S. Response/Reply Brief at 47, *Virginia v. Sebelius*; *see also* U.S. Response/Reply Brief at 58, *Florida v. HHS*, Nos. 11-11021 & 11-11067 (11th Cir.) (filed May 18, 2011). Congress would not have wanted to wait until after these interconnected provisions were implemented (and relied upon by millions of

² The ACA also provides that “[i]n 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.” 26 U.S.C.A. § 5000A(g)(2)(A).

individuals, as well as the insurance industry) for challenges to the constitutionality of the minimum coverage provision to be resolved.

Third, Congress delayed the effective date of the minimum coverage provision, thus dramatically mitigating the risk of disruption to ongoing administration of the tax code that the AIA is intended to prevent. The AIA's purpose is to prevent anyone from interfering with the federal government's administration of the Tax Code, from forcing it by judicial fiat to treat a particular taxpayer or group of taxpayers differently than others, and from compelling it to stop or alter the ongoing business of tax enforcement. This broad challenge to the constitutionality of the minimum coverage provision, which was brought nearly four years before the minimum coverage provision is to be implemented, five years before any tax is to be paid and the IRS begins assessing and collecting those taxes, and well before the IRS has even set up the systems to administer the provision, poses no realistic threat of such disruption -- in contrast to the threat of disruption to the administration of the ACA that postponing review would raise.

Finally, the ACA's legislative history supports the conclusion that Congress did not intend the AIA to prohibit pre-enforcement challenges to the minimum coverage provision. In enacting the statute, Members of Congress reflected an awareness that constitutional challenges were "likely" to be adjudicated, but never

suggested that the only way for an individual to obtain review would be to refuse in 2014 to maintain the minimum essential coverage the ACA sought to ensure, pay the tax penalty in 2015, and commence a refund action. 155 Cong. Rec. S13,823 (Dec. 23, 2009) (Sen. Hatch); *see also* 156 Cong. Rec. E475-02 (Mar. 21, 2010) (Rep. Bonner) (noting “there are already attempts to challenge [the provision] in court”).

2. As the United States has explained (U.S. Opening Brief at 58-61, *Virginia v. Sebelius*; U.S. Opening Brief at 54-59, *Liberty v. Geithner*), the minimum coverage provision is a valid exercise of Congress’s constitutional power over taxation. But that conclusion does not mean that the AIA bars this lawsuit; the two inquiries are distinct.

In “passing on the constitutionality of a tax law,” a court is “concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.” *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) (citation omitted). The minimum coverage provision easily satisfies that test. Among other things, it will be administered by the IRS; any penalty is due on April 15 with individuals’ tax returns; and, in many cases, the penalty will be a percentage of income. In “practical operation,” *id.*, this is a tax for constitutional purposes. That inquiry, unlike the technical question of whether

Congress intended the AIA to apply, does not depend on the particular Chapter in which the provision appears in the Internal Revenue Code or the precise language of the statutory cross-references Congress employed.

The distinction between these inquiries is illustrated by two Supreme Court cases from 1922. In *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20 (1922), the Court upheld a claim for a tax refund, and invalidated a federal child labor tax law as a punitive sanction. Nevertheless, on the same day, the Court ordered dismissal of a pre-enforcement suit to enjoin collection of the same tax. *Bailey v. George*, 259 U.S. 16 (1922). The Court held that “[t]he averment that a taxing statute is unconstitutional does not take this case out of” the predecessor to the AIA. *Id.* at 20. The Court has since reiterated that the AIA applies even where the taxpayer challenges Congress’s power to enact a purported tax. See *Bob Jones Univ.*, 416 U.S. at 740-41; *Alexander v. Americans United, Inc.*, 416 U.S. 752, 759-60 (1974).

The converse is also true. For the reasons provided above, this Court may determine that, as a matter of statutory interpretation, the AIA does not apply here and that Section 5000A is an exercise of Congress’s taxing power.

3. An individual plaintiff may also challenge Section 5000A in a refund suit. A taxpayer who seeks a refund of taxes that he claims were unlawfully

assessed or collected may sue either in a district court or the Court of Federal Claims. 28 U.S.C. § 1346(a)(1). However, he must first comply with the tax refund scheme in the Internal Revenue Code – *i.e.*, pay the challenged tax and file an administrative claim for a refund with the IRS before bringing suit. 26 U.S.C. § 7422(a). Having complied with these prerequisites, the taxpayer may challenge the constitutionality of the tax in his refund suit, *see, e.g., United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 9-10 (2008), but could not do so in this context until 2015 at the earliest, after he failed to maintain minimum coverage during the 2014 tax year. In the unique circumstances of this case, we do not believe that Congress intended a refund suit to be the sole recourse for a constitutional challenge to the minimum coverage provision.³

³ The Commonwealth of Virginia, which is not an individual subject to Section 5000A and thus lacks standing to challenge it, cannot avail itself of these refund procedures. The district court held that the Commonwealth’s suit therefore fell under the exception to the AIA permitting a state to challenge a federal taxing statute directly rather than to depend upon the “mere possibility of persuading a third party to assert his claims.” *South Carolina v. Regan*, 465 U.S. 367, 381 (1984). Here, unlike in *Regan*, private parties, such as the individuals in the *Liberty University* case, are willing to assert the constitutional challenge that the Commonwealth wishes to bring. The *Regan* exception thus does not apply.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, according to the word count provided in Corel WordPerfect 12, the foregoing brief contains 2,466 words. The text of the brief is composed in 14-point Times New Roman typeface.

The text of the hard copy of this brief and the text of the “PDF” version of the brief filed electronically through ECF (“the E-brief”) are identical. A virus check was performed on the E-brief, using Microsoft Forefront Client Security software (version 1.5.1973.0), and no virus was detected.

/s/ Alisa B. Klein
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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2011, I filed and served the foregoing Supplemental Brief for Appellant with the Clerk of the Court by causing a copy to be electronically filed and served via the appellate CM/ECF system. I also hereby certify that I have caused copies to be delivered to the Court by Federal Express, and caused copies to be served upon the following counsel by Federal Express:

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