No. 11-398

IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,
v.
STATE OF FLORIDA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR COURT-APPOINTED AMICUS CURIAE SUPPORTING VACATUR (ANTI-INJUNCTION ACT)

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QUESTION PRESENTED

Whether the Anti-Injunction Act, 26 U.S.C. § 7421(a), bars the suit brought by Respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES AND REGULATIONS

OTHER AUTHORITIES

BRIEF FOR COURT-APPOINTED AMICUS CURIAE

INTEREST OF AMICUS CURIAE

This brief is submitted in response to the Court's order appointing counsel to brief and argue this case as *amicus curiae* in support of the position that the Anti-Injunction Act, 26 U.S.C. § 7421(a), bars the suit brought by Respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-273a, is reported at 648 F.3d 1235. The district court's order granting summary judgment, Pet. App. 274a-368a, is reported at 780 F. Supp. 2d 1256. The district court's order and opinion granting in part, and denying in part, the federal government's motion to dismiss, Pet. App. 394a-475a, is reported at 716 F. Supp. 2d 1120.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). For the reasons set forth in this brief, this suit is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a).

STATUTES INVOLVED

Pertinent statutory provisions are set forth in the appendix to this brief. *See* App., *infra*, 1a-19a.

STATEMENT

1. The Affordable Care Act

In March 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 ("Affordable Care Act"). The statute is intended to "increase the number and share of Americans who are insured," "lower health insurance premiums," and "improve financial security for families." 42 U.S.C. § 18091(a)(2)(C), (F), & (G); *see also Seven-Sky v. Holder*, 661 F.3d 1, 4 (D.C. Cir. 2011) (statute is intended to "reform our nation's health insurance and health care delivery markets with the aims of improving access to those markets and reducing health care costs and uncompensated care.").

The Affordable Care Act amends the Internal Revenue Code ("Code") by requiring "applicable individual[s]" to "ensure" that they and their dependents maintain "minimum essential coverage" for health care costs beginning in 2014. 26 U.S.C. § 5000A(a). This requirement can be satisfied by enrolling in an employer-sponsored insurance plan, an individual plan, a "grandfathered" health plan, a government-sponsored program (such as Medicare or

Medicaid), or obtaining other federally-recognized coverage. *Id.* § 5000A(f).[1]

Taxpayers who fail to maintain minimum essential coverage for themselves and their dependents must pay a penalty. *Id.* § 5000A(b). This penalty is calculated as a percentage of the taxpayer's income (subject to a floor), and is capped at the national average premium for the lowest-level plan providing "minimum essential coverage." *Id.* § 5000A(c). The penalty is included with the taxpayer's income tax return. *Id.* § 5000A(b)(2).

The statute directs that "[t]he 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." *Id.* § 5000A(g)(1). The exceptions in paragraph (2) prohibit criminal prosecutions, notices of lien with respect to any property of a taxpayer, or levying any property of a taxpayer for failing to pay the penalty. *Id.* § 5000A(g)(2).

The Congressional Budget Office has estimated that the penalty provision will produce between five and six billion dollars per year in annual revenue for the U.S. Treasury by the end of this decade. *See* Cong. Budget Office, *CBO's Analysis of the Major Health Care Legislation Enacted in March 2010*

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[1] The full text of Section 5000A is set out in the appendix to this brief. *See* App., *infra*, 1a-15a.

Before the H. Subcomm. on Health, Comm. on Energy and Commerce, 111th Cong. at 14 tbl.2 (Mar. 30, 2011) (statement of Douglas W. Elmendorf, Director), *available at* http://www.cbo.gov/ftpdocs/121xx/doc12119/03-30-healthcarelegislation.pdf [hereinafter *CBO Analysis*].

2. The Anti-Injunction Act

The Anti-Injunction Act bars pre-enforcement challenges to tax laws unless an exception to the Act applies. The statute provides:

> 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), and 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.

26 U.S.C. § 7421(a).

The Anti-Injunction Act originally provided that "no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 475. The Revised Statutes added the term "any," so that the statute read: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." *South Carolina v. Regan*, 465 U.S. 367, 373 n.10 (1984).

Although the Anti-Injunction Act appears to have no recorded legislative history, *see Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974), this Court concluded that Congress acted with "the sense . . . of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence." *State Railroad Tax Cases*, 92 U.S. 575, 613 (1875). The "principal purpose" of the Act is "protection of the Government's need to assess and collect taxes as expeditiously as possible 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*, 416 U.S. at 736 (quoting *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962)).[2]

"During the first half century of the [Anti-Injunction] Act's existence, the Court gave it literal force, without regard to the character of the tax, the nature of the pre-enforcement challenge to it, or the status of the plaintiff." *Bob Jones*, 416 U.S. at 742. In 1922, however, the Court "seized upon" dicta in earlier cases suggesting that "extraordinary and exceptional circumstances might justify an injunction despite the Act" as support for three decisions approving pre-enforcement injunctions

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[2] Congress has included a similar limitation in the Declaratory Judgment Act, which authorizes federal courts to issue declaratory judgments in any case within the courts' jurisdiction, "except with respect to Federal taxes." 28 U.S.C. § 2201(a). This limitation is "at least as broad as the Anti-Injunction Act." *Bob Jones*, 416 U.S. at 732 n.7.

"against tax statutes that were viewed as penalties or as adjuncts to the criminal law." *Id.* at 743. "Shortly thereafter," the Court retreated from these decisions, making clear that they "were of narrow scope and had no application to pre-enforcement challenges to truly revenue-raising tax statutes." *Id.* (citing *Graham v. Du Pont*, 262 U.S. 234 (1923)). The Court "subsequently abandoned" the "distinctions between regulatory and revenue-raising taxes." *Bob Jones*, 416 U.S. at 741 n.12 (citing *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)).

In the 1930s, the Court held in two cases that the Anti-Injunction Act "is merely 'declaratory of the principle' of cases prior to its passage that equity usually, but not always, disavows interference with tax collection." *Id.* at 744 (quoting *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932)). "Read literally," the Court's decision in *Standard Nut* "effectively repealed the Act, since the Act was viewed as requiring nothing more than equity doctrine had demanded before the Act's passage." *Bob Jones*, 416 U.S. at 744.

The "incongruity" of the Court's interpretation in *Standard Nut* "led directly" to the Court's unanimous decision in *Williams Packing*, which marked "the second time the Court has undertaken to rehabilitate the Act following debilitating departures from its explicit language." *Id.* at 744-45. In *Williams Packing*, the Court "switched the focus of the extraordinary and exceptional circumstances test from a showing of the degree of harm to the plaintiff absent an injunction to the requirement

that it be established that the Service's action is plainly without a legal basis." *Id* at 745.

The Court has viewed *Williams Packing* as "the capstone to judicial construction of the Act," declaring that it "spells an end to a cyclical pattern of allegiance to the plain meaning of the Act, followed by periods of uncertainty caused by a judicial departure from that meaning, and followed in turn by the Court's rediscovery of the Act's purpose." *Id.* at 742. Following *Williams Packing*, the Court has returned to giving the Anti-Injunction Act "literal force, without regard to the . . . nature of the pre-enforcement challenge." *Id.*

3. This Case

a. Respondents—26 States, two individuals, and the National Federation of Independent Business—filed this action in the Northern District of Florida challenging the constitutionality of several provisions of the Affordable Care Act, including the minimum coverage provision. The district court held that an individual respondent, Mary Brown, has standing to challenge the minimum coverage provision. Pet. App. 292a.[3] The district court also held that Idaho and Utah have standing to challenge the minimum coverage provision because they

[3] Respondent Brown has since declared bankruptcy, and Respondents have filed a motion for leave to add two individuals as parties to this case. *See* Private Resp. Unopposed Mot. for Leave to Add Parties Dana Grimes & David Klemencic (filed Jan. 4, 2012).

enacted statutes purporting to exempt their residents from that provision. *Id.* at 293a-95a.

In the district court, the federal government moved to dismiss Respondents' lawsuit on the ground that it is barred by the Anti-Injunction Act. The district court held that the Anti-Injunction Act does not bar this suit. *Id.* at 401a-25a. The court concluded that the penalty is not "collected and treated 'in the same manner as taxes' in light of the fact that Congress specifically divorced the penalty from the tax code's traditional collection and enforcement mechanisms." *Id.* at 424a. In addition, the court held that the Anti-Injunction Act does not apply to penalties that are "'imposed for substantive violations of laws not directly related to the tax code.'" *Id.* (citation omitted).

On the merits, the district court held that the minimum coverage provision is not a valid exercise of Congress's commerce or taxing powers. *Id.* at 296a-350a, 401a-24a. The court held that the minimum coverage provision cannot be severed from the rest of the statute, and therefore entered a declaratory judgment invalidating the Affordable Care Act in its entirety. *Id.* at 350a-64a.

b. A divided court of appeals affirmed in part and reversed in part. Before the court of appeals, the federal government did not raise the Anti-Injunction

Act issue.[4] The court of appeals opinion did not address the issue.

The court of appeals held that Respondent Brown has standing to challenge the minimum coverage provision, and did not decide whether the Respondent States also have standing to challenge that provision. *Id.* at 9a-10a. On the merits, the court of appeals affirmed the district court's ruling that the minimum coverage provision is not a valid exercise of Congress's commerce or taxing powers. The court of appeals reversed the district court's conclusion that the minimum coverage provision is not severable, and held that the remainder of the Affordable Care Act may stand. *Id.* at 172a-86a.

c. Before this Court, no party takes the position that the Anti-Injunction Act bars this suit. The federal government suggested that the Court direct the parties to brief this question and appoint counsel as amicus curiae to argue that the suit is barred by the Anti-Injunction Act. By orders dated November 14, 2011 and November 18, 2011, the Court adopted both suggestions.

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[4] In a supplemental brief filed at the request of the Fourth Circuit, the federal government explained that it had reconsidered its position on the Anti-Injunction Act and "concluded that the [Act] does not foreclose the exercise of jurisdiction in these cases." U.S. Supp. Br. at 2, *Liberty Univ., Inc. v. Geithner*, __ F.3d __, 2011 WL 3962915 (4th Cir. Sept. 8, 2011) (No. 10-2347).

SUMMARY OF ARGUMENT

1. The Anti-Injunction Act limits the courts' jurisdiction by directing that "no suit . . . shall be maintained in any court." 26 U.S.C. § 7421(a). Consistent with this language, the Court has held repeatedly that the Anti-Injunction Act is a jurisdictional statute. *See, e.g.*, *Bob Jones Univ. v. Simon*, 416 U.S. 725, 749 (1974); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962). The Court has also concluded that the Tax Injunction Act, a closely-related statute that was modeled on the Anti-Injunction Act, is jurisdictional in nature. Congress has amended the Anti-Injunction Act on multiple occasions without disturbing this Court's holdings that the statute is jurisdictional.

This Court's recent decisions analyzing whether particular statutory provisions are "jurisdictional prescriptions" or "claim-processing rules" do not support a different conclusion. The Anti-Injunction Act does more than simply "promote the orderly progress of litigation"; it addresses the courts' "adjudicatory capacity." Even if that were not so, when a provision has been treated as jurisdictional in a long line of this Court's decisions, the Court has considered the provision to be jurisdictional. *See, e.g.*, *Bowles v. Russell*, 551 U.S. 205, 209 n.2, 210-11 (2007).

The decisions in *Williams Packing* and *South Carolina v. Regan*, 465 U.S. 367 (1984), are not to the contrary. In those cases, the Court construed the Anti-Injunction Act in light of its purpose and structure, while continuing to affirm that the statute

is jurisdictional. The decision in *Helvering v. Davis*, 301 U.S. 619 (1937), which accepted the federal government's waiver of a defense under the Anti-Injunction Act, is insufficient to negate the long line of decisions, both before and after *Davis*, affirming that the statute is jurisdictional. In this case, moreover, the federal government has argued that the Anti-Injunction Act bar is non-waivable.

2.a. The text of the Anti-Injunction Act bars any "suit for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). This suit falls within the scope of the Anti-Injunction Act for two reasons. *First*, Congress provided that the penalty imposed by Section 5000A shall be "assessed and collected in the same manner" as taxes. *Second*, the term "tax" is broad enough to include the Section 5000A penalty, particularly in light of statutory provisions that define "taxes" to include "assessable penalties" for purposes of assessment and collection.

i. Congress expressly directed 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." *Id.* § 5000A(g)(1). Congress further directed that "[t]he penalties . . . provided by [subchapter B of chapter 68] . . . shall be assessed and collected in the same manner as taxes." *Id.* § 6671(a). If taxpayers (and others) can pursue litigation to restrain the assessment or collection of the Section 5000A penalty without regard to the Anti-Injunction Act, the penalty will not be assessed and collected in the same manner as taxes.

When the Anti-Injunction Act applies, taxpayers wishing to challenge a tax must either pay the tax and then file for a refund, or wait for the federal government to bring a collection action. Absent the Anti-Injunction Act, taxpayers and other plaintiffs could sue at a time of their own choosing, without paying the tax in advance, giving the Internal Revenue Service notice and an opportunity to respond administratively, or subjecting themselves to additional penalties if the government prevails in a collection action.

ii. Even if Congress had not provided that the Section 5000A penalty shall be assessed and collected in the same manner as a tax, the Anti-Injunction Act would still apply. When Congress enacted the Anti-Injunction Act, the ordinary meaning of "tax" "includ[ed] almost every species of imposition on persons or property for supplying the public treasury." Noah Webster, *An American Dictionary of the English Language* 1132 (rev. by Chauncy A. Goodrich) (1860). Consistent with this meaning, the Court has construed the Anti-Injunction Act broadly, as applying to an "exaction [that] is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue." *Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589, 596 (1931). The Section 5000A penalty falls within the ordinary meaning of "tax" because it is codified in the Code, calculated as part of the taxpayer's federal income tax liability, assessed and collected by the IRS, and paid into the federal government's general revenues. This conclusion is reinforced by statutory provisions making clear that, for purposes of assessment and

collection, "assessable penalties" are "taxes." *See* 26 U.S.C. § 6201(a).

b. The Anti-Injunction Act cannot be avoided by characterizing this suit as a challenge only to the minimum coverage requirement, rather than the penalty provision. Respondents have challenged both the penalty provision and the minimum coverage requirement. Even if they had purported to challenge only the minimum coverage requirement, their suit would be barred, because invalidating that requirement would make it impossible for the Secretary to assess and collect the penalty. This Court has rejected similar arguments aimed at avoiding the Anti-Injunction Act as "circular" and "unpersuasive." *See Alexander v. "Americans United" Inc.*, 416 U.S. 752, 760-62 (1974).

c. The Anti-Injunction Act applies to the State Respondents as well as the Private Respondents. The definitional provisions of the Code state that a "person" includes certain specified entities, and that the term "includes" "shall not be deemed to exclude other things otherwise within the meaning of the term defined." 26 U.S.C. §§ 7701(a)(1), (c). This Court and other courts have interpreted the term "person" in the Code to include States. *See, e.g.*, *Sims v. United States*, 359 U.S. 108 (1959); *Ohio v. Helvering*, 292 U.S. 360 (1934). Congress added the term "person" to the Anti-Injunction Act in 1966 to reaffirm the broad scope of the statute, and to prevent suits by third parties whose property rights compete with federal tax liens. Consequently, there is no basis for concluding that the addition of the

"any person" language exempted States from coverage.

Nor are the State Respondents "aggrieved parties" for purposes of the implied exception recognized in *South Carolina v. Regan*, 465 U.S. at 378. The States are not liable for the penalty, and they are not authorized to sue as *parens patriae* to protect citizens of the United States from the operation of federal statutes. *See Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923). The States also cannot qualify as "aggrieved parties" by arguing that the minimum coverage provision will induce individuals who were previously eligible for Medicaid to enroll in the program. This claim is both speculative and premature, and in any event a State is not injured when eligible individuals enroll in a state-sponsored program intended for their benefit.

d. Policy considerations cannot justify departing from the explicit statutory language of a jurisdictional statute. Congress can, at any time, authorize immediate judicial review of the constitutionality of the minimum coverage provision, but it has not done so in this case. Moreover, an immediate decision would be contrary to the policy that courts avoid deciding constitutional issues unless it is necessary to do so.

ARGUMENT

I. THE ANTI-INJUNCTION ACT LIMITS THE COURTS' SUBJECT-MATTER JURISDICTION.

In the district court, the federal government moved to dismiss this case on the ground that it is barred by the Anti-Injunction Act. *See* Pet. App. 424a. Although the federal government subsequently abandoned this position, it has recognized that the issue implicates the Court's subject-matter jurisdiction. *See* U.S. Pet. 32-34. Subject-matter jurisdiction "involves a court's power to hear a case," and therefore "courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (citations and internal quotations omitted).

1. The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). As the Court has explained, a statutory provision is jurisdictional if "it governs a court's adjudicatory capacity," *Henderson* ex rel. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011), or "speak[s] to the power of the court rather than to the rights or obligations of the parties," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (citation and internal quotations omitted). The Anti-Injunction Act's command that no suit "shall be maintained in any court" is jurisdictional because it

imposes a limitation on the courts' capacity to hear and decide cases seeking to restrain the assessment or collection of taxes.

Consistent with the language of the Anti-Injunction Act, the Court has held repeatedly that "[t]he object of § 7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962). *See also Jefferson Cnty. v. Acker*, 527 U.S. 423, 434 (1999) (Act is a "measure depriving courts of jurisdiction over suits brought 'for the purpose of restraining the assessment or collection' of any federal tax."); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 749 (1974) (Act "deprived the District Court of jurisdiction to issue the injunctive relief petitioner sought."); *Dodge v. Osborn*, 240 U.S. 118, 119 (1916) (affirming dismissal "for want of jurisdiction" because the Act barred the lawsuit); *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 10 (1916) (applicability of the Act is "a question of jurisdiction"); *Snyder v. Marks*, 109 U.S. 189, 194 (1883) (Congress enacted the Act "to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues."); *Hornthall v. The Collector*, 76 U.S. (9 Wall.) 560, 566 (1869) (Act implicates "the jurisdiction of the court."). In addition, the courts of

appeals uniformly hold that the Anti-Injunction Act is a jurisdictional statute.[5]

The jurisdictional nature of the Anti-Injunction Act is also evident from the Court's interpretation of a closely-related statute, the Tax Injunction Act. The Tax Injunction Act 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." 28 U.S.C. § 1341. This Court has noted that, "[i]n composing the [Tax Injunction Act's] text, Congress drew particularly on . . . the Anti-Injunction Act." *Hibbs v. Winn*, 542 U.S. 88, 102-03 (2004); *see also Jefferson Cnty.*, 527 U.S. at 434 ("Congress modeled the Tax Injunction Act" on the Anti-Injunction Act.). As with the Anti-Injunction Act, the Court has held repeatedly that the Tax Injunction Act limits the jurisdiction of federal courts. *See Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2335 n.10 (2010); *Hibbs*, 542 U.S. at

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[5] *See United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 331 n.12 (1st Cir. 2003); *Randell v. United States*, 64 F.3d 101, 106 (2d Cir. 1995); *Sherman v. Nash*, 488 F.2d 1081, 1083 (3d Cir. 1973); *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291, 298-99 (4th Cir. 2000); *Lange v. Phinney*, 507 F.2d 1000, 1003 (5th Cir. 1975); *Hoogerheide v. Internal Revenue Serv.*, 637 F.3d 634, 638 (6th Cir. 2011); *Rappaport v. United States*, 583 F.2d 298, 300-01 (7th Cir. 1978) (per curiam); *Pagonis v. United States*, 575 F.3d 809, 813-15 (8th Cir. 2009); *In re J.J. Re-Bar Corp., Inc.*, 644 F.3d 952, 955 (9th Cir. 2011); *Sterling Consulting Corp. v. United States*, 245 F.3d 1161, 1167 (10th Cir. 2001); *Mathes v. United States*, 901 F.2d 1031, 1033 (11th Cir. 1990); *Gardner v. United States*, 211 F.3d 1305, 1310-11 (D.C. Cir. 2000).

104 ("The Act was designed expressly to restrict 'the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes.'" (quoting S. Rep. No. 75-1035, at 1 (1937))); *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 825 (1997) (Act creates a "broad jurisdictional barrier" (citation and internal quotations omitted)).

The amendments to the Anti-Injunction Act confirm that the Act is jurisdictional. Congress has amended the Anti-Injunction Act on numerous occasions without disturbing the Court's decisions holding that the Act is jurisdictional. To the contrary, Congress has reinforced those decisions by framing exceptions to the Anti-Injunction Act in explicitly jurisdictional terms.[6]

2. The Private Respondents argue that the Anti-Injunction Act is not jurisdictional, and thus the Court need not address it. *See* Private Resp. Cert. Stage Br. 16-18. Their arguments are unpersuasive.

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[6] *See* 26 U.S.C. § 6015(e) (Tax Court "shall have jurisdiction" in specified cases, and is authorized to enjoin levies and collection actions "[n]otwithstanding the provisions of section 7421(a)."); *id.* § 6213(a) ("Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund . . . unless" specified conditions are met.); *id.* § 6225(b) (same, conferring authority "notwithstanding section 7421(a)"); *id.* § 6246(b) (same); *id.* § 6330(e)(1) (same); *id.* §§ 7426(a), (b)(1) (authorizing certain civil actions but providing that "[t]he district court shall have jurisdiction to grant only" limited forms of relief); *id.* § 7429(b)(2)(A) (providing that, with certain exceptions, district courts "shall have exclusive jurisdiction over any civil action for a determination under this subsection").

a. The Private Respondents contend that the language of the Anti-Injunction Act does not create a jurisdictional limitation under the Court's recent decisions, which have analyzed whether particular statutory provisions are "claim-processing rules" or "jurisdictional prescriptions." *Reed Elsevier, Inc. v. Muchnik*, 130 S. Ct. 1237, 1243-44 (2010). *See, e.g.*, *Henderson*, 131 S. Ct. 1197; *Arbaugh*, 546 U.S. 500. According to these cases, statutes that "govern[] a court's adjudicatory capacity" are jurisdictional, while "rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times" are not. *Henderson*, 131 S. Ct. at 1202-03.

The Court's recent decisions provide no basis for overruling the long line of decisions that have treated the Anti-Injunction Act as jurisdictional. *See supra* p. 16. By directing that "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) (emphasis added), the Anti-Injunction Act does more than simply "promote the orderly progress of litigation." Instead, it governs the court's adjudicatory capacity by commanding that suits for the purpose of restraining the assessment or collection of taxes shall not be "maintained in any court."

Moreover, the Courts' recent decisions give dispositive weight to longstanding precedent that a statute is jurisdictional. *See Henderson*, 131 S. Ct. at 1203 ("When a long line of this Court's decisions left undisturbed by Congress has treated a similar requirement as jurisdictional, we will presume that

Congress intended to follow that course." (citation and internal quotations omitted)); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134-36 (2008); *Bowles v. Russell*, 551 U.S. 205, 206 (2007) (Court has "long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature."). Altering the Act's jurisdictional status would "require the repudiation of a century's worth of precedent and practice in American courts." *Bowles*, 551 U.S. at 209 n.2. Consequently, the Court's recent decisions support continued adherence to past decisions treating the Anti-Injunction Act as jurisdictional.

b. Nor is there any merit to the Private Respondents' contention that the limitations on the scope of the Anti-Injunction Act recognized in *Williams Packing* and *South Carolina v. Regan*, 465 U.S. 367 (1984), demonstrate that the statute is non-jurisdictional. *Williams Packing* and *Regan* did not repudiate the Anti-Injunction Act's jurisdictional status. To the contrary, *Williams Packing* expressly reaffirmed that the Act "withdraw[s] jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes." 370 U.S. at 5.

In both cases, the Court construed the statute based on its purpose and structure. In *Williams Packing*, the Court explained that, "if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable." *Id.* at 7. Likewise, in *Regan*, the Court concluded that "the Act's purpose and the circumstances of its enactment indicate that

Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." 465 U.S. at 378.

The Court's reliance on statutory purpose and structure does not imply that the Anti-Injunction Act is non-jurisdictional. The Court has construed other jurisdictional statutes to permit exceptions not expressly set out in the text of the statute, yet none of those exceptions made the statutes any less jurisdictional. *See Farm Credit Servs.*, 520 U.S. at 823 (Tax Injunction Act "on its face, yields no exception to the jurisdictional bar save where the state remedy is wanting, but at least one other exception is established by our cases."); *Ankenbrandt v. Richards*, 504 U.S. 689, 700 (1992) (discussing domestic relations exception to diversity jurisdiction); *Markham v. Allen*, 326 U.S. 490, 494 (1946) (discussing probate exception to diversity jurisdiction).

c. Contrary to the Private Respondents' assertion, the Court's decision in *Helvering v. Davis*, 301 U.S. 619, 639-40 (1937), does not demonstrate that the Anti-Injunction Act is non-jurisdictional. In *Davis*, the federal government acknowledged that the Anti-Injunction Act was jurisdictional, and that, in its view, the Act barred the plaintiffs' suit. Br. for Pet'rs Helvering & Welch at 28, 31, *Helvering v. Davis*, 301 U.S. 619 (1937) (No. 36-910). The federal government nevertheless argued that it would further the purpose of the Anti-Injunction Act if the government were permitted to waive any defenses that it had under the Act. *Id.* at 22-23, 31.

In writing for the Court, Justice Cardozo noted that he and three other Justices would have dismissed the case without reaching the merits. *Davis*, 301 U.S. at 639. But five Justices concluded that the case had "extraordinary features making it fitting in their judgment" to issue a decision. *Id.* at 640. The Court's limited explanation of the basis for this ruling does not indicate that five Justices had concluded—notwithstanding the Court's prior decisions—that the Anti-Injunction Act is non-jurisdictional.

Davis's treatment of the Anti-Injunction Act has not been relied upon as support for the view that the Anti-Injunction Act is non-jurisdictional. To the contrary, notwithstanding *Davis*, the Court has continued to hold that "[t]he object of § 7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes." *Williams Packing*, 370 U.S. at 5.[7]

II. THE ANTI-INJUNCTION ACT BARS THIS SUIT.

The text of the Anti-Injunction Act "could scarcely be more explicit." *Bob Jones*, 416 U.S. at 736. The

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[7] The *Davis* Court's decision to permit the federal government to waive a jurisdictional issue has been characterized as "an anomaly predating more stringent jurisdictional limitations." *Seven-Sky v. Holder*, 661 F.3d 1, 13 (D.C. Cir. 2011). The Court need not revisit *Davis* in this case because the federal government has not purported to waive a valid defense under the Anti-Injunction Act.

statute provides, with specified exceptions, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). Respondents do not contend that their suit falls within any of the express exceptions to the Anti-Injunction Act. Nor do they contend that their suit can proceed because "it is clear that under no circumstances could the Government ultimately prevail." *Williams Packing*, 370 U.S. at 7. And Respondents do not contend that constitutional challenges are exempt from the Act, because the "decisions of this Court make it unmistakably clear that the constitutional nature of a taxpayer's claim . . . is of no consequence under the Anti-Injunction Act." *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 759 (1974). The critical question is thus whether this is a "suit for the purpose of restraining the assessment or collection of any tax" within the meaning of the Anti-Injunction Act. The answer to that question is "yes."

A. The Relevant Statutory Text Bars This Suit.

The Anti-Injunction Act bars pre-enforcement challenges to the Section 5000A penalty for two distinct reasons. *First*, Congress provided that the penalty should be assessed and collected in the same manner as taxes, which makes suits challenging Section 5000A subject to the Anti-Injunction Act. *Second*, the Anti-Injunction Act's reference to "any tax" includes the penalty, particularly in light of provisions specifying that "taxes" include "assessable penalties" for assessment and collection purposes.

1. The Anti-Injunction Act Applies Because Congress Specified That The Section 5000A Penalty Shall Be Assessed And Collected In The Same Manner As Taxes.

a. In the Affordable Care Act, Congress directed that the penalty created by Section 5000A "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." 26 U.S.C. § 5000A(g)(1). Subchapter B of chapter 68, in turn, provides that "[t]he penalties and liabilities provided by this subchapter . . . shall be assessed and collected *in the same manner as taxes*." *Id.* § 6671(a) (emphasis added). By cross-referencing subchapter B of chapter 68, Congress expressly provided that the Section 5000A penalty "shall be assessed and collected in the same manner as taxes." *Id.*[8]

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[8] As Judge Kavanaugh explained, Congress appeared undecided over whether to label the Section 5000A penalty a "tax" or a "penalty." *See Seven-Sky*, 661 F.3d at 30 n.13 (Kavanaugh, J., dissenting) (quoting Staff of Joint Comm. on Taxation, JCX-27-10, Errata for JCX-18-10, at 2 (2010) (stating that the Section 5000A "penalty is an excise tax")). Congress ultimately (i) labeled the payment a "penalty," (ii) placed Section 5000A in chapter 48 (entitled "'Miscellaneous Excise Taxes"), and (iii) cross-referenced chapter 68 subchapter B to direct that the penalty shall be assessed and collected in the same manner as taxes. As Judge Kavanaugh noted, both "Assessable Penalties" under subchapter B of chapter 68 and "Miscellaneous Excise Taxes" under chapter 48 are subject to the Anti-Injunction Act. *See* 661 F.3d at 30 n.13.

The Anti-Injunction Act bars any "suit for the purpose of restraining the assessment or collection of any tax." *Id.* § 7421(a). "[T]he term 'assessment' refers to . . . the calculation or recording of a tax liability." *United States v. Galletti*, 541 U.S. 114, 122 (2004). The assessment process typically begins with the submission of a tax return. *See* 26 C.F.R. § 601.103(a). "In most cases, the Secretary accepts the [taxpayer's] self-assessment and simply records the liability of the taxpayer." *Galletti*, 541 U.S. at 122. "Where the taxpayer fails to file the form of return or miscalculates the tax due," the Secretary may "'record[] the liability of the taxpayer in the office of the Secretary'" in accordance with the Secretary's rules. *Id.* (quoting 26 U.S.C. § 6203).[9]

Assessment by the Secretary triggers "collection," which is the "actual imposition of a tax." *Cohen v. United States*, 650 F.3d 717, 726 (D.C. Cir. 2011) (en banc). Collection begins with a notice that the taxpayer is liable for an unpaid amount and a demand that the taxpayer pay it. 26 C.F.R. § 601.103(a). If the taxpayer fails to pay the tax, the Secretary can take additional steps to collect it, including offsetting tax refunds otherwise due to the taxpayer or bringing a collection action under 26 U.S.C. § 6502(a).

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[9] When the Secretary believes that the collection of a tax will be jeopardized by delay, he may assess the tax immediately. 26 U.S.C. §§ 6861-62. A taxpayer may seek administrative and judicial review of such "jeopardy assessments." *Id.* § 7429.

The Anti-Injunction Act addresses the manner in which taxes are assessed and collected by prohibiting (with limited exceptions) judicial interference in the assessment and collection process. If pre-enforcement challenges to the Affordable Care Act are allowed, the Section 5000A penalty will not be assessed and collected in the same manner as taxes, because judicial review will be available before, rather than after, the penalty is assessed and collected. The Anti-Injunction Act must apply in order to give effect to Congress's choice of the manner in which the Section 5000A penalty is assessed and collected.

b. Courts of appeals have held that the "manner" of assessing and collecting taxes refers only to the "methodology and procedures" for assessment and collection, and not the "timing" of those actions. *Seven-Sky*, 661 F.3d at 11; *see also Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 540 (6th Cir. 2011) (concluding that "manner" of assessment and collection refers only to "mechanisms the Internal Revenue Service employs to enforce penalties, not to the bar against pre-enforcement challenges to taxes").

Contrary to the courts of appeals' view, timing is a critical component of the assessment and collection of taxes. This Court has recognized that the purpose of the Anti-Injunction Act is to ensure "prompt collection" of revenue. *Williams Packing*, 370 U.S. at 7; *see also Bob Jones*, 416 U.S. at 747 (government has "powerful" interests in "protecting the administration of the tax system from premature judicial interference"). As Judge Kavanaugh noted,

"[t]he whole theory of the Anti-Injunction Act rests on the fact that there is a significant difference for purposes of the Government's tax assessment and collection efforts between a tax assessed and collected in Year 1 and a tax assessed and collected in Year 2." *Seven-Sky*, 661 F.3d at 32.

The Code's provisions on assessment (codified in chapter 63) and collection (codified in chapter 64) include detailed provisions specifying the timing of various steps in the process, including when a taxpayer can restrain the process by going to court.[10] Indeed, many of the express exceptions to the Anti-Injunction Act refer to assessment or collection provisions in chapters 63 or 64 of the Code.[11]

Even if the distinction between timing and methodology were valid, the courts of appeals' decision would still be incorrect because the availability of pre-enforcement review affects more than just the timing of assessment and collection. If the Anti-Injunction Act does not apply and the taxpayer successfully challenges the Section 5000A

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[10] *See, e.g.*, 26 U.S.C. § 6206 (assessment period); *id.* § 6213(a) (time for filing petition); *id.* § 6229 (limitations period for assessments); *id.* § 6302 (time of collection); *id.* § 6331(d)(2) (timing of levy); *id.* § 6335(d) (timing of sale of seized property).

[11] *See* 26 U.S.C. § 6213(a) (restriction on assessment); *id.* § 6225(b) (restriction on premature assessment and collection); *id.* § 6246 (restriction on premature adjustments and collection); *id.* § 6330(e)(1) (suspension of collections); *id.* § 6331(i) (restriction on levies). *See also id.* § 6207(a) (cross-referencing Anti-Injunction Act).

penalty, the Secretary will be enjoined from assessing and collecting the penalty. In this situation, the penalty will *never* be assessed or collected.

In contrast, if the Anti-Injunction Act applies, the Secretary is free to assess the Section 5000A penalty without judicial interference. Taxpayers who wish to dispute the penalty have two options. *First*, a taxpayer can pay the penalty and sue for a refund in in federal district court or the Court of Federal Claims. *See* 28 U.S.C. § 1346(a)(1); 26 U.S.C. § 7422; *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4-5 (2008). A taxpayer who chooses this option may not file suit immediately after paying the penalty. Instead, the taxpayer must first file a refund claim with the IRS explaining why she is not liable for the penalty, and then wait at least six months to give the IRS a chance to resolve the claim administratively or marshal its defense. 26 U.S.C. §§ 6532(a)(1) & 7422(a).

Second, the taxpayer can decline to pay the penalty and wait for the IRS to file a collection action. *See id.* § 7403. The IRS is barred from using levies to collect the amounts owed, which means that a taxpayer can avoid paying the penalty until the court issues a ruling. *Id.* § 5000A(g)(2)(B)(ii). If the IRS prevails, however, the taxpayer may be liable for

statutory penalties as well as interest on the amount owed. *Id.* §§ 6601(e)(2) & 6651(a)(3).[12]

Regardless of which avenue the taxpayer chooses, judicial review is available only after the penalty has been assessed and either (i) collected or (ii) made the subject of a collection proceeding initiated by the federal government.

Contrary to the lower courts' view, a penalty that is never assessed and collected has not been "assessed and collected in the same manner" as a penalty that was assessed and collected but later refunded. Apart from challenges to the minimum coverage provision, it appears that no court has ever accepted an argument that a penalty can be assessed and collected in the same manner as taxes without being subject to the Anti-Injunction Act. Rather, as a leading treatise notes, "because § 6671(a) provides that penalties shall be *assessed and collected as taxes*, the Anti-Injunction Act bars taxpayers from seeking to enjoin the assessment of penalties." Bittker, McMahon & Zelenak, *Fed. Inc. Tax'n of Indiv.* § 51.10 (3d ed. 1993-2003, updated Nov. 2011 and visited on Jan. 5, 2012) (emphasis added).

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[12] For taxes imposed by subtitles A or B or chapters 41, 42, 43, or 44 of the Code, a notice and demand for payment from the IRS triggers a 90-day period during which the taxpayer is permitted to file a petition for review with the Tax Court. *See* 26 U.S.C. § 6213(a). The filing of such a petition generally stays collection efforts by the IRS. *Id.* Because Section 5000A is codified in Chapter 48 of subtitle D, this option is not available to taxpayers wishing to challenge the Section 5000A penalty.

c. In addition to stating that penalties under Subchapter B of chapter 68 "shall be assessed and collected in the same manner as taxes," Section 6671(a) provides that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by [Subchapter B]." 26 U.S.C. § 6671(a). The D.C. Circuit concluded that it is this second sentence of section 6671(a) that makes the Anti-Injunction Act applicable to Subchapter B penalties. *Seven-Sky*, 661 F.3d at 11-12. The court reasoned that the first sentence cannot require the same result or else "the last sentence of section 6671 would be superfluous." *Id.* at 12.

The court of appeals' reasoning is flawed. Interpreting the first sentence of Section 6671 as triggering the Anti-Injunction Act does not render the last sentence superfluous. The first sentence addresses only "assessment and collection"; it triggers the Anti-Injunction Act because that statute directly addresses restraints on assessment and collection. In contrast, the second sentence equates Subchapter B penalties with taxes for all purposes under the Code. Thus, for example, the second sentence provides that penalties imposed by chapter 68 are subject to Section 7433(a), which gives taxpayers a right of action against IRS employees who violate any provision of the Code in collecting a tax. 26 U.S.C. § 7433(a). Because the first sentence of Section 6671 does not make provisions like Section 7433 applicable to assessable penalties, the last sentence is not superfluous regardless of whether the first sentence triggers the Anti-Injunction Act.

Even if that were not so, the anti-surplusage canon would not justify a decision to distort the meaning of the first sentence. As the Court recently explained, "[t]here are times when Congress enacts provisions that are superfluous." *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2249 (2011) (citation and internal quotations omitted). This is certainly true of the Code. *See Callaway v. Comm'r of Internal Revenue*, 231 F.3d 106, 131 (2d Cir. 2000) ("[I]n a statutory scheme as complex as the Internal Revenue Code and its implementing Treasury Regulations, we should not be surprised to find repetitive 'surplusage.'"); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 520 (1992) (Scalia, J., concurring) (concluding that the language in Section 5845(i) of the Code "may well be redundant," but that such "residual provisions . . . are often meant for insurance, to cover anything the draftsman might inadvertently have omitted"); *Church of Scientology of Cal. v. Internal Revenue Serv.*, 792 F.2d 153, 161 (D.C. Cir. 1986) ("[*A*]*ny* interpretation of [Section 6103(b)(2) of the Code] . . . creates some redundancy.").

Similar statutory redundancies—where a specific statutory command is accomplished by a general command that encompasses the specific—are not uncommon in the Code. *See, e.g.*, Bittker & Lokken, *Fed. Tax'n of Income, Estates and Gifts* § 111A.5.1 (3d ed. 1993-2003 & 2011 Cum. Supp. No. 3) (noting that "[t]he statutory language [of § 6331(a) of the Code] is redundant"); *see generally Fort Stewart Sch. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 646 (1990) ("It might reasonably be argued, of course, that these two exceptions are indeed technically

unnecessary, and were inserted out of an abundance of caution—a drafting imprecision venerable enough to have left its mark on legal Latin (*ex abundanti cautela*).").

In any event, the principle that statutes should be interpreted to avoid redundancy is not applicable here, because *no* reasonable interpretation of Section 6671(a) avoids redundancy. *See Microsoft*, 131 S. Ct. at 2248 (canon against superfluity "assists only where a competing interpretation gives effect to every clause and word of a statute" (citation and internal quotations omitted)). Under the D.C. Circuit's interpretation, the first sentence of Section 6671(a) is surplusage. Moreover, there is inevitable redundancy between Sections 6671(a) and 6665(a), which provides that "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 [Chapter 68]." 26 U.S.C. § 6665(a).

In sum, the second sentence of Section 6671(a) is broader than the first sentence, but that does not alter the conclusion that the language of the first sentence brings challenges to penalty within the scope of the Anti-Injunction Act.

d. No intent to allow pre-enforcement challenges to the Affordable Care Act can be inferred from Congress's decision to prohibit criminal prosecutions, notices of liens with respect to any property of a taxpayer, or levying any property of a taxpayer for failing to pay the Section 5000A penalty. The federal government has argued that "[t]hose actions are

among the principal tools the federal government uses to collect unpaid taxes," and because they "are unavailable in the context of the minimum coverage provision, it makes sense that Congress would regard it as unnecessary to apply the" Anti-Injunction Act. U.S. Supp. Br. at 5-6, *Liberty Univ.*, 2011 WL 3962915 (No. 10-2347).

This argument lacks merit because the IRS retains other tools to collect the Section 5000A penalty. Specifically:

- The IRS may offset the penalty against any refund to which the taxpayer would otherwise be entitled. 26 U.S.C. §§ 6402(a), 6671.

- The IRS may bring an action to collect the penalty. *Id.* § 7403.

- Failure to pay the penalty creates a statutory lien against the taxpayer. *Id.* § 6321. Although Section 5000A prohibits the IRS from filing a *notice* of lien, a tax lien arises automatically, as a matter of law, when the IRS assesses a tax, sends the taxpayer a notice and demand for payment, and the taxpayer fails to pay in full. *Id.* The statutory lien attaches to "all property and rights to property" belonging to the taxpayer, including the taxpayer's home

and any future property that the taxpayer acquires. *Id.*[13]

- The IRS can use the "jeopardy assessment" procedures if it believes that the taxpayer will dissipate her assets. *Id.* § 6862(a).

Because pre-enforcement challenges would restrain these collection methods, as well as the assessment of penalties, the federal government is wrong to argue that Congress's decision to make other collection methods unavailable eliminates any reason to apply the Anti-Injunction Act. *See United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 10 (1974) (holding that a suit seeking to restrain even one method of assessment or collection is barred by the plain language of the Anti-Injunction Act).

e. There is also no merit to the suggestion that this suit will not restrain the assessment or collection of taxes because the minimum coverage provision does not take effect until 2014. *See Thomas More*, 651 F.3d at 540. The scope of the Anti-Injunction Act is not limited to lawsuits seeking to restrain "current" or "imminent" assessment and collection of taxes. Instead, the statute provides, in sweeping terms, that "*no* suit for the purpose of restraining the assessment or collection of *any* tax shall be maintained in any court by any person." 26

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[13] Although Section 5000A(g)(2)'s prohibition against filing a notice of lien does not affect the existence of a tax lien, it does affect the Service's position vis-à-vis third-party creditors. *See* 26 U.S.C. § 6323(a).

U.S.C. § 7421(a) (emphasis added). As Judge Kavanaugh observed, "there is no 'early-bird special' exception to the Anti-Injunction Act." *Seven-Sky*, 661 F.3d at 46. Judicial creation of such an exception "would pose a host of arbitrary line-drawing problems." *Id.*

f. "The [Internal Revenue] Code contains 'a mind-numbing assortment' of civil penalties." Bittker & Lokken, *Federal Taxation of Income, Estates and Gifts* § 114.2 (citation omitted).[14] Several provisions of the Code expressly state that specified penalties are treated as taxes, including for purposes of assessment and collection. *See, e.g.*, 26 U.S.C. §§ 5114(c)(3), 5684(b), 5761(e), 6665(a), 6671(a). A leading treatise summarizes the effect of these provisions by stating that "[v]irtually all civil penalties are assessed, collected, and subject to statutes of limitations in the same manner as taxes." Bittker et al., *Federal Income Taxation of Individuals* § 50.03.

The federal government takes the position that the Anti-Injunction Act applies to other penalties that, like the Section 5000A penalty, are codified

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[14] For example, Congress has imposed penalties on political organizations that fail to disclose contributions and expenditures, 26 U.S.C. § 527(j)(1); on tax-exempt organizations that fail to comply with public inspection requirements, *id.* § 6685, or fail to disclose that the information or services they provide are available without charge from the federal government, *id.* § 6711; and on entities that sell or offer to sell diesel fuel that does not meet EPA standards, *id.* § 6720A.

outside chapter 68 but cross-reference chapter 68. U.S. Supp. Br. at 4, *Liberty Univ.*, 2011 WL 3962915 (No. 10-2347). For example, Sections 5114(c)(3), 5684(b), and 5761(e) of the Code provide that penalties for violation of certain laws related to alcohol and tobacco "shall be assessed, collected and paid in the same manner as taxes." The government acknowledges that these penalties are subject to the Anti-Injunction Act, but attempts to distinguish them from the Section 5000A penalty on the ground that they expressly provide that the penalties shall be assessed and collected in the same manner as taxes, and expressly cross-reference Section 6665(a).

The government's effort to distinguish these provisions is unconvincing. Congress included a cross-reference expressly providing that the Section 5000A penalty shall be assessed and collected in the same manner as taxes. Congress must be presumed to know that it has repeatedly provided that certain penalties should be treated as taxes, and that, as a result of these provisions, the Anti-Injunction Act prevents pre-enforcement challenges to those penalties. Had Congress intended a different result for the Section 5000A penalty, it would have said so explicitly. Instead, it explicitly provided that this penalty shall be assessed and collected in the same manner as taxes.

2. The Section 5000A Penalty Is A "Tax" Within The Meaning Of The Anti-Injunction Act.

Even if Congress had not enacted specific statutory language providing that the Section 5000A penalty shall be assessed and collected in the same

manner as a tax, the Anti-Injunction Act would still bar this suit. The Anti-Injunction Act bars suits seeking to restrain the assessment and collection of "any tax." 26 U.S.C. § 7421(a). That statutory language encompasses assessable penalties such as the Section 5000A penalty.

a. The Anti-Injunction Act does not define the term "tax." The Court should therefore presume that Congress intended to give the term its ordinary meaning. *See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). When Congress enacted the Anti-Injunction Act, it would have understood the term "tax" to refer broadly to any "sum of money assessed on the person or property of a citizen by government, for the use of the nation or state." Noah Webster, *An American Dictionary of the English Language* 1132 (1860). Indeed, a leading dictionary at the time defined "tax" as "a term of general import, including almost every species of imposition on persons or property for supplying the public treasury, as tolls, tribute, subsidy, excise, impost, or customs." *Id.*

Consistent with this ordinary meaning, the Court has broadly construed the term "tax" in applying the Anti-Injunction Act. For example, the Court has said that the Act applies to an "exaction [that] is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue." *Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589, 596 (1931); *see also Helwig v. United States*, 188 U.S. 605, 613 (1903) (in the tax context, labels do not "change the nature and character of the enactment"). The Court has held

that an exaction qualifies as a "tax" even if it raises "obviously negligible" revenue, and even if the primary goal of the exaction is regulation. *United States v. Sanchez*, 340 U.S. 42, 44 (1950). *See also Sonzinsky v. United States*, 300 U.S. 506, 514 (1937).

This Court's decision in *Bailey v. George*, 259 U.S. 16 (1922), demonstrates the broad scope of the Anti-Injunction Act. In a related case decided on the same day, the Court held that the Child Labor Tax was a regulatory measure that fell outside Congress's taxing power. *See Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922). The Court nevertheless held that, for purposes of the Anti-Injunction Act, this very same provision was a "tax," and thus was not subject to a pre-enforcement challenge. *George*, 259 U.S. at 19-20; *see also Bob Jones*, 416 U.S. at 740 (Anti-Injunction Act applies to a "regulatory measure [that is] beyond the taxing power of Congress").

The ordinary meaning of the term "tax" in the Anti-Injunction Act includes the penalty imposed by Section 5000A. The penalty is codified in the Code, calculated as part of taxpayer's federal income tax liability, assessed and collected by the Secretary of the Treasury, and paid into the federal government's general revenues upon notice and demand by the Secretary. The amount of the penalty depends in part on the taxpayer's income, and on whether the taxpayer is otherwise obligated to file a federal income tax return. Although the Anti-Injunction Act would apply even if the minimum coverage provision were expected to raise only "negligible" revenue, the provision is expected to produce revenues of $5 to 6

billion per year, an amount that is far from negligible. *See CBO Analysis* at 14.

b. Although the ordinary meaning of "tax" is broad enough to encompass the penalty imposed by Section 5000A, the Court need not rely solely on the ordinary meaning of "tax" to resolve this case. The Anti-Injunction Act addresses "the assessment or collection of any tax," 26 U.S.C. § 7421(a), and therefore the relevant question is whether the Section 5000A penalty is a tax for purposes of assessment and collection. Other provisions of the Code demonstrate that it is.

Section 6201, which addresses the Secretary's assessment authority, provides that "[t]he 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 . . . ." 26 U.S.C. § 6201(a) (emphasis added). Had Congress thought that "assessable penalties" were not "taxes," it would have authorized the Secretary to assess *both* taxes *and* assessable penalties. Instead, Congress authorized only assessment of "all taxes," and expressly noted that "assessable penalties" are included within the meaning of "taxes" for assessment purposes. Thus, at least insofar as assessment is concerned, Congress has made clear that "assessable penalties" are "taxes."

Section 6301, which addresses the Secretary's collection authority, provides that "[t]he Secretary shall collect the taxes imposed by the internal

revenue laws." *Id.* § 6301. By operation of this provision, the Secretary is required to collect the taxes that must be assessed under Section 6201. Those "taxes" expressly include "assessable penalties." *Id.* § 6201(a). Accordingly, sections 6201 and 6301 make clear that, when Congress addresses the assessment and collection of taxes, it uses the term "taxes" in a broad manner that includes exactions not expressly labeled as taxes. As a result, the Anti-Injunction Act's prohibition on suits restraining the "the assessment or collection of any tax," *id.* § 7421(a), applies to suits that seek to restrain the assessment or collection of assessable penalties.

There is no dispute that the Section 5000A penalty is a "penalty." *See id.* § 5000A(b) (expressly describing the "shared responsibility payment" as a "penalty"). The penalty is also "assessable." The statute expressly states that it "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." *Id.* § 5000A(g)(1).[15] Because the Section 5000A penalty is an "assessable penalty" for purposes of Section 6201(a), it is included in the definition of "tax" for

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[15] Assessable penalties are "components of tax liability" that may be assessed by the Secretary and collected through an administrative action; non-assessable penalties "cannot be determined to be due and collectable" by the IRS. *Pac. Gas & Elec. Co. v. United States*, 417 F.3d 1375, 1383 (Fed. Cir. 2005) (citation omitted). *See, e.g.*, *Internal Revenue Manual* 34.6.2.4(1) (Aug. 11, 2004) (liability for failure to comply with a levy "is not assessable but must be collected by suit").

purposes of assessment and collection. As a result, the Anti-Injunction Act bars suits to restrain the assessment or collection of the Affordable Care Act penalty.

c. The courts of appeals have divided over whether the Section 5000A penalty is a "tax" within the meaning of the Anti-Injunction Act. *Compare Liberty Univ.*, 2011 WL 3962915, at *5-*16 (holding that Section 5000A penalty is a "tax" under the Anti-Injunction Act), *with Seven-Sky*, 661 F.3d at 6-11 (holding that Section 5000A penalty is not a "tax"); *and Thomas More*, 651 F.3d 529, 539-40 (6th Cir. 2011) (same). The courts that have held the Anti-Injunction Act to be inapplicable have not based their holding on the ordinary meaning of "tax." Instead, those courts have held that "tax" must be interpreted to exclude the Section 5000A penalty in order to give effect to Congress's decision to refer to the payment as a "penalty" rather than a "tax." *Seven-Sky*, 661 F.3d at 5-8; *Thomas More*, 651 F.3d at 539-40. This reasoning is unpersuasive.

Congress's decision to refer to the Section 5000A penalty as a "penalty" provides no basis for interpreting "tax" contrary to its ordinary meaning. To be sure, Congress debated whether to call the payment a "tax" or a "penalty," but nothing in the legislative history suggests that this debate had anything to do with whether the payment would be subject to the Anti-Injunction Act. As the federal government has repeatedly recognized, referring to an exaction as a "penalty" signals to the taxpayer that noncompliance is unacceptable. *See, e.g.*, Office of Tax Policy, Dep't of the Treasury, *Report to the*

Congress on Penalty & Interest Provisions of the Internal Revenue Code 36 (1999) ("[P]enalties clearly signal that noncompliance is not acceptable behavior. . . . In establishing social norms and expectations, subjecting the noncompliant behavior to any penalty may be as important as the exact level of the penalty . . . .") [hereinafter "*Penalty Report*"]; Exec. Task Force for the Comm'r's Penalty Study, *Report on Civil Tax Penalties* at II-4 (1989) (penalty is adverse consequence for failure to comply with a rule); *id.* at III-1 ("Penalties as a consequence of violating a standard of behavior remind taxpayers of their duty."). By labeling the Section 5000A penalty a "penalty," Congress signaled to taxpayers that they are expected to comply with the minimum coverage requirement.

The D.C. Circuit's view that the Section 5000A penalty is not even an "assessable penalty," *see Seven-Sky*, 661 F.3d at 8, also lacks merit. The court of appeals did not dispute that Section 5000A imposes a "penalty," nor did it deny that the penalty is "assessable." Instead, the court noted that the term "assessable penalties" is "generally used to refer to Chapter 68, subchapter B penalties." *Id.* In the court's view, the term "assessable penalties" cannot include the Section 5000A penalty because, if it did, "Congress's deliberate efforts to treat the shared responsibility payment as a penalty, not a tax, would be inexplicable." *Id.*

Congress's decision to treat the Section 5000A penalty as a "penalty" is not inexplicable if it is treated as an "assessable penalty." The legislative history does not suggest that the debate over

terminology was related to whether the Anti-Injunction Act would apply. In contrast, Congress's use of "penalty" is significant regardless of the Anti-Injunction Act's applicability because of its importance in "establishing social norms and behavior." *Penalty Report* at 36.

Likewise, the fact that "assessable penalties" are "generally" found in Subchapter B is irrelevant, because "assessable penalties" are also located outside of Chapter 68. *See* 26 U.S.C. §§ 6038(b), 6038A(d), 6038B(c), 6038C(c); *see also Internal Revenue Manual* 20.1.9.1.1(2) (Apr. 22, 2011) (penalties in Sections 6038-6038C of chapter 61 "are assessable penalties"). Section 6201 cannot be limited to "assessable penalties" contained in Subchapter B because the provision expressly extends to "all taxes (including . . . assessable penalties) imposed by *this title*." 26 U.S.C. § 6201(a) (emphasis added).

In sum, the term "taxes" includes the Section 5000A penalty. Congress reinforced that conclusion by providing that, for purposes of assessment and collection, the term "taxes" includes "assessable penalties" such as the Section 5000A penalty. Accordingly, the relevant statutory language requires that the Anti-Injunction Act insulate this penalty from pre-enforcement suits.

B. The Anti-Injunction Act Cannot Be Avoided By Characterizing This Case As A Challenge To The Minimum Coverage Requirement Rather Than The Penalty Provision.

In holding that the Anti-Injunction Act did not bar the litigation in *Seven-Sky*, the D.C. Circuit deemed it "critical" that plaintiffs' suit was "center[ed]" on challenging the constitutionality of the minimum coverage requirement. *See* 661 F.3d at 9. The court concluded that the Anti-Injunction Act was inapplicable because the plaintiffs "brought suit for the purpose of enjoining a regulatory command, the individual mandate, that requires them to purchase health insurance from private companies, produces no revenues for the Government, and imposes obligations independent of the shared responsibility payment." *Id.* at 8. This argument does not justify a decision that the Anti-Injunction Act is inapplicable to this case.

First, Respondents have challenged the penalty imposed by Section 5000A as well as the minimum coverage requirement. Counts One and Two of the Amended Complaint challenge the allegedly "Unconstitutional Mandate That All Individuals Have Healthcare Insurance Coverage *Or Pay A Penalty*." J.A. 122, 125 (emphasis added). The Amended Complaint also seeks an injunction against "enforcement" of the Act. *Id.* at 124, 126. "[T]he 'enforcement' contemplated by the statute is the assessment and collection of the tax penalties by the IRS." *Seven-Sky*, 661 F.3d at 41 n.29 (Kavanaugh, J., dissenting). The allegations in the Amended

Complaint "leave little doubt that a primary purpose of this lawsuit is to prevent the Service from assessing and collecting" the Section 5000A penalty. *Bob Jones*, 416 U.S. at 738.

Second, even if Respondents had attempted to challenge only the minimum coverage requirement and not the penalty, the Anti-Injunction Act would bar their suit. Arguments that the Anti-Injunction Act can be avoided in this way are "circular" and "unpersuasive." *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 760-61 (1974). *See also Bob Jones*, 416 U.S. at 731-32.

In *Americans United*, plaintiffs sought to challenge an IRS decision to revoke a non-profit corporation's tax-exempt status under 26 U.S.C. § 501(c)(3). The Court dismissed as "irrelevant" the corporation's argument that it did "'not seek in this lawsuit to enjoin the assessment or collection of its own taxes,'" because "a suit to enjoin the assessment or collection of *anyone's* taxes triggers the literal terms of § 7421(a)." 416 U.S. at 760 (citation omitted) (emphasis added). The Court also rejected the plaintiffs' argument that the Act was inapplicable because "restraining the assessment or collection of taxes was at best a collateral effect of respondent's action." *Id.* (citation and internal quotations omitted). The Court held that, "[u]nder any reasonable construction of the statutory term 'purpose,'" the corporation's purpose was "to restore advance assurance that donations to it would qualify as charitable deductions . . . . Indeed, [the corporation] would not be interested in obtaining the declaratory and injunctive relief requested if that

relief did not effectively restrain the taxation of its contributors." *Id.* at 760-61. The Court concluded that it was "circular" to describe the plaintiffs' "primary design" as "avoid[ing] the disposition of contributed funds away from the corporation," rather than "remov[ing] the burden of taxation from those presently contributing." *Id.* at 761 (citation and internal quotations omitted). The first "goal is merely a restatement of" the second "and can be accomplished only by restraining the assessment and collection of a tax in contravention of § 7421(a)." *Id.*

Similarly, in *Bob Jones*, the plaintiff University argued that its lawsuit was "intended solely to compel the Service to refrain from withdrawing [the University's] § 501(c)(3) ruling letter and from depriving [its] donors of advance assurance of deductibility." 416 U.S. at 738. The University argued that its purpose was "the maintenance of the flow of contributions, not the obstruction of revenue." *Id.* The Court held that the Anti-Injunction Act would apply even if "petitioner would owe no federal income taxes if its § 501(c)(3) status were revoked," because the University was seeking "to restrain the collection of taxes from its donors." *Id.* at 738-39. The Court rejected the University's argument that the IRS was "attempt[ing] to regulate the admissions policies of private universities" rather than "an effort to protect the revenues," because the University could not show "that the Service's action [was] without an independent basis in the requirements of the Code." *Id.* at 739-40.

The D.C. Circuit attempted to distinguish *Americans United* and *Bob Jones* on the ground that

the minimum coverage requirement and the Section 5000A penalty are not "inextricably linked." *Seven-Sky*, 661 F.3d at 10. According to the court of appeals, the provisions impose distinct legal obligations, as evidenced by the fact that some "applicable individuals" subject to the minimum coverage requirement are exempt from the penalty provision. *Id.* at 9-10.

This attempt to distinguish *Americans United* and *Bob Jones* fails. This Court did not characterize the regulations and taxes at issue in those cases as "inextricably linked," much less rely on such a characterization in holding that the Anti-Injunction Act applied. To the contrary, the Court has "abandoned" any "distinctions between regulatory and revenue-raising taxes." *Bob Jones*, 416 U.S. at 741 n.12. Indeed, the Court has applied the Anti-Injunction Act even to regulatory provisions that are beyond the taxing power of Congress. *See Bailey v. George*, 259 U.S. 16.[16]

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[16] Some courts of appeals have interpreted the State Tax Injunction Act to allow challenges to the regulatory aspect of state exactions. *See, e.g.*, *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 761-63 (10th Cir. 2010); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cnty.*, 115 F.3d 1372, 1382-83 (8th Cir. 1997). There are strong arguments that these cases were wrongly decided. *See Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722, 727-30 (7th Cir. 2011) (en banc) (Posner, J.). In any event, the Court's decisions in *Americans United* and *Bob Jones* foreclose that interpretation of the Anti-Injunction Act.

Moreover, the minimum coverage requirement and the penalty provision *are* tightly linked. The penalty provision, which immediately follows and cross-references the minimum coverage requirement, is the sole means of enforcing that requirement. Absent the penalty provision, there would be no legally-prescribed consequences for non-compliance. As a practical matter, taxpayers could choose whether to obtain minimum coverage for themselves and their dependents, just as they did before the Affordable Care Act was enacted. Moreover, the revenues generated by the penalty provision will offset some of the additional expenses incurred by the federal government when uninsured patients consume health care services.

It is irrelevant that some individuals may be subject to the minimum coverage requirement but exempt from the penalty. That hypothetical situation has no application to this case, in which the Private Respondents have sued to avoid paying the penalty. It is far from clear that an "applicable individual" who is exempt from the penalty would have standing to challenge the minimum coverage provision. Even assuming such an individual were to bring suit, establish standing, and prevail, the result would be to reduce the penalties of other taxpayers. Because the Anti-Injunction Act precludes a lawsuit to reduce "anyone's taxes," *Americans United,* 416 U.S. at 760, such an action would be barred.

C. The Anti-Injunction Act Applies To The State Respondents.

The State Respondents contend that the Anti-Injunction Act does not bar their suit, even if it bars

the Private Respondents' suit. State Resp. Cert. Stage Br. 14. In support of this contention, the State Respondents argue that (i) a State is not a "person" within the meaning of the Anti-Injunction Act and (ii) they are "'aggrieved parties for whom [Congress] has not provided an alternative remedy.'" *Id.* at 14-15 (quoting *Regan*, 465 U.S. at 378). Both contentions lack merit.

1. The Anti-Injunction Act provides that no suit to restrain "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) (emphasis added). The Act does not define the term "person," but the general definitional provisions of the Code state that "person" "shall be construed to mean *and include* an individual, a trust, estate, partnership, association, company or corporation." *Id.* § 7701(a)(1) (emphasis added). Another definitional provision states that the term "includes" "shall not be deemed to exclude other things otherwise within the meaning of the term defined." *Id.* § 7701(c). This Court has construed these definitions and held that the term "person," as used in various provisions of the Code, includes States.

In *Ohio v. Helvering*, 292 U.S. 360, 370 (1934), the Court held that a State is a "person" subject to a statutory provision imposing a federal tax on "every person who sells" liquor. The Court acknowledged that the definition of "person" in the Code does not expressly include States; rather, it defined "person" in essentially the same way that it is defined today: "the word 'person,' as used in this title, shall be

construed to mean and include a partnership, association, company, or corporation, as well as a natural person." *Id.* at 367 (citation and internal quotations omitted). The Court explained that whether the term "person" "includes a state or the United States depends upon the connection in which the word is found." *Id.* at 370. After reviewing the many cases holding that State is a "person" within the meaning of other statutory provisions, the Court concluded that a State is a "person" under the tax law at issue. *Id.* at 370-71.

Similarly, in *Sims v. United States*, 359 U.S. 108, 110-14 (1959), the Court held that the IRS was authorized to levy the salaries of state employees to collect delinquent federal taxes, and that a State Auditor who refused to honor the levies (and instead issued paychecks to the state employees) was personally liable for the amount of the paychecks. Rather than relying on the Code's general definition of "person," the provision at issue in *Sims* provided a narrower definition of "person." *See* 26 U.S.C. § 6332 (The term "person" "includes an officer or employee of a corporation or a member or employee of a partnership, who . . . is under a duty to surrender the property or rights to property, or to discharge the obligation."). The Court reasoned that this definition, while not explicitly including States, also does not exclude them, and that Congress has directed that the term "includes" should not be read "'to exclude other things otherwise within the meaning of the term defined.'" *Sims*, 359 U.S. at 112 (quoting 26 U.S.C. § 7701(b) (1954)). More generally, the Court explained that in construing "federal revenue measures expressed in terms of general

application," it "has ordinarily found them operative in the case of state activities even though States were not expressly indicated as subjects of tax." *Id.* (quoting *Wilmette Park Dist. v. Campbell*, 338 U.S. 411, 416 (1949)).

The State Respondents' argument is further undermined by *Regan*, 465 U.S. 367, which considered whether the Anti-Injunction Act barred a suit brought by a State. Although some members of this Court specifically noted that a State "is not a 'person' within the meaning of the Due Process Clause," *see id.* at 394 (O'Connor, J., concurring), not a single Justice suggested that South Carolina was not a "person" for purposes of the Anti-Injunction Act.[17]

The amendment history of the Anti-Injunction Act confirms that the term "person" was not intended to exclude States from its coverage. From 1867 to 1966, the Act provided simply that "no suit . . . shall be maintained in any court." *See* Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 475 (current version at 26 U.S.C. § 7421(a)). Congress added the "by any person" language to prevent suits by "third parties

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[17] *See also Chickasaw Nation v. United States*, 208 F.3d 871, 879 (10th Cir. 2000) (holding that Indian tribes are "persons" under Section 4401(c), and concluding that "Congress unambiguously intended for the word 'person,' as used in § 7701(a)(1), to encompass all legal entities . . . that are the subject of rights and duties"); *United States v. Sahadi*, 555 F.2d 23, 26 n.3 (2d Cir. 1977) (State is included in "any person" under § 4424).

whose property rights competed with federal tax liens." *Regan*, 465 U.S. at 377 (citing *Bob Jones*, 416 U.S. at 732 n.6). At the same time, Congress enacted Section 110(a) of the Tax Lien Act, which "gave such third parties a right of action against the United States." *Id.* The addition of the "by any person" language "to the Anti-Injunction Act was primarily designed to insure that the right of action granted by § 110(a) of the Federal Tax Lien Act was exclusive," and also served "as a reaffirmation of the plain language of the Act." *Id.* at 377 & n.16. The 1966 amendment thus provides no basis for holding that the States are now excluded from coverage under the Anti-Injunction Act.

2. Nor is there any merit to the State Respondents' assertion that their suit may proceed under the exception recognized in *Regan*, which held that "Congress did not intend the [Anti-Injunction] Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." *Id.* at 378. An "aggrieved party" must, at a minimum, establish that it has suffered an injury sufficient to satisfy the standing requirements of Article III. *See, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 162 (1997). The State Respondents have not made that showing.

a. Unlike the tax provision at issue in *Regan*, Section 5000A does not directly injure the States. *Regan* involved a provision that "impose[d] a tax on the interest earned on state obligations issued in bearer form," and thus directly affected South Carolina's "freedom to issue obligations in the form that it chooses." 465 U.S. at 371-32. The Court held

that the State was an "aggrieved party" because the statute interfered with the State's sovereignty under "the Tenth Amendment and the doctrine of intergovernmental tax immunity." *Id.* at 370. Here, the minimum coverage provision imposes liability on individual citizens. Even if the State Respondents incur additional costs as a result of the provision's implementation, the rights they are seeking to protect are constitutional rights of individual taxpayers, not those of the States.

b. The States lack standing to assert claims on behalf of their citizens. Because citizens of a State "are also citizens of the United States," a State cannot act as *parens patriae* and sue "to protect citizens of the United States from the operation of the statutes thereof." *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923). *See also Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 520 n.17 (2007) (*Mellon* prohibits a State from suing "'to protect her citizens from the operation of federal statutes.'" (citation omitted)). A State's interest in exercising sovereign power over its residents, including by "creat[ing] and enforc[ing] a legal code," *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982), does not extend to exempting state residents from complying with federal law. As the Fourth Circuit recently held, a state law providing that state residents are not required to purchase health insurance "regulates nothing and provides for the administration of no state program. Instead, it simply purports to immunize [state] citizens from federal law." *Virginia v. Sebelius*, 656 F.3d 253, 270 (4th Cir. 2011). To permit States to grant themselves standing by enacting such laws would

negate *Mellon* and "convert the federal judiciary into a 'forum' for the vindication of a state's 'generalized grievances about the conduct of government.'" *Id.* at 271 (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)).

c. The State Respondents assert standing based on "the effect the mandate will have on States' financial obligations under Medicaid." State Resp. Cert. Stage Br. 16. Specifically, the States contend that the minimum coverage provision will cause "individuals who were previously eligible for Medicaid but declined to enroll" to become enrolled, increasing the States' Medicaid costs. *Id.* This contention is also insufficient to establish standing.

First, the States' alleged injury is not legally cognizable because it results "from decisions by their respective state legislatures." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (per curiam). *See also Mellon*, 262 U.S. at 480 (noting that Massachusetts chose to participate in the Maternity Act program). The States have chosen to participate in the Medicaid program, and Florida has a longstanding policy of *encouraging* full participation in Medicaid. *See Florida KidCare Program: Amendment to Florida's Title XXI Child Health Ins. Plan Submitted to the Ctrs. for Medicare & Medicaid Servs.* at 17 (July 1, 2010) (Florida "has a strong historical commitment to Medicaid outreach" and has taken steps to encourage eligible individuals to enroll). A State is not injured when eligible individuals enroll in a state program in furtherance of a state policy that encourages them to do so.

Second, the States' alleged economic harm is "conjectural or hypothetical." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (citation and internal quotations omitted). The Court has distinguished direct injury to States from indirect fiscal injury caused by private citizens responding to federal law. *See Florida v. Mellon*, 273 U.S. 12 (1927); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976). In *Florida v. Mellon*, the State challenged a federal tax on the ground that it would "have the result of inducing potential taxpayers to withdraw property from the state, thereby diminishing the subjects upon which the state power of taxation may operate." 273 U.S. at 17-18. The Court held that Florida lacked standing because the state was not in immediate danger of sustaining "any direct injury as a result of the enforcement of the act in question." *Id.* at 18; *see also Simon*, 426 U.S. at 42-43 (noting that it was "purely speculative" that hospitals had denied services to indigents due to a Revenue Ruling rather than from "decisions made by the hospitals without regard to the tax implications"). Here, eligible individuals may enroll in Medicaid for a variety of reasons. The States' assumptions about the future choices of private actors, and the reasons for those choices, are too conjectural to provide a basis for standing.[18]

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[18] The federal government contends that the Affordable Care Act will *decrease*, rather than increase, the States' Medicaid costs. Defendants' Response to Plaintiffs' "Statement of Material Facts in Support of Plaintiffs' Motion for Summary Judgment" ¶¶ 12, 15, *Florida v. Dep't of Health & Human* (continued…)

Third, the States' claim of economic harm is not only speculative, but premature. The minimum coverage provision does not take effect until 2014, and the federal government will pay 100 percent of the costs of benefits to the newly eligible Medicaid participants through 2016. 42 U.S.C. § 1396d(y)(1). As the Court has previously held, a State lacks standing to challenge a federal law before it has been enforced in the State. *See South Carolina v. Katzenbach*, 383 U.S. 301, 317 (1966).

d. Before the court of appeals, the States argued that they have standing because they are injured by provisions of the Affordable Care Act that expand Medicaid eligibility, and those provisions are not severable from the minimum coverage provision. Br. for Appellee/Cross-Appellant States at 68-69, *Florida v. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (Nos. 11-11021, 11-11067). This contention fails. The Court has held that "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). "[A] plaintiff must demonstrate standing for each claim he seeks to press" and "'for each form of relief sought.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)). Accordingly, a plaintiff with standing to challenge one provision of a statute may not challenge other provisions, whether or not

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Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (No. 3:10-cv-00091-RV/EMT).

those provisions are severable. *See also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733-34 (2008).

e. Even if the State Respondents could demonstrate an injury sufficient to support Article III standing, they lack standing to assert "the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). This Court has held repeatedly that plaintiffs do not have standing to challenge the tax liability of a third party. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 757-59 (1984); *Simon*, 426 U.S. at 42-43 (1976). Because the minimum coverage provision does not impose tax liability on the State Respondents, they do not have standing to litigate on behalf of affected individual taxpayers. *See also Simon*, 426 U.S. at 46 (Stewart, J., concurring) ("I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else."); *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) ("It is well-recognized that the standing inquiry in tax cases is more restrictive than in other cases.").

In sum, the Anti-Injunction Act applies to the State Respondents as well as the Private Respondents.

D. Policy Considerations Do Not Justify A Departure From The Anti-Injunction Act.

It can be argued that public policy considerations favor a prompt answer to the question whether the minimum coverage provision is constitutional. But

even if those arguments were persuasive, the language of the Anti-Injunction Act "could scarcely be more explicit." *Bob Jones*, 416 U.S. at 736. Courts may not disregard clear statutory language based on their views of public policy. That principle applies with special force to statutes that limit the jurisdiction of courts. *See Bowles*, 551 U.S. at 214 ("[T]his Court has no authority to create equitable exceptions to jurisdictional requirements."). Moreover, there are countervailing policy arguments for applying the Anti-Injunction Act according to its terms.

First, an immediate decision in this case would be contrary to the policy that courts avoid deciding constitutional issues unless it is necessary to so do. *See Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2508 (2009). Here, it is possible that the Private Respondents will never have to pay a penalty under Section 5000A. Moreover, it is possible that Congress could amend or repeal the Affordable Care Act at some point before penalties are assessed and collected, beginning in 2015. An amendment could avoid the need for this Court to decide the constitutional issue presented in this case. *See Seven-Sky*, 661 F.3d at 47-50 (Kavanaugh, J., dissenting) (arguing that relatively minor amendments to the Affordable Care Act would make the penalty clearly constitutional under the Taxing Power).

Second, separation of powers principles strongly favor allowing Congress, not the courts, to decide whether to make an exception to the Anti-Injunction Act. *See Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17-

18 (1951) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation."). There is no doubt that Congress can, at any time, enact a law permitting pre-enforcement challenges to the minimum coverage provision. A bill that would create such an exception is pending before Congress. *See* Americans Need a Health Care Ruling Act, H.R. 3558, 112nd Cong. (2011). To date, however, Congress has not expressed an intention to allow such challenges.

Congress knows how to create exceptions to the Anti-Injunction Act. *See* 26 U.S.C. § 7421(a) (setting out fourteen express exceptions). It did not adopt an express exception for challenges to Section 5000A. The absence of such an exception is particularly striking, because Congress *did* make express exceptions for criminal penalties, liens, and levies. *Id.* § 5000A(g)(2). Moreover, it directed that, apart from these express exceptions, the Section 5000A penalty shall be assessed and collected in the same manner as taxes. *Id.* § 5000A(g)(1). This statutory language indicates that Congress did not intend to allow other, implied exceptions. *See, e.g.*, *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a [statute], additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."). Moreover, Congress did not adopt a special provision providing for judicial review of the constitutionality of the Affordable Care Act, as it has sometimes done with major legislation. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 132-33 (2003) (Bipartisan Campaign Reform Act); *Raines v. Byrd*, 521 U.S. 811,

817-18 (1997) (Line Item Veto Act); *Turner Broad. Sys., Inc. v. Fed. Commnc'ns Comm'n*, 512 U.S. 622, 634-35 (1994) (must-carry provisions of the Cable Television Consumer Protection and Competition Act).

In short, if Congress decides that policy considerations justify pre-enforcement challenges to the constitutionality of the Affordable Care Act, it can enact legislation providing for immediate review. Unless and until such legislation is enacted, pre-enforcement challenges are barred by the Anti-Injunction Act.

CONCLUSION

The decision of the court of appeals should be vacated and remanded for dismissal of Respondents' challenge to Section 5000A for lack of jurisdiction.

Respectfully submitted,

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STATUTORY APPENDIX

26 U.S.C. § 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.

26 U.S.C. § 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. * * *

26 U.S.C. § 6665(a)

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 amount, and penalties provided by this chapter.

26 U.S.C. § 6671(a)

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.

26 U.S.C. § 7421(a)

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), and 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.