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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR STATE RESPONDENTS ON THE ANTI-INJUNCTION ACT

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QUESTION PRESENTED

The question presented is whether the suit brought by Respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a).

PARTIES TO THE PROCEEDING

Petitioners, who were the appellants/cross-appellees below, are the U.S. Department of Health & Human Services; Kathleen Sebelius, Secretary, U.S. Department of Health & Human Services; the U.S. Department of Treasury; Timothy F. Geithner, Secretary, U.S. Department of Treasury; the U.S. Department of Labor; and Hilda L. Solis, Secretary, U.S. Department of Labor.

The State Respondents, who were the appellees/cross-appellants below, are 26 States: Florida, by and through Attorney General Pam Bondi; South Carolina, by and through Attorney General Alan Wilson; Nebraska, by and through Attorney General Jon Bruning; Texas, by and through Attorney General Greg Abbott; Utah, by and through Attorney General Mark L. Shurtleff; Louisiana, by and through Attorney General James D. "Buddy" Caldwell; Alabama, by and through Attorney General Luther Strange; Attorney General Bill Schuette, on behalf of the People of Michigan; Colorado, by and through Attorney General John W. Suthers; Pennsylvania, by and through Governor Thomas W. Corbett, Jr., and Attorney General Linda L. Kelly; Washington, by and through Attorney General Robert M. McKenna; Idaho, by and through Attorney General Lawrence G. Wasden; South Dakota, by and through Attorney General Marty J. Jackley; Indiana, by and through Attorney General Gregory F. Zoeller; North Dakota, by and through Attorney General Wayne Stenehjem; Mississippi, by and through Governor Phil Bryant; Arizona, by and through Governor Janice K. Brewer and Attorney General Thomas C. Horne; Nevada, by and through

Governor Brian Sandoval; Georgia, by and through Attorney General Samuel S. Olens; Alaska, by and through Attorney General Michael C. Geraghty; Ohio, by and through Attorney General Michael DeWine; Kansas, by and through Attorney General Derek Schmidt; Wyoming, by and through Governor Matthew H. Mead; Wisconsin, by and through Attorney General J.B. Van Hollen; Maine, by and through Attorney General William J. Schneider; and Governor Terry E. Branstad, on behalf of the People of Iowa. The National Federation of Independent Business, Kaj Ahlburg, and Mary Brown are also Respondents, and were also appellees below. Individuals Dana Grimes and David Klemencic were also made Respondents by this Court's order of January 17, 2012.

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INTRODUCTION

The Anti-Injunction Act ("AIA") poses no bar to this Court reaching the merits of the critically important questions concerning the constitutionality of the individual mandate. That is particularly true of the States' challenge. Initially, the AIA imposes no obstacle because the provision is not jurisdictional and is not pressed by any party to this case. If the Court agrees that the AIA is not jurisdictional, it need go no further.

But even if the AIA were jurisdictional, it would not bar the States' challenge to the mandate. While the States have standing to challenge the mandate—it inflicts injury on them by, *inter alia*, imposing massive costs by forcing currently eligible but unenrolled low-income individuals to obtain health insurance funded by the State—they are not injured as penalty payers and could never seek a refund. Thus, as this Court has already held, *see South Carolina v. Regan*, 465 U.S. 367 (1984), the AIA does not apply and leave States wholly without a remedy. Indeed, the AIA and its generic reference to persons do not even extend to States in the first place.

In all events, the AIA is not applicable for the most basic reason of all: The challenge here is to the mandate, and not the penalty that enforces it. The two are distinct provisions with distinct exemptions. Numerous individuals subject to the mandate are exempt from the penalty—indeed, the States' injury stems in large measure from the mandate's coverage of just such individuals. What is more, because the insurance premiums paid to satisfy the mandate cannot be paid under protest and recouped in a refund action in which the constitutional claims can be vindicated, the AIA is a non-sequitur.

At bottom, this case involves assertion of a federal power of unprecedented scope. That power is constitutionally problematic for numerous reasons, not the least of which is the mandate's tendency to avoid the political accountability associated with straightforward efforts to increase taxes. The federal government simply cannot be allowed to assert this unprecedented power, avoid the accountability required of taxes, and then avoid judicial review for years based on a provision limited to taxes. The time for review of the individual mandate is now.

STATEMENT OF THE CASE

A. The Affordable Care Act

1. The Affordable Care Act is a 2,700-page collection of "sweeping and comprehensive" provisions, Pet. App. 20a, intended to impose "near-universal" health insurance coverage on the Nation. ACA § 1501(a)(2)(D).[1] The Act imposes new and substantial obligations on every corner of society, from individuals to insurers to employers to States.

The centerpiece of the ACA is an unprecedented mandate that nearly every individual must maintain health insurance coverage at all times. In a provision entitled "Requirement to maintain minimum essential coverage," Congress mandated

[1] All citations of provisions of the "ACA" are of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education and Reconciliation Act of 2010, Pub. L. No. 111-152.

that every "applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month." ACA § 1501(b); 26 U.S.C.A. § 5000A(a). This mandate to maintain a federally approved level of insurance applies to all individuals except foreign nationals residing here unlawfully, incarcerated individuals, and individuals falling within two very narrow religious exemptions. *Id.* § 5000A(d).

The individual mandate is enforced by a separate statutory provision labeled a "Shared Responsibility Payment." *Id.* § 5000A(b). Under that provision, "[i]f a taxpayer who is an applicable individual … fails to meet the requirement" that the mandate imposes, "then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty." *Id.* This "penalty" has its own set of five "exemptions." *Id.* § 5000A(e). Importantly, though, individuals exempted from the *penalty* are *not* thereby exempted from the *mandate*. Thus, individuals fully subject to the mandate may be exempt from the penalty, but exemption from the penalty does not obviate their obligation to comply with the mandate to maintain health insurance at all times. Nor does payment of the penalty satisfy the individual mandate for those who are subject to both.

The penalty, subject to certain exceptions, is to be "assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68" of the federal tax code. *Id.* § 5000A(g)(1). Penalties in that chapter, in turn, are to be "assessed and collected in the same manner as taxes." 26

U.S.C. § 6671(a). Neither the mandate nor the penalty is housed in chapter 68 of the code; they are instead found in chapter 48. *See* 26 U.S.C.A. § 5000A(b). While Congress made the ACA's penalty payable to the Secretary of the Treasury, the exceptions to assessment and collection "in the same manner as" assessable penalties actually preclude the Secretary from using most of the traditional means of enforcing and collecting a tax. Specifically, those who fail to pay the penalty "shall not be subject to any criminal prosecution or penalty" for that failure, and the Secretary may not uses liens or levies to recover the penalty. *Id.* § 5000A(g)(2).

Among the individuals exempted from the penalty but not the mandate are individuals with income below the federal poverty level. *See id.* § 5000A(e)(2). As a result, many individuals who are eligible for Medicaid are not subject to the penalty, but are still subject to the mandate's requirement to maintain a minimum level of insurance. The ACA expressly renders enrollment in Medicaid a means of satisfying that obligation. *See id.* § 5000A(f)(1)(A)(ii). Indeed, there is no other mechanism in the Act besides Medicaid for those below the poverty level to comply with the mandate, *see* Br. for State Petrs. on Medicaid 11–13, and the federal government estimates that some 18 million additional individuals will satisfy the mandate in just that way. *See* Richard S. Foster, *Estimated Financial Effects of the "Patient Protection and Affordable Care Act," Centers for Medicare & Medicaid Servs.*, (Apr. 22, 2010) at 6 ("[o]f the additional 34 million people who are estimated to be insured by 2019 as a result of the [ACA], a little more than one-half (18 million) would receive Medicaid coverage"). Although some of that additional enrollment is in part attributable to a dramatic expansion of Medicaid that the ACA will impose upon the States, *see* ACA § 2001, the Congressional Budget Office concluded that, even with the expansion, 6 to 7 million fewer individuals would enroll in Medicaid if there were no individual mandate. CBO, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* (June 16, 2010).[2]

Although the ACA provides that the federal government will initially fund 100% of the costs of covering individuals newly eligible for Medicaid under the ACA's expanded eligibility criteria, the ACA does not provide any increase in funding for enrollment of individuals who are currently eligible for Medicaid but have chosen not to enroll. ACA § 2001(a)(3). Thus, States will continue to pay up to 50% of the costs generated by enrollment of the currently eligible but unenrolled. Florida, for example, has projected that solely as a result of enrolling the currently eligible, its share of Medicaid spending will increase by more than $500 million annually by the end of the decade. JA (Medicaid) 76 ¶¶ 17–18.

2. Before enacting the ACA, Congress considered and rejected a number of other pieces of legislation that differed markedly from the ACA. For example, two bills introduced in the House of Representatives would have imposed a "tax upon individuals without acceptable health care coverage." H.R. 3200, 111th Cong. § 401 (2009); *see also* H.R. 3962, 111th Cong.

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[2] *Available at* http://www.cbo.gov/ftpdocs/113xx/doc11379/Eliminate_Individual_Mandate_06_16.pdf.

§ 501 (2009) (same). Unlike the ACA, neither of those bills imposed a stand-alone mandate that individuals maintain insurance, and the exaction that each imposed on "individuals without acceptable" insurance was expressly and repeatedly labeled a "tax," not a penalty.

By contrast, the ACA explicitly imposes a stand-alone requirement to obtain insurance, and then explicitly describes the punishment for failure to comply with that requirement as a "penalty," both in the operative provision and more than a dozen times throughout the statute. *See* ACA § 1501(b); 26 U.S.C. § 5000A(b). That terminology also stands in stark contrast to another bill considered by the Senate that also would have imposed a "requirement to maintain essential health benefits coverage," but would have "imposed a *tax*" on individuals who "fail[] to meet th[at] requirement." S. 1796, 111th Cong. § 1301 (2009) (emphasis added).

The terminology used in section 5000A also differs materially from other provisions throughout the ACA, many of which expressly impose new "taxes." For instance, section 9001 imposes a "tax" on so-called "Cadillac health plans." ACA § 9001, 26 U.S.C.A § 4980I(a) ("[i]f—(1) an employee is covered under any applicable employer-sponsored coverage of an employer at any time during a taxable period, and (2) there is any excess benefit with respect to the coverage, there is hereby imposed a *tax* equal to 40 percent of the excess benefit" (emphasis added)). Similarly, Congress imposed on "any indoor tanning service a *tax* equal to 10 percent of the amount paid for such service." ACA § 10907(b), 26 U.S.C.A. § 5000B (emphasis added); *see also* ACA § 9007(b)(1), 26 U.S.C.A. § 4959 (imposing "a tax equal to $50,000" on hospitals that fail to meet certain requirements); ACA § 9009, 26 U.S.C.A. § 4191(a) (imposing a "tax" "on the sale of any taxable medical device"); ACA § 9015, 26 U.S.C.A. § 3101(b) (imposing hospital "tax" on high income taxpayers).

Notably, the President insisted that the penalty for failure to obtain insurance was not a tax. *See, e.g.*, *Obama: Requiring health insurance is not a tax increase*, CNN (Sept. 20, 2009) ("For us to say you have to take responsibility to get health insurance is absolutely not a tax increase.").[3] The Congressional Joint Committee on Taxation also did not include the effects of the penalty in its assessment of the effects of the ACA's tax provisions.[4]

B. The Anti-Injunction Act

The AIA provides that, with exceptions not relevant here, "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 statute's

[3] *Available at* http://articles.cnn.com/2009-09-20/politics/obama.health.care_1_health-insurance-coverage-mandate-medicare-advantage?_s=PM:POLITICS.

[4] *See* Staff of the Joint Committee on Taxation, Estimated Revenue Effects of the Amendment in the Nature of a Substitute to H.R. 4872, the "Reconciliation Act of 2010," as amended, in Combination with the Revenue Effects of H.R. 3590, the "Patient Protection and Affordable Care Act ('PPACA')," as Passed by the Senate, and Scheduled for Consideration by the House Committee on Rules on March 20, 2010 (JCX-17-10) (2010), *available at* http://www.jct.gov/publications.html?func=startdown&id=3672.

basic function is to prohibit taxpayers from bringing pre-enforcement suits to enjoin taxes, and to instead require them to "pay income taxes, … exhaust … internal refund procedures, and then bring suit for a refund." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 746 (1974). Because the AIA is premised on the relatively unusual ability of a disgruntled taxpayer to pay taxes under protest and still have "a full, albeit delayed, opportunity to litigate the legality of" a tax even if the challenger pays the tax as required, *id.*, courts will apply "the Act to bar a suit only in situations in which Congress had provided the aggrieved party with an alternative legal avenue by which to contest the legality of a particular tax." *Regan*, 465 U.S. at 374.

C. Proceedings Below

Shortly after the ACA was enacted, Florida and 12 other States brought this action seeking a declaration that the individual mandate is facially unconstitutional and the Act as a whole is invalid. They have since been joined by 13 additional States, the National Federation of Independent Business, and multiple individuals.

Initially, the federal government argued that Respondents' challenge to the individual mandate was barred by the AIA. *See* Govt.'s Mem. Supp. Mot. Dismiss 33–34 [Eleventh Circuit Record Excerpts ("R.E.") 128–29]. According to the federal government, any challenge to the mandate was a suit for the purpose of restraining the separate penalty provision, which the federal government argued was a tax. *See id.* at 34 [R.E. 129]. The States replied that the ACA's "enforcement penalty

… is not a tax" because Congress explicitly chose to enact a penalty, not a tax. Plfs.' Mem. Opp. Mot. Dismiss 18–19 [R.E. 193–94].

The District Court rejected the federal government's AIA argument. The court first found it telling that Congress considered and rejected numerous proposals to impose a "tax" rather than a "penalty." Pet. App. 410a. The court also found "Congress's failure to call the penalty a 'tax' … especially significant in light of the fact that the Act itself imposes a number of taxes in other sections." Pet. App. 411a. The court concluded that this demonstrated "beyond question that Congress knew how to impose a tax when it meant to do so" and thus that "the strong inference and presumption must be that Congress did not intend for the 'penalty' to be a tax." Pet. App. 411a. The court also concluded that the ACA "contain[ed] *no* indication that Congress was exercising its taxing authority" in section 5000A. Pet. App. 415a. And it found noteworthy that the ACA both "eliminated traditional IRS enforcement methods for the failure to pay the" penalty and "failed to identify … any revenue that would be raised from it, notwithstanding that at least seventeen other revenue-generating provisions were specifically so identified." Pet. App. 421a. Accordingly, the court concluded that the AIA does not bar the States' challenge to the individual mandate and proceeded to hold the mandate unconstitutional. Pet. App. 350a.

On appeal to the Eleventh Circuit, the federal government declined to pursue its argument that the AIA bars Respondents' challenge to the mandate. *See* Fed. Govt.'s Pet. for Cert. 32. And in two parallel suits challenging the AIA, the federal government disavowed its earlier position and expressly argued that the AIA does *not* bar pre-enforcement challenges to the individual mandate because the penalty provision is not a tax for purposes of the AIA. *Id.* at 32–33; *see also* Fed. Govt.'s Supp. Br. 2, *Liberty Univ., Inc. v. Geithner* (4th Cir.) (No. 10-2347).

The Eleventh Circuit affirmed the District Court's holding that the individual mandate is unconstitutional. Pet. App. 187a–88a. Although the court did conclude that the penalty to enforce the mandate is not a "tax" for purposes of constitutional analysis under Congress' tax power, Pet. App. 157a–72a, it did not address the AIA issue.

SUMMARY OF ARGUMENT

The AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). There is no need to consider whether that proscription encompasses the States' challenge to the individual mandate because the AIA is not a jurisdictional statute. The AIA lacks the clear indication this Court requires to find a statute jurisdictional because it is addressed to the rights and obligations of litigants, not to the power of courts. Moreover, it is located in a section of the U.S. Code that governs procedure and administration, not the jurisdiction of the courts. And it admits of exceptions, both statutorily defined and judicially created. While the Court's cases have sometimes used loose language to describe the AIA as "jurisdictional," the AIA is hardly the only statutory context where that has occurred, and the Court has more recently insisted on turning square corners and reserving the jurisdictional label and its consequences for truly jurisdictional statues. The AIA is clearly a claims-processing rule, not a jurisdictional bar. No party to this case invokes the AIA. Accordingly, the Court can consider the critical constitutional questions the individual mandate raises without considering the applicability of the AIA.

Even if the AIA were jurisdictional, it would pose no bar to the States' challenge to the mandate. The States are injured by the mandate for multiple reasons, most obviously because it will force millions of individuals to enroll in Medicaid, thereby substantially increasing States' financial obligations under the program. The States are injured just as obviously as if Congress had amended Medicaid directly to require the States to enroll a higher percentage of eligible individuals. But because neither the mandate nor its penalty provision applies directly to the States, to hold the AIA applicable to the States' challenge would deprive the States of *any* remedy for that injury. This Court has already rejected the argument that the AIA applies in such circumstances, and *Amicus* does not argue otherwise. Beyond that, the AIA does not even apply to States in the first place, as it uses the generic term "person" and contains no clear indicia to overcome the "longstanding interpretive presumption that 'person' does not include the sovereign." *Vt. Agency of Natural Res. v. United States ex. rel. Stevens*, 529 U.S. 765, 780 (2000).

The AIA is also inapplicable because the States are challenging the individual mandate, not the penalty provision through which the mandate is enforced. That renders the AIA inapplicable by its plain terms regardless of whether that penalty is a tax, as the States' challenge is not a "suit for the purpose of restraining" the penalty. 26 U.S.C. § 7421(a). That the two are distinct is most evident from the fact that many individuals are subject to the mandate but not the penalty. Indeed, the States' injury is largely a product of the mandate's effect on just such individuals, as many of the Medicaid-eligible individuals who must enroll on account of the mandate are exempt from the penalty.

Moreover, unlike taxpayers to whom the AIA applies, those who oppose the mandate have no option of paying insurance premiums under protest and seeking to recoup them as unconstitutional in a refund action. If the AIA applies nonetheless it would leave individuals such as Private Respondents—who fully intend to comply with the mandate so long as it stands—without any ability to challenge the mandate. They would have to violate the mandate to challenge it. That is not how the AIA is supposed to work. It forces taxpayers to pursue a refund action; it does not force citizens to break the law in order to challenge it.

Moreover, to the extent that a challenge to the mandate might be construed as a challenge to the penalty, the AIA would still pose no bar because that penalty is not a tax. Congress considered and rejected proposals to impose a tax on the insured, and instead imposed a stand-alone regulatory command to obtain insurance, with a "penalty" provision to enforce it. Congress did so for an obvious reason: It lacked the political support to impose a tax. That Congress could not and would not have passed the penalty were it a tax is reason enough not to construe it as one, as accountability to the people is the single most important restraint on Congress' vast power to impose taxes.

In short, *Amicus*' argument fails on every level: The AIA is not jurisdictional, does not apply to the States, and does not apply to challenges to the individual mandate or even its penalty provision. There is no reason that the AIA should prevent the Court from reaching the critical constitutional questions that this case presents.

ARGUMENT

I. The Court Need Not Consider Whether The AIA Applies Because It Is Not Jurisdictional.

Because the federal government has affirmatively disavowed reliance on the AIA, there is no need for the Court to consider the AIA's applicability unless the statute is jurisdictional. *See Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011). It is not. The AIA has none of the clear indications that this Court requires before concluding that a statute is truly jurisdictional. And while this Court's opinions in the AIA context, as in other contexts, contain some loose references to the statute as jurisdictional, this Court has cautioned against relying on such mislabeling. What matters is not the label attached, but the substance of this Court's decisions, and the Court has consistently treated the AIA as non-jurisdictional by recognizing exceptions to its application, which could not be squared with a truly jurisdictional statute. Accordingly, this Court need only reaffirm that the AIA is not jurisdictional and move on to decide the merits.

A. Congress Did Not Clearly Indicate That the AIA Is Jurisdictional.

Given the "drastic" consequences that attend a withdrawal of jurisdiction, this Court will not find a statute jurisdictional absent a clear indication from Congress. *Gonzalez v. Thaler*, ___ S. Ct. ___, 2012 WL 43513, at *5 (2012); *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1245 (2010) (question is whether statute "clearly states' that its … requirement is 'jurisdictional'" (quoting *Arbaugh v. Y & H Corp*., 546 U.S. 500, 515 (2006))). A limit is jurisdictional "[i]f the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional." *Thaler*, 2012 WL at *5 (quoting *Arbaugh*, 546 U.S. at 515–16; emphasis added). Conversely, "[w]here Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional." *Arbaugh*, 546 U.S. at 516.

The AIA plainly lacks the clear statement that this Court requires before finding a statute jurisdictional. To begin, the term "jurisdiction" is wholly absent from the AIA. Even beyond that obvious deficiency, the AIA lacks the most salient characteristic of jurisdictional statutes: It is not addressed to courts, but is instead addressed to litigants. Because "[s]ubject matter jurisdiction" refers to "the courts' statutory or constitutional *power* to adjudicate the case," *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998), the term properly applies only to prescriptions that "speak to the power of the court rather than to the rights or obligations of the parties." *Reed Elsevier*, 130 S. Ct. at 1243 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994)). Statutes that speak to the rights or obligations of litigants, by contrast, establish "claim-processing rules" rather than "jurisdictional prescriptions." *Id.* at 1243–44.

Instead of limiting "the courts' statutory or constitutional power to adjudicate the case," *Steel Co.*, 523 U.S. at 89, the AIA focuses on the litigant's cause of action: "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). It would have been easy enough for Congress to direct the Act to the ability of the court to hear the suit (or in the passive voice the ability of the matter to be maintained or heard "*by* any court"), but Congress focused instead on the ability of a person to maintain a suit "*in* any court *by* any person." As such, the AIA "says nothing about whether a federal court has subject-matter jurisdiction." *Reed Elsevier*, 130 S. Ct. at 1245. It instead functions as a claims-processing statute, establishing the method and timing of judicial review by directing certain litigants to statutorily provided refund actions. As this Court put it, the AIA "was merely intended to require taxpayers to litigate their claims in a designated proceeding." *Regan*, 465 U.S. at 374.

The location of the AIA also provides no "clear indication" that Congress intended the AIA to be jurisdictional. *Henderson*, 131 S. Ct. at 1205. The AIA does not reside in the section of the U.S. Code dedicated to district court jurisdiction. It resides instead in a miscellaneous tax code section that governs procedure and administration. That the AIA "is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over [the] respective claims" is further confirmation that it is not jurisdictional. *Reed Elsevier*, 130 S. Ct. at 1245–46; *see also Arbaugh*, 546 U.S. at 514–15.

Although the enactment of the Tax Injunction Act ("TIA") "throws light on the proper construction" of the AIA, *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 6 (1962); *see Amicus* Br. 17, it is the contrast between the two that shines through. Unlike the AIA, the TIA *is* directed to the power of courts and *is* located in the section of the U.S. Code that establishes the jurisdiction of district courts. *See* 28 U.S.C. § 1341 ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."). Congress' choice to use such obviously jurisdictional language in an analogous context only underscores that the requisite "clear indication" is lacking for the AIA. As the Court explained in *Williams Packing*, the inclusion of express language addressing a particular issue in the TIA "indicates" that, if Congress had desired the AIA to have the same effect, "it would have said so explicitly." 370 U.S. at 6.

Congress could have spoken in jurisdictional terms in the AIA, *e.g.*, "no court shall hear" (or better yet, "have jurisdiction over") "any suit for the purpose of restraining the assessment or collection of any tax," but it did not. Its "failure to do so" demonstrates Congress' intent that the AIA is not jurisdictional, even if the TIA is. *Williams Packing*, 370 U.S. at 6; *see also Thaler*, 2012 WL at *6 ("unambiguous jurisdictional terms" in a related statute are evidence that Congress "would have spoken in clearer terms if it intended [the statute] to have similar jurisdictional force"). In short, there is nothing to indicate that Congress intended the AIA to "speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Reed Elsevier*, 130 S. Ct. at 1246.

B. This Court's Precedents Confirm that the AIA Is Not Jurisdictional.

1. Recent cases warn against relying on "less than meticulous" past use of the term "jurisdictional."

Amicus argues that this Court can overlook the absence of any clear jurisdictional statement in the AIA because prior cases have referred to the statute as "jurisdictional." *Amicus* Br. 17. But the smattering of cases that *Amicus* musters for this point cannot survive the Court's more recent admonishments that such loose uses of the term "jurisdictional" are of little or no value.

"Jurisdiction," the Court has cautioned, "is a word of many, too many, meanings." *Steel Co.*, 523 U.S. at 90. As a result, "[c]ourts—including this Court—have sometimes mischaracterized claim-processing rules … as jurisdictional limitations." *Reed Elsevier*, 130 S. Ct. at 1243–44; *see also Arbaugh*, 546 U.S. at 511–12 (citing examples); *Steel*

Co., 523 U.S. at 91 (same). In a series of recent cases, however, the Court has sought to "bring some discipline to the use of th[e] term" "jurisdictional," *Henderson*, 131 S. Ct. at 1202–03, and has "pressed a stricter distinction between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim-processing rules,' which do not." *Thaler*, 2012 WL at *5 (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454–55 (2004)).

Amicus' argument that historical labeling of the AIA as "jurisdictional" should be given "dispositive weight," *Amicus* Br. 19, is at odds with this Court's "marked desire" to correct loose language and "drive-by jurisdictional rulings." *Reed Elsevier*, 130 S. Ct. at 1244. The best that can be said about the old cases *Amicus* offers is that they were "less than meticulous" in their use of the term "jurisdictional." *Kontrick*, 540 U.S. at 454.

2. Labels aside, the Court has consistently treated the AIA as non-jurisdictional.

As *Amicus* concedes, even as the Court labeled the AIA jurisdictional, it did not treat it as such. *Amicus* attempts to characterize the Court's construction of the AIA as "cyclical," infused only with "periods" in which the Court affirmatively rejected a jurisdictional interpretation. *Amicus* Br. 19. But those non-jurisdictional rulings cannot be dismissed as just youthful indiscretions or an experimental period. They are emblematic of this Court's interpretation of the AIA as a claims-processing rule that permits equitable exceptions. What is more, they are precedential decisions of this

Court that no one proposes overruling. It is simply too late in the day to say that the AIA is a jurisdictional statute not subject to forfeiture, waiver, or equitable exceptions.

1. At the outset, the AIA's *non*-jurisdictional status is confirmed by the very decision that *Amicus* acknowledges is the Court's "capstone" interpretation of the Act: *Enochs v. Williams Packing*. *See Amicus* Br. 7. In *Williams Packing*, the Court of Appeals had enjoined a tax on grounds that "collection would destroy [the taxpayer's] business." 370 U.S. at 2. Although this Court reversed, it did not do so because the AIA is a jurisdictional statute that admits of no exceptions. Quite the contrary, the Court reiterated that the AIA does *not* apply when "it is clear that under no circumstances could the Government ultimately prevail" and "equity jurisdiction otherwise exists." *Id.* at 7. The Court then went on to conclude that those circumstances did not exist in the case at hand. *See id.* at 8 (reversing after examining merits and concluding that "[t]he record before us clearly reveals that the Government's claim of liability was not without foundation").

Williams Packing's merits-based requirement that the federal government's claim of liability have "foundation" would make no sense if the AIA were a truly jurisdictional statute. That inquiry into the merits cannot be dismissed as analogous to the *Bell v. Hood*, 327 U.S. 678, 683 (1946), notion that a claim that is wholly frivolous does not trigger a court's subject-matter jurisdiction. The *Williams Packing* test is more demanding of the federal government, and in all events applies to the federal government's defense, not the taxpayer's claim. The notion that a complete jurisdictional bar has an exception if the merits of the defendant's position are wholly without foundation would be a complete anomaly. The notion that the AIA provides the federal government a defense, except when its position on the merits is extremely weak, is far less anomalous.

The existence of the "judicially-created" *Williams Packing* exception, *Regan*, 465 U.S. at 372, is fatal to *Amicus*' effort to construe the AIA as jurisdictional. It is hornbook law that, if a limit is truly jurisdictional, "[t]he prohibition is absolute." *Dolan v. United States*, 130 S. Ct. 2533, 2538 (2010). Courts have "no authority to create equitable exceptions to jurisdictional requirements." *Bowles v. Russell*, 551 U.S. 205, 214 (2007); *Kontrick*, 540 U.S. at 452 ("Only Congress may determine a lower federal court's subject-matter jurisdiction"); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Yet *Williams Packing* explicitly confirms that courts may adjudicate pre-enforcement tax disputes notwithstanding the AIA. *Cf. Bob Jones*, 416 U.S. at 748–49 ("Without deciding the merits, we think that petitioner's First Amendment, due process, and equal protection contentions are sufficiently debatable to foreclose any notion that 'under no circumstances could the Government ultimately prevail."). That only confirms that the AIA is a claims-processing rule that directs certain litigants to a statutorily provided refund remedy, and is not truly jurisdictional in the sense of limiting "the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co.*, 523 U.S. at 89.

2. This Court's decision in *South Carolina v. Regan* also underscores that the AIA is a claims-processing statute that directs certain litigants to statutorily provided refund actions, not a jurisdictional statute that limits the adjudicatory authority of courts. *Regan* teaches that it is who sues and when—not the nature of the suit—that matters. Those are not "jurisdictional" inquiries.

In *Regan*, South Carolina challenged the constitutionality of "a tax on the interest earned on state obligations issued in bearer form." 465 U.S. at 372. No one disputed that an *identical* challenge brought by a bondholder would have been subject to the AIA. *See id.* If the AIA were jurisdictional and directed to the courts' authority, that would have ended the matter. Analyzing the Act's purposes, however, the Court held that South Carolina could sue under another exception to the Act. Using claims-processing language, the Court concluded that the AIA only "prohibited injunctions in the context of a statutory scheme that provided an alternative remedy," and "was merely intended to require taxpayers to litigate their claims in a designated proceeding." *Id.* at 374. The AIA, in other words, protects certain defendants from certain suits by certain plaintiffs, but does not cordon off an entire subject matter from the courts' jurisdiction. *See id.* (AIA "was also designed as 'protection of the collector from litigation pending a suit for a refund'" (quoting *Williams Packing*, 370 U.S. at 7–8)). The AIA directs certain litigants to a favored forum, but it is not directed to the courts' power. Since South Carolina was "unable to utilize any statutory procedure to contest the constitutionality of" the bond provision, the AIA did not bar South Carolina's action. *Id.* at 378.

Amicus maintains that the limitation on the AIA's scope recognized in *Regan* does not affect its "jurisdictional" status. *Amicus* Br. 20. But *Regan*'s exception for claims without an alternative remedy is irreconcilable with a jurisdictional bar. This Court is not in the business of arrogating to itself jurisdiction where none exists; if a limit is truly jurisdictional, it admits of no equitable exception, even if application of a strict jurisdictional limit leaves a litigant wholly without a remedy. *Dolan*, 130 S. Ct. at 2538; *Bowles*, 551 U.S. at 214; *Arbaugh*, 546 U.S. at 514; *Kontrick*, 540 U.S. at 452.

3. Even in earlier cases, the Court consistently treated the AIA as non-jurisdictional. Most notably, in *Helvering v. Davis*, 301 U.S. 619 (1937), the Court relied upon the federal government's waiver of an AIA "defense" and proceeded to address the merits of plaintiff's motion to enjoin taxation. *Id.* at 640. This Court's decision on the merits conclusively demonstrates that (at least) a majority of this Court concluded that the AIA is not jurisdictional. *See Bowles*, 551 U.S. at 216 ("[I]f a limit is taken to be jurisdictional, waiver becomes impossible.").

Amicus' only answer is to label *Davis* "an anomaly." *Amicus* Br. 22 n.7. It is not. *Davis* is consistent with a long line of cases treating the AIA as a claims-processing statute. From the early 1900s, the Court has treated the AIA as heightening the standard for equitable review by forbidding "the enjoining of a tax *unless* by some extraordinary and entirely exceptional circumstance its provisions are not applicable." *Dodge v. Osborn*, 240 U.S. 118, 122 (1916) (emphasis added). In other words, the Court has long held the AIA "inapplicable" when "extraordinary and exceptional circumstance[s]" exist. *Bailey v. George*, 259 U.S. 16, 20 (1922); *Dodge v. Brady*, 240 U.S. 122, 126 (1916) ("[W]e think that this [tax] case is so exceptional in character as not to justify us in holding that reversible error was committed by the court below in passing upon the case upon its merits.").

In 1922, the Court also repeatedly held the AIA inapplicable to tax statutes that operate as enforcement mechanisms for regulatory commands. *See Hill v. Wallace*, 259 U.S. 44 (1922); *Lipke v. Lederer*, 259 U.S. 557 (1922); *Regal Drug Corp. v. Wardell*, 260 U.S. 386 (1922). While the Court subsequently clarified the scope of that exception, holding that it would not apply to "truly revenue-raising tax statutes," the Court did not repudiate the underlying equitable exception. *Bob Jones*, 416 U.S. at 743 (citing *Graham v. Du Pont*, 262 U.S. 234 (1923)); *see also id.* (describing AIA as "merely 'declaratory of the principle' that equity usually, *but not always*, disavows interference with tax collection" (quoting *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932); emphasis added)); *Allen v. Regents of the University System of Georgia*, 304 U.S. 439 (1938) (same). Jurisdictional statutes are not descriptions of generally applicable equitable principles. They are strict limits on a court's power.

These early cases—from *Brady* to *Miller* to *Davis*—all affirmatively reject the notion that the AIA is jurisdictional in any sense of the word, and the more recent cases discussed above are equally inconsistent with jurisdictional status. Indeed, the non-jurisdictional status of the AIA is plain from *Williams Packing*, which confirms that courts possess discretion to exercise jurisdiction if a particularly strong showing of success on the merits is made. 370 U.S. at 7. And under the even more recent *Regan*, courts retain the discretion to exercise jurisdiction when the alternative remedy provided by Congress is unavailable. 465 U.S. at 380. Thus, if there is any "anomaly," it is the Court's occasional characterization of the AIA's limits as absolute, *see, e.g.*, *Snyder v. Marks*, 109 U.S. 189, 194 (1883), and the more frequent loose language concerning jurisdiction mentioned above.

Certainly, principles of *stare decisis* counsel in favor of treating the AIA as non-jurisdictional. Any anomalous decisions referring to the AIA as jurisdictional or treating its limits harshly pose no serious issue. This Court has been adding clarity to the law by cleaning up loose language and turning square corners in a number of contexts. And, of course, even a claims-processing rule can be "mandatory" and non-waivable in certain circumstances. *See Henderson*, 131 S. Ct. at 1205. But this Court's decisions recognizing exceptions to the AIA and finding it waivable are real obstacles to treating the statute as truly jurisdictional. *See id.* ("mandatory prescriptions" are not all "properly typed jurisdictional"). *Amici* does not suggest that the Court should overrule any of its earlier decisions.

Thus, the only path open to this Court that is faithful to its precedents is to recognize that the AIA is not jurisdictional. If the Court reaches that conclusion, it need consider the AIA no further, and can reach the weighty constitutional issues implicated by the mandate.

II. Even Assuming The AIA Is Jurisdictional, It Is Not An Obstacle To The States.

Even if the AIA were a jurisdictional bar to some challenges to the individual mandate, it is not a bar to the States' challenge. The States fall squarely within the exception that this Court recognized in *Regan* since the alternative remedy of a refund action is not available to them. For the States, it is this action or nothing. Indeed, the AIA, properly construed, does not even apply to States, as States are not "persons" within the meaning of the statute. Accordingly, the AIA, even were it jurisdictional, would pose no bar to consideration of the States' claim.

A. The States Have Standing to Challenge the Individual Mandate.

At the outset, there is no merit to *Amicus*' attempt to sidestep the question of the AIA's applicability to the States by arguing that the States lack standing to challenge the mandate. *See Amicus* Br. 53–57. The States have standing for at least three separate and independent reasons.

1. The individual mandate requires nearly all individuals to maintain insurance, including individuals who are either newly eligible for Medicaid or were previously eligible but had not

opted to enroll. *See* 26 U.S.C. § 5000A(a). Thus, because of the mandate, millions more individuals will enroll in Medicaid, imposing millions of dollars in additional costs upon the States. The Act makes the link direct by specifying that Medicaid coverage satisfies the mandate, *see* ACA § 5000A(f)(1)(A)(ii), and by providing no alternative mechanism for low-income individuals to comply, *see* Br. for State Petrs. on Medicaid 11–13. The States' injury is essentially no different from the injury suffered by a company with an agreement with the federal government to provide a product at a subsidized rate to all individuals who request it. If the federal government passed a law making the purchase of that product mandatory, not voluntary, the company would suffer an immediate and enormous financial hit and would clearly have standing to sue.

Contrary to *Amicus*' contention, there is nothing "'conjectural or hypothetical'" about that injury. *Amicus* Br. 55 (quoting *Steel Co.*, 523 U.S. at 103). According to the federal government's own studies, of the 16 to 18 million individuals expected to enroll in Medicaid as a result of the ACA, a full 6 to 7 million would not enroll if there were no individual mandate requiring them to do so. *See supra*, p. 5. As those numbers confirm, the increase in enrollment and the corresponding increase in the States' financial obligations under Medicaid are neither speculative nor the product of "unfettered choices made by independent actors." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.). Those increases are instead a direct, inevitable, and intended consequence of the individual mandate.

Amicus alternatively contends the States' claim is premature because the federal government will cover the costs of newly eligible Medicaid enrollees through 2016. *Amicus* Br. 56. But even assuming the claim were premature as to those individuals (and it is not), *Amicus* simply ignores the States' uncontested evidence that the mandate will *immediately* increase their Medicaid costs in a very substantial way by forcing currently eligible but unenrolled individuals to enroll. Because the ACA's initial offer of 100% federal funding applies only to *newly* eligible enrollees, States will continue to pay up to 50% of the costs generated by enrollment of the currently eligible but unenrolled. ACA § 2001(a)(3). Florida, for example, has projected that solely as a result of enrolling the currently eligible, its share of Medicaid spending will increase by more than $500 million annually by the end of the decade. JA 76 ¶¶ 17–18. That enormous cost is associated directly with the individual mandate. These are additional costs to the States from servicing individuals for whom the difference between a voluntary option to enroll and a mandate is determinative.

Amicus also misses the mark by insisting that the States' injury is insufficient to establish standing because it "result[]s 'from decisions by their respective legislatures'" to participate in Medicaid. *Amicus* Br. 54 (quoting *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (per curiam)). Whatever the nature of the States' decision to participate in Medicaid, the States did not agree to participate in Medicaid under the condition that federal law would require every eligible individual to enroll. The States' standing to challenge the mandate is no different from their standing to challenge any other statute that alters States' obligations under a spending program, something that even the federal government concedes States have standing to do. While the individual mandate does not *expressly* alter the terms of the States' participation in Medicaid, it has precisely that effect to the tune of hundreds of millions of dollars. If Medicaid were amended to require States to ensure that a greater percentage of eligible individuals were, in fact, enrolled, the States' standing would be unquestionable. There is no reason for a different result when the mandate has the same effect.

Neither of the cases upon which *Amicus* relies (at 54) even hints that a State lacks standing to challenge an injury that relates to its participation in a spending program. *Massachusetts v. Mellon*, 262 U.S. 477 (1923), involved a State's challenge to a spending program in which the State had chosen *not* to participate. *Id.* at 479. In rejecting that challenge, the Court did not conclude that States somehow "forfeit" standing to challenge injuries arising out of programs in which they voluntarily participate; it merely recognized that the State never acquired standing in the first place because it declined to participate in the challenged program. *Id.* at 480.

Pennsylvania v. New Jersey is even less relevant. That case involved Pennsylvania's challenge to New Jersey's tax scheme, which taxed the in-state income of out-of-state residents but did not tax out-of-state income of its own residents if that income was taxed by the State where it was earned. *See Pennsylvania*, 426 U.S. at 663. Because

Pennsylvania exempted its own residents from taxation on out-of-state income if that income was taxed where earned, Pennsylvania complained that New Jersey was unconstitutionally "diverting" tax dollars from Pennsylvania's treasury. *Id.* The problem with that claim was that New Jersey was not actually "diverting" anything from Pennsylvania's treasury; Pennsylvania had merely made a voluntary decision not to impose additional taxes on its own residents. Thus, to the extent that there was *any* injury, it was plainly "self-inflicted." *Id.* at 664.

The injury that the individual mandate will cause the States is not remotely analogous to *Mellon* or *Pennsylvania*. The States are not complaining about Congress' authority to enact a program in which they are not participating or unfair benefits to other States as a consequence of their own voluntary choices. They are complaining that by flipping a switch that makes previously voluntary Medicaid participation mandatory, the ACA effectively amends the terms of a program they actually participate in, with a net impact of hundreds of millions of dollars. The hundreds of millions of dollars that States will be forced to spend surely qualifies as injury in fact; it is directly traceable to Congress' decision to make voluntary participation mandatory; and it is obviously redressable, as invalidating the mandate will restore the status quo ante and save the States millions.

2. The States also have standing to argue that the individual mandate is unconstitutional because they have adequately alleged that the mandate is inextricably intertwined with provisions of the ACA

that unquestionably injure the States. Contrary to *Amicus*' contentions, that injury readily satisfies the rule that "'[a] plaintiff must demonstrate standing for each claim he seeks to press' and 'for each form of relief sought.'" *Amicus* Br. 56 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). Indeed, this Court allowed just such a claim in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987). There, the plaintiffs claimed that the congressional-veto provision of the Airline Deregulation Act was unconstitutional and that an entire section of the Act must fall with it. *Id.* at 683. The plaintiffs did not allege that they were injured by the veto provision itself, or that the Act's other provisions were independently unconstitutional or invalid. They instead argued only that the veto provision was unconstitutional, and that the other provisions must be invalidated as a result. This Court and each court below adjudicated their claims without suggesting that their lack of independent standing to challenge the veto provision deprived them of standing to argue that the provisions they had standing to challenge must fall as a consequence of the veto provision's unconstitutionality. *See Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1556 (D.C. Cir. 1985) (rejecting other ripeness and standing arguments).

Here, the States have plainly demonstrated that they are inured in fact by, *inter alia*, the ACA's Medicaid expansion and employer regulations. They thus have standing to seek invalidation of the Act on the basis that the mandate is unconstitutional.

3. As a matter of first principles, the States also have an obvious interest in challenging the

individual mandate because it is a direct assault on the "'residuary and inviolable sovereignty,'" that the Constitution "reserved explicitly to the States." *New York v. United States*, 505 U.S. 144, 188 (1992) (quoting The Federalist No. 39 (C. Rossiter ed. 1961) at 245). To the extent that the Court's decision in *Mellon* is to the contrary, more recent cases cast doubt on its reasoning.

As the Court reiterated just this past Term, "[t]he federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011); *see also Texas v. White*, 74 U.S. 700, 725 (1868) ("[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government."). Thus, when a State argues that Congress has overstepped its bounds, the State is not merely "protect[ing] citizens of the United States from the operations of the statues thereof." *Mellon*, 262 U.S. at 485. It is also protecting its *own* "integrity, dignity, and residual sovereignty," as preserved by the Constitution. *Bond*, 131 S. Ct. at 2364.

In rejecting the argument that States are the only ones with standing to raise Tenth Amendment objections to federal statutes that impact state residents, this Court in no way suggested that only individuals can bring those claims. To the contrary, *Bond* recognizes that the Tenth Amendment reserves powers not delegated to the new federal government to both the States and the people, and emphasizes that they both have important rights to vindicate. *See id.* at 2366. Indeed, the Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), underscores that States are uniquely well-suited to litigate claims to vindicate their own sovereignty. *See id.* at 518 (stressing "the special position and interest of" the State and finding it "of considerable relevance that the party seeking review [t]here [wa]s a sovereign State and not … a private individual").

To the extent that *Mellon* forecloses States from challenging federal incursions into their sovereignty on the theory that only individuals have a cognizable interest in enforcing the Constitution's structural constraints, *Mellon* is inconsistent with the Court's more recent precedents and should be overruled. As the federal government has argued elsewhere, *stare decisis* has little force as to questions of this Court's jurisdiction, as reliance interests cannot justify continued application of misinterpretations of the courts' authority under Article III. *See* Govt.'s Reply Br. 19, *Hein v. Freedom From Religion Found., Inc.* (No. 06-157). That said, the Court need not consider the continuing vitality of *Mellon* to conclude that the States have standing to challenge the mandate because the States quite obviously have standing as a result of the mandate's direct and substantial effect on their fiscal obligations under Medicaid.

4. Finally, there is no merit to *Amicus*' contention that the States lack *prudential* standing to challenge the mandate under third-party standing principles, as that argument is squarely foreclosed by at least two of the Court's cases. *See Amicus* Br. 57. The very question before the Court in *Regan* was whether a State could proceed with an original action to

challenge a tax that applied to individuals but not the State. In concluding that the AIA did not bar that suit, the Court expressly rejected the notion that a State should be "required to depend on the mere possibility of persuading a third party to assert his claims." *Regan*, 465 U.S. at 381. It would be passing strange for this Court to devise an exception to the AIA for the explicit purpose of allowing a State to pursue a challenge to a tax that applied only to individuals—and then to adjudicate that very challenge on the merits, *see South Carolina v. Baker*, 485 U.S. 505 (1988)—if prudential standing principles counseled against allowing a State to proceed with such a claim.

Amicus' prudential standing argument also rests on the same arguments that the Court rejected just last Term in *Bond*. As the Court explained, because "[t]he principles of limited national powers and state sovereignty are intertwined," a law that oversteps Congress' enumerated powers interferes with both the rights of individuals *and* the sovereignty of the States. 131 S. Ct. at 2366. Just as an individual "is not forbidden to object that her injury results from disregard of the federal structure of our Government" in a way that injures the States, *id.*, a State is not forbidden to object that its injury results from disregard of the enumeration of powers in a way that injures individuals. Accordingly, here too "[t]here is no basis to support the Government's proposed distinction between different federalism arguments for purposes of prudential standing rules." *Id.*

Indeed, if anything, the manner in which the ACA operates only underscores why the States are proper parties to challenge the individual mandate and the very real injury that it causes them. Because the penalty that is the gateway for later judicial review—as distinct from the mandate—does not apply to many of the individuals who are Medicaid-eligible, *see* 26 U.S.C.A. § 5000A(e)(2) (exempting individuals with income under federal poverty level), many of the individuals that the mandate will force to enroll in Medicaid, thereby injuring the States, will have the least ability and incentive to challenge it. Indeed, their standing would depend on convincing a court that their autonomy interest in not enrolling for a government benefit would confer standing in the absence of a financial injury. But while those individuals actually stand to *benefit* financially from being forced onto the rolls, States suffer a huge financial hit. Particularly in those circumstances, it makes no sense to suggest that the States should be "required to depend on the mere possibility of persuading [those individuals] to assert [their] claims." *Regan*, 465 U.S. at 381.

B. The States Fall Squarely Within *Regan*'s Exception to the AIA.

Once it is clear that States have standing to object to the mandate, it is equally clear that the AIA is no obstacle to the States' suit in light of this Court's decision in *Regan*. Indeed, aside from his erroneous standing objection and the related suggestion that the States are not "aggrieved parties," *Amicus* does not quarrel with application of *Regan* to this case. *Amicus* Br. 52. Nor could he, as the States' challenge to the mandate falls squarely within the *Regan* exception.

In *Regan*, South Carolina challenged the constitutionality of "a tax on the interest earned on state obligations issued in bearer form." 465 U.S. at 372. The tax burden fell on individual bondholders, not South Carolina. *Id.* Because South Carolina would "incur no tax liability," it could not raise its constitutional claims pursuant to the statutorily provided refund remedy. *Id.* at 379–80. Looking to the purpose and circumstances of the ACA's enactment, the Court concluded that "Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." *Id.* at 378. As a result, the AIA was no bar to the State's constitutional claims. *Id.* at 380.

The States' challenge to the individual mandate is on all fours with South Carolina's challenge in *Regan*. Although the mandate imposes burdens upon the States—not unlike the regulatory burdens that the bearer bonds tax provision placed on South Carolina—neither the mandate nor its penalty provision applies directly to the States. To the extent that payment of the mandate's penalty might constitute a "tax" subject to challenge in a refund suit, the States "will be unable to utilize any [such] statutory procedure to contest the constitutionality of" the mandate because they "will incur no tax liability" under its penalty provision. *Id.* at 379–80. "Because Congress did not prescribe an alternative remedy for the plaintiff[s] in this case, the Act does not bar this suit." *Id.* at 381.

Regan makes clear that it is one thing to channel particular litigants to particular remedies, but it is another thing entirely to eliminate any remedy altogether. That concern is precisely what led the Court to conclude that the AIA "bar[s] a suit only in situations in which Congress had provided the aggrieved party with an alternative legal avenue by which to contest the legality of a particular tax." *Id.* at 373; *see also Bob Jones*, 416 U.S. at 746 & 747 n.21 (noting that its conclusion that AIA forbade suit "might well be different" if "aggrieved party ha[d] no access at all to judicial review" and leaving open question whether due process would be satisfied if an organization had to rely on a "friendly donor" to obtain judicial review).

Precluding the States' suit under the AIA "would entirely deprive the State[s] of any opportunity to obtain review of [their] claims." *Regan*, 465 U.S. at 380–81. That position is inconsistent not only with this Court's interpretation of the AIA, but also with the principle that the Constitution protects the "integrity, dignity, and residual sovereignty of the States." *Bond*, 131 S. Ct. at 2364. Because the AIA "appl[ies] only when Congress has provided an alternative avenue for an aggrieved party to litigate its claims on its own behalf," *Regan*, 465 U.S. at 381, it cannot and does not bar the States' claim.

C. States Are Not Persons Within the Meaning of the AIA.

Even if *Regan* did not render the AIA irrelevant, the AIA would still be no bar to the States because it applies to "persons" and contains no indication that it reaches States. *See* 26 U.S.C. § 7421(a). *Amicus*' contention to the contrary is unavailing for a number of reasons.

When interpreting a statute's use of the term "person," a court "must apply [the] longstanding interpretive presumption that 'person' does not include the sovereign." *Vt. Agency*, 529 U.S. at 780. That presumption "may be disregarded *only* upon some affirmative showing of statutory intent to the contrary." *Id.* at 781 (emphasis added); *see also Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 82–83 (1991) ("[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." (internal quotation marks omitted)); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 275 (1947) (same).

The presumption that "person" does not include "State" is a straightforward application of "the ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Vt. Agency*, 529 U.S. at 787 (internal quotation marks omitted). That "clear statement principle reflects an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 544 (2002) (internal quotation marks omitted); *cf. Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004) ("[F]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism."). Because "statutes should be construed so as to avoid difficult constitutional questions," the Court will not lightly assume that Congress meant to impose obligations or restrictions upon States absent an "affirmative showing" of such intent. *Vt. Agency*, 529 U.S. at 787.

The AIA contains no such affirmative showing. By its plain text, the statute applies to "any person," not "any State." *See* 26 U.S.C. § 7421(a). For purposes of the tax code, "the term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company, or corporation." *Id.* § 7701(a)(1). A State does not fall within that definition. While the tax code's definitional provision further provides that "the term 'includes' … shall not be deemed to exclude other things otherwise within the meaning of the term defined," *Id.* 7701(c), that is triply irrelevant. The definition of "person" uses both "mean and include," so section 7701(c)'s caution is inapplicable. Moreover, the States' argument is not that States are not any of the entities on the inclusive definitional list, but that they are not within the defined term—"persons"—in the first place. Finally, none of this remotely constitutes the kind of affirmative showing that this Court's precedents require before the term "person" will deemed to include the sovereign.

Amicus does not attempt to divine any congressional intent to reach States from the text or history of the AIA, but instead merely avers that "[t]his Court has construed these definitions and held that the term 'person,' as used in various provisions of the Code, includes States." *Amicus* Br. 49 (citing *Ohio v. Helvering*, 292 U.S. 360 (1934), and *Sims v. United States*, 359 U.S. 108 (1959)). But this

Court has already rejected the argument that because the term "person" includes States in one part of a statute, it must include States throughout the statute. *See Vt. Agency*, 529 U.S. at 784 (acknowledging that States are persons for purposes of initiating False Claims Act cases, but not for provision identifying proper defendants). What is more, the cases upon which *Amicus* relies only underscore why, even if "person" might be construed to include "States" in certain provisions of the tax code, it should not be construed to do so in the AIA.

Helvering involved whether a State was subject to a retail tax upon "[e]very person who sells or offers for sale" alcohol. 292 U.S. at 367–68. The Court concluded that the statute reached the States because the tax would apply only when a State "engage[d] in a business of a private nature," and thus was "exercis[ing] nongovernmental functions." *Id.* at 368. In reaching that conclusion, the Court did not adopt a blanket rule that a State is *always* a "person" for purposes of tax code provisions. Quite the contrary, the Court stressed that "[w]hether the word 'person' or 'corporation' includes a state … depends upon the connection in which the word is found." *Id.* at 370. Given that the *particular* provision in question applied only "[w]hen a state … divests itself of its quasi sovereignty pro tanto," *id.* at 369, the Court concluded that Congress intended *that* statute to reach States because doing so would not run afoul of the "firmly established" rule "that 'the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them are … exempt from taxation by the United States.'" *Id.* at 368 (quoting *Indian*

Motorcycle Co. v. United States, 283 U.S. 570, 575 (1931)).[5]

Sims also underscores that a State is not always a "person" for purposes of the tax code. At the outset, *Sims* did not even involve interpretation of "person" under the tax code's definitional provision; it instead involved whether a state auditor was a "person" under a tax code provision that defined "person" to include any "employee of a corporation." *Sims*, 359 U.S. at 109 n.3 (quoting 26 U.S.C. § 6332(a) & (c)). In concluding that the statute reached the state auditor, the Court once again reiterated that "[w]hether the term 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment." *Id.* at 112 (citing *Helvering*, 292 U.S. at 376). Examining "the subject matter, the context, the legislative history, and the executive interpretation, *i.e.*, the legislative environment, of" the particular provision in question, the Court found "it plain that Congress intended to and did include States within the term 'person' *as used in § 6332*." *Id*. at 112 (emphasis added).

As is clear, *Helvering* and *Sims* establish nothing more than that a State *can* be a person for

[5] While the Court subsequently rejected that view of the federal government's power to tax States in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985), that only underscores the need for caution when determining whether Congress meant to sweep States within the reach of tax code provisions. There is little reason to think Congress intended such a provision to apply to States if that application would have been unconstitutional under the Court's precedents as they existed when the provision was enacted.

purposes of a tax code provision when the provision would not infringe on the States' sovereignty or when its "legislative environment" evinces Congress' specific intent to include States. Neither of those conditions is satisfied here. Unlike the statute in *Helvering*, the AIA is not a statute that would apply to States only when they are acting outside their sovereign capacity, and thus a statute that would not "alter the usual constitutional balance between States and the Federal Government," *Vt. Agency*, 529 U.S. at 787, if read to apply to the States. This case illustrates the danger that the AIA could be invoked even when a State exercises core sovereign functions and seeks to vindicate its sovereignty. More broadly, if the AIA applies to States, it would be dramatically invasive, as it would preclude States from challenging the validity of federal taxes unless and until they have paid those taxes to the federal government. And unlike in *Sims*, there are no surrounding provisions or executive interpretations evincing Congress' clear intent to impose that kind of burden on States. *Compare Sims*, 359 U.S. at 112 (emphasizing that immediately preceding provision expressly applied same restriction to federal employees).[6]

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[6] There is no merit to *Amicus*' suggestion that the States' argument is "undermined," *Amicus* Br. 51, by the Court's seeming assumption in *Regan* that the AIA applies to States. In *Regan*, South Carolina did not argue that "person" did not include States. Even if it had, it would have still been the narrower ground to hold the AIA inapplicable to the particular state claim at issue in *Regan*, as opposed to inapplicable to all state claims. The same narrow ground is available here. *See supra*, Part II.B.

Indeed, the very manner in which the AIA operates underscores why it would be wholly inappropriate to read the statute to apply to States. The whole purpose of the AIA is to deprive litigants of the opportunity to proceed directly to an Article III court when they want to challenge a tax. A litigant not only must wait until the tax has been paid, but also must begin the claim with an administrative refund proceeding against the Secretary. *See* 26 U.S.C. § 7422. It is one thing for Congress to impose federal taxes on States. It is another thing entirely for Congress to withdraw from the federal courts jurisdiction to hear claims brought by States, and to channel States into administrative proceedings before they can obtain judicial review even of constitutional challenges to federal taxes. *Cf. Federal Maritime Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 760 n.11 (2002) (arguably a great affront for State to be hauled in front of an administrative tribunal). Given the unique litigating status that both the Constitution and this Court have afforded States, *see* U.S. Const. art. III, § 2, cl. 2, *Massachusetts*, 549 U.S. at 518, the concerns animating the clear statement rule are at their zenith when sweeping States within a generic reference to "person" would impair their ability to obtain immediate judicial review of federal statutes.

That is all the more true given the Court's renewed commitment to enforcing the clear statement rule with vigor. In a whole host of contexts, the Court has been increasingly reluctant to read federal statutes to encroach upon state sovereignty when Congress has not made its intent to do so clear. *See*, *e.g.*, *Mo. Mun. League*, 541 U.S.

at 140; *Raygor*, 534 U.S. at 544; *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 432 (2002) ("We would hesitate before interpreting [a] statute to effect … a substantial change in the balance of federalism unless that is the manifest purpose of the legislation."); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (reading statute to "avoid … significant constitutional and federalism questions" when no "clear statement" of intent to impose "significant impingement of the States' traditional and primary power over land and water use"); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides th[e federal-state] balance" (internal quotation marks omitted)). This Court should decline *Amicus*' invitation to read the AIA to impose a significant burden upon the States' core sovereign litigating function when there is nothing in the text, structure, or history of the statute evincing Congress' intent—clear or otherwise—to do so.

III. In All Events, The AIA Does Not Apply To Challenges To The Individual Mandate.

A. The States Are Challenging the Mandate, Not the Penalty.

The AIA bars any "suit for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). By its plain terms, that proscription has no application here because the purpose of the States' suit is to challenge the individual mandate, not the mechanism by which it is enforced. Indeed, the States' injury flows primarily from the mandate's effect on individuals who are exempt from the penalty.

The States "seek injunctive and declaratory relief to prevent anyone from being subject to the mandate … irrespective of the means Congress chooses to implement it." *Seven-Sky v. Holder*, 661 F.3d 1, 8–9 (2011). That distinction is "critical," *id.* at 9, because the mandate and the penalty are distinct. The mandate is a stand-alone command that every "applicable individual shall" obtain and maintain insurance. 26 U.S.C.A. § 5000A(a). That command makes it unlawful for an "applicable individual" (which means nearly any individual) to live in the United States without approved health care insurance.

While section 5000A(b) imposes a "penalty" on individuals "who fail[] to meet the requirement" that the mandate imposes, § 5000A(b)(1), that penalty provision only underscores that the mandate is, itself, a separate legal command. First, the penalty does not apply as broadly as the mandate because it is subject to its own set of exemptions, and exemption from the penalty does not obviate the need to comply with the mandate. *Compare* § 5000A(e), *with* § 5000A(d). Second, payment of the penalty does not satisfy the mandate; an individual paying the penalty is still in violation of the mandate. The penalty is a "penalty" precisely because it *penalizes* individuals who violate the mandate's applicable substantive command. *See United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) ("[I]f the concept of penalty means anything, it means punishment for an unlawful act or omission.").

The purpose of the States' suit is to invalidate the substantive command that the mandate imposes, not to restrain enforcement of the penalty that would fall on a subset of its violators. Indeed, whether the penalty stands or falls is ultimately irrelevant to the States, as their injury flows from the mandate's effect on individuals who will *comply* with the mandate by enrolling in Medicaid even though they would not do so absent the mandate's command. *See* CBO, *Effects of Eliminating the Individual Mandate* (estimating that 6 to 7 million fewer individuals would enroll in Medicaid without mandate); 26 U.S.C.A. § 5000A(f)(1)(A)(ii) (enrollment in Medicaid satisfies mandate). That the States' injury is a product of the mandate, not the penalty, is only underscored by the fact that many Medicaid-eligible individuals are subject to the mandate but not the penalty. Those individuals will enroll in Medicaid not to avoid a penalty that does not apply to them, but because of the mandate to obtain insurance. Because it is *that* command that both injures the States and is the target of this action, the suit is not one "for the *purpose* of restraining" the penalty, and is thus not within the scope of the AIA. 26 U.S.C. § 7421(a) (emphasis added).

Indeed, as Private Respondents' situation vividly illustrates, applying the AIA to bar such a suit would produce bizarre and unintended results. Private Respondents are individuals who fully intend to *comply* with the mandate if it is constitutional. Thus, like the States, their injury flows from the mandate itself, and its requirement that they purchase costly insurance that they do not want or need. Precisely because they intend to abide by that requirement so long as it stands, they will not pay the penalty imposed on violators and thus do not anticipate ever being in a position to file a refund suit. Unlike taxpayers who have the option of paying taxes under protest and initiating a refund action in which they can contest the validity of the tax, the Private Respondents do not have the option of paying insurance premiums under protest and seeking a refund. Thus, if the AIA precludes their suits, they will have no forum to vindicate their view that the mandate is unconstitutional. The AIA is inapplicable in such circumstances. *See Regan*, 465 U.S. at 380.

This anomaly flows from the fact that the ACA's penalty is not a mechanism to ensure compliance with the tax laws, but a penalty for failing to engage in independent conduct. If the penalty were a penalty for not paying a tax, the taxpayer could pay under protest and retain the option to challenge the tax in a refund action. Compliance does not require acquiescence. But when the penalty is for something else—here, not entering a compelled contract with a third party—there is no obvious way to comply without forfeiting any ability to challenge the mandate's constitutionality. There is no reason to think that the AIA was intended to have this latter dramatic effect, or to force individuals to violate a law just to challenge it. To the contrary, when a party seeks to challenge an affirmative command, rather than the penalty that enforces it, the purpose of that suit is not to restrain the collection of any tax or even the penalty. The purpose is to enjoin the primary obligation, and the AIA is inapplicable.

Contrary to *Amicus*' contentions, neither *Bob Jones* nor *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974), supports reading the AIA to apply in the circumstances at hand. *See Amicus* Br. 45. Both of those cases involved formerly tax-exempt non-profit organizations seeking to challenge revocation of their tax-exempt status. In holding those claims barred by the AIA, the Court did not conclude that the AIA bars suits for the purpose of restraining anything that touches upon taxes or penalties. Rather, the Court merely concluded that "[u]nder any reasonable construction of the statutory term 'purpose,' the objective of th[ose] suit[s] was to restrain the assessment and collection of taxes" from the groups or their contributors. *Americans United*, 416 U.S. at 760–61; *see also Bob Jones*, 416 U.S. at 727 (finding "little doubt that a primary purpose of [the] lawsuit [was] to prevent the Service from assessing and collecting income taxes from petitioner").

The Court reached that conclusion because the tax-exempt status determinations were simply a mechanism for establishing whether contributions to the groups would be subject to taxes, meaning the challengers "would not be interested in obtaining the declaratory and injunctive relief requested if that relief did not effectively restrain the taxation of its contributors." *Americans United*, 416 U.S. at 761; *see also Bob Jones*, 416 U.S at 727 (petitioner's claimed "irreparable injury" was "'substantial' federal income tax liability" it would incur if tax-exempt status were revoked).

Thus, the "crucial distinction" between those cases and this one is that the "challenges to IRS letter-rulings revoking tax-exempt status [we]re *inextricably linked* to the assessment and collection of taxes." *Seven-Sky*, 661 F.3d at 10. In that unique situation, it would be entirely "circular to conclude … that respondent's primary design was not to remove the burden of taxation from those presently contributing but rather to avoid the disposition of contributed funds away from the corporation." *Americans United*, 416 U.S. at 761 (internal quotation marks omitted). What is more, in those cases, neither the organizations nor the taxpayers faced the dilemma faced by those who believe the mandate is unconstitutional, but would prefer to comply (and obtain insurance) rather than pay an equivalent penalty (and get nothing). Those organizations and their contributors could pay their taxes under protest and seek to vindicate the organizations' tax-exempt status in a refund action.

That is not remotely the case here. The mandate is not some mere means of establishing tax (or even penalty) consequences for the uninsured; it is a stand-alone substantive command to obtain health care insurance. The States' challenge to that command is not a "circular" effort to get at the penalty; it is a challenge to the unconstitutional command itself. Because that is not a "suit for the purpose of restraining" a tax (or even a penalty), 26 U.S.C. § 7421(a), the AIA is simply irrelevant.

B. The Individual Mandate Is Enforced by a Penalty, Not a Tax.

The AIA is inapplicable not only to a challenge to the mandate (which is what the States have brought), but to a challenge to the penalty itself.

The AIA applies to taxes, not penalties, and when Congress wants to treat penalties as taxes, it says so explicitly. Congress did nothing of the sort here.

The AIA is strong medicine: It creates a near-absolute bar to challenging a tax until after a tax has been paid. Indeed, even "the constitutional nature of a taxpayer's claim … is of no consequence under the Anti-Injunction Act." *Americans United*, 416 U.S. at 759; *see also United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 11 (1974). That bar makes sense in the context of taxes because a tax may be paid without waiving the right to a refund suit, meaning that an individual may comply with a tax law but still challenge it. By contrast, as noted, a penalty will apply only if an individual violates a legal command, which means denying pre-enforcement review of penalties would require individuals to break the law in order to challenge it.

Precisely because applying the AIA to penalties would produce that bizarre and often unintended result, courts should not lightly presume that Congress intended to sweep penalty provisions within the AIA's broad prohibition on pre-enforcement challenges to "any *tax*." At the very least, Congress' intent to treat a penalty as a "tax" must be clear before the AIA can apply. Here, not only is there no clear indication that Congress intended to treat the mandate's penalty provision as a "tax"; it is abundantly clear that Congress intended to do precisely the opposite.

1. First and foremost, Congress intentionally and explicitly refused to label the mandate's enforcement mechanism a "tax." As explained, *see*

supra, pp. 5–7, Congress considered several other health care reform bills, many of which would have imposed a straightforward and self-identified "tax" on the uninsured. Yet when it came to the bill finally passed by both houses of Congress, Congress "pointedly rejected proposals to designate the shared responsibility payment as a 'tax,' instead labeling it a 'penalty.'" *Seven-Sky*, 661 F.3d at 6. Congress not only referred to the mandate's enforcement mechanism as a "penalty" in the operative provision of section 5000A; it did so in each of its 15 references to the provision throughout the statute. *See* 26 U.S.C.A. § 5000A(b), (c), (e), (g).

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) (internal quotation marks omitted); *cf. Russello v. United States*, 464 U.S. 16, 23–24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."); *Brewster v. Gage*, 280 U.S. 327, 337 (1930) ("The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."). Congress considered and rejected proposals to impose a "tax" on the uninsured in favor of imposing a "penalty" on some of those who fail to comply with a separate mandate to purchase insurance. The Court should give full effect to that decision to impose a penalty rather than a tax, which removes the penalty provision from the AIA's reach.

The deliberateness of Congress' decision is underscored by comparing the penalty provision to other provisions of the ACA that quite clearly impose "taxes." *See supra*, pp. 6–7. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Dean v. United States*, 129 S. Ct. 1849, 1854 (2009) (quoting *Russello*, 464 U.S. at 23). As those other provisions confirm, Congress knows how to impose a tax and chose not to do so in section 5000A(b). *See Seven-Sky*, 661 F.3d at 6 ("That Congress called numerous other provisions in the Act 'taxes' indicates that its decision to use the word 'penalty' here was deliberate.").

That Congress knew it was not imposing a tax is also underscored by its findings accompanying section 5000A. Nothing in those findings "suggest[s] that Congress's purpose was to raise revenue"; quite the contrary, they emphasize that "the goal is universal coverage, not revenues from penalties." *Id.* The Congressional Joint Committee on Taxation evinced the same understanding when it did not include penalty payments among the tax revenues that the ACA would be produce. *See supra*, p. 7.

In short, by its plain text, section 5000A(b) imposes a penalty, not a tax. Thus, the AIA does not apply because it bars only "suit[s] for the purpose of restraining the assessment or collection of any *tax*." 26 U.S.C. § 7421 (emphasis added).

2. *Amicus* contends that even if the penalty is not a "tax," it should still be treated like a tax for

purposes of the AIA. *Amicus* arrives at that conclusion by reasoning that the penalty "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68," § 5000A(g)(1), and the tax code states that "penalties and liabilities provided by [Subchapter B of chapter 68] … shall be assessed and collected in the same manner of taxes," 26 U.S.C. § 6671(a). *See Amicus* Br. 24. According to *Amicus*, the penalty cannot be "assessed and collected" like assessable penalties or taxes if the AIA does not bar litigants from challenging the penalty before it is assessed and collected. That argument is flawed in multiple respects.

At the outset, *Amicus*' argument gets him nowhere because the AIA does not "address[] the manner in which taxes are assessed and collected." *Amicus* Br. 26. It addresses the manner in which taxes are *challenged in courts*. *See Seven-Sky*, 661 F.3d at 11; *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 540 (6th Cir. 2011). To be sure, the AIA's requirement that an individual may not challenge a tax before it has been paid *affects* assessment and collection of taxes by precluding courts from interfering with the Secretary's efforts. But that does not mean that an instruction to *the Secretary* to assess and collect a penalty in the same manner as a tax (or, here, as a penalty that, in turn, is assessed and collected like a tax) carries with it the implication that Congress intended to bar individuals from challenging the penalty before the Secretary assesses and collects it.

In any event, Congress' direction to assess and collect the penalty "in the same manner as an assessable penalty under subchapter B of chapter 68" only underscores that the mandate's penalty is something *other than* an "assessable penalty" under that subchapter. Setting aside the fact that the penalty is housed in chapter 42, not chapter 68, if it were in fact an "assessable penalty" in its own right, Congress would not need to state that it should be treated like one. For the same reason, that a penalty imposed under chapter 68 "shall be deemed" a tax, *see id.* § 6671(a), does not mean that the mandate's penalty shall be deemed a tax as well. The penalty is *not* imposed under chapter 68, and while Congress invoked the language of the first sentence of section 6671(a) to instruct that it "shall be assessed and collected" like such a penalty, it did not invoke the section sentence to instruct that it "shall be deemed" a tax as well. Congress' decision not to do so is only further proof that, while the mandate's penalty may be assessed and collected like an assessable penalty or tax, it is neither of those things.

Moreover, *Amicus* omits a critical piece of section 5000A(g)(1): The statute states that the penalty "shall be assessed and collected" like an assessable penalty "*except as provided in paragraph (2)*." Paragraph (2) then denies the Secretary the very enforcement tools typically used to collect taxes and assessable penalties. *See* § 5000A(g)(2)(A) (Secretary may not enforce through "any criminal prosecution or penalty"); § 5000A(g)(2)(B) (Secretary may not use liens or levies on individual's property). By "prohibit[ing] the IRS from using traditional criminal enforcement or levying powers to collect" the mandate's penalty, *Seven-Sky*, 661 F.3d at 6, Congress confirmed that the penalty may *not* be "assessed and collected" in the same manner as a "tax" or "assessable penalty," which only confirms that Congress did *not* intend the penalty to be treated as an assessable penalty or a tax.

3. Relying on *Bailey v. George*, 259 U.S. 16 (1922), and *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), *Amicus* contends that the AIA should apply nonetheless because *George* "demonstrates the broad scope of the Anti-Inunction Act." *Amicus* Br. 38. *Amicus* gets the implication of those cases exactly backwards.

Both cases involved a statute entitled "The Child Labor Tax Law," which imposed a heavy tax upon employers who used child laborers. In *Drexel Furniture*, an employer paid the tax under protest and then brought suit alleging that the law was an unconstitutional "regulation of the employment of child labor" rather than a "tax." 259 U.S. at 36. The Court agreed, and held the "so-called tax" in fact an unconstitutional penalty for failure to abide by a regulatory command that was beyond Congress' power under the Court's then-current view of the Commerce Clause. *Id.* In *George*, by contrast, an employer sought to challenge the same law without first paying the levied taxes. 259 U.S. at 20. Even though the Court's decision deeming that "so-called tax" an impermissible penalty came down on the very same day, the Court held the *George* suit barred by the AIA. *Id.*

Amicus claims these cases demonstrate that the AIA applies "broadly," irrespective of the labels Congress uses. *Amicus* Br. 37. In fact, they show just the opposite—the AIA applies "broadly" *when a* *provision is labeled a "tax."* Indeed, the whole point of *George* is that Congress' label *does* control, such that the AIA may apply to something designated a "tax" even if that so-called tax is not a tax at all.[7] Because the plain text of the Child Labor Tax Law labeled the exaction a "tax," Congress clearly intended the exaction to be a tax for purposes of the AIA, even though, as it turned out, it was not a constitutional tax.

Thus, to the extent that *Drexel Furniture* and *George* say anything about the applicability of the AIA here, they only undermine *Amicus*' argument. Unlike in those cases, Congress did *not* designate the penalty accompanying the individual mandate a "tax." It deliberately, expressly, and repeatedly labeled it a "penalty," and treated it as something distinct from assessable penalties and taxes found elsewhere in the tax code.

What is more, because the exaction in *Drexel Furniture* was both labeled a tax and exacted as a tax, Drexel Furniture had the option of paying the tax under protest and vindicating the Constitution in a refund proceeding. That option is not available for parties challenging the mandate. Payments of insurance premiums under protest will not secure "applicable individuals" a refund action. And while the penalty could be incurred and paid under protest, nothing in the AIA remotely requires a party to go through those steps when Congress has

[7] Of course, the *Williams Packing* exception cabins the reach of that holding, as it renders the AIA inapplicable when the federal government's defense of a provision labeled a "tax" is meritless. *See supra*, Part I.B.1.

assiduously avoided labeling either the mandate or even the penalty a tax.

4. *Amicus* invokes separation of powers principles to argue that Congress, not the courts, should decide whether the AIA applies. *Amicus* Br. 58. *Amicus*' contentions are beside the point because Congress *did* make the decision—it decided to impose a mandate and to enforce it with a penalty that it declined to label a tax. But even apart from that, the principles *Amicus* invokes only underscore why Congress must speak clearly when it wants to bring a provision within the ambit of a statute that, by *Amicus*' and the federal government's reading, deprives courts of jurisdiction over suits to restrain constitutional violations.

Like all federalism principles inherent in our Constitution, separation of powers "carries with it a diffusion of accountability," ensuring that "the public can[] 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) (quoting The Federalist No. 72, p. 487 (J. Cooke ed. 1961) (A. Hamilton)). When Congress deliberately eschews the label "tax" and the President assures the public that a statute is not a tax, it would circumvent political accountability entirely for a court to then treat that provision as the very thing the political branches insisted it was not. Particularly when doing so would deprive litigants of the opportunity to challenge unprecedented exercises of federal power without violating the law, the accountability that separation of powers is designed to protect only underscores the need for a clear indication from Congress that a provision either is a tax or, at the very least, should be treated as one. Because section 5000A(b) contains no such indication, and in fact contains many unambiguous indications that it imposes a "penalty," not a "tax," the AIA plainly does not bar the Court from reaching the critical constitutional questions presented.

CONCLUSION

For the foregoing reasons, the Court should hold that the AIA does not bar the States' challenge to the individual mandate.

Respectfully submitted,

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