No. 11-398

IN THE
Supreme Court of the United States

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

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

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

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The Anti-Injunction Act's "pay first, litigate later" rule is central to the federal tax assessment and collection process. The Act applies to the Section 5000A penalty because Congress specified that the penalty "shall be assessed and collected in the same manner as taxes." Congress also provided that the term "taxes" includes penalties for assessment purposes. Even if that were not so, the Section 5000A penalty bears the indicia of a tax. Moreover, the federal government has not identified *any* other assessable penalty in the Internal Revenue Code that is not subject to the Anti-Injunction Act. There is no reason to believe that Congress made a singular exception for the Section 5000A penalty. Accordingly, this action is barred by the Anti-Injunction Act.

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

Respondents contend that the Court need not consider the Anti-Injunction Act because the Act does not limit the Court's subject-matter jurisdiction. *See* States Br. 13-25; NFIB Br. 41-57. Respondents' arguments are unpersuasive.

1. Respondents contend that recent decisions of this Court support the conclusion that the Anti-Injunction Act is merely a "claims-processing rule." States Br. 15; NFIB Br. 45-46. But this Court's recent decisions do not help Respondents. Those

decisions hold that, "[w]hen a long line of this Court's decisions left undisturbed by Congress has treated a . . . requirement as jurisdictional," the Court "will presume that Congress intended to follow that course." *Henderson* ex rel. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011) (citation and internal quotations omitted). That is the case here.

Numerous decisions of the Court have treated the Anti-Injunction Act as jurisdictional. *See* Br. for Court-Appointed Amicus ("Amicus Br.") 16 (collecting cases). Moreover, Congress has ratified the Court's interpretation by enacting exceptions to the Act that speak expressly to the courts' "jurisdiction." *See id.* at 18 & n.6. These amendments confirm that Congress views the Anti-Injunction Act as a jurisdictional limitation.

Respondents assert that the text of the Anti-Injunction Act "is not addressed to courts, but is instead addressed to litigants." States Br. 14; NFIB Br. 43. That is incorrect. The prohibition on "maintain[ing]" a suit in any court, 26 U.S.C. § 7421(a), speaks to courts as well as litigants. In any event, a statute may address the litigants, rather than the court, and retain its jurisdictional status. *See, e.g.*, *Gonzalez v. Thaler*, 132 S. Ct. 641, 649 (2012) (statute providing that "an appeal may not be taken to the court of appeals" contains "'clear' jurisdictional language").[1]

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[1] Respondents' argument is also contrary to this Court's interpretation of two provisions that are similar to the Anti-
(continued…)

2. Respondents contend that the Anti-Injunction Act cannot be jurisdictional because the Court's decisions in *Enochs v. Williams Packing & Navigation Company*, 370 U.S. 1 (1962), and *South Carolina v. Regan*, 465 U.S. 367 (1984), created equitable exceptions to the Act. *See* NFIB Br. 52-57. This argument is refuted by the Court's explicit statement in *Williams Packing* that "[t]he object of § 7421(a) is to withdraw jurisdiction . . . ." 370 U.S. at 5. Moreover, neither *Williams Packing* nor *Regan* created an equitable exception to the Anti-Injunction Act. In both cases, the Court recognized exceptions based on the text and purpose of the statute. *See* Amicus Br. 20-21; *Seven-Sky v. Holder*, 661 F.3d 1, 29 n.8 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("[T]he status of a statute as jurisdictional does not disable the courts from interpreting the statute and Congress's intent by means of the usual tools of statutory construction.").

3. Respondents argue that the Anti-Injunction Act is non-jurisdictional because the government was allowed to waive its application in *Helvering v. Davis*, 301 U.S. 619 (1937). *See* NFIB Br. 49-52; States Br. 22-23. But *Davis* is "an anomaly predating more stringent jurisdictional limitations." *Seven-Sky*, 661 F.3d at 13. When the Court decided *Davis*, it viewed the Act as "merely 'declaratory of the principle' of cases prior to its passage that equity

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Injunction Act, 26 U.S.C. § 7422(a) and 28 U.S.C. § 1341. The Court has held that both provisions are jurisdictional. *See Jefferson Cnty. v. Acker*, 527 U.S. 423, 434 (1999); *United States v. Dalm*, 494 U.S. 596, 608-10 (1990); *see also* U.S. Br. 12-14.

usually, but not always, disavows interference with tax collection." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 744 (1974) (quoting *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932)). The Court has since repudiated that view, *see Bob Jones*, 416 U.S. at 742, which calls into question *Davis*'s continuing viability, *see* U.S. Reply Br. 9.[2] Thus, *Davis* cannot overcome the Court's many decisions declaring that the Anti-Injunction Act imposes a jurisdictional limitation.

II. THE ANTI-INJUNCTION ACT BARS THIS SUIT.

A. The Anti-Injunction Act Applies To Penalties That Are "Assessed And Collected In The Same Manner As Taxes."

1. Congress directed that the Section 5000A penalty "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68" of the Internal Revenue Code ("Code"). 26 U.S.C. § 5000A(g)(1). Congress further directed that such penalties "shall be assessed and collected in the same manner as taxes." *Id.* § 6671(a). There is no dispute that *both* taxes and assessable penalties under subchapter B of chapter 68 are

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[2] Moreover, *Davis* was a suit by a shareholder against a private corporation. Prior to *Davis*, the Court held that the Anti-Injunction Act did not bar such litigation. *See Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 10 (1916); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 554 (1895).

subject to the Anti-Injunction Act. The only question is whether the requirement that the Section 5000A penalty be "assessed and collected in the same manner as taxes" makes the penalty subject to the Anti-Injunction Act. The answer to that question is "yes."

The Anti-Injunction Act directly addresses assessment and collection by barring suits "for the purpose of restraining *the assessment or collection of any tax*." 26 U.S.C. § 7421(a) (emphasis added). As a practical matter, an exaction that is not subject to the Anti-Injunction Act is not "assessed and collected in the same manner as taxes." *See* Amicus Br. 26-29; *Seven-Sky*, 661 F.3d at 31-38 (Kavanaugh, J., dissenting). The Code establishes a "pay first, litigate later" regime, subject to limited and carefully defined exceptions, that applies even to illegal and unconstitutional taxes. *See* Amici Tax Law Professors Br. 9-10. After paying a tax, the taxpayer must seek a refund from the Secretary and wait at least six months before filing a refund action. *See* 26 U.S.C. §§ 6532(a)(1) & 7422(a). In the limited circumstances in which a taxpayer is permitted to litigate before paying a tax, litigation is prohibited until the Secretary sends the taxpayer a notice of deficiency addressing a specific tax and tax period. *See id.* § 6213(a).

If the Anti-Injunction Act does not apply to the Section 5000A penalty, taxpayers will be free to bring suit at any time, for any tax period, without waiting for the Secretary to issue a notice of deficiency and without exhausting administrative remedies. Taxpayers who obtain an injunction can

force the Secretary to assess and collect the penalty only after litigation ends, not before it begins. If a taxpayer's suit is successful, the Secretary will *never* be able to assess or collect the penalty. (That is the result Respondents are seeking in this case.) To say that a penalty that is never assessed or collected is assessed and collected in the same manner as a tax that is both assessed *and* collected, and later refunded with interest, is an abuse of language.

2. The parties do not dispute most of these points. Indeed, their lengthy briefs have relatively little to say about the requirement that the Section 5000A penalty be "assessed and collected in the same manner as taxes." *See* U.S. Br. 31-33; States Br. 51-54; NFIB Br. 37-41. The parties' primary argument is that the "in the same manner" requirement "is a procedural instruction to the *Secretary* governing administration of the Code," not "an instruction to *courts* governing adjudication of suits." U.S. Br. 32. But the statutory directive that the penalty "shall be assessed and collected in the same manner as taxes" is not limited to the Secretary. *See Dean v. United States*, 129 S. Ct. 1849, 1853 (2009) ("The passive voice focuses on an event that occurs without respect to a specific actor . . . .").

The federal government notes that neither Chapter 63 of the Code (concerning assessment) nor Chapter 64 (concerning collection) includes the Anti-Injunction Act. U.S. Br. 32. Based on this statutory structure, the federal government contends that the "manner" of assessment and collection "'refers to the mechanisms the Internal Revenue Service employs to enforce penalties, not to the bar against pre-

enforcement challenges to taxes." *Id.* (quoting *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 540 (6th Cir. 2011)). The government is mistaken. For one thing, "[n]o inference [or] implication" may be based on "the location or grouping of any particular section or provision" of the Code. 26 U.S.C. § 7806(b). Moreover, the *text* of the assessment and collection provisions strongly supports the conclusion that the Anti-Injunction Act applies to an exaction that is "assessed and collected in the same manner as taxes."

First, the assessment and collection provisions create multiple express exceptions to the Anti-Injunction Act.[3] There is thus a tight textual link between the Anti-Injunction Act and the Code's assessment and collection provisions.

Second, the assessment and collection provisions are not directed solely to the Secretary, but include detailed instructions governing the interaction between the Secretary and courts during the assessment and collection process. For taxes that are subject to deficiency proceedings, for example, the Secretary must send a notice of deficiency to the

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[3] *See* 26 U.S.C. § 6213(a) (If the Secretary proceeds with an assessment or levy without waiting 90 days after the notice of deficiency, or while an action is pending in the Tax Court, "*[n]otwithstanding the provisions of section 7421(a)*," the Secretary "may be enjoined by a proceeding in the proper court") (emphasis added); *see also id.* §§ 6225(b), 6330(e)(1), 6246(b), & 6331(i)(4)(B). *See also id.* § 6207(1) (cross-referencing Anti-Injunction Act).

taxpayer, and generally must wait 90 days before assessing a deficiency or beginning collection proceedings. *See* 26 U.S.C. §§ 6212(a) & 6213(a). If the taxpayer files an action in the Tax Court during this 90-day period, the Secretary may not proceed with assessment or collection until the court's decision becomes final, *id.* § 6213(a), and generally may not determine any additional tax deficiency for the same period, *id.* § 6212(c). *See also id.* § 6225(a).[4]

Third, the Code's assessment and collection provisions address, in detail, the courts' jurisdiction to restrain the assessment and collection process. For example, so long as the taxpayer files a timely petition after receiving a notice of deficiency, the Tax Court has jurisdiction to restrain assessment or collection by the Secretary, but only with respect to the tax period covered by the Secretary's notice. 26 U.S.C. § 6214. Moreover, collection efforts may directly involve the courts. *See id.* § 6502(a). The assessment and collection provisions thus address courts as well as the Secretary.[5]

In sum, the assessment and collection provisions of the Code support the conclusion that the Anti-

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[4] The Section 5000A penalty is not subject to deficiency proceedings. *See* Amicus Br. 29 n.12.

[5] For additional examples, see 26 U.S.C. §§ 6226, 6247, 6305(b), and 6334(e)(1)(B).

Injunction Act is integral to the manner in which federal taxes are assessed and collected.[6]

3. The federal government argues (U.S. Br. 23-24) that the second sentence of Section 6671(a), rather than the first sentence, makes the Anti-Injunction Act applicable to penalties in subchapter B of Chapter 68. This argument is flawed. The second sentence of Section 6671 provides taxpayers with "the full panoply of rights and obligations under the Tax Code." *Seven-Sky*, 661 F.3d at 36 (Kavanaugh, J., dissenting); *see also* Amicus Br. 30. But the Anti-Injunction Act addresses restraints on the assessment and collection of taxes, so it is triggered by the first sentence (as well as the second sentence) of Section 6671(a).[7]

The anti-surplusage canon does not help the government, because *no* reasonable interpretation of Sections 6671(a) and 6665(a) avoids surplusage. *See* Amicus Br. 31-32. The Court has recognized that Congress sometimes enacts provisions that are superfluous, and such redundancies are not

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[6] The D.C. Circuit was persuaded that the "manner" of assessing and collecting taxes is unrelated to the *timing* of assessment and collection. *See Seven-Sky*, 661 F.3d at 11. The parties do not press this argument, which is refuted by the many detailed timing requirements in Chapters 63 and 64 of the Code. *See* Amicus Br. 26-27 & n.10.

[7] When Congress added the second sentence of Section 6671(a) in 1954, the legislative reports stated that the addition made "no material change from existing law." H.R. REP. NO. 83-1337, at A420 (1954); S. REP. NO. 83-1635, at 596 (1954).

uncommon in the Code. *Id.* The parties do not dispute these points.

4. The federal government notes that Congress used different language in other provisions of the Affordable Care Act, and argues that these differences support the conclusion that the Anti-Injunction Act does not apply to the Section 5000A penalty. *See* U.S. Br. 25-26. This argument is unconvincing. *First*, the different formulations demonstrate that Congress did not adopt a single approach to indicating that the Anti-Injunction Act applies. *Second*, the different formulations are not addressed solely to whether the Anti-Injunction Act applies, but instead cover a range of issues.

For example, Section 4980H imposes an "assessable payment" on large employers that fail to offer their employees minimum essential coverage. 26 U.S.C. § 4980H(a). Congress provided that this penalty, like the Section 5000A penalty, "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." *Id.* § 4980H(d)(1). The federal government contends that the Anti-Injunction Act applies to Section 4980H, and that Congress's use of the word "tax" in two places in Section 4980H distinguishes that provision from Section 5000A. *See* U.S. Br. 26 n.16 (citing 26 U.S.C. §§ 4980H(b)(2) & (c)(7)). But Congress's use of the terms "tax" and "assessable penalty" indicates that those terms are interchangeable for purposes of assessment and collection. *See* Amici Caplin & Cohen Br. 33-34. The passing references to "tax" in Section 4980H hardly indicate that Congress intended to exclude the

Section 5000A penalty from coverage under the Anti-Injunction Act. *See DePierre v. United States*, 131 S. Ct. 2225, 2234 (2011) ("Congress sometimes uses slightly different language to convey the same message" (citation and internal quotations omitted)).

Section 4377(c) of Title 26 provides that "[f]or purposes of subtitle F" of the Code (which includes the Anti-Injunction Act), "the fees imposed by this subchapter shall be treated as if they were taxes." Similarly, Sections 9008 and 9010 of the Affordable Care Act provide that certain fees imposed on pharmaceutical manufacturers and health insurance providers, "for purposes of subtitle F . . . , shall be treated as excise taxes." Pub. L. No. 111-148, §§ 9008 & 9010, 124 Stat. 119, 861, 867 (2010). Subtitle F of the Code covers a broad range of matters, including tax returns, time and place for paying tax, and confidentiality rules. Congress had good reason to make these fee provisions subject to all of Subtitle F, rather than only the provisions relating to assessment and collection. Unlike the Section 5000A penalty, the fee provisions are not tied to the annual tax returns of individual taxpayers, but instead are free-standing financial obligations. By applying all of Subtitle F, Congress provided a means to administer these fees.[8] Thus, Congress's

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[8] The IRS has confirmed that, as a result of the cross-reference to subtitle F, "the fee imposed by section 9008 is assessed (section 6201), collected (sections 6301, 6321, and 6331), enforced (section 7602), subject to examination and summons (section 6103), and subject to confidentiality rules (section 6103), in the same manner as taxes imposed by the Code." 26 (continued…)

choice of language does not imply that the Section 5000A penalty, which is expressly included in taxpayers' annual tax returns, is not subject to the Anti-Injunction Act.[9]

Other provisions of the Code cast doubt on the federal government's current position. Section 527 imposes penalties on political organizations for failing to make certain disclosures. 26 U.S.C. § 527(j)(1). The federal government has successfully argued that "there is no principled basis for distinguishing" Section 527 from taxes for the purposes of the Anti-Injunction Act because the penalties "shall be assessed and collected in the same manner as taxes." U.S. Br. 31-32, *Mobile Republican Assembly v. United States*, 353 F.3d 1357 (11th Cir.

C.F.R. § 51.9T(a); *see also* IRS Notice 2011-35, at 11-12 (June 20, 2011), *available at* http://www.irs.gov/pub/irs-drop/n-11-35.pdf (same for fees imposed by Sections 4375 and 4376 of the Code).

[9] Contrary to the federal government's suggestion (U.S. Br. 33 n.20), Sections 6305 and 7421 of the Code do not support its position. Section 6305 provides that certain child support obligations shall be assessed and collected "in the same manner . . . as if such amount were a tax imposed by subtitle C the collection of which would be jeopardized by delay," and further provides that courts may not "restrain or review the assessment or collection of amounts by the Secretary." 26 U.S.C. §§ 6305(a) & (b). This complete bar on litigation against the Secretary sweeps more broadly than the Anti-Injunction Act, which has fourteen express exceptions and does not bar refund suits. Similarly, Section 7421(b)(1) of the Code, which applies to the derivative tax liability of a transferee of property of a taxpayer, omits the express exceptions to Section 7421(a).

2003) (No. 02-16283). The same is true of the Section 5000A penalty. [10]

5. The State Respondents argue (States Br. 53-54) that the Anti-Injunction Act does not apply to the Section 5000A penalty because Section 5000A(g)(2)(B) expressly provides that some of the methods ordinarily available to collect taxes are not available to collect the Section 5000A penalty. But as the amicus Tax Law Professors explain, the specific collection methods that are made unavailable, as well as the placement of Section 5000A outside the Code's deficiency procedures, show that Congress adhered to the "pay first, litigate later" principle. *See* Amici Tax Law Professors Br. 19-25. Moreover, the detailed and specific exceptions in Section 5000A (as well as those in the Anti-Injunction Act itself) demonstrate that Congress knew how to exempt the Section 5000A penalty from the Anti-Injunction Act if it wished to do so.

6. If the Anti-Injunction Act does not apply to this case, it will not apply to routine litigation seeking to restrain the assessment or collection of Section 5000A penalties. *See* Amici Caplin & Cohen Br. 36.

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[10] Moreover, the federal government takes the position that the penalties imposed by Sections 5114(c), 5684, and 5761 of the Code are subject to the Anti-Injunction Act. *See* U.S. Br. 36 n.22. Those penalties "shall be assessed, collected, and paid in the same manner as taxes, as provided in section 6665(a)." 26 U.S.C. §§ 5114(c)(3), 5684(b), & 5761(d). There is no valid basis for distinguishing these penalties from the Section 5000A penalty. *See Seven-Sky*, 661 F.3d at 34, n.17 (Kavanaugh, J., dissenting).

There is no reason to think that Congress, having made the Anti-Injunction Act applicable to essentially every penalty imposed by the Code, intended to make a special exception for the Section 5000A penalty. If Congress had such an unusual intent, it would have made it known more directly, for example by adding an additional express exception to Section 5000A(g)(2) or the Anti-Injunction Act.

The federal government's only response is that other doctrines, such as "standard equitable principles," may block such suits. *See* U.S. Br. 36-37. But if Congress had thought such doctrines were adequate to protect the collection of federal revenues, it would not have enacted the Anti-Injunction Act in the first place. The existence of such back-up doctrines does not indicate that Congress intended to make a rare (and perhaps unique) exception to the Anti-Injunction Act.

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

1. Neither the Anti-Injunction Act nor the Code defines "tax." No party disputes that, when the Anti-Injunction Act was enacted, the ordinary meaning of "tax" included "almost every species of imposition on persons or property for supplying the public treasury." Noah Webster, *An American Dictionary of the English Language* 1132 (rev. by Chauncy A. Goodrich) (1860).

The Section 5000A penalty satisfies this broad definition. The penalty is codified in the Code and

"included with a taxpayer's return." 26 U.S.C. § 5000A(b)(2). The obligation to pay the penalty, and the amount of the penalty, depend on the taxpayer's income and whether the taxpayer is obligated to file a return. *Id.* § 5000A(c) & (e)(2). The federal government relies on these factors to argue that the penalty is a tax for constitutional purposes. *See* U.S. Br. 21.[11]

The parties contend that interpreting "tax" according to its ordinary meaning fails to give effect to Congress's decision to label the Section 5000A exaction a "penalty." U.S. Br. 20-22; NFIB Br. 32-33. But there is no indication that Congress labeled the Section 5000A exaction a "penalty" to exclude it from the Anti-Injunction Act. Nor does interpreting "tax" to include the Section 5000A penalty make Congress's choice irrelevant. By calling the exaction a "penalty," Congress signaled to taxpayers "that noncompliance is not acceptable behavior." Office of Tax Policy, Dep't of the Treasury, *Report to The Congress on Penalty and Interest Provisions of the Internal Revenue Code* 36 (1999).

The parties also contend that "tax" cannot be given its ordinary meaning because other provisions of the Code, such as Sections 7422(a) and 6671(a), demonstrate that "a 'penalty' is not the same thing as a 'tax' for statutory purposes under the Code."

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[11] The Private Respondents argue (NFIB Br. 26-27) that a "tax" is a sum of money assessed for the government's use, unless the government's purpose in making the exaction is to punish, but the dictionary definition of "tax" includes no such limitation.

U.S. Br. 21-23; NFIB Br. 29 (arguing that "penalty" and "tax" are not "synonymous"). But no one argues that the two terms are synonymous. The ordinary meaning of "tax" is broad enough to include exactions labeled as "penalties," but not all taxes are penalties. Therefore, the terms are not interchangeable.

Nor are the parties correct to rely on the canon against surplusage to argue that "tax" should be interpreted narrowly. *See* U.S. Br. 28. That canon provides no basis for limiting the meaning of "tax" because it is used to resolve statutory ambiguity, not to depart from a statute's ordinary meaning. *See, e.g.*, *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004). In addition, the canon "assists only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2248 (2011) (citation and internal quotations omitted). Interpreting "tax" narrowly will not give separate effect to all of the Code provisions. *See, e.g.*, 26 U.S.C. §§ 6665(a) & 6671(a). Moreover, because "tax" is undefined in the Code, provisions specifying that particular penalties shall be treated as taxes provide "insurance" that the term "tax" will be defined broadly in particular contexts. *See United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 520 (1992) (Scalia, J., concurring).[12]

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[12] The section of the Code that restricts refund actions separately refers to both "tax" and "penalty," 26 U.S.C. § 7422(a), but that does not demonstrate that the Section 5000A penalty is not a type of tax. As the federal government (continued…)

2. The Court need not rely on the ordinary meaning of "tax," because Section 6201 of the Code requires the Secretary to make "assessments of all taxes (*including . . . assessable penalties*) imposed by this title . . . ." 26 U.S.C. § 6201(a) (emphasis added). By defining "taxes" to include "assessable penalties" (as well as "interest" and "additional amounts"), Congress confirmed that—at least for purposes of assessment—an assessable penalty is included in the definition of tax. *See also id.* § 6301 (directing the Secretary to collect "taxes," which are assessed under Section 6201).[13]

The federal government contends that "Section 6201(a) is simply a way of describing that the Secretary's assessment authority with respect to 'taxes' also extends to . . . assessable penalties' imposed by the Internal Revenue Code." U.S. Br. 34. But Congress did not simply authorize the Secretary to assess "taxes" *and* "assessable penalties." Instead,

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concedes, the language of the refund statute is "materially identical" to the Anti-Injunction Act. U.S. Reply Br. 5. Moreover, interpreting "tax" to include "penalty" does not render superfluous any part of the refund statute, because the statute uses "tax" and "penalty" to govern different types of challenges. *See* 26 U.S.C. § 7422(a) (barring suits to recover a "tax" that is "alleged to have been erroneously or illegally assessed or collected," and suits to recover a "penalty" that is "claimed to have been collected without authority").

[13] The Section 5000A penalty is an assessable penalty. *See* Amicus Br. 40-41; *Seven-Sky*, 661 F.3d at 38-40 (Kavanaugh, J., dissenting)

it provided that the term "taxes" *includes* "assessable penalties" for purposes of assessment and collection.

In sum, the Anti-Injunction Act "postpones redress for the alleged invasion of property rights if the exaction is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue." *Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589, 595-96 (1931). The federal government dismisses this statement on the ground that Congress labeled the exaction at issue in *Phillips* a "tax." U.S. Br. 29. But the Court's language accurately describes the broad scope of the Act, and nothing in its decision supports a narrow interpretation of the term "tax" in the Anti-Injunction Act.[14]

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[14] Private Respondents attempt to distinguish between "penalties" and "taxes" by relying on cases discussing those terms in other contexts, such as bankruptcy. NFIB Br. 26-27. But as those cases recognize, whether an exaction is a "tax" for purposes of bankruptcy law does not determine whether it is a tax under the Internal Review Code. *See United States v. Reorganized CF&I Fabricators of Utah*, 518 U.S. 223, 224 (1996).

III. THE ANTI-INJUNCTION ACT CANNOT BE AVOIDED ON ALTERNATIVE GROUNDS.

A. Respondents Challenge Both The Minimum Coverage Requirement And The Penalty Provision.

Respondents contend that the Anti-Injunction Act does not apply because the "purpose" of their suit is to challenge the minimum coverage requirement, not the penalty provision. NFIB Br. 10-25; States Br. 43-48. This argument fails for two reasons.

First, Respondents' complaint challenges both the minimum coverage requirement *and* the penalty provision. The complaint states that Respondents are challenging the requirement that individuals "obtain and maintain a federally-approved level of [healthcare] coverage *or pay a penalty*." J.A. 122 (emphasis added); *see also* J.A. 104-05. The complaint also seeks to enjoin "enforcement" of the Act. *Id.* at 124, 126. Because "the 'enforcement' contemplated by the statute is the assessment and collection of the tax penalties by the IRS," *Seven-Sky*, 661 F.3d at 41 n.29 (Kavanaugh, J., dissenting), an action seeking to enjoin enforcement of the Act is a challenge to the penalty. *See also* NFIB Pet. i (presenting the question "whether the ACA must be invalidated in its entirety").

Private Respondents contend that their request to enjoin enforcement of Section 5000A is irrelevant because the district court did not grant an injunction. NFIB Br. 16. But the application of the Anti-Injunction Act does not depend on the relief

that the court grants. A court must determine whether it has subject-matter jurisdiction before it reaches the merits and decides to grant relief. *See Haywood v. Drown*, 129 S. Ct. 2108, 2126 (2009). Moreover, the court's decision to grant or withhold relief does not change the "purpose" for which the suit was brought. Thus, the Anti-Injunction Act applies regardless of the relief that the court may ultimately grant.[15]

Second, even if the complaint had not mentioned the penalty provision, the Anti-Injunction Act would apply because the minimum coverage requirement cannot be separated from the sole means of enforcing that requirement.

Respondents cite no case holding the Anti-Injunction Act inapplicable on the ground that the taxpayer was challenging only the regulatory aspect of a tax provision. This Court's decisions have reached the opposite result. *See Bob Jones*, 416 U.S. at 739-40 (Anti-Injunction Act applies even if IRS is "attempt[ing] to regulate the admissions policies of private universities"); *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 760-61 (1974) (Act applies even if "restraining the assessment or collection of

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[15] Furthermore, "there is little practical difference between an injunction and anticipatory relief in the form of a declaratory judgment." *Jefferson Cnty.*, 527 U.S. at 433 (internal citation and quotations omitted). The district court observed that the declaratory judgment in this case is "the functional equivalent of an injunction." Pet. App. 364a.

taxes was at best a collateral effect of respondent's action" (citation and internal quotations omitted)).

Respondents attempt to distinguish *Americans United* and *Bob Jones* on the ground that, in those cases, the regulatory and tax provisions were inextricably linked. But this Court has "abandoned" any "distinctions between regulatory and revenue-raising taxes." *Bob Jones*, 416 U.S. at 741 n.12. The Anti-Injunction Act applies even when the plaintiff seeks to challenge only the regulatory aspect of a tax, because "a suit to enjoin the assessment or collection of *anyone's* taxes triggers the literal terms of § 7421(a)." *Americans United*, 416 U.S. at 760 (emphasis added). Even if Respondents had challenged only the minimum coverage requirement, a successful challenge would relieve taxpayers of the obligation to pay the Section 5000A penalty. Such a suit would be barred because it could restrain assessment and collection of other people's taxes. *See id.*

The minimum coverage requirement cannot be separated from the penalty provision because the penalty is the sole means of enforcing the minimum coverage requirement. The minimum coverage requirement uses mandatory language and is set forth in a separate subsection, but the penalty provision immediately follows and expressly cross-references the minimum coverage requirement.[16]

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[16] Private Respondents seek to analogize their claims to a challenge to the penalty imposed for violations of EPA (continued…)

Indeed, the better reading of Section 5000A is that it imposes only a single legal obligation: non-exempt covered individuals are required to pay an income tax penalty. Congress exempted individuals who "cannot afford coverage" from the penalty, 26 U.S.C. § 5000A(e)(1), so it is unlikely to have intended "the exempted individuals to be regarded as violators of a freestanding statutory requirement that they lacked the resources to satisfy." U.S. Br. 41; *see also* 42 U.S.C. § 18022(e)(2)(B) (referring to individuals who are "exempt from *the* requirement under section 5000A . . . by reason of section 5000A(e)(1)") (emphasis added). But even if Section 5000A imposed separate obligations to obtain insurance and to pay a penalty, the Anti-Injunction Act would still bar actions seeking to restrain assessment or collection of the penalty. *See* U.S. Reply Br. 14.

In short, Respondents' assertion that they challenge only the minimum coverage requirement is belied by the allegations of their own complaint. And even if Respondents had pled the case differently, they still could not avoid the Anti-Injunction Act because a challenge to the minimum coverage requirement necessarily challenges the penalty provision as well.

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regulations governing diesel fuels. *See* NFIB Br. 13-14 (citing 26 U.S.C. § 6720A(a)). This analogy fails because the EPA regulations, unlike the minimum coverage requirement, impose non-tax penalties for noncompliance. *See* 42 U.S.C. § 7545(d)(1); 40 C.F.R. 80.615. A plaintiff's ability to challenge the EPA regulations thus provides no guidance for interpreting the Anti-Injunction Act.

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

The State Respondents cannot escape the Anti-Injunction Act for two reasons: (1) they are not "aggrieved parties" for purposes of the narrow exception recognized by *South Carolina v. Regan*, 465 U.S. at 378, and (2) they are "person[s]" subject to the Anti-Injunction Act.

1. The State Respondents contend that they are "aggrieved parties" because the individual mandate "forces" eligible individuals to enroll in Medicaid. States Reply Br. 9-10. But the minimum coverage provision does not *require* low-income individuals (who will be exempt from the penalty) to enroll in Medicaid. *See* U.S. Reply Br. 16. The State Respondents' theory of standing would permit *any* third party to challenge the tax liability of someone else based on incidental effects of the tax. *See* Amicus Br. 57. This Court has rejected attempts to establish standing through assumptions about the future choices of private citizens responding to federal law. *See* Amicus Br. 54-55; U.S. Br. 43-44.

In the courts below, the State Respondents argued that they had standing based on their sovereign interest in enacting and enforcing statutes that shield their citizens from the requirement to purchase health insurance. They no longer dispute that, under *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923), they are precluded from establishing standing on that basis. The State Respondents now contend that the Court's decision in *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011), permits them to challenge any federal statute on the ground that it

exceeds the federal government's enumerated powers. States Br. 30-32. But *Bond* does not adopt such a sweeping view of standing where, as here, the law in question regulates only individuals and imposes no obligations on the States.

The State Respondents do not fall within the narrow exception provided by *Regan*, 465 U.S. 367. In *Regan*, South Carolina asserted a direct injury to its sovereign power to borrow money resulting from Congress's decision to terminate a federal tax exemption for bearer bonds. The Court concluded that South Carolina was not relegated to the "mere possibility" that an individual taxpayer would assert a claim on its behalf because "instances in which a third party may raise the constitutional rights of another are the exception rather than the rule." *Id.* at 380, 381. Here, by contrast, the State Respondents seek to protect the constitutional rights of individual taxpayers, not those of the States.

2. Congress has not exempted the States from the Anti-Injunction Act's ban on suits by "any person." In the context of the Code, the Court has construed the word "person" to include States. *See* Amicus Br. 49-51 (citing *Sims v. United States*, 359 U.S. 108 (1959); *Ohio v. Helvering*, 292 U.S. 360 (1934)). These decisions refute the State Respondents' assertion that they are *never* "persons" for purposes of tax provisions absent a clear statement by Congress. *See* U.S. Reply Br. at 19 n.8.

It is particularly appropriate to treat States as "persons" under the Anti-Injunction Act because that term did not appear in the Act until a century after it

was enacted, and was added by an amendment intended to *broaden* the scope of the Act. *See* Amicus Br. 51-52. Moreover, both *Regan* and *Allen v. Regents of University System of Georgia*, 304 U.S. 439 (1938), were decided based on the understanding that States generally are subject to the Anti-Injunction Act. If the rule were otherwise, States would be free to pursue litigation seeking to restrain the collection of a host of federal taxes.

CONCLUSION

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

Respectfully submitted,

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