No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

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

BRIEF FOR PETITIONERS
(Anti-Injunction Act)

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JOHN A. DICICCO
Principal Deputy Assistant Attorney General
BETH S. BRINKMANN
Deputy Assistant Attorney General
LEONDRA R. KRUGER
Assistant to the Solicitor General
MARK B. STERN
ALISA B. KLEIN
JOEL MCELVAIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

GEORGE W. MADISON
General Counsel
Department of the Treasury
Washington, D.C. 20220
M. PATRICIA SMITH
Solicitor of Labor
Department of Labor
Washington, D.C. 20210
WILLIAM B. SCHULTZ
Acting General Counsel
KENNETH Y. CHOE
Deputy General Counsel
Department of Health and Human Services
Washington, D.C. 20201

QUESTION PRESENTED

The minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, provides that, beginning in 2014, non-exempted federal income taxpayers who fail to maintain a minimum level of health insurance for themselves or their dependents will owe a penalty, calculated in part on the basis of the taxpayer's household income and reported on the taxpayer's federal income tax return, for each month in which coverage is not maintained in the taxable year. 26 U.S.C. 5000A (Supp. IV 2010).

The question presented is whether the suit brought by respondents to challenge the minimum coverage provision is barred by the Anti-Injunction Act, 26 U.S.C. 7421(a).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

Statutes—Continued: Page

Statutes—Continued: Page

Statutes—Continued: Page

Statutes—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-273a) is reported at 648 F.3d 1235. The district court's opinion on the federal government's motion to dismiss (Pet. App. 394a-475a) is reported at 716 F. Supp. 2d 1120. The district court's opinion on the parties' cross-motions for summary judgment (Pet. App. 274a-368a) is reported at 780 F. Supp. 2d 1256.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this brief. App., *infra*, 1a-22a.

STATEMENT

A. Statutory Background

Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Affordable Care Act or Act),[1] to address a crisis in the national health care market, a market that accounts for 17.6% of the Nation's economy. 42 U.S.C.A. 18091(a)(2)(B) (Supp. 2011). The Act establishes a comprehensive framework of economic regulation and incentives that are designed, *inter alia*, to improve the functioning of the national market for health care by regulating the terms on which health insurance is offered, controlling costs, and rationalizing the timing and method of payment for health care services. See generally Gov't Minimum Coverage Br. 2-12.

As relevant here, the Act provides that, beginning in 2014, non-exempted federal income taxpayers who fail to maintain a minimum level of health insurance coverage for themselves or their dependents will owe a penalty for each month in the tax year during which minimum coverage is not maintained. 26 U.S.C. 5000A(a) and (b).[2] The amount of the penalty will be calculated as a percentage of household income for federal income tax purposes, subject to a floor and capped at the price of forgone insurance coverage. 26 U.S.C. 5000A(c). The penalty will be reported on the taxpayer's federal income tax return for the taxable year, and assessed and collected by the Internal Revenue Service (IRS) in the same manner as "assessable penalties" un-

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[1] Amended by the Health Care and Education Reconciliation Act of 2010 (HCERA), Pub. L. No. 111-152, 124 Stat. 1029.

[2] Unless otherwise indicated, all citations to the United States Code refer to the 2006 edition and Supplement IV (2010).

der Subchapter B of Chapter 68 of the Internal Revenue Code. 26 U.S.C. 5000A(b)(2) and (g); see 26 U.S.C. 6671(a) ("assessable penalties" under Subchapter B of Chapter 68 "shall be assessed and collected in the same manner as taxes").

Individuals who are not required to file federal income tax returns for a given year are not subject to the penalty. Congress also exempted taxpayers whose premium payments would exceed 8% of their household income, taxpayers who establish that obtaining coverage would be a hardship under standards to be set by the Secretary of Health and Human Services, and members of recognized Indian tribes. 26 U.S.C. 5000A(e). Individuals who meet specified criteria for religious exemptions, individuals who are incarcerated, and undocumented aliens also are not subject to the minimum coverage provision, irrespective of their income levels or ability to afford insurance. 26 U.S.C. 5000A(d).

B. Proceedings Below

Respondents Mary Brown and Kaj Ahlburg, the National Federation of Independent Business (NFIB), and 26 States filed suit in the Northern District of Florida, challenging the constitutionality of several provisions of the Affordable Care Act.[3]

1. The district court held that Brown had standing to challenge the minimum coverage provision because she did not currently have health insurance and had to "make financial arrangements now to ensure compliance" with that provision in 2014. Pet. App. 292a. The court also concluded that respondent NFIB had stand-

[3] On January 17, 2012, this Court granted the private respondents' motion for leave to add Dana Grimes and David Klemencic as additional respondents.

ing because one of its members (Brown) had standing, *id.* at 293a, and that Ahlburg's declaration was sufficient to establish his standing as well, *id.* at 291a. The court further held that two States, Idaho and Utah, have standing to challenge the minimum coverage provision because their legislatures had enacted statutes purporting to exempt their residents from it. *Id.* at 293a-295a.

In district court, the government argued that respondents' suit was barred by the Anti-Injunction Act (AIA), which 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." 26 U.S.C. 7421(a). The court rejected that argument, concluding that the penalty for failure to maintain minimum essential coverage is not a "tax" to which the AIA applies. Pet. App. 401a-425a.

On the merits, the district court held that the minimum coverage provision is not a valid exercise of Congress's commerce or taxing powers. Pet. App. 278a n.4, 296a-350a, 401a-424a. The court then declared the entire Act invalid because it concluded that the minimum coverage provision could not be severed from any other provision in the Act. *Id.* at 350a-364a. The court stayed its judgment pending appellate review. *Id.* at 387a-392a.

2. A divided court of appeals affirmed in part and reversed in part. As a threshold matter, the court held that respondents Brown, NFIB, and Ahlburg had standing to challenge the minimum coverage provision. Pet. App. 8a-10a. In view of that determination, the court declined to decide whether any state respondents also have standing. *Ibid.* The government did not renew in the court of appeals its argument that the AIA bars this

suit, and the parties did not address that question. Nor did the court of appeals.[4]

On the merits, the court held that the minimum coverage provision is not a valid exercise of Congress's commerce or tax powers. Pet. App. 63a-172a. Judge Marcus dissented on Commerce Clause grounds, concluding that the minimum coverage provision regulates "quintessentially economic conduct"—the means by which individuals pay for health care. *Id.* at 189a, 194a-195a.

SUMMARY OF ARGUMENT

The suit brought by respondents to challenge the minimum coverage provision is not barred by the Anti-Injunction Act, 26 U.S.C. 7421(a).

1. Although the parties are in agreement on the question presented, this Court must independently review the issue to ensure that it does not exceed the scope of its jurisdiction.

The AIA is a substantive limitation on the subject-matter jurisdiction of the courts. The text of the AIA—"no suit * * * shall be maintained in any court by any person"—speaks unambiguously to the courts' adjudicatory authority, not merely the rights and obligations of the parties. 26 U.S.C. 7421(a). That jurisdictional limitation is consistent with the primary purpose animating the AIA: enabling the prompt and efficient assessment and collection of taxes on which the government's opera-

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[4] Following the district court's decision in this case and decisions rendered in other Affordable Care Act litigation, the government reexamined its position on the AIA and concluded that it does not foreclose the exercise of jurisdiction to consider the constitutionality of the minimum coverage provision. See Gov't Supp. Br. at 2, *Liberty Univ.* v. *Geithner*, No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011).

tions depend. The AIA therefore bars the courts from exercising jurisdiction over pre-enforcement tax disputes.

This Court has repeatedly described the AIA as jurisdictional in nature, and it has held that other, related provisions also rank as jurisdictional. Congress has endorsed that understanding in its subsequent amendments to the statute, which have left its operative language untouched.

2. The AIA does not, however, bar the Court's exercise of jurisdiction in this case. The AIA applies to suits to restrain the assessment or collection of "any tax." The payment under the Affordable Care Act's minimum coverage provision is, however, termed a "penalty" rather than a "tax," and it is not within the category of tax penalties that trigger the AIA's jurisdictional bar.

For purposes of determining whether Congress has properly exercised its Article I taxing power, use of the term "penalty" is irrelevant; it is the practical operation of the provision, not its label, that controls, see *License Tax Cases*, 72 U.S. 462, 471 (1867), and a provision should be upheld as a valid exercise of the taxing power so long as it can reasonably be construed as an exercise of that power, see Gov't Minimum Coverage Br. 56-59. But the precise labels Congress chooses are highly relevant for the very different purpose of statutory construction under the Internal Revenue Code. The term "tax" carries with it a number of procedural and substantive implications under various statutory provisions, and a "penalty" is not the same thing as a "tax" for statutory purposes under the Internal Revenue Code. The Affordable Care Act does not specify that the minimum coverage penalty is to be treated as a "tax" for all statutory purposes, including the AIA. On the contrary, Con-

gress specified only that the penalty was to be "assessed and collected in the same manner as an assessable penalty" under a separate provision of the Internal Revenue Code. 26 U.S.C. 5000A(g)(1). That limited directive indicates that Congress determined not to apply the full panoply of statutory rules governing "taxes," including the AIA, to the minimum coverage penalty.

3. Should the Court nevertheless conclude that the minimum coverage penalty qualifies as a "tax" subject to the AIA, respondents cannot evade the jurisdictional bar by recharacterizing their claim as a challenge solely to the provision governing minimum essential coverage and not the accompanying provision prescribing a penalty for failure to maintain such coverage. The two provisions are inextricably intertwined; the only consequence of failing to maintain minimum coverage is payment of a penalty. Respondents' complaint thus necessarily challenged the penalty as well as the predicate for its imposition. And because a decision in respondents' favor would have the effect of restraining the assessment and collection of the penalty, respondents' challenge would be barred by the AIA if the penalty were in fact a "tax" within the statute's compass.

4. Finally, because state respondents lack standing to challenge the minimum coverage provision, this Court need not address their arguments for a special exemption from the terms of the AIA. Those arguments lack merit in any event. States, like individuals, are "persons" subject to the prohibitions of the AIA. And should the Court conclude that the individual respondents' challenge is barred by the AIA, the rule of *South Carolina* v. *Regan,* 465 U.S. 367 (1984), provides no basis for allowing the state respondents to go forward. Unlike the petitioner in *Regan*, state respondents are not parties

"aggrieved" by the minimum coverage provision, and this is not the rare case in which a constitutional question will go unanswered if state respondents are not permitted to proceed.

ARGUMENT

RESPONDENTS' CHALLENGE TO THE MINIMUM COVERAGE PROVISION OF THE AFFORDABLE CARE ACT IS NOT BARRED BY THE ANTI-INJUNCTION ACT

A. Where It Applies, The Anti-Injunction Act Imposes A Jurisdictional Limitation On The Courts' Adjudicatory Authority

The Anti-Injunction Act provides that, with certain enumerated exceptions inapplicable 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 AIA's primary purpose is "the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference, 'and to require that the legal right to the disputed sums be determined in a suit for refund.'" *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 736 (1974) (quoting *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962)); see 26 U.S.C. 7422 (governing civil refund actions); see also *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 10 (2008). Where the AIA applies, it imposes a jurisdictional limitation on the courts' power to hear pre-enforcement suits challenging federal tax liability.[5]

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[5] The Declaratory Judgment Act also excepts from its coverage suits for declaratory relief "with respect to Federal taxes." 28 U.S.C. 2201.

1. The term "'[j]urisdiction' refers to 'a court's adjudicatory authority.'" *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237, 1243 (2010) (quoting *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004)). A jurisdictional statute is accordingly one that "speak[s] to the power of the court rather than to the rights or obligations of the parties." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994) (internal quotation marks and citation omitted). Because "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction," courts "must raise and decide jurisdictional questions" on their own, even where, as here, the parties agree that there is no jurisdictional impediment to adjudicating the case. *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011).

To differentiate between "truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim processing rules,' which do not," *Gonzalez* v. *Thaler*, No. 10-895 (Jan. 10, 2012), slip op. 5 (quoting *Kontrick*, 540 U.S. at 455), "this Court has looked to statutory language, to the relevant context, and to what they reveal about the purposes that [the rule] is designed to serve." *Dolan* v. *United States*, 130 S. Ct. 2533, 2538 (2010); accord, *e.g.*, *Gonzalez*, *supra*, slip op. at 6 & n.3. The language, purpose, and context of the AIA all demonstrate that the statutory bar to preenforcement tax challenges is jurisdictional.

a. The plain text of the AIA—"no suit * * * shall be maintained in any court by any person," 26 U.S.C. 7421(a)—speaks in language that is "'clear[ly]' jurisdic-

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That exception "is at least as broad as the Anti-Injunction Act." *Bob Jones Univ.*, 416 U.S. at 733 n.7. The federal tax exception to the Declaratory Judgment Act does not reach the minimum coverage provision for the same reasons that the Anti-Injunction Act does not.

tional." *Gonzalez*, *supra*, slip op. at 7; see *ibid.* (identifying as an example of "'clear' jurisdictional language" the directive in 28 U.S.C. 2253(c) that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals"). The AIA's language does not merely describe procedures to "promote the orderly process of litigation." *Henderson*, 131 S. Ct. at 1203. Rather, in barring the very "maint[enance]" of pre-enforcement tax challenges, 26 U.S.C. 7421(a), the AIA is a substantive "prescription[] delineating the classes of cases (subject-matter jurisdiction) * * * falling within a court's adjudicatory authority," *Kontrick*, 540 U.S. at 455.

b. Interpreting the statutory bar as jurisdictional is consistent with its purpose. The AIA was first enacted in 1867 as an amendment to the statute then in force imposing restrictions on tax refund suits. Act of Mar. 2, 1867 (1867 Act), § 10, 14 Stat. 475;[6] see *Snyder* v. *Marks*, 109 U.S. 189, 192 (1883). Congress enacted the AIA with a "sense * * * of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence." *State R.R. Tax Cases*, 92 U.S. 575, 613 (1876); see also *Cheatham* v. *United States*, 92 U.S. 85, 89 (1876). The AIA accordingly governs the very "maint[enance]" of litigation rather than

[6] The tax refund provision was enacted in Section 19 of the Act of July 13, 1866, 14 Stat. 152, which provided, in pertinent part, that "no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected," until an appeal has been filed with and resolved by the Commissioner of Internal Revenue. The 1867 Act added to the end of that Section a sentence stating: "And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." § 10, 14 Stat. 475.

the way litigation will proceed. As this Court has noted, "to permit even the maintenance of a suit in which an injunction could issue only after the taxpayer's non-liability had been conclusively established might 'in every practical sense operate to suspend collection of the . . . taxes until the litigation is ended.'" *Williams Packing*, 370 U.S. at 8 (citation omitted). The law thus requires that taxpayers who seek to challenge their federal tax liability file a refund suit after payment, see 26 U.S.C. 7422(a), or file a petition with the Tax Court after receiving a notice of deficiency, see 26 U.S.C. 6213(a).

c. Against this backdrop, it is unsurprising that this Court has long regarded the AIA, as well as related provisions, as "jurisdictional." See *Jefferson County* v. *Acker*, 527 U.S. 423, 434 (1999) (describing AIA as "depriv[ing] courts of jurisdiction over suits brought 'for the purpose of restraining the assessment or collection' of any federal tax.") (quoting 26 U.S.C. 7421(a)); see also, *e.g.*, *Bob Jones Univ.*, 416 U.S. at 749 (affirming judgment "that [AIA] deprived the District Court of jurisdiction to issue the injunctive relief [the plaintiff] sought"); *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 758 (1974) (suit that fell within AIA's strictures "must be dismissed"); *Williams Packing*, 370 U.S. at 5 ("The object of § 7421 (a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes."); *Dodge* v. *Osborn*, 240 U.S. 118, 119, 121, 122 (1916) (affirming trial court's dismissal of complaint seeking to enjoin assessment and collection of taxes "for want of jurisdiction because the complainants had an adequate remedy at law" and because of AIA). The

courts of appeals have likewise unanimously concluded that the AIA imposes a jurisdictional bar.[7]

This Court has also squarely held that provisions closely related to the AIA are jurisdictional. Under 28 U.S.C. 1346(a)(1), district courts and the Court of Federal Claims are granted "jurisdiction" over tax refund actions. The statute restricting tax refund suits, to which the AIA was added in 1867 to form an integrated set of restrictions (see p. 10, *supra*), in turn provides:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary.

26 U.S.C. 7422(a). This Court has held that Section 7422(a), along with the prescribed time limits for filing

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[7] See *Seven-Sky* v. *Holder*, 661 F.3d 1, 5 (D.C. Cir. 2011), petition for cert. pending, No. 11-679 (filed Nov. 30, 2011); *Liberty Univ., Inc.* v. *Geithner*, No. 10-2347, 2011 WL 3962915, at *4 (4th Cir. Sept. 8, 2011), petition for cert. pending, No. 11-438 (filed Oct. 7, 2011); *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 539 (6th Cir. 2011), petition for cert. pending, No. 11-117 (filed July 26, 2011); *Pagonis* v. *United States*, 575 F.3d 809, 813-815 (8th Cir. 2009); *Hansen* v. *Department of Treasury*, 528 F.3d 597, 600-602 (9th Cir. 2007); *Sterling Consulting Corp.* v. *United States*, 245 F.3d 1161, 1167 (10th Cir. 2001), cert. denied, 534 U.S. 1114 (2002); *Randell* v. *United States*, 64 F.3d 101, 106 (2d Cir. 1995), cert. denied, 519 U.S. 815 (1996); *Mathes* v. *United States*, 901 F.2d 1031, 1033 (11th Cir. 1990); *In re LaSalle Rolling Mills, Inc.*, 832 F.2d 390, 392 n.6 (7th Cir. 1987); *McCarthy* v. *Marshall*, 723 F.2d 1034, 1037 (1st Cir. 1983); *Zernial* v. *United States*, 714 F.2d 431, 433-434 (5th Cir. 1983) (per curiam); *Sherman* v. *Nash*, 488 F.2d 1081, 1083 (3d Cir. 1973).

an administrative refund claim, 26 U.S.C. 6511(a), is a limitation on the courts' "jurisdiction." *United States* v. *Dalm*, 494 U.S. 596, 608-610 (1990); see *id.* at 611 ("controlling jurisdictional statutes" barred suit); see also *United States* v. *Brockamp*, 519 U.S. 347, 352-353 (1997) (rejecting equitable tolling of time limitations for filing administrative refund claim under Section 6511(a)); *Commissioner* v. *Lundy*, 516 U.S. 235, 240 (1996) (noting that "provisions governing refund suits * * * make timely filing of a refund claim a jurisdictional prerequisite to bringing suit.") (citing 26 U.S.C. 7422(a) and *Martin* v. *United States*, 833 F.2d 655, 658-659 (7th Cir. 1987)). The Court's conclusion that the preconditions to suit under Section 7422(a) are jurisdictional strongly reinforces the conclusion that the AIA is as well, because the AIA works in tandem with Section 7422(a) and uses materially identical language (as it has since 1867): "No suit * * * shall be maintained in any court * * * ."

This Court has reached a similar conclusion with respect to the Tax Injunction Act, 28 U.S.C. 1341, a limitation on federal-court interference with state tax collections that was modeled on the AIA. *Hibbs* v. *Winn*, 542 U.S. 88, 102-103 (2004); *Jefferson County*, 527 U.S. at 434; 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."). The Court has squarely held that the Tax Injunction Act is a subject-matter jurisdiction limitation. See *Arkansas* v. *Farm Credit Servs.*, 520 U.S. 821, 824, 825-826 (1997) (noting that Tax Injunction Act is a "broad jurisdictional barrier," and directing dismissal of suit for lack of subject-matter jurisdiction even though

court of appeals had not addressed Tax Injunction Act and parties had not raised it in this Court) (citation omitted); *California* v. *Grace Brethren Church*, 457 U.S. 393, 396, 408, 417-418 n.38 (1982) (holding that Tax Injunction Act "deprive[d] the District Court of jurisdiction," notwithstanding defendant's contention that it was inapplicable); *Rosewell* v. *LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981) (Tax Injunction Act "was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes").

This Court has recognized that "context, including this Court's interpretation of similar provisions in many years past, is relevant" in determining whether a statute is jurisdictional. *Reed Elsevier*, 130 S. Ct. at 1248. "When 'a long line of this Court's decisions left undisturbed by Congress,' has treated a similar requirement as 'jurisdictional,'" this Court "will presume that Congress intended to follow that course." *Henderson*, 131 S. Ct. at 1203 (citation omitted); see also *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 134-135, 139 (2008). Since its original enactment in 1867, Congress has amended the AIA many times, most recently in 2000. See Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, App. G, § 313(b)(2)(B), 114 Stat. 2763A-642; *id.* § 319(24), 114 Stat. 2763A-647. Congress has not, however, altered the operative text of the statute. Moreover, when Congress has amended the AIA to carve out exceptions to the bar against pre-enforcement suits, it typically has phrased those exceptions in juris-

dictional terms.[8] That history confirms that the AIA is properly regarded as jurisdictional.

2. Private respondents have contended that the AIA cannot be jurisdictional because the Court has recognized a "'judicially created exception[].'" NFIB Cert.-Stage Br. 17 (citation omitted; brackets in original). That contention lacks merit.

The "exception" to which private respondents refer is the situation described in *Williams Packing*. There, the Court stated that an injunction against tax assessment or collection may issue "[o]nly if it is * * * apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim." 370 U.S. at 7. Contrary to private respondents' characterization, the *Williams Packing* rule is not an "equitable exception[]" that undermines this Court's longstanding recognition of the AIA as jurisdictional. NFIB Cert.-Stage Br. 17 (quoting *Bowles* v. *Russell*, 551 U.S. 205, 214 (2007)). To the contrary, *Williams Packing* de-

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[8] See, *e.g.*, 26 U.S.C. 6015(e)(1) (an individual who seeks relief from joint-and-several liability on a joint return "may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual"), 6213(a) ("Notwithstanding the provisions of section 7421(a)," certain assessments, levies, and collection proceedings "may be enjoined by a proceeding in the proper court, including the Tax Court," but Tax Court "shall have no jurisdiction" unless certain conditions are met), 6225(b) ("Notwithstanding section 7421(a)," action that violates certain restrictions on assessments, levies, and collection proceedings related to deficiencies attributable to partnership items "may be enjoined in the proper court, including the Tax Court," with similar "no jurisdiction" language), 6246(b) (similar for restrictions on partnership adjustments), 6330(e)(1) (similar for collection actions), 7426(b) (district court "jurisdiction" to enjoin levy), 7429(b)(2)(A) (exclusive district court "jurisdiction" to review jeopardy levy or assessment).

scribed the AIA in jurisdictional terms. See 370 U.S. at 7 (unless it is clear that there are no circumstances under which the government could prevail, "the District Court is without jurisdiction, and the complaint must be dismissed"). The principle announced in *Williams Packing* was a product of statutory interpretation, rooted in the AIA's text and purpose. The Court explained that "if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and * * * the exaction is merely 'in the guise of a tax,'" rather than being an actual "tax" the assessment and collection of which the AIA would shield. *Ibid.* (quoting *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932)).[9]

This Court's decision in *South Carolina* v. *Regan*, 465 U.S. 367 (1984), likewise does not support private respondents' position. There, the Court held that the AIA did not bar a suit in which the State was an "aggrieved party" because the tax allegedly interfered with its sovereign prerogative under the Tenth Amendment, but the State lacked "an alternative legal avenue by which to contest the legality of a particular tax." *Id.* at 373. The Court did not arrive at that conclusion as a matter of equity, but rather rested its decision on consideration of Congress's intent, as evidenced by the

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[9] *Williams Packing*'s "under no circumstances" test is analogous to the rule that a "claim invoking federal-question jurisdiction under 28 U.S.C. § 1331 * * * may be dismissed for want of subject-matter jurisdiction if it is not colorable, *i.e.*, if it is * * * 'wholly insubstantial and frivolous.'" *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006) (citation omitted). A district court's ability to examine the merits of a claim to that limited extent does not make Section 1331 any less jurisdictional.

"Act's purpose and the circumstances of its enactment." *Id.* at 378.

Thus, far from demonstrating that the AIA is nonjurisdictional, *Williams Packing* and *Regan* stand for the unremarkable proposition that "the 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." *Seven-Sky* v. *Holder*, 661 F.3d 1, 29 n.8 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), petition for cert. pending, No. 11-679 (filed Nov. 30, 2011).

3. Private respondents also argue (Cert.-Stage Br. 17) that this Court's willingness to accept the government's waiver of an AIA defense in *Helvering* v. *Davis*, 301 U.S. 619, 639-640 (1937), demonstrates that the AIA is nonjurisdictional. On this point, too, private respondents are incorrect.

In its brief in *Davis*, the government took the view that, because the AIA "was enacted to promote, not to discourage, the orderly administration and collection of Government revenues," if "the appropriate officers of the Government" conclude that "the litigation of an injunction suit is more important for the protection of the revenues than insistence upon adherence to the ordinary procedure of payment followed by a suit for refund, the officers should be permitted to waive" the AIA's protections. Gov't Br. at 31, *Davis*, *supra* (No. 910). By a closely divided vote, the Court in *Davis* chose to proceed to the merits. 301 U.S. at 639-640. The government similarly waived the AIA in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940) (see Gov't Br. at 9, *Sunshine Anthracite*, *supra* (No. 804)), and the

Court proceeded to decide the case without mention of the AIA.[10]

It is unclear whether the results in those cases represent "an anomaly predating more stringent jurisdictional limitations" or reflected the Court's acceptance of a reading of the AIA that would render it inapplicable upon an affirmative waiver by certain government officials. *Seven-Sky*, 661 F.3d at 13. In either event, these decisions do not detract from the overwhelming indications that Congress has ranked the bar to pre-enforcement tax liability challenges as jurisdictional.

Davis and *Sunshine Anthracite* date from an era when the Court viewed the AIA as simply "declaratory of the principle" in equity that the tax collector could be enjoined if there were "special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence." *Standard Nut*, 284 U.S. at 509. That reading "effectively repealed the Act, since the Act was viewed as requiring nothing more than equity doctrine had demanded before the

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[10] In *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), the Court decided it was appropriate "[u]nder the[] circumstances" to consider the merits of stockholders' constitutional challenge to imposition of the income tax on their corporation. *Id.* at 554. The Court noted that "so far as it was within the power of the government to do so, the question of jurisdiction * * * was explicitly waived at argument." The Court also pointed out, however, that the relief sought was against voluntary action "by the defendant company, and not in respect of the assessment and collection themselves." *Ibid.* In *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1 (1916), another stockholder action, the Court concluded that the AIA did not bar the suit, relying on *Pollock*, but with no mention of government waiver. *Id.* at 10. In our view, a suit to bar a corporation from voluntarily paying a tax should be regarded as one seeking to "restrain" the "collection" of the tax within the meaning of the AIA.

Act's passage." *Bob Jones Univ.*, 416 U.S. at 744. And, in fact, the Court in *Davis* discussed the government's waiver of a defense under the AIA together with its waiver of equitable defenses. 301 U.S. at 639-640. The Court has more recently clarified, however, that the "explicit language" of the AIA bars such a reading of the statute. *Bob Jones Univ.*, 416 U.S. at 745; see *Williams Packing*, 370 U.S. at 7. The Court has further emphasized that where the AIA applies, "the District Court is *without jurisdiction*, and the complaint must be dismissed." *Ibid.* (emphasis added). This Court's repudiation of any view of the AIA as nothing more than a codification of equitable principles, and its recognition that the AIA's bar deprives the courts of jurisdiction, calls into serious doubt any continuing force of the Court's cryptic ruling in *Davis*.

It would be theoretically possible to read the AIA as both depriving the courts of jurisdiction *and* subject to affirmative and explicit waiver by the government where, as in *Davis*, the government concludes that resolution of the dispute would further tax collection by eliminating constitutional doubts. Nothing would bar Congress from enacting such a statute. The AIA is designed to preserve the government's sovereign immunity and protect its revenues and the general Treasury. As in *Davis*, there could be circumstances in which allowing the government to affirmatively waive the bar that would otherwise be imposed by the AIA would be consistent with those purposes.[11] And the Court has

[11] Under such an interpretation, however, there would be no forfeiture of the protections of the AIA's bar as a result of the mere failure by the government to raise it as a defense. Cf. *Puckett* v. *United States*, 556 U.S. 129, 138 (2009) (distinguishing waiver from forfeiture).

never expressly disavowed the result in *Davis* that enabled it to reach the merits.

Yet neither has the Court ever reaffirmed, relied upon, or even cited that brief passage in *Davis*. Because the rationale of *Davis* on this point is itself unclear, and in light of this Court's decisions in *Williams Packing* and other more modern cases repeatedly reaffirming that the AIA constitutes a jurisdictional bar, we do not believe that the AIA is properly construed to allow the government to waive the AIA's bar if it otherwise applies.

B. The Anti-Injunction Act Does Not Bar Respondents' Challenge To The Constitutionality Of The Minimum Coverage Provision

Because the AIA is a jurisdictional statute, this Court has an independent obligation to determine whether it applies here. See *Henderson*, 131 S. Ct. at 1202. It does not. The wording of the minimum coverage provision does not trigger the AIA's bar to respondents' challenge to Section 5000A.

1. The AIA does not bar challenges to every exercise of Congress's taxing power, but bars only those impositions designated as or deemed to be "taxes" for purposes of the Internal Revenue Code

The AIA bars suits "for the purpose of restraining the assessment or collection *of any tax.*" 26 U.S.C. 7421(a) (emphasis added). In enacting the minimum coverage provision, Congress designated the shared-responsibility payment as a "penalty," rather than a "tax." 26 U.S.C. 5000A(b). By its terms, then, the AIA does not embrace the "penalty" imposed by Section 5000A. Nor, as we explain below, is the AIA rendered

applicable to the Section 5000A penalty by any other provision of the Internal Revenue Code.

a. For purposes of determining whether the minimum coverage provision is a valid exercise of Congress's Article I taxing power, the label Congress attached to the monetary payment is irrelevant; what matters is the practical operation of the provision. See Gov't Minimum Coverage Br. 56-59. Because the minimum coverage penalty operates as a tax provision, it can reasonably be construed as an exercise of Congress's tax power, and must therefore be upheld on that basis. See *id.* at 52-62.

The precise terms Congress chose to use in the Affordable Care Act are highly relevant, however, for purposes of statutory construction under the Internal Revenue Code, of which the AIA is a part. Under the Code, the term "tax" carries with it a wide array of substantive and procedural statutory consequences, and a "penalty" is not the same thing as a "tax" for statutory purposes under the Code.

That much is evident from a comparison of the AIA and the immediately adjacent refund statute, 26 U.S.C. 7422(a). The AIA provides that, with specified exceptions, "no suit for the purpose of restraining the assessment or collection of any *tax* shall be maintained." 26 U.S.C. 7421(a) (emphasis added). Section 7422(a), by contrast, provides that, until a refund claim has been filed with and disposed of by the Secretary of the Treasury (Secretary), "[n]o suit or proceeding shall be maintained," not only "for the recovery of any internal revenue *tax* alleged to have been erroneously or illegally assessed or collected," but also for the recovery of "any *penalty* claimed to have been collected without authority," or of "any *sum* alleged to have been excessive or in any manner wrongfully collected." 26 U.S.C. 7422(a)

(emphases added). Section 7422(a), by its inclusion of any "penalty" or "sum" in addition to any "tax," is plainly broader than Section 7421(a). See *Clintwood Elkhorn*, 553 U.S. at 13. It demonstrates that a "tax" under Section 7421(a) is distinct from a "penalty," including the penalty imposed by Section 5000A.

b. The distinction between a "penalty" and a "tax" for statutory purposes is also evident from the text and operation of other parts of the Internal Revenue Code to which Section 5000A is tied. Subsection (g)(1) of Section 5000A provides that the minimum coverage penalty "shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." 26 U.S.C. 5000A(g)(1).[12]

The text of Section 5000A(g)(1) makes it necessary to turn to Subchapter B of Chapter 68 to determine the "manner" in which assessable penalties are assessed and collected, in order to determine the applicable procedures for the penalty under Section 5000A. In that Subchapter, the relevant section is 26 U.S.C. 6671(a). The first sentence of Section 6671(a) provides that "[t]he penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected *in the same manner as taxes*." 26 U.S.C. 6671(a) (emphasis added). The directive in Section 6671(a) that "assessable penalties"—and therefore the "penalty" imposed by Section 5000A—

[12] Subsection (g)(2), to which the quoted passage refers, specifies certain "[s]pecial rules" limiting the government's tools for enforcement: A taxpayer may not be subject to criminal prosecution or penalty for failure to make timely payment, nor may the Secretary file a notice of lien or levy on the taxpayer's property. 26 U.S.C. 5000A(g)(2).

"shall be assessed and collected in the same manner *as* taxes" refutes the proposition that such penalties *are* taxes for statutory purposes under the Code, including the AIA.

That conclusion is confirmed by the second sentence of Section 6671(a), which states that, except as otherwise provided, "any reference in this title [*i.e.*, Title 26 of the United States Code] to 'tax' imposed by this title shall be deemed *also* to refer to the *penalties* and liabilities provided by this subchapter." 26 U.S.C. 6671(a) (emphases added). Assessable penalties imposed by Subchapter B of Chapter 68 therefore are treated as "taxes" for all purposes under the Internal Revenue Code, including the AIA, not because of the first sentence of Section 6671(a), which governs only assessment and collection, but because they are "deemed" to be taxes for all purposes by the second sentence of Section 6671(a). See, *e.g.*, *Souther* v. *Mihlbachler*, 701 F.2d 131, 131-132 (10th Cir. 1983) (per curiam) ("[T]he penalties imposed pursuant to § 6682 are 'taxes' under § 7421(a). Such penalties are taxes by definition and are to be treated as taxes.") (citing 26 U.S.C. 6671(a)); *Botta* v. *Scanlon*, 314 F.2d 392, 393 (2d Cir. 1963) (rejecting argument that "assessments under § 6672 are in the nature of a penalty and that they do not come within the prohibition of § 7421(a) against suits to restrain the collection of a 'tax,'" because "it is expressly provided in § 6671(a) of the Code that 'except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter [including § 6672].'") (brackets in original).[13]

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[13] In parallel fashion to Section 6671(a), 26 U.S.C. 6665(a), which applies to all of Chapter 68, provides both that "the additions to the tax,

The penalty imposed by Section 5000A is not in Chapter 68 of the Code, but rather is in a new Chapter 48 added by the Affordable Care Act. Because the second sentence of Section 6671(a) refers only to "penalties" provided by Subchapter B of Chapter 68, the Section 5000A penalty is *not* deemed a "tax" for all purposes under the Code, including the AIA, by the second sentence of Section 6671(a).[14]

c. The conclusion that follows from the text of Section 6671(a) is reinforced by comparing it to the text of Section 5000A(g) itself, as well as other provisions of the Affordable Care Act. As noted above, Section 5000A(g) directs that the minimum coverage penalty shall generally be "assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68" of the Code. 26 U.S.C. 5000A(g)(1). This language parallels the *first* sentence of Section 6671(a), which refers to assessment and collection of assessable penalties under that same subchapter. But Section 5000A(g) contains no further directive, parallel to that in the *second* sentence of Section 6671(a), that any reference to any "tax" under Title 26 shall be deemed also to refer to the penalty in Section 5000A. That distinct and more limited text indi-

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additional amounts, and penalties provided by this chapter * * * shall be assessed, collected, and paid in the same manner as taxes," *and* that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter." 26 U.S.C. 6665(a)(1) and (2). Also using parallel language, Congress has provided that "interest" is generally deemed to be a "tax" for purposes of the Internal Revenue Code. See 26 U.S.C. 6601(e).

[14] The Section 5000A penalty is, however, covered by the restrictions in the refund statute, which applies to suits to recover "any penalty," as well as any "tax." 26 U.S.C. 7422(a).

cates that Congress considered the treatment of the minimum coverage provision under the Internal Revenue Code and decided that the full panoply of rules relating to "taxes," including the AIA, should not apply. See *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 540 (6th Cir. 2011) ("Distinct words have distinct meanings. Congress said one thing in sections 6665(a)(2) and 6671(a), and something else in section 5000A, and we should respect the difference."), petition for cert. pending, No. 11-117 (filed July 26, 2011).

This conclusion is reinforced by the presence of other provisions in the Affordable Care Act that, unlike Section 5000A(g), do make the AIA applicable. Section 6301(e)(2) of the Act, 124 Stat. 743, added a new Subchapter B to Chapter 34 of the Internal Revenue Code, 26 U.S.C. 4375 *et seq.*, to impose "fees" on certain health plans. The new Section 4377(c) expressly provides that, "[f]or purposes of subtitle F," which includes the AIA, "the fees imposed by this subchapter shall be treated as if they were *taxes*." 26 U.S.C. 4377(c) (emphasis added).

Similarly, Sections 9008 and 9010 of the Affordable Care Act provide for the imposition of "fees" on pharmaceutical manufacturers and health insurance providers, respectively. 124 Stat. 859, 865. Sections 9008 and 9010 both provide that the fees imposed, "for purposes of subtitle F of the Internal Revenue Code of 1986, shall be treated as excise *taxes* with respect to which only actions for refund under procedures of such subtitle shall apply." §§ 9008(f)(1), 9010(f)(1), 124 Stat. 861, 867 (emphasis added). These two provisions of the Act, like Section 6301, thus expressly and specifically direct that the monetary exactions they impose shall be treated as "taxes," and all of these provisions cross-reference all of Subtitle F of the Code, 26 U.S.C. 6001 *et seq.*, which con-

tains the AIA, rather than (like Section 5000A(g)) only Subchapter B of Chapter 68 in Subtitle F, which does not.

Significantly, moreover, Section 9010(g)(3) imposes a "penalty" on an insurer that understates its premiums in its report to the Secretary. Section 9010(g)(3) then expressly provides that the penalty imposed "shall be subject to the provisions of subtitle F of the Internal Revenue Code of 1986 that apply to assessable penalties under chapter 68 of such Code." HCERA § 1406(a)(5), 124 Stat. 1066 (ACA § 9010(g)(3)(C)). This provision thus triggers the AIA specifically with respect to penalties.[15] Congress has thereby demonstrated in the Affordable Care Act itself that it knows how to trigger application of the AIA to the monetary exactions it imposes, including penalties, but it did not do so in Section 5000A(g).[16]

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[15] Section 9010(g)(2) imposes a penalty for the late filing of a report to the Secretary. That penalty "shall be treated as a penalty for purposes of subtitle F of the Internal Revenue Code of 1986," shall be paid on notice and demand "and in the same manner as a tax under such Code," and "with respect to which only civil actions for refund under procedures of subtitle F shall apply." § 9010(g)(2)(b)(i)-(iii). It is unclear whether the first clause triggers the AIA, since 26 U.S.C. 6671(a) deems "penalties" under Subchapter B of Chapter 68 (which is part of Subtitle F) to be "taxes." The third clause, by limiting the available remedy to a refund action, may preclude a pre-enforcement challenge to that penalty.

[16] The employer responsibility provision of the Affordable Care Act, much like the minimum coverage provision, provides that an "assessable payment" under that provision "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." 26 U.S.C. 4980H(d)(1). But unlike Section 5000A, that provision expressly refers to the assessable payment as a "tax." 26 U.S.C. 4980H(b)(2) and (c)(7). That description triggers application of the AIA. Indeed, Section 4980H, in its Subsection (c)(7), specifically

d. The Court-appointed amicus curiae argues that, because the AIA does not define the term "tax," it should be read "to refer broadly to any 'sum of money assessed on the person or property of a citizen by government, for the use of the nation or state.'" Court-Appointed Amicus Br. 37 (quoting Noah Webster, *An American Dictionary of the English Language* 1132 (1860) (Webster)). That definition, the amicus notes, is broad enough to include "almost every species of imposition on persons or property for supplying the public treasury, as tolls, tribute, subsidy, excise, impost, or customs." *Ibid.* (quoting Webster 1132).

Once again, this broad view of a "tax" reinforces the conclusion that the minimum coverage provision is a valid exercise of Congress's Article I taxing power as a *constitutional* matter because it underscores that the provision can, and therefore must, be construed as an exercise of that power. It is, however, out of place in the context of construing the specific statutory terms in a

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cross-references 26 U.S.C. 275(a)(6) as establishing the rule "[f]or denial of deduction for the tax imposed by this section." Section 275(a)(6), which bars a deduction for "[c]ertain taxes," is also expressly cross-referenced by Sections 9008 and 9010 for the fees that are treated as "excise taxes." See §§ 9008(f), 9010(f), 124 Stat. 861, 867.

Section 527 of Title 26, which prescribes certain penalties for a political organization's failure to make required disclosures of expenditures and contributions, provides that the penalty "shall be assessed and collected in the same manner as penalties imposed by section 6652(c)." 26 U.S.C. 527(j)(1). It does not specify that the penalty shall be deemed a "tax" for any purpose. The Eleventh Circuit has held that, because the "disclosure requirements constitute conditions attached to the receipt of a tax subsidy," the "penalties imposed for violating the conditions of that tax status should be considered as part of the tax for purposes of analysis under the Anti-Injunction Act." *Mobile Republican Assembly* v. *United States*, 353 F.3d 1357, 1362 (2003).

highly reticulated scheme like the Internal Revenue Code, in which distinctions between different kinds of "sum[s] of money assessed" carry important substantive and procedural statutory consequences. To ascribe to the Code's use of the word "tax" a meaning broad enough to cover "almost every species of imposition" would render numerous Code provisions entirely superfluous. If every such imposition—including the penalty imposed by Section 5000A—fell within the scope of the term "tax," there would be no need for Congress to have specified that interest, or Chapter 68 penalties, or other payments shall be treated as "taxes" for some or all purposes under the Code. See pp. 23-24 & note 13, *supra*. The Code should not be interpreted in a manner that would render so many provisions "superfluous, void, or insignificant." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001)).[17]

Nor do this Court's cases ascribe a broader meaning to the word "tax" as it appears in the AIA than elsewhere in the Code. Amicus points (Br. 37) to this Court's statement that the AIA "postpones redress for [an] alleged invasion of property rights if the exaction is

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[17] The Court-appointed amicus cites *Helwig* v. *United States*, 188 U.S. 605 (1903), for the proposition that "in the tax context, labels do not 'change the nature and character of the enactment.'" Br. 37 (quoting *Helwig*, 188 U.S. at 613). But in *Helwig*, which concerned whether a particular imposition qualified as a "penalty" subject to challenge in district court, the Court also made clear that, "[i]f it clearly appear that it is the will of Congress that the provision shall not be regarded as in the nature of a penalty, the court must be governed by that will." *Helwig*, 188 U.S. at 613. Here, the text of Section 5000A makes clear that Congress did not intend to apply all of the statutory rules in the Internal Revenue Code governing "taxes," including the AIA, to the minimum coverage penalty.

made under the color of their offices by revenue officers charged with the general authority to assess and collect the revenue." *Phillips* v. *Commissioner*, 283 U.S. 589, 595-596 (1931). But the issue before the Court in *Phillips* concerned procedures used for the collection of certain income and profits *taxes*, and in the quoted passage the Court simply described the purpose of the AIA to protect collection of taxes generally. *Id.* at 591-592. The Court had no occasion to consider whether other types of payments not designated as "taxes" fall within the scope of the AIA. Similarly, cases concerning the scope of Congress's taxing authority, *e.g.*, *United States* v. *Sanchez*, 340 U.S. 42, 44-45 (1950), or concluding that the AIA applies to taxes challenged as beyond Congress's taxing authority, *e.g.*, *Bailey* v. *George*, 259 U.S. 16, 19-20 (1922), do not support amicus's proposed interpretation of the AIA as barring judicial challenges to payments that Congress has not chosen to treat as "taxes" for statutory purposes. On the contrary, the Court's decision in *Bailey* v. *George* demonstrates that the AIA and the scope of the tax power are not coterminous. See *ibid.* Here, Congress has demonstrated an intent not to apply the AIA to the minimum coverage provision, even though it is a valid exercise of the taxing power.[18]

e. The conclusion that Congress did not subject the penalty under Section 5000A to the AIA's jurisdictional bar is reinforced by the role of the minimum coverage

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[18] Private respondents have asserted that the minimum coverage penalty is not a "tax" within the meaning of the AIA because it imposes a "punishment" for an unlawful act. 11-393 Pet. 17. For the reasons explained below, see pp. 39-41, *infra*, and in prior filings, see Gov't Minimum Coverage Br. 59-62, that is a mischaracterization of the minimum coverage provision.

provision in the Affordable Care Act's insurance reforms and the timing of those reforms. The minimum coverage provision is integral to the Act's guaranteed-issue and community-rating provisions, and all these provisions go into effect in 2014. See Gov't Minimum Coverage Br. 27-30; Gov't Severability Br. 44-54. That delayed effective date enables the responsible federal agencies, the insurance industry, and millions of individuals to prepare for implementation of the insurance reforms. Application of the AIA to Section 5000A would have required that any constitutional challenge to the minimum coverage provision be postponed until after those interconnected provisions of the Act were fully implemented and relied upon by millions of individuals, as well as by the insurance industry.

By the same token, Congress's decision to delay the effective date meant that any constitutional challenges to the minimum coverage provision brought soon after enactment of the Affordable Care Act would not cause immediate disruption to the ongoing administration of the Internal Revenue Code, or the receipt of revenues by the Treasury. Congress was aware of the prospect of such constitutional challenges.[19]

Of course, where the AIA applies, there is no basis for a court to disregard its jurisdictional bar because Congress has delayed the effective date of the relevant statutory provision, or because of the court's own assessment of whether the purposes of the AIA would be

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[19] See 155 Cong. Rec. S13,823 (daily ed. Dec. 23, 2009) (statement of Sen. Hatch); see also 156 Cong. Rec. E475 (daily ed. Mar. 24, 2010) (statement of Rep. Bonner) (noting "there are already attempts to challenge [the provision] in court"); see also Gov't Minimum Coverage Br. 58 (discussing constitutional point of order in Senate).

served. Here, however, the text and structure of Section 5000A and related statutory provisions establish that the AIA does *not* apply. The practical considerations associated with the minimum coverage provision's delayed effective date underscore that Congress could reasonably conclude that not subjecting Section 5000A to the AIA would facilitate the orderly implementation of the insurance market reforms and at the same time not unduly undermine the policies of the AIA in this particular context.

2. The statutory directive that the minimum coverage penalty shall be assessed and collected in the same manner as assessable penalties is a procedural instruction to the Secretary rather than a jurisdictional instruction to the courts

a. The Court-appointed amicus argues (Br. 24-36) that the statutory directive that the minimum coverage penalty generally be "assessed and collected in the same manner" as assessable penalties under Subchapter B of Chapter 68 (see 26 U.S.C. 5000A(g)(1)) supports, rather than undermines, application of the AIA to bar respondents' challenge. As amicus notes (Br. 24), and as explained above, Section 6671(a) provides that "[t]he penalties and liabilities provided by this subchapter * * * shall be assessed, collected, and paid in the same manner as taxes." 26 U.S.C. 6671(a). Amicus reasons that unless the AIA bars pre-enforcement judicial challenges to the minimum coverage penalty, the penalty cannot be "assessed and collected in the same manner" as taxes because assessment and collection could be delayed or prohibited by a judicial ruling. Br. 26. Amicus is incorrect.

The statutory directive that the minimum coverage penalty be "assessed and collected in the same manner" as assessable penalties under Chapter 68 is a procedural instruction to the *Secretary* governing administration of the Code. It is not an instruction to *courts* governing adjudication of suits. Cf., *e.g.*, *Sage* v. *United States*, 908 F.2d 18, 24-25 (5th Cir. 1990) (rejecting taxpayer's argument that the statutory directive that assessable penalties be "assessed and collected in the same manner as taxes" means that the general three-year limitations period for assessing "any tax" applies to the Chapter 68 penalty for promoting abusive tax shelters, 26 U.S.C. 6700 (1988)).

The Secretary's assessment authority is found in Chapter 63 of the Internal Revenue Code, which generally grants him the power to record tax liabilities as reported by the taxpayer or as determined by the Secretary. 26 U.S.C. 6201 *et seq.*; see *United States* v. *Galletti*, 541 U.S. 114, 122-124 (2004). The Secretary's collection authority is found in Chapter 64 of the Code, which generally grants him the authority to collect assessed taxes upon notice and demand. 26 U.S.C. 6301 *et seq*. Neither Chapter 63 nor Chapter 64 includes the AIA.

Given this structure, "the most natural reading of the [minimum coverage] provision is that the 'manner' of assessment and collection mentioned in sections 5000A(g)(1) and 6671(a) refers to the mechanisms the Internal Revenue Service employs to enforce penalties, not to the bar against pre-enforcement challenges to taxes." *Thomas More Law Ctr.*, 651 F.3d at 540; see also *Seven-Sky*, 661 F.3d at 11 ("The phrase 'in the same manner,' which modifies 'assessment and collection,'

* * * is used throughout the Code to refer to methodology and procedures.") (citing examples).[20]

b. Alternatively, amicus argues (Br. 39-41) that respondents' challenge is barred because all "assessable penalties" are "tax[es]" within the meaning of the AIA. Amicus notes that the Code's assessment provision authorizes the Secretary to assess "all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title." 26 U.S.C. 6201(a). Because the AIA is concerned with suits to restrain the assessment and collection of taxes, amicus argues, Section 6201(a)'s statement that taxes subject to assessment "includ[e]" assessable penalties means that assessable penalties must also be "tax[es]" within the meaning of Section 7421(a). Br. 40.

Amicus's argument is a variant of the "assessed and collected" argument discussed above, and it is incorrect for similar reasons. Section 6201(a) is a directive to the Secretary in his administration of the Internal Revenue

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[20] In other provisions of the Code, Congress has provided *both* that a particular payment shall be "assessed and collected" as a tax *and* that no suit shall be maintained to restrain the assessment or collection of the payment. See 26 U.S.C. 7421(b)(1) (prohibiting suit to restrain assessment or collection of "the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax"), 6901(a) (providing that this transferee liability shall be "assessed, paid, and collected in the same manner * * * [as] taxes"); 26 U.S.C. 6305(a) and (b) (providing that certain child support obligations, see 42 U.S.C. 652, shall be assessed and collected in the same manner as taxes, and explicitly barring pre-enforcement review of that assessment or collection). These provisions furnish further evidence that Congress has not regarded a directive to the Secretary to "assess and collect" a payment in the same manner as a tax as also a directive to the courts not to entertain suits to restrain assessment or collection.

Code; the AIA, which appears in a separate chapter of the Code, is a directive to the courts. And unlike Section 6201(a), the AIA contains no language providing that the term "tax" includes assessable penalties.

In any event, amicus reads far too much into Section 6201(a)'s provision for the Secretary to assess "all taxes (including * * * assessable penalties)." See also 26 U.S.C. 6202 (same language governing "mode or time of assessment"). The wording of Section 6201(a) is simply a way of describing that the Secretary's assessment authority with respect to "taxes" also extends to "interest, additional amounts, additions to tax, and assessable penalties" imposed by the Internal Revenue Code. 26 U.S.C. 6201(a). To say that those items are "includ[ed]" as "taxes" for purposes of assessment does not mean that they are included as "taxes" for purposes of all sections of the Code, such as the AIA, that do not contain such "including" language.

Significantly, moreover, other provisions of the Code, such as those cited in Judge Kavanaugh's dissenting opinion in *Seven-Sky*, 661 F.3d at 40, that also refer to "assessable penalties" for the most part do not say that taxes "includ[e]" such penalties.[21] There thus is no

[21] Section 6155(a), in language parallel to Section 6201(a), does require payment on demand at the specified place and time of "any tax (including any interest, additional amounts, additions to taxes, and assessable penalties)." 26 U.S.C. 6155(a). But a number of other provisions cited by Judge Kavanaugh are worded in a way that does not suggest that the term "tax" actually subsumes "penalty." See 26 U.S.C. 860(h)(1) (running of statute of limitations on deficiency "*and* all interest * * * and assessable penalties") (emphasis added), 6321 (if person refuses to pay "any tax," "the *amount* (including any interest * * * or assessable penalty)" "shall be a lien") (emphasis added), 6324A(a) ("deferred amount (*plus* any interest * * * [and] assessable penalty)" shall be a lien) (emphasis added), 6601(e)(1) and (2) (interest

pattern across the Code to suggest that "penalties" necessarily are subsumed within the term "taxes." And the language of Section 6201(a), on which amicus relies, simply makes clear that assessable penalties are encompassed within the same general grant of assessment authority as taxes.

3. The conclusion that the AIA does not bar respondents' pre-enforcement challenge to Section 5000A does not undermine the protections of the AIA and other bars to relief

To decide this case, the Court need not broadly hold that the AIA has no application to any payments designated as a "penalty" unless a statutory provision like Section 6671(a) provides that the penalty should be deemed a "tax." See Caplin & Cohen Amicus Br. 18. The Internal Revenue Code is complex, with many differently worded provisions. It suffices here to conclude that Congress does not intend every exercise of its taxing power to be deemed a "tax" for any and all purposes under the Internal Revenue Code, including the AIA. Here, the unique wording of Section 5000A—its limited cross-reference to Subchapter B of Chapter 68, its failure either to incorporate *or* cross-reference the language in Section 6671(a) deeming an assessable penalty to be a "tax," and its failure to include the expansive cross-reference language that is found in other provi-

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shall be "assessed, collected, and paid in the same manner" as taxes, and any reference to "taxes" shall be deemed to refer to interest; separate reference to interest on "assessable penalties"), 6602 (interest to be paid on erroneous refunds of "any internal revenue tax (*or* any interest [or] assessable penalty * * *)") (emphasis added), 7122(b) (in case of compromises, General Counsel shall record "(1) [t]he amount of tax assessed," "(2) [t]he amount of interest * * * or assessable penalty," *and* "(3) [t]he amount actually paid").

sions of the Affordable Care Act—establishes that the minimum coverage penalty is not to be treated as a "tax" for purposes of the AIA.[22]

Nor is it the case that permitting this challenge to proceed means "forever * * * enabl[ing] taxpayers to evade the Code's carefully constructed procedures for the exhaustion of administrative remedies and the time limits for filing suit" concerning the application of Section 5000A to individual taxpayers. Caplin & Cohen Amicus Br. 7-8; see *id.* at 36. Such suits would be barred on any of a host of grounds: (1) the absence of "final agency action" under the Administrative Procedure Act, 5 U.S.C. 704; (2) preclusion of review because there is a special statutory administrative and judicial review procedure for raising such issues, see 5 U.S.C. 703; compare *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994), with *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3150-3151 (2010); (3) primary jurisdiction and failure to exhaust administrative remedies, see *McKart* v. *United States*,

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[22] There thus is no occasion to decide, for example, whether the AIA applies to challenges to other provisions of the Code, cited by the Court-appointed amicus (Br. 35-36), providing that the penalties imposed under the Code's alcohol and tobacco tax chapters "shall be assessed, collected and paid in the same manner as taxes, as provided in [26 U.S.C. 6665(a)]." 26 U.S.C. 5114(c)(3), 5684(b), and 5761(e). Those provisions expressly refer to "taxes," and refer to the entirety of Section 6665(a) (a provision parallel to Section 6671(a)), which includes both a provision for assessable penalties to be assessed in the same manner as taxes *and* a provision deeming all references to taxes as referring also to such items. See 26 U.S.C. 6665(a)(1) and (2). Section 5000A(g)(1), by contrast, expressly refers to an "assessable penalty," not a "tax," and contains no cross-reference to Section 6671 or 6665(a) and thus no express cross-reference to the provisions deeming assessable penalties to be "taxes."

395 U.S. 185, 193 (1969); and (4) standard equitable principles such as those barring a suit where there is another adequate remedy, see 5 U.S.C. 702(1) (preserving equitable grounds for dismissal); *O'Shea* v. *Littleton*, 414 U.S. 488, 499 (1974). Moreover, unlike respondents' general challenge to the constitutionality of the minimum coverage provision, a challenge to the calculation or imposition of a particular penalty under Section 5000A would often implicate other federal tax liabilities, because the Section 5000A penalty turns on calculations of gross income, deductions, and other matters that also go to the existence and amount of federal income tax liability. See 26 U.S.C. 5000A(c). A suit raising such issues thus would seek to restrain the assessment or collection of a "tax" as well as that of the minimum coverage penalty, and for that reason would be barred by the AIA.[23]

Finally, the AIA will continue to bar other pre-enforcement challenges to the many other provisions of the Affordable Care Act that concern "taxes" within the meaning of the AIA, including the employer responsibility provision, 26 U.S.C. 4980H. See note 16, *supra*.[24] That is so whether the pre-enforcement suit takes the form of a direct constitutional challenge or an indirect challenge in the form of an argument that, if the minimum coverage provision is held unconstitutional, the tax

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[23] Indeed, questions concerning the calculation of the minimum coverage penalty for a particular taxpayer would affect the *total* amount of liability on the taxpayer's federal income tax return.

[24] See also, *e.g.*, 26 U.S.C. 1401(b)(2) (additional Medicare tax on high-income taxpayers); 26 U.S.C. 4980I (excise tax on high cost employer-sponsored health coverage); 26 U.S.C. 5000B (tax on indoor tanning services).

provisions are inseverable and therefore invalid. See Gov't Severability Br. 14 n.8.

C. If The AIA Otherwise Applies, Respondents Cannot Avoid Its Application By Recharacterizing Their Challenge As Focused Solely On The "Requirement" To Maintain Minimum Essential Coverage, Without Regard To The Penalty

Private respondents have contended in this case that the AIA does not apply because their "'purpose' is to 'restrain' the mandate's free-standing legal requirement that *they must buy costly insurance*," and "obviously has nothing to do with 'restraining' the sanction for noncompliance with the mandate." 11-393 Pet. 18; see also *Seven-Sky*, 661 F.3d at 8-9 (suggesting similar theory). Private respondents err in suggesting that they can avoid the AIA, if otherwise applicable, by characterizing their suit as a challenge to the statutory predicate for imposition of the minimum coverage penalty rather than the penalty itself.

1. As an initial matter, the premise of private respondents' argument is belied by respondents' complaint, which repeatedly characterizes their challenge as directed to "the Act's mandate that all citizens and legal residents of the United States maintain qualifying healthcare coverage *or pay a penalty*." J.A. 104-105 (emphasis added); see also J.A. 109, 112, 122, 125, 126. Moreover, as relief for the alleged constitutional violation, the complaint asks the court to enjoin enforcement of the Affordable Care Act. J.A. 124-126. Because the only consequence for failure to comply with the "[r]equirement to maintain minimum essential coverage," 26 U.S.C. 5000A(a), is the assessment and collec-

tion of a penalty, respondents necessarily are seeking to enjoin that penalty.

2. Even if respondents had drafted their complaint differently, however, if the relief they seek "would necessarily preclude the collection" of "taxes" within the meaning of the AIA, "a suit seeking such relief falls squarely within the literal scope of the Act." *Bob Jones Univ.*, 416 U.S. at 732; see *id.* at 738-739. And even if the individual private respondents now plan to obtain minimum essential coverage rather than incur the penalty, see 11-393 Pet. 18, this Court has emphasized that "Section 7421(a) does not bar merely a taxpayer's attempt to enjoin the collection of his own taxes": "[A] suit to enjoin the assessment or collection of anyone's taxes triggers the literal terms of [Section] 7421(a)," *Americans United*, 416 U.S. at 760. The relief respondents seek in this Court—the invalidation of 26 U.S.C. 5000A—necessarily would restrain the assessment and collection of the minimum coverage penalty against any applicable individuals who fail to maintain minimum essential coverage. Thus if the penalty imposed when an individual fails to maintain minimum coverage were a "tax" to which the AIA applied, respondents could not escape the AIA's application by characterizing their challenge as focused on the statutory predicate for imposition of the penalty rather than the penalty itself.

3. This Court's holdings in *Bob Jones University* and *Americans United* cannot be distinguished on the ground that the challenges at issue in those cases were "*inextricably linked* to the assessment and collection of taxes" in a way that a challenge to Section 5000A(a) is not. *Seven-Sky*, 661 F.3d at 10. The minimum coverage provision cannot meaningfully be divided into a "discrete regulatory requirement" and a companion penalty. *Ibid.*

Under the Affordable Care Act, the only consequence of noncompliance with Section 5000A(a) is the penalty prescribed by Section 5000A(b); Section 5000A(a) establishes no independently enforceable legal obligation. See Gov't Minimum Coverage Provision Br. 60-61. It therefore *is* "inextricably linked" with the penalty provision.

The minimum coverage provision is projected to raise at least $4 billion a year for the general Treasury from taxpayers who do not maintain qualifying coverage. Letter from Douglas Elmendorf, Director, Congressional Budget Office, to Nancy Pelosi, Speaker, U.S. House of Representatives Tbl. 4 (Mar. 20, 2010). To be sure, Congress had regulatory purposes in addition to a revenue-raising purpose in enacting 26 U.S.C. 5000A—namely, to rationalize payments for health care services and solve the cost-shifting problem in the national health care market, and to ensure the effectiveness of the Affordable Care Act's guaranteed-issue and community-rating provisions. See *Seven-Sky*, 661 F.3d at 10. But this Court has long since "abandoned" any distinctions that prior cases drew between "regulatory and revenue-raising taxes" for purposes of the AIA. *Bob Jones Univ.*, 416 U.S. at 741 n.12; see *Sanchez*, 340 U.S. at 44-45; *Sonzinsky* v. *United States*, 300 U.S. 506, 513 (1937); *Seven-Sky*, 661 F.3d at 41-45 (Kavanaugh, J., dissenting).

Nor does either the mandatory phrasing of the reference to maintaining minimum coverage in Subsection (a) of Section 5000A ("An applicable individual shall" maintain minimum essential coverage)—or its codification in a subsection of Section 5000A that is separate from Subsection (b)'s specification of the penalty imposed—mean that Subsection (a) prescribes a freestanding legal obli-

gation subject to challenge separate and apart from the penalty. To the contrary, Congress's understanding that Subsection (a) does not operate separately from the tax penalty associated with it is reflected later in Section 5000A, in the subsection specifying exemptions from the penalty, which refers to the "penalty imposed under *subsection (a)*." 26 U.S.C. 5000A(e) (emphasis added). And there is in any event no basis for concluding that the Congress that exempted individuals from the penalty because of their low income nonetheless intended the exempted individuals to be regarded as violators of a freestanding statutory requirement that they lack the resources to satisfy. Compare *New York* v. *United States*, 505 U.S. 144, 151, 170-171 (1992) (holding, in light of constitutional concerns, that statute providing that "[e]ach State shall be responsible for providing * * * for the disposal of * * * low-level radioactive waste," 42 U.S.C. 2021c(a)(1)(A), is not a "command to the States independent of the remainder of the Act," but instead must be read as part of an Act "compris[ing] sets of 'incentives,'" including through a federal tax).

The relevant question, then, is not whether a taxing statute uses mandatory terms, but instead what consequences flow from the operation of the provision as a whole. "Construed as a whole," *New York*, 505 U.S. at 170, Section 5000A describes tax consequences—and only tax consequences—for a taxpayer's failure to maintain insurance coverage for himself, or for applicable individuals for whom he is responsible. Respondents' attempt to describe their suit as challenging only a "requirement," and not the consequences that follow, therefore fails.

D. States Are Subject To The Limitations Of The Anti-Injunction Act On The Same Terms As Other Persons

State respondents, for their part, have argued that, if the AIA did apply to the minimum coverage provision, it still would not bar their suit, for two reasons: (1) because they are not "person[s]" subject to the Act, and (2) because they are "aggrieved parties for whom [Congress] has not provided an alternative remedy," *Regan*, 465 U.S. at 378. States Cert.-Stage Br. 14-18. Both assertions fail. Should the Court conclude that state respondents have standing and that the minimum coverage provision qualifies as a "tax" subject to the AIA, the Court should reject the States' argument for special treatment: States that wish to challenge federal tax law are subject to the AIA on the same terms as anyone else.

1. Because state respondents lack standing to challenge the minimum coverage provision, the Court need not consider their arguments for special treatment under the AIA

As an initial matter, the Court need not address state respondents' AIA arguments because their challenge fails for another fundamental reason: They lack standing to challenge the minimum coverage provision in the first place.

a. As the government has previously explained, see Gov't Severability Br. 16, a plaintiff seeking to invalidate a federal statute must demonstrate that it has suffered an injury in fact caused by the challenged statute and fairly redressable by a decision in its favor. See, *e.g.*, *Raines* v. *Byrd*, 521 U.S. 811, 818-820 (1997). The plaintiff must also satisfy established prudential standing rules, such as the rule barring reliance on the rights of

third parties. *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). These standing rules operate as an important check on using litigation as a forum for airing mere policy or political disagreements. See, *e.g.*, *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1441-1442, 1449 (2011).

State respondents fail to satisfy these basic requirements for invoking the courts' authority. The minimum coverage provision applies to individuals, not States. See 26 U.S.C. 5000A. As this Court has recognized, it is "'substantially more difficult'" for a plaintiff challenging "the government's allegedly unlawful regulation (or lack of regulation) of *someone else*" to establish Article III standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quoting *Allen* v. *Wright*, 468 U.S. 737, 758 (1984)). That is particularly true in cases involving the liability of third-party taxpayers. See, *e.g.*, *Allen*, 468 U.S. at 756-758; *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40-42 (1976); *Louisiana* v. *McAdoo*, 234 U.S. 627, 632 (1914). State respondents cannot meet that demanding standard here.

State respondents contend that, even though they are not subject to the minimum coverage provision, they are injured by the provision because it will lead "individuals who were previously eligible for Medicaid but declined to enroll" to do so. States Cert.-Stage Br. 16. That claimed injury does not establish standing. A State has suffered no legally cognizable injury if an eligible person applies for a benefit that a State has elected to provide (such as those available through a State's Medicaid program). See *Lujan*, 504 U.S. at 560 ("injury in fact" requires "an invasion of a *legally protected* interest") (emphasis added). State respondents do not claim that they have policies of discouraging eligible individu-

als from enrolling in Medicaid; to the contrary, States that elect to participate in Medicaid must ensure that "all individuals wishing to make application for medical assistance under the [State's Medicaid] plan shall have opportunity to do so." 42 U.S.C. 1396a(a)(8). And lead respondent Florida last year represented to the federal government that it "has a strong historical commitment to Medicaid outreach" and that it has taken a number of steps to encourage eligible individuals to enroll in the program. Florida Agency for Health Care Admin., *Florida KidCare Program: Amendment to Florida's Title XXI Child Health Insurance Plan Submitted to the Centers for Medicare and Medicaid Services* 17 (July 1, 2010).

b. State respondents have not in any event met the standards for prudential standing under the Internal Revenue Code, since they challenge the application of the penalty to others. The orderly administration and enforcement of the Code would be greatly undermined if a third party were permitted to challenge a tax or tax penalty or benefit applicable *to someone else* based on asserted indirect effects on the third party. And States have no standing to assert the "legal rights" of individuals to whom the minimum coverage provision does apply. *Warth*, 422 U.S. at 499. As a rule, a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004) (internal quotation marks and citation omitted). Although the Court has made an exception where the plaintiff can show "a 'close' relationship with the person who possesses the right" and "a 'hindrance' to the possessor's ability to protect his own interests," *id.* at 130 (citations omitted), neither criterion applies here.

States do not possess a "close relationship" with individuals to whom the minimum coverage provision applies. And as the presence of the individual respondents in this very case demonstrates, there is no hindrance to individuals' ability to challenge the minimum coverage provision.

c. Nor do the States have authority as *parens patriae* to challenge the minimum coverage provision on behalf of individuals to whom the provision applies. A State has no authority "to protect her citizens from the operation of federal statutes." *Massachusetts* v. *EPA*, 549 U.S. 497, 520 n.17 (2007) (internal quotation marks and citation omitted); see *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923) ("[I]t is no part of [the state's] duty or power to enforce [citizens'] rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as *parens patriae,* when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status."); accord *Virginia* v. *Sebelius*, 656 F.3d 253, 268-269 (4th Cir. 2011) (State lacked standing as *parens patriae* to challenge minimum coverage provision), petition for cert. pending, No. 11-420 (filed Sept. 30, 2011).

2. States are "persons" subject to the AIA

Should the Court reach the issue, the Court should reject state respondents' claim that they are beyond the reach of the AIA because they are not "person[s]" to whom the statute applies.

There is "no hard and fast rule" governing whether a State qualifies as a "person" for purposes of federal laws. *United States* v. *Cooper Corp.*, 312 U.S. 600, 604-

605 (1941); see *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989). In fact, "[i]t many times has been held that * * * a state is a 'person' within the meaning of statutory provisions applying only to persons." *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 91-92 (1934).[25] Whether "person" incorporates such a meaning in any given statute depends on context.

For almost a century after its enactment in 1867, the AIA contained no reference to "person[s]." See 1867 Act § 10, 14 Stat. 475 ("And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court."). This Court's cases contained no suggestion that States were not subject to the AIA on the same terms as other persons. Indeed, in *Allen* v. *Regents of the University System*, 304 U.S. 439 (1938), the Court declined to apply the AIA to a State, not because the State was excused from its restrictions, but on the different ground that the State's situation fell within the Court's then-existing precedents permitting suit in certain "exceptional cases." *Id.* at 449 (citing *Standard Nut Margarine*, 284 U.S. at 509).

The Court's cases did, however, make clear that States are "persons" to whom various other internal revenue laws apply. In *Ohio* v. *Helvering*, 292 U.S. 360 (1934), the Court held that a tax on "person[s]" selling

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[25] See, *e.g.*, *Jefferson County Pharm. Ass'n* v. *Abbott Labs.*, 460 U.S. 150, 155-157 (1983) (State is "person" that can be sued under Robinson-Patman Act, 15 U.S.C. 13(a) and (f)); *Georgia* v. *Evans*, 316 U.S. 159, 162 (1942) (State is "person" entitled to sue for treble damages under Sherman Act, 15 U.S.C. 7). Compare *Vermont Agency of Natural Res.* v. *United States*, 529 U.S. 765, 787 (2000) (State is not "person" subject to *qui tam* liability under False Claims Act, 31 U.S.C. 3729(a)); *Will*, 491 U.S. at 66 (State is not "person" that may be sued for damages under 42 U.S.C. 1983).

liquor in 26 U.S.C. 205 (1925)—"person" being defined to "include a partnership, association, company, or corporation, as well as a natural person," in 26 U.S.C. 11 (1925)[26]—applied to the State of Ohio as such a seller. The Court found "no merit in the * * * contention that a state is not embraced within the meaning of the word 'person,' as used in" Section 205. 292 U.S. at 370.

Similarly, in *Sims* v. *United States*, 359 U.S. 108, 112 (1959), the Court held that a State, like any other person who fails to honor a levy despite being in possession of a taxpayer's property upon which a levy has been made, is a "person" that may be held liable to the United States for the value of the property not so surrendered under 26 U.S.C. 6332(b) (Supp. V. 1957) (now codified as amended at 26 U.S.C. 6332(d)(1)). The Court reached that conclusion even though the definition of "person" in 26 U.S.C. 6332(c) (Supp. V. 1957) (now codified at 26 U.S.C. 6332(f)) did not refer to a State. Observing that "[i]t is clear that § 6332 is stated in all-inclusive terms of general application," the Court held that it is "plain that Congress intended to and did include States within the term 'person' as used in § 6332." *Ibid.*

The AIA's reference to "any person" was added in 1966, after the decisions of this Court discussed above, in apparent response to questions that had arisen in suits brought by nontaxpayers whose property had been wrongfully levied upon. *Priority of Federal Tax Liens and Levies: Hearings on H.R. 11256 and H.R. 11290 Before the House Comm. on Ways & Means*, 89th Cong., 2d Sess. 58 (1966) (*House Hearing*) (statement of Stanley S. Surrey, Assistant Sec'y of the Treasury); see, *e.g.*,

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[26] A similar definition of "person" appears in the current version of the Code. 26 U.S.C. 7701(a)(1).

Tomlinson v. *Smith*, 128 F.2d 808, 811 (7th Cir. 1942). To provide a remedy to third parties in that situation, Congress created a suit for wrongful levy by "persons other than taxpayers." *House Hearing* 58; Federal Tax Lien Act of 1966 (FTLA), Pub. L. No. 89-719, § 110(a), 80 Stat. 1142; see 26 U.S.C. 7426. At the same time, Congress amended the AIA, not only to make an express exception to the Act's proscription where a wrongful levy would irreparably injure the nontaxpayer's superior rights in property, but to emphasize that the AIA's bar applies to suits "by any person, whether or not such person is the person against whom such tax was assessed." FTLA § 110(c), 80 Stat. 1144; see 26 U.S.C. 7426(b)(1). See generally *Regan*, 465 U.S. at 388-390 (O'Connor, J., concurring in the judgment). As this Court has explained, the 1966 amendment to the AIA was intended to "reaffirm[] the plain meaning of the original language of the Act." *Americans United*, 416 U.S. at 760 & n.11; see also *Bob Jones Univ.*, 416 U.S. at 732 n.6 (the change was "declaratory, not innovative"). The history of the 1966 amendment makes clear that Congress added the phrase beginning with "by any person" to make clear that it *extends* to third parties—such as state respondents in this case—and not to narrow the AIA to *exclude* States.

State respondents contend that none of these precedents should have force here, because a plain statement should be required to include States in a provision that would alter the ordinary constitutional balance. States Cert.-Stage Br. 14-15. But this Court has already concluded in *Ohio* and *Sims* that the internal revenue laws apply to States as "persons." And in any event, applying the AIA to the States does not upset the federal-state balance. This is not a case in which the Court is asked

to determine whether a State is subject to suit by private persons under a federal statute—a context in which the Court has required a clear statement. See, *e.g.*, *Vermont Agency of Natural Res.* v. *United States*, 529 U.S. 765, 787 (2000). This case instead involves a suit by States *against the United States*. Under the Supremacy Clause and rules governing federal sovereign immunity, no principle of federalism is implicated by applying to States a generally applicable bar on pre-enforcement tax challenges. Cf. *Block* v. *North Dakota*, 461 U.S. 273, 289 (1983) (generally applicable statute of limitations on suits against United States under Quiet Title Act, 28 U.S.C. 2409(a) (1982), applies equally to state plaintiffs).

3. ***State respondents are not entitled to challenge the minimum coverage provision under*** **South Carolina *v.* Regan**

Finally, should this Court conclude that the AIA bars private respondents' challenge to the minimum coverage provision, this Court's decision in *South Carolina* v. *Regan*, provides no basis for allowing state respondents' challenge to go forward.

In that case, South Carolina sought leave to file an original action in this Court to enjoin enforcement of 26 U.S.C. 103(j)(1) (1982) (repealed 1986), which provided that interest on certain obligations issued in bearer, rather than registered, form was taxable. The State contended that Section 103(j)(1) interfered with its sovereign power to raise money by issuing tax-exempt bonds, in violation of the Tenth Amendment and asserted intergovernmental immunity. The State could not file a refund action itself, however, because the tax on unregistered bonds fell on the bondholder, not the State. *Regan*, 465 U.S. at 379-380.

The Court rejected the federal government's argument that the State should obtain judicial review by issuing bearer bonds and urging a friendly purchaser of the bonds to contest the validity of Section 103(j)(1). *Regan*, 465 U.S. at 380-381. In the Court's view, that was not a satisfactory alternative mechanism, because it was "by no means certain that the State would be able to convince a taxpayer to raise its claims," and, moreover, "instances in which a third party may raise the constitutional rights of another are the exception rather than the rule." *Id.* at 380. Instead, the Court held that the AIA did not preclude the suit, reasoning that "the Act's purposes and the circumstances of its enactment[] demonstrate that * * * the Act was intended to apply only when Congress has provided an alternative avenue for an aggrieved party to litigate its claims on its own behalf." *Id.* at 381.

Regan was, as this Court has noted, a "unique suit," *Winn*, 542 U.S. at 104 n.6, and rarely since have courts found occasion to apply the rule announced in that case, see, *e.g.*, *Judicial Watch, Inc.* v. *Rossotti*, 317 F.3d 401, 408 n.3 (4th Cir.) ("Because of the strong policy animating the Anti-Injunction Act, and the sympathetic, almost unique, facts in *Regan*, courts have construed the *Regan* exception very narrowly."), cert. denied, 540 U.S. 825 (2003). Because third parties generally lack standing to litigate the tax liabilities of others, it would be exceedingly rare for a person to be "aggrieved" in the sense used in *Regan*, or in any cognizable sense, by any tax to be paid by someone else.

Unlike South Carolina in *Regan*, state respondents in this case are not "aggrieved part[ies]." South Carolina challenged a statute that allegedly infringed its power to borrow funds in violation of its Tenth Amend-

ment rights. As explained above, see pp. 42-44, *supra*, state respondents here can claim no similar injury to their own rights as a result of the minimum coverage provision, because that provision applies only to individuals. The States thus are necessarily seeking to invoke the rights of third parties, which they cannot do here. See pp. 44-45, *supra*.

Should this Court determine that the AIA otherwise bars private respondents' challenge, there is no reason to permit the States' challenge alone to go forward. State respondents have no legitimate interest in circumventing the AIA when the actual taxpayers, whose asserted rights and interests are at stake, could not.

CONCLUSION

The Court should hold that the suit brought by respondents to challenge the minimum coverage provision is not barred by the Anti-Injunction Act.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JOHN A. DICICCO
Principal Deputy Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

LEONDRA R. KRUGER
Assistant to the Solicitor General

MARK B. STERN
ALISA B. KLEIN
JOEL MCELVAIN
Attorneys

GEORGE W. MADISON
General Counsel
Department of the Treasury

M. PATRICIA SMITH
Solicitor of Labor
Department of Labor

WILLIAM B. SCHULTZ
Acting General Counsel

KENNETH Y. CHOE
Deputy General Counsel
Department of Health and Human Services

FEBRUARY 2012

APPENDIX

1. 26 U.S.C. 5000A (Supp. IV 2010) provides:

Requirement to maintain minimum essential coverage

(a) Requirement to maintain minimum essential coverage

An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

(b) Shared responsibility payment

(1) In general

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

(2) Inclusion with return

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

(3) Payment of penalty

If an individual with respect to whom a penalty is imposed by this section for any month—

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

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

(c) Amount of penalty

(1) In general

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

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

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

(2) Monthly penalty amounts

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

(A) Flat dollar amount

An amount equal to the lesser of—

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

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

(B) Percentage of income

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

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

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

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

(3) Applicable dollar amount

For purposes of paragraph (1)—

(A) In general

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

(B) Phase in

The applicable dollar amount is $95 for 2014 and $325 for 2015.

(C) Special rule for individuals under age 18

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

(D) Indexing of amount

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

(i) $695, multiplied by

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

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

(4) Terms relating to income and families.

For purposes of this section—

(A) Family size

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

(B) Household income

The term "household income" means, with respect to any taxpayer for any taxable year, an amount equal to the sum of—

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

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

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

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

(C) Modified adjusted gross income

The term "modified adjusted gross income" means adjusted gross income increased by—

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

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

(d) Applicable individual

For purposes of this section—

(1) In general

The term "applicable individual" means, with respect to any month, an individual other than an individual described in paragraph (2), (3), or (4).

(2) Religious exemptions

(A) Religious conscience exemption

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

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

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

(B) Health care sharing ministry

(i) In general

Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

(ii) Health care sharing ministry

The term "health care sharing ministry" means an organization—

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

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

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

(IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and

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

(3) Individuals not lawfully present

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

(4) Incarcerated individuals

Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

(e) Exemptions

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

(1) Individuals who cannot afford coverage

(A) In general

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

(B) Required contribution

For purposes of this paragraph, the term "required contribution" means—

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

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

(C) Special rules for individuals related to employees

For purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination under subparagraph (A) shall be made by reference to[1] required contribution of the employee.

(D) Indexing

In the case of plan years beginning in any calendar year after 2014, subparagraph (A) shall be ap-

[1] So in original. Probably should be followed by "the".

plied by substituting for "8 percent" the percentage the Secretary of Health and Human Services determines reflects the excess of the rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period.

(2) Taxpayers with income below filing threshold

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

(3) Members of Indian tribes

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

(4) Months during short coverage gaps.

(A) In general

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

(B) Special rules

For purposes of applying this paragraph—

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

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

(iii) if there is more than 1 continuous period described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph shall only apply to months in the first of such periods.

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

(5) Hardships.

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

(f) Minimum essential coverage

For purposes of this section—

(1) In general

The term "minimum essential coverage" means any of the following:

(A) Government sponsored programs

Coverage under—

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

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

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

(iv) medical coverage under chapter 55 of title 10, United States Code, including coverage under the TRICARE program;[2]

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

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

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

(B) Employer-sponsored plan

Coverage under an eligible employer-sponsored plan.

(C) Plans in the individual market

Coverage under a health plan offered in the individual market within a State.

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[2] So in original. The semicolon probably should be a comma.

(D) Grandfathered health plan

Coverage under a grandfathered health plan.

(E) Other coverage

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

(2) Eligible employer-sponsored plan.

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

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

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

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

(3) Excepted benefits not treated as minimum essential coverage.

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

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

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

(4) Individuals residing outside United States or residents of territories

Any applicable individual shall be treated as having minimum essential coverage for any month—

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

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

(5) Insurance-related terms

Any term used in this section which is also used in title I of the Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

(g) Administration and procedure.—

(1) In general

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

(2) Special rules

Notwithstanding any other provision of law—

(A) Waiver of criminal penalties

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

(B) Limitations on liens and levies

The Secretary shall not—

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

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

2. 26 U.S.C. 6201(a) provides in pertinent part:

Assessment authority

(a) Authority of Secretary

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

* * * * *

3. 26 U.S.C. 6671(a) provides:

Rules for application of assessable penalties

(a) Penalty assessed as tax

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

4. 26 U.S.C. 7421 provides:

Prohibition of suits to restrain assessment or collection

(a) Tax

Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

(b) Liability of transferee or fiduciary

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

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

(2) the amount of the liability of a fiduciary under section 3713(b) of title 31, United States Code[3] in respect of any such tax.

5. 26 U.S.C. 7422(a) provides:

Civil actions for refund

(a) No suit prior to filing claim for refund

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

6. 28 U.S.C. 1341 provides:

Taxes by States

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

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[3] So in original. Probably should be followed by a comma.

7. Subchapter B of Chapter 34 of the Internal Revenue Code, 26 U.S.C. 4375-4377 (Supp. IV 2010), provides in pertinent part:

Insured and Self-Insured Health Plans

* * * * *

§ 4375. Health insurance

(a) Imposition of fee

There is hereby imposed on each specified health insurance policy for each policy year ending after September 30, 2012, a fee equal to the product of $2 ($1 in the case of policy years ending during fiscal year 2013) multiplied by the average number of lives covered under the policy.

* * * * *

§ 4376. Self-insured health plans

(a) Imposition of fee

In the case of any applicable self-insured health plan for each plan year ending after September 30, 2012, there is hereby imposed a fee equal to $2 ($1 in the case of plan years ending during fiscal year 2013) multiplied by the average number of lives covered under the plan.

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§ 4377. Definitions and special rules

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(c) Treatment as tax

For purposes of subtitle F, the fees imposed by this subchapter shall be treated as if they were taxes.

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8. Section 9008 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 859, provides in pertinent part:

IMPOSITION OF ANNUAL FEE ON BRANDED PRESCRIPTION PHARMACEUTICAL MANUFACTURERS AND IMPORTERS.

(a) IMPOSITION OF FEE.—

(1) IN GENERAL.—Each covered entity engaged in the business of manufacturing or importing branded prescription drugs shall pay to the Secretary of the Treasury not later than the annual payment date of each calendar year beginning after 2009 a fee in an amount determined under subsection (b).

* * * * *

(f) TAX TREATMENT OF FEES.—The fees imposed by this section—

(1) for purposes of subtitle F of the Internal Revenue Code of 1986, shall be treated as excise taxes with respect to which only civil actions for refund under procedures of such subtitle shall apply, and

(2) for purposes of section 275 of such Code, shall be considered to be a tax described in section 275(a)(6).

* * * * *

9. Section 9010 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 865, provides in pertinent part:

IMPOSITION OF ANNUAL FEE ON HEALTH INSURANCE PROVIDERS.

(a) IMPOSITION OF FEE.—

(1) IN GENERAL.—Each covered entity engaged in the business of providing health insurance shall pay to the Secretary not later than the annual payment date of each calendar year beginning after 2009 a fee in an amount determined under subsection (b).

* * * * *

(f) TAX TREATMENT OF FEES.—The fees imposed by this section—

(1) for purposes of subtitle F of the Internal Revenue Code of 1986, shall be treated as excise taxes with respect to which only civil actions for refund under procedures of such subtitle shall apply, and

(2) for purposes of section 275 of such Code shall be considered to be a tax described in section 275(a)(6).

(g) REPORTING REQUIREMENT.—

(1) IN GENERAL.—Not later than the date determined by the Secretary following the end of any calendar year, each covered entity shall report to the Secretary, in such manner as the Secretary prescribes, the covered entity's net premiums written with respect to health insurance for any United States health risk and third party administration agreement fees for such calendar year.

(2) PENALTY FOR FAILURE TO REPORT.—

(A) IN GENERAL.—In the case of any failure to make a report containing the information required by paragraph (1) on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause, there shall be paid by the covered entity failing to file such report, an amount equal to—

(i) $10,000, plus

(ii) the lesser of—

(I) an amount equal to $1,000, multiplied by the number of days during which such failure continues, or

(II) the amount of the fee imposed by this section for which such report was required.

(B) TREATMENT OF PENALTY.—The penalty imposed under subparagraph (A)—

(i) shall be treated as a penalty for purposes of subtitle F of the Internal Revenue Code of 1986,

(ii) shall be paid on notice and demand by the Secretary and in the same manner as tax under such Code, and

(iii) with respect to which only civil actions for refund under procedures of such subtitle F shall apply.

* * * * *