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

REPLY BRIEF FOR PETITIONERS
(Anti-Injunction Act)

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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The minimum coverage provision of the Patient Protection and Affordable Care Act (Affordable Care Act or Act)[1]—which is contained in the Internal Revenue Code and imposes only tax consequences for failure to maintain minimum coverage—represents a constitutional exercise of Congress's taxing power as well as its power to regulate commerce. Gov't Minimum Coverage Br. 52-62. In this instance, as in myriad others, Congress has implemented its constitutional powers through the highly reticulated provisions of the Internal Revenue Code that provide for monetary exactions and various

[1] Pub. L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

credits, deductions, and exemptions, as well as detailed conditions or requirements for their application. For purposes of assessing the minimum coverage provision's constitutionality under the Tax Clause, it is immaterial whether Congress has chosen to identify a particular component in the calculation of liability under the Code as a tax, addition to tax, credit, deduction, exemption—or, here, a "penalty," calibrated to income and reported on a taxpayer's income tax return. Because the provision is embedded in the Code's tax system, and will raise substantial revenues, it is—and should be interpreted as—a constitutional exercise of Congress's powers under the Tax Clause irrespective of the label Congress has chosen. See *New York* v. *United States*, 505 U.S. 144, 170-171 (1992); *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471-472 (1867).

But the fact that the minimum coverage provision is a constitutional exercise of Congress's taxing power does not compel the conclusion that the Anti-Injunction Act (AIA), 26 U.S.C. 7421(a),[2] bars this suit. To resolve questions of statutory interpretation under the Internal Revenue Code itself, such as the applicability of the AIA, it is necessary to adhere closely to the specific text and structure of the provisions within the Code. Here, the text and structure of the Code, and of the minimum coverage provision in particular, establish that the AIA does not apply to respondents' claims.

The AIA bars suits "for the purpose of restraining the assessment or collection of any *tax*." 26 U.S.C. 7421(a) (emphasis added). The payment for failure to maintain minimum essential coverage is characterized

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

in the Act as a "penalty," rather than a "tax." For statutory purposes under the Internal Revenue Code, of which the AIA is a part, a "penalty" is not the same thing as a "tax." To be sure, Congress specified in 26 U.S.C. 5000A(g) that the minimum coverage penalty is to be assessed and collected in the same manner as assessable penalties under Subchapter B of Chapter 68—which are, in turn, assessed and collected in the same manner as taxes, 26 U.S.C. 6671(a). But Congress did not provide, as it did in Section 6671(a) and other provisions of the Code, that the penalty is itself to be deemed a "tax" for AIA purposes. The procedural instruction to the Secretary of the Treasury to assess and collect the minimum coverage penalty in the same manner as a tax is not a directive to *courts* dictating that the AIA bars adjudication of suits like respondents' challenge to Section 5000A. See Gov't AIA Br. 20-38.

Respondents agree that, under this statutory analysis advanced by the government, the AIA does not bar their challenge to the minimum coverage provision. The Court should so hold, and there is no need for it to proceed further. Respondents nonetheless make a series of additional, broader arguments against application of the AIA. These arguments lack merit.

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

Respondents contend (NFIB Br. 41-58; States Br. 13-25)[3] that this Court need not even consider whether the AIA applies in this case because the parties agree that it does not. The AIA is, however, a jurisdictional

[3] All references to NFIB Br. and States Br. are to the briefs of those parties on the Anti-Injunction Act.

limit on the courts' authority to hear pre-enforcement challenges to federal taxes. The Court therefore has an "independent obligation to ensure" that the AIA does not bar the exercise of jurisdiction in this case. *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011).

1. The AIA provides that, with certain exceptions not relevant here, "no suit" to restrain the assessment or collection of taxes "shall be maintained in any court by any person." 26 U.S.C. 7421(a). This language, barring the very "maint[enance]" of pre-enforcement tax challenges, is a mandatory "prescription[] delineating the classes of cases (subject-matter jurisdiction) * * * falling within a court's adjudicatory capacity." *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004). It makes perfect sense that Congress would have intended to impose a firm jurisdictional bar: the AIA's purpose is to foreclose impediments to the prompt and efficient assessment and collection of taxes on which the government's operations depend. See Gov't AIA Br. 8-20.

Respondents contend that the AIA is not jurisdictional because the statute does not include the word "jurisdiction," and because its text is not "addressed to courts, but is instead addressed to litigants," referring to the maintenance of a suit "*in* any court *by* any person," rather than "*by* any court." States Br. 14-15; see NFIB Br. 43-44. That contention is incorrect.

This Court has repeatedly held that a statute may be jurisdictional even when it neither includes the term "jurisdiction" nor explicitly speaks of the power of the courts to hear the case. Section 2253(c)(1) of Title 28, for example, provides: "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals." Although that statute, like the AIA, might appear to be addressed to litigants rather than the courts, this Court has concluded that Section 2253(c)(1) speaks in "'clear' jurisdictional language," establishing by its "plain terms" that "'until a [certificate of appealability] has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.'" *Gonzalez* v. *Thaler*, 132 S. Ct. 641, 649 (2012) (quoting *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003)). This Court has similarly held that 28 U.S.C. 2101(c), which provides that an appeal or writ of certiorari to this Court in a civil action "shall be taken or applied for within ninety days" after the lower court's judgment, imposes a limitation on this Court's jurisdiction. See, *e.g.*, *Bowles* v. *Russell*, 551 U.S. 205, 211-212 (2007).

Respondents' contention that the AIA is a claims-processing rule, rather than a jurisdictional limit, rests on an erroneous assumption that a statute that "direct[s] certain litigants to statutorily provided refund actions" cannot be jurisdictional. States Br. 15; see NFIB Br. 45-46. This Court has held that the statute restricting tax refund actions, which is worded almost identically to the AIA, is jurisdictional. See 26 U.S.C. 7422(a) ("No suit or proceeding shall be maintained in any court for the recovery of [any tax, penalty, or sum] * * * until a claim for refund or credit has been duly filed with the Secretary."); *United States* v. *Dalm*, 494 U.S. 596, 608-610 (1990) (holding that Section 7422(a) is jurisdictional). Section 7422(a) and the AIA share a common origin and are designed to work together to preclude disruption of the efficient collection of tax revenues. See Gov't AIA Br. 12-13. There is no reason to believe that Congress would have ranked Section 7422(a) as jurisdictional, while relegating the materially identical AIA to the status of a claims-processing rule.

The structure of the Code's tax-refund provisions similarly refute respondents' arguments that the AIA cannot be jurisdictional because it is located in Title 26 rather than Title 28 of the United States Code, or because it contains a number of statutory exceptions. States Br. 15-16; NFIB Br. 43-45 & n.6. Both the AIA and the tax refund restriction were enacted long before the organization of the present-day United States Code. See Gov't AIA Br. 10 & n.6. That the AIA was placed in Title 26 rather than Title 28 is unsurprising, given that the AIA applies to suits concerning taxes imposed under the Internal Revenue Code but not to suits concerning exactions imposed under other statutes. See 26 U.S.C. 7851(a)(6)(A) (providing that "[t]he provisions of subtitle F," 26 U.S.C. 6001 *et seq.*, in which the AIA appears, "shall be applicable with respect to any tax imposed by this title.").[4] Congress's amendments of the AIA to create specific statutory exceptions reinforce the conclusion that the AIA's bar is a jurisdictional limitation because those exceptions are typically framed in jurisdictional terms. See Gov't AIA Br. 14-15 & n.8; cf. *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997).

2. For essentially the same reasons, respondents' efforts (NFIB Br. 46-47; States Br. 16) to distinguish the AIA from the concededly jurisdictional Tax Injunction Act (TIA), 28 U.S.C. 1341, are unavailing. Given that Congress "modeled the Tax Injunction Act" on the AIA, *Jefferson County* v. *Acker*, 527 U.S. 423, 434 (1999), there is no basis for concluding that Congress ranked the latter statute as jurisdictional but not the

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[4] Title 26, moreover, contains other jurisdictional provisions. See, *e.g.*, 26 U.S.C. 7402 (governing district court jurisdiction in civil actions by United States), 7482(a)(1) (granting the courts of appeals exclusive jurisdiction to review Tax Court decisions).

former. Although respondents contend that the TIA's location in Title 28 and its reference to "district courts" manifest such an intent, see States Br. 16, the only meaningful difference between the two statutes points in the opposite direction: While the TIA does not apply if "a plain, speedy and efficient remedy" cannot be had in state court, 28 U.S.C. 1341, the AIA contains no such exception, see *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 6 (1962). It is thus the AIA, not the TIA, that imposes the "more stringent" limitation on federal-court authority. NFIB Br. 47.

3. Respondents err in contending (NFIB Br. 48-57; States Br. 18-25) that this Court has treated the AIA as non-jurisdictional by fashioning "equitable exceptions" to it.

As the government has previously explained (Gov't AIA Br. 18-19), the Court did at one time view 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." *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932). But the Court arrived at that approach as a matter of statutory construction, not as a direct exercise of equitable authority. *Id.* at 509-510.

The Court later reconsidered that approach and narrowed the "special and extraordinary circumstances" under which injunctive relief could issue to situations in which it is "clear that under no circumstances could the Government prevail" on its tax claim. *Williams Packing*, 370 U.S. at 7. And as in *Standard Nut*, the Court in *Williams Packing* rooted that rule in the text and purpose of the AIA, rather than in the exercise of equitable authority to fashion judicial exceptions. See *ibid.*; Gov't

AIA Br. 15-16. Indeed, the Court was quite clear that the AIA "withdraw[s] jurisdiction" from the courts, and that where it applies, the district court "is without jurisdiction, and the complaint must be dismissed." *Williams Packing*, 370 U.S. at 5, 7.

As respondents note (NFIB Br. 54-55), the Court has since described the *Williams Packing* rule as prescribing a route by which the "literal terms of § 7421(a) [can] be avoided." *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 737 (1974). But that simply means that as a matter of statutory construction, the literal terms of the jurisdictional provision do not bar suit when the government's position is wholly insubstantial. Compare *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006), and *Bob Jones Univ.*, 416 U.S. at 742.[5] And this Court not infrequently interprets statutes in a manner that departs from their "literal" meaning, in light of their text, purpose, and relevant context. See, *e.g.*, *American Needle, Inc.* v. *National Football League*, 130 S. Ct. 2201, 2208 (2010); *Parker* v. *Flook*, 437 U.S. 584, 589 (1978).

The same is true of the result in *South Carolina* v. *Regan*, 465 U.S. 367 (1984), which permitted an aggrieved party—a State whose own constitutional rights

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[5] The Court in *Bob Jones* rejected the petitioner's contention that *Williams Packing* "does not constitute an all-encompassing reading of the Act," and that Section 7421(a) "is subject to judicially created exceptions other than the 'under no circumstances' test announced in *Williams Packing*." 416 U.S. at 742. Private respondents argue that, if the Court had believed *Williams Packing* was not a "judicially created exception[]," but "instead a permissible construction of the AIA's text in light of its purpose, then surely it would have said so." NFIB Br. 54 (citation omitted). But the Court effectively said just that when it rejected the petitioner's argument on the ground that *Williams Packing* represented "the capstone to judicial construction of the Act." *Bob Jones Univ.*, 416 U.S. at 742.

allegedly were violated by a tax provision—to challenge the provision because the State lacked an alternative remedy. *Id.* at 373. The Court rested its decision not on a supposed equitable discretion to create judicial exceptions to the AIA's bar, but instead on its review of the "Act's purpose and the circumstances of its enactment." *Id.* at 378. The jurisdictional status of a statutory bar 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).

4. Finally, respondents err in relying (NFIB Br. 49; States Br. 22) on *Helvering* v. *Davis*, 301 U.S. 619 (1937). As previously noted, *Davis* was the product of a short-lived era when the Court saw the AIA as merely "declaratory" of pre-existing equitable principles, *Standard Nut*, 284 U.S. at 509, a view the Court has long since repudiated. See p. 7, *supra*; Gov't AIA Br. 17-20. Although Congress certainly has the power to enact a jurisdictional statute that allows an affirmative and explicit waiver by the government, cf. 28 U.S.C. 1604, 1605(a)(1) (Foreign Sovereign Immunities Act provision permitting district courts to exercise jurisdiction if foreign sovereign waives immunity), the Court's decisions in *Williams Packing* and subsequent cases cast considerable doubt on the result in *Davis*. In any event, any inferences that might be drawn from the result in *Davis* do not detract from the AIA's text, purpose, and history, all of which demonstrate that the AIA's statutory bar to pre-enforcement tax challenges is jurisdictional.

B. If The Court Concludes That The AIA Otherwise Applies, Respondents Cannot Circumvent It By Recharacterizing Their Challenge As Directed To A "Requirement" To Maintain Minimum Essential Coverage

Respondents argue (NFIB Br. 10-25; States Br. 43-48) that the AIA does not apply because they are challenging only the "requirement" that non-exempted individuals maintain minimum essential coverage, and not the penalty that results from a failure to do so. Respondents cannot avoid the AIA on that rationale if the Court concludes that the AIA otherwise applies.

1. To make this argument, respondents mischaracterize their own complaint, which—as the government previously noted (Gov't AIA Br. 38-39)—explicitly asked the district court to enjoin operation of the minimum coverage provision, necessarily including the tax penalty.

Private respondents urge (NFIB Br. 16) the Court to disregard their prayer for relief because the district court granted only a declaratory judgment. But jurisdiction is determined at the outset of litigation, and respondents' complaint plainly evinces a "purpose" to enjoin collection of the tax penalty. Moreover, the district court granted a declaratory judgment on the understanding that it was "the functional equivalent of an injunction." Pet. App. 364a (citation omitted). This Court has noted that "there is 'little practical difference between an injunction and anticipatory relief in the form of a declaratory judgment'" against a taxing statute. *Jefferson County*, 527 U.S. at 433 (citation omitted). For this reason, Congress added the tax exception to the Declaratory Judgment Act shortly after it was enacted, "thus reaffirming the restrictions set out in the [AIA]." *Bob Jones Univ.*, 416 U.S. at 732 n.7.

2. Respondents' argument also rests on the misconception that there is a material difference between a suit "for the purpose of" restraining the shared responsibility payment under Section 5000A and a suit "for the purpose of" restraining the "requirement" to maintain minimum essential coverage. There is in fact no material difference between the two.

It is not uncommon for statutes enacted pursuant to Congress's taxing power to describe actions that a taxpayer "shall" perform in one section, and to describe the tax consequences of nonperformance in another section. See, *e.g.*, 26 U.S.C. 6012 (certain individuals "shall" make income tax returns); 26 U.S.C. 6651(a) (additions to tax for failure to file return). This Court has long resisted efforts to isolate the predicates for liability from their tax consequences, and instead has construed such statutes as a whole. See, *e.g.*, *New York*, 505 U.S. at 170-171.

The *License Tax Cases*, *supra*, for example, involved a statute providing that "no person * * * shall be engaged in, prosecute, or carry on any trade, business, or profession [involving, *inter alia*, selling lottery tickets and liquor] until he * * * shall have obtained a license thereof" from the federal government. Act of June 30, 1864, ch. 173, § 71, 13 Stat. 248. An entirely different section required payment of specified sums to obtain the required license. See *id.* § 79, 13 Stat. 251. The Court concluded that, when read in context, "[t]he granting of a license" by Section 71 of the Act "must be regarded as nothing more than a mere form of imposing a tax" under Section 79. *License Tax Cases*, 72 U.S. (5 Wall.) at 471. The Court noted that Congress had long structured revenue statutes in this way. See *id.* at 472 (describing Act of June 5, 1794, ch. 48, § 2, 1 Stat. 377, which required "retail dealer[s] in wines, or foreign distilled spirituous liquors," to obtain licenses, "merely as a convenient mode of imposing taxes").

Similarly, Section 5000A(a)'s "requirement" to maintain minimum coverage cannot be viewed in isolation from the remainder of the provision. There is no consequence for the failure to maintain minimum coverage other than the shared responsibility payment in Section 5000A(b). See Gov't Minimum Coverage Br. 60-61; Gov't AIA Br. 39-40. Any challenge to enforcement of the minimum coverage provision is thus necessarily a challenge to that penalty. If the payment were a "tax" for statutory purposes including the AIA (but see Gov't AIA Br. 20-38), respondents' challenge would be barred.[6]

3. Respondents note that Section 5000A includes exemptions to the definition of an "applicable individual" who is subject to Section 5000A(a), see 26 U.S.C. 5000A(d), and textually separate exemptions to the shared responsibility payment established by Section 5000A(b), see 26 U.S.C. 5000A(e). See States Br. 44. They thus posit that an individual's "exemption from the penalty does not obviate the need to comply with the mandate." *Ibid.* But far from establishing the existence of a freestanding "mandate" independent of the tax penalty, the structure of Section 5000A establishes that it is to be read as a whole.

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[6] Private respondents thus fail in their attempt (NFIB Br. 13-14) to analogize the minimum coverage provision to the penalty for failure to comply with certain EPA diesel-fuel regulations. A person who violates those regulations is subject not only to the $10,000 assessable penalty under 26 U.S.C. 6720A, but also to civil enforcement by EPA, including fines of up to $25,000 per day. See 42 U.S.C. 7545(d)(1); 40 C.F.R. 80.610(a)(1). That regulatory requirement is thus freestanding in a way that Section 5000A(a) is not.

In Subsection 5000A(e), for example, Congress provided exemptions from the penalty for individuals who "cannot afford coverage," 26 U.S.C. 5000A(e)(1), or who have been "determined by the Secretary of [HHS] * * * to have suffered a hardship with respect to the capability to obtain coverage," 26 U.S.C. 5000A(e)(5). In their assertion that Section 5000A(a) has independent legal force, respondents attribute to Congress an intention to brand those who qualify for the Section 5000A(e) exemptions as scofflaws, even as it recognized their inability to afford coverage or their hardship in obtaining it. The Court should not read an exercise of Congress's taxing power to produce such a consequence.

Other provisions of the Act confirm that Section 5000A should be read as an integrated whole. For example, the Act provides that an individual with a "certification * * * that the individual is exempt from the requirement under Section 5000A * * * by reason of * * * section 5000A(e)(1) of such Code (relating to individuals without affordable coverage); or * * * section 5000A(e)(5) of such Code (relating to individuals with hardships)," is eligible to enroll in a special catastrophic insurance plan. 42 U.S.C.A. 18022(e)(2)(B) (Supp. 2011). In this provision, Congress expressly characterized penalty exemptions in Section 5000A(e) as exemptions from "the requirement under Section 5000A," *ibid.*, demonstrating that exemptions from the penalty and from the definition of "applicable individual" generally have the same legal effect. Likewise, Congress provided for issuance of a single, all-purpose "certification of exemption" "from the individual requirement or from the penalty imposed" by Section 5000A. 42 U.S.C.A. 18031(d)(4)(H), 18081(a)(4), (b)(5) and (e)(2)(B) (Supp. 2011).

Therefore, if this Court were to determine that the minimum coverage penalty otherwise qualifies as a "tax" within the meaning of the AIA, respondents' challenge must necessarily await a refund suit. Nothing in Section 5000A would prevent individuals who wished to challenge that provision from declining to obtain insurance, paying the penalty, and seeking a refund. Cf. NFIB Br. 22; States Br. 45-46. That is true regardless of whether the individual respondents in this case plan to obtain minimum coverage; "[a] taxpayer cannot render an available review procedure an inadequate remedy at law by voluntarily foregoing it." *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 762 n.13 (1974). Respondents make a great deal out of the choice the individual respondents will face if they cannot adjudicate their claims now. But the reality is that they will face no legal or practical consequences (apart from the risk of remaining without health coverage) should they choose to forgo coverage in 2014, pay a tax penalty instead, and then seek a refund. And in any event, it is not uncommon, and is fully consistent with due process, to allow for a challenge to a law only in the context of the assessment of a sanction or other consequence for a failure to comply. See, *e.g.*, *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207-212 (1994); *Bob Jones Univ.*, 416 U.S. at 746-748.

4. Because Section 5000A does not make the failure to maintain health coverage independently unlawful, respondents' observation that a "punishment for an unlawful act" is not a "tax" for constitutional purposes is beside the point. NFIB Br. 27 (quoting *United States* v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996)); see *id.* at 26-28; States Br. 44.

Nor can the minimum coverage penalty plausibly be described as punitive—*i.e.*, as an "illegal penalt[y] in the nature of punishment for a criminal offense" for which pre-enforcement review might otherwise be justified under the AIA. *Graham* v. *du Pont*, 262 U.S. 234, 257 (1923); *Bob Jones Univ.*, 416 U.S. at 743; see *Seven-Sky*, 661 F.3d at 43 n.31, 48 n.37 (Kavanaugh, J., dissenting). Section 5000A forbids criminal prosecution for failure to pay the penalty. 26 U.S.C. 5000A(g)(2)(A). Instead, the Secretary gives notice and demand to the taxpayer, 26 U.S.C. 5000A(g)(1), and payment is to be "assessed and collected" in the same manner as taxes, 26 U.S.C. 5000A(g)(1), 6671(a), subject to limitations on notices of lien or levies on taxpayer property, 26 U.S.C. 5000A(g)(2)(B). "That Congress provided a distinctly civil procedure for the collection of [the § 5000A penalty] indicates clearly that it intended a civil, not a criminal, sanction." *Helvering* v. *Mitchell*, 303 U.S. 391, 402 (1938).

Above a floor, the penalty is proportional to income, and it cannot exceed the cost of qualifying insurance. 26 U.S.C. 5000A(c)(1)(B). Further, the penalty is pro-rated to apply only to those months in which the taxpayer lacks qualifying insurance. 26 U.S.C. 5000A(b)(1) and (c)(2). And unlike a punitive sanction, it has a hardship exemption. 26 U.S.C. 5000A(e)(5). These limits show that Congress intended to provide an incentive to obtain health coverage, not to impose a disproportionate sanction that could plausibly be regarded as punishment. As there is a "rational foundation" for the amount of the penalty, it has a "civil character." *United States* v. *Sanchez*, 340 U.S. 42, 45 (1950).

C. The State Respondents Are Subject To The Limitations Of The AIA On The Same Terms As Other Persons

Should this Court conclude that the minimum coverage penalty is a "tax" within the meaning of the AIA, state respondents cannot circumvent that statutory bar by seeking special treatment.

1. As an initial matter, the Court need not reach state respondents' AIA arguments because they lack standing to challenge the minimum coverage provision.

The States contend that they have standing because the provision will "forc[e] currently eligible but unenrolled individuals to enroll" in Medicaid, thereby purportedly increasing the States' Medicaid expenditures. States Br. 27. But the minimum coverage provision does not "forc[e]" anyone to maintain minimum coverage, much less does it "forc[e]" low-income individuals—who would be exempt from the penalty—to enroll in Medicaid. See Gov't Medicaid Br. 49-50. To the extent state respondents complain that the Affordable Care Act will *encourage* eligible individuals to enroll, they fail to explain how that encouragement invades any right or legally cognizable interest of theirs. See Gov't AIA Br. 43-44. The orderly administration of the Internal Revenue Code would break down if an indirect economic impact alone were a sufficient basis for allowing a person to challenge a tax or exemption applicable *to someone else*. See *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1443 (2011).[7]

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[7] Contrary to state respondents' allegations of financial injury, studies have shown that overall state spending will be approximately $100 billion *lower* through 2019 than it would have been in the absence of the Act. See Gov't Medicaid Br. 10-11.

State respondents next contend (Br. 30) that because they have standing to challenge other provisions of the Affordable Care Act to which States are directly subjected, such as the employer responsibility provision, 26 U.S.C. 4980H, they must also have standing to challenge the minimum coverage provision and then to seek invalidation of the entire Act as inseverable. Putting the AIA's bar to challenging the employer responsibility provision to one side (see Gov't Nos. 11-393 & 11-400 Cert.-Stage Br. 18-19), state respondents' bootstrapping theory of standing will not work. As this Court has repeatedly affirmed, "'[s]tanding is not dispensed in gross.' Rather, 'a plaintiff must demonstrate standing for each claim he seeks to press' and '"for each form of relief"' that is sought." *Davis* v. *Federal Election Comm'n*, 554 U.S. 724, 734 (2008) (citations omitted).

Alaska Airlines, Inc. v. *Brock*, 480 U.S. 678 (1987), on which state respondents rely, lends no support to their argument. The district court in *Alaska Airlines* had held the legislative-veto provision of the statute at issue unconstitutional, and further held the portion of the statute establishing certain protections for airline employees were inseverable from the offending provision. See *id.* at 683. The government appealed only on severability; the court of appeals reversed, holding the entire statute severable; and this Court affirmed without addressing the plaintiffs' standing. See *ibid.* State respondents' efforts to extract meaning from the Court's silence are unavailing. This Court has made clear that, "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Arizona Christian Sch. Tuition Org.*, 131 S. Ct. at 1448. Moreover, unlike the minimum coverage provision, the legislative-veto provision in *Alaska Airlines* applied to regulations that governed the plaintiffs' own conduct. 480 U.S. at 682-683. In any event, particularly because the minimum coverage provision is severable from those provisions of the Act that do apply to the States, see Gov't Severability Br. 26-44, state respondents cannot rely on those unrelated provisions to establish their standing to challenge the minimum coverage provision. Compare *INS* v. *Chadha*, 462 U.S. 919, 931-936 & n.7 (1983) (concluding that respondent had standing to challenge legislative-veto provision only after concluding that it was severable from remainder of statute, such that respondent would receive relief if his challenge were successful).

Finally, state respondents claim (Br. 30-31) that they have standing to challenge any statute they assert to be beyond Congress's unenumerated powers. But as they acknowledge, that sweeping theory of standing is foreclosed by *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923), in which this Court concluded that a State does not have *parens patriae* standing to represent its citizens vis-a-vis the United States, and that "the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of a statute" does not suffice to establish a State's standing to challenge the law. *Id.* at 483-486. *Bond* v. *United States*, 131 S. Ct. 2355 (2011), casts no doubt on those principles. In holding that an individual subject to criminal prosecution had standing to challenge the statute under which she was charged as violative of the Tenth Amendment, *id.* at 2363-2364, the Court did not suggest that a State has standing to challenge any statute it regards as beyond Congress's Article I powers—especially where, as here, the statute applies to individuals and not to the

States themselves. That theory of standing is breathtaking in its reach and would invite officials in any State to rove through the United States Code in search of provisions with which they disagree.

2. Should the Court nevertheless address the States' treatment under the AIA, it should reject state respondents' argument that they are not "person[s]" to whom the AIA applies.

For the first century of its existence, the AIA did not refer to "person[s]" at all. See Gov't AIA Br. 47-48. The phrase "by any person, whether or not such person is the person against whom such tax was assessed," was added in 1966, not to grant States permission to sue, but instead to remove any doubt that the AIA bars actions by non-taxpayers. See *ibid*. By that time, the Court had decided multiple cases interpreting the term "person" in other provisions of the Internal Revenue Code to include States. See *Sims* v. *United States*, 359 U.S. 108 (1959); *Ohio* v. *Helvering*, 292 U.S. 360 (1934). It would stand Congress's intent on its head to treat the 1966 amendment as narrowing the AIA by creating a special exemption for States that are not even subject to the challenged tax provision and that have no rights of their own that allegedly are infringed by it.[8]

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[8] State respondents contend (Br. 38-41) that *Ohio* v. *Helvering* is distinguishable because the tax statute there applied to States in their non-sovereign capacity as sellers of liquor. Although the Court rejected the State's constitutional challenge on that basis, 292 U.S. at 368-370, it did not rely on that rationale in rejecting the State's separate argument that "a state is not embraced within the word 'person,' as used" in the statute, *id.* at 370.

State respondents attempt to distinguish *Sims* (Br. 40-41) on the ground that the Court referred not to the word "person" alone, but also to "the legislative environment" in which the term appeared. 359 U.S.

State respondents' invocation of the "longstanding interpretive presumption that 'person' does not include the sovereign," States Br. 37 (quoting *Vermont Agency of Natural Res.* v. *United States*, 529 U.S. 765, 780 (2000)), is out of place here. Whereas "comity and respect for our federal system demand that something more than mere use of the word 'person' demonstrate the federal intent to authorize unconsented private suit *against*" States, *Vermont Agency*, 529 U.S. at 780-781 n.9 (emphasis added), no similar principles counsel in favor of reading the AIA's reference to "person" to permit the States—and the States alone—to sue the federal government, without regard to the terms on which the United States has consented to suit. See *Block* v. *North Dakota*, 461 U.S. 273, 287-289 (1983). The States do not "retain substantial sovereign powers" to sue the federal government on whatever terms they wish. States Br. 37 (quoting *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 544 (2002)). To the contrary, under the Constitution, the United States is immune from suit unless Congress consents, and Congress controls the terms on which the federal government will be sued. It therefore undermines no principle of federalism and works no interference with state sovereignty for Congress to require a State to proceed against the federal government on the same terms as any other plaintiff.[9]

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at 112. But here, too, the "legislative environment" of the AIA, including its subject matter and context, demonstrates that the AIA does not exempt States from its compass. See *ibid.*

[9] State respondents offer no support for their contention that it would be "inappropriate" to apply the AIA in a manner that would require a State to pay any federal taxes owed before filing suit to challenge its tax liability, as other taxpayers must do. States Br. 42. To the contrary, this Court's decision in *Regan* proceeded on the premise

3. Finally, state respondents contend that they are "aggrieved parties for whom [Congress] has not provided an alternative remedy." States Br. 35 (quoting *Regan*, 465 U.S. at 378). They are incorrect. The State in *Regan* was "aggrieved" by the tax provision because it assertedly interfered with the State's exercise of its sovereign power to raise money. See 465 U.S. at 379-380. Under those circumstances, the State was not required to depend on the possibility that an individual taxpayer would assert its Tenth Amendment claim on its behalf, particularly because "instances in which a third party may raise the constitutional rights of another are the exception rather than the rule." *Id.* at 380. This case is the converse of *Regan*. The minimum coverage provision does not apply to or regulate any sovereign function of the States. It applies to individual taxpayers only and directly. It is thus the States that are attempting to assert the "constitutional rights of another." *Ibid.* Neither the text of the AIA nor the result in *Regan* supports the notion that anyone may circumvent the AIA in this manner. Accordingly, if the Court concludes that the AIA bars individual taxpayers who are directly affected by the minimum coverage provision from bringing a pre-enforcement challenge, *a fortiori* there is no basis to permit state respondents to do so.

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that the State's suit would have been barred by the AIA if the State had an alternative remedy. See 465 U.S. at 373-381.

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For the foregoing reasons and those stated in the government's opening brief on the Anti-Injunction Act, 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

FEBRUARY 2012

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