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NO. 11-398

IN THE
Supreme Court of the United States

DEPARTMENT OF HEALTH & HUMAN SERVICES, *ET AL.*,

PETITIONERS,

v.

STATE OF FLORIDA, *ET AL.*,

RESPONDENTS.

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

BRIEF FOR *AMICUS CURIAE* CENTER FOR THE FAIR ADMINISTRATION OF TAXES OPPOSING *VACATUR* (ANTI-INJUNCTION ACT)

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QUESTION PRESENTED

The sole question addressed by the Center for the Fair Administration of Taxes is whether the actions brought by the private litigants and the States challenging the minimum coverage provisions of the Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A, are barred by the Anti-Injunction Act.

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INTEREST OF *AMICUS*

This brief is being filed under the parties' blanket consents filed with the Court.

Amicus Center for the Fair Administration of Taxes ("CFAT") is a not for profit organization seeking to promote fairness in the administration of the tax laws to taxpayers as a whole. Currently, the primary means utilized to achieve this goal is through the filing of briefs as *amicus curiae* in tax-related cases throughout the United States. CFAT works jointly with the Chapman University School of Law Appellate Tax Clinic, offering law students the opportunity to assist in the preparation of the *amicus curiae* briefs filed by CFAT. A. Lavar Taylor, the Director for CFAT and Adjunct Professor of Law at Chapman Law School, has over 30 years of experience in the handling of civil and criminal tax controversies, both in government and in private practice.[1]

In this case, private litigants and a number of States have brought suit challenging the constitutionality of the Patient Protection and Affordable Care Act, Pub. L. No. 111-48, 124 Stat.

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[1] No person other than the named *amicus* or their counsel authored this brief or provided financial support for this brief. Recent University of Illinois College of Law graduate Suoo Lee assisted CFAT in preparing this brief.

119 (2010). In particular, they challenge the constitutionality of the so-called individual mandate.

The individual mandate is found in 26 U.S.C. § 5000A, which imposes a penalty on certain individual taxpayers who fail to maintain certain minimum health insurance coverage.

Three briefs have been filed by other *amici* urging *vacatur* of the suit below on the grounds that the suit was barred by 26 U.S.C. §7421 ("Anti-Injunction Act"). The first brief was filed by the court-appointed *amicus* ("Long *amicus* brief"), a second brief was filed by two former Commissioners of Internal Revenue ("Cohen and Caplin *amicus* brief"), and the third brief was filed by Tax Law Professors ("Tax Law Professors *amicus* brief").

The parties to the suit have filed briefs arguing that the Anti-Injunction Act does not bar the suit, except that the United States argues that Anti-Injunction Act bars the suit by the States. CFAT supports the conclusion that the Anti-Injunction Act does not bar either the suit by the private litigants or the suit by the States and thus disagrees with the result advocated by the three *amici* who urge *vacatur*.

But CFAT is concerned that many of the arguments made by the parties in support of the position that the Anti-Injunction Act does not apply are incorrect and, if adopted by this Court, would be detrimental to the administration of the tax laws.

Accordingly, with respect to the private litigants, *amicus* CFAT urges this Court hold that the Anti-Injunction Act does not bar the suit by the private litigants, but for reasons not clearly articulated by any of the parties in their briefs on the Anti-Injunction Act.

Specifically, CFAT urges that this Court base its holding that the Anti-Injunction Act does not bar suit by the private litigants on the fact that Congress has already effectively prohibited the IRS from taking meaningful collection action to collect the penalty imposed 26 U.S.C. §5000A(b) by virtue of the provisions in section 5000A(g) which bar the IRS from a) pursuing criminal charges against those taxpayers who willfully fail to pay these penalties in violation of the general criminal provisions of the Internal Revenue Code, b) filing a notice of federal tax lien against taxpayers who owe this penalty, and c) collecting the unpaid penalty through levy action. These provisions, which apply to no other liabilities imposed by the Internal Revenue Code, evidence a Congressional intent to effectively prohibit the IRS from taking active collection measures to collect this penalty from those taxpayers who do not pay the penalty. By virtue of these provisions, Congress has created a new exception to the Anti-Injunction Act.

Importantly, the scope of this new exception is extremely narrow. This is because the three provisions described in the preceding paragraph apply only to the penalties imposed under section 5000A(b). By basing its holding that the Anti-Injunction Act does not bar suit by the private

litigants on these unique provisions, the Court will avoid the potential mischief that could arise should the court wade into the "penalty vs. tax" issue that has been extensively briefed by the parties and other *amici.* This particular issue, insofar as it concerns the Anti-Injunction Act, would become moot.

CFAT further urges that, as a general matter, the Court either reject or not rely on the arguments made in the parties' briefs to hold that the Anti-Injunction Act does not bar the suits brought by the private parties.

With respect to the State litigants, CFAT urges this Court to rely only on the exception to the Anti-Injunction Act discussed by the court in *South Carolina v. Regan,* 465 U.S. 367 (1984), to hold that the suit brought by the States is not barred by the Anti-Injunction Act. CFAT urges the Court to reject the other arguments offered by the States in support of this position.

SUMMARY OF ARGUMENT

The arguments of the various *amici* who urge *vacatur* in this case are without merit. The statutory exceptions to the "pay now, litigate later" rule enacted by Congress in 1998 render nearly irrelevant the application of the Anti-Injunction to penalties assessed outside of the deficiency procedures where the taxpayer desires to challenge the merits of the penalty assessment prior to paying the tax.

The Collection Due Process procedures enacted in 1998 allow taxpayers who have been assessed penalties outside of the deficiency procedures to challenge the merits of the penalty assessment both administratively and judicially after the government has recorded a notice of federal tax lien or has issued a notice of intent to levy. While such challenges are pending, the government may not take forced collection action to collect the penalty. Because forced collection measures are statutorily enjoined in this situation, it is not inconsistent with the Anti-Injunction Act to permit the private litigants to bring suit to challenge the penalty imposed by section 5000A(b).

Congress created a new exception to the Anti-Injunction Act by virtue of the provisions in section 5000A which prohibit the government from criminally prosecuting taxpayers who intentionally refuse to pay a section 5000A(b) penalty assessment and which prohibit the government from taking meaningful collection activity to collect penalties assessed under section 5000A(b) against taxpayers who refuse to pay those penalties. These provisions, which apply to no other liabilities imposed by the Internal Revenue Code, evidence Congressional intent to except section 5000A(b) penalties from the application of the Anti-Injunction Act.

Relying on the rationale offered by CFAT for excepting section 5000A(b) penalties from the application of the Anti-Injunction Act ensures that the new exception to the Anti-Injunction Act will be narrowly drawn. Potential problems in the

administration of the tax laws which could result if the Court adopts the position advocated by the United States and the other litigants can be minimized or avoided.

The Anti-Injunction Act is either jurisdictional or a non-waivable claims processing statute. In either event, the application of the Anti-Injunction Act cannot be waived by the Executive Branch. Allowing the Executive Branch to waive the application of the Anti-Injunction Act on a case by case basis would invite a flood of litigation from taxpayers asking the Executive Branch to waive the Act's application in their case. These suits would burden both the courts and the Executive Branch personnel who would be asked to waive the application of the Anti-Injunction Act. In addition, allowing the Executive Branch to waive the application of the Anti-Injunction Act on a case by case basis would invite political favoritism by the Executive Branch or at least would create the appearance of such political favoritism. This could seriously undermine the administration of the tax laws.

This Court, if it adopts the position urged by CFAT, need not decide whether the arguments of the private litigants in support of their position that the Anti-Injunction Act does not bar them from bringing suit. But if the Court does address these arguments made by the private litigants, these arguments should be rejected.

With respect to the State litigants, the exception to the Anti-Injunction Act discussed in

South Carolina v. Regan applies. Should this Court reject this argument, however, the other arguments made by the States in support of their position that the Anti-Injunction Act does not bar their suit should be rejected.

ARGUMENT

I. THE POSITIONS ADVANCED BY AMICI WHO URGE *VACATUR* ARE WITHOUT MERIT

A. The "Pay Now, Litigate Later" Scheme Does Not Apply With Respect To Penalties Which Are Not Subject To The Deficiency Procedures In 26 U.S.C. §6213

All *amici* urging *vacatur* in this case emphasize that one of the key purposes of the Anti-Injunction Act is to ensure the integrity of the "pay now, litigate later" scheme established by Congress. *See* Long *amicus* brief at 25-29, Caplin and Cohen *amicus* brief at 19-23, Tax Law Professors *amicus* brief at 8-10. None of these *amici* properly acknowledge that, in 1998, Congress dramatically altered the "pay now, litigate later" scheme for penalties which are assessed without resort to the deficiency procedures in section 6213 of the Internal Revenue Code.

These statutory exceptions to the "pay now, litigate later" rule swallow the rule itself. Thus, the Anti-Injunction Act is of far less significance than it was prior to 1998 in situations where a "non-

deficiency" penalty is assessed against a taxpayer and the taxpayer wishes to challenge the imposition of the penalty in court prior to paying the assessed penalty.

The penalty imposed by section 5000A(b) is found in Subtitle D of the Internal Revenue Code, Miscellaneous Excise Taxes. This penalty is assessed and collected in the same manner as penalties imposed under Subchapter B of Chapter 68. Section 5000A(g)(1).

Liabilities imposed by Subtitle D, whether designated as "taxes" or as "penalties," generally may be assessed and collected by the government without resort to the deficiency procedures in the Code. Similarly, penalties imposed by Subchapter B of Chapter 68 generally may be assessed and collected without resort to the deficiency procedures in the Code. *See Smith v. Commissioner*, 133 T.C. No. 18 (2009).

By way of contrast, in order to assess and collect liabilities which are subject to the deficiency procedures, whether designated as "taxes" or as "penalties," the government must issue a notice of deficiency to a taxpayer before assessing and collecting the liability. 26 U.S.C. §6213(a). The notice of deficiency in turn gives the taxpayer the right to litigate the merits of a liability in the Tax Court before the government assesses and collects any liability that is determined to exist, absent jeopardy as to collection. *Id.*

Because the government is not required to issue a notice of deficiency before assessing liabilities arising under Subtitle D and penalties imposed by Subchapter B of Chapter 68, the government can simply assess those liabilities or penalties and send the taxpayer a bill. If the taxpayer fails to pay the bill, the government can normally begin the collection process that is well described at pages 10-18 of the Tax Law Professors *amicus* brief.

The Collection Due Process procedures enacted by Congress in 1998, set forth in 26 U.S.C. §§ 6320 and 6330, allow taxpayers to judicially challenge the merits of penalties assessed outside of the deficiency procedures. This judicial challenge can be brought where the taxpayers who have been assessed have not paid any portion of the assessment. And the government generally can not pursue involuntary collection action against the person assessed until the judicial challenge to the merits of the penalty assessment has runs its course.

There are two ways in which taxpayers can bring pre-payment judicial challenges to liabilities which are assessed outside of the deficiency procedures. Both ways involve the Collection Due Process procedures mentioned above.

The government will typically file a notice of federal tax lien against the taxpayer to perfect the tax lien imposed by operation of law vis-à-vis certain third parties where the taxpayer has failed to pay a liability after notice and demand. *See* Tax Law Professors *amicus* brief at 11-14. The Secretary must send the taxpayer written notice of the filing of the

notice of federal tax lien. 26 U.S.C. §6320(a). This notice in turn triggers the right of the taxpayer to an administrative appeal. 26 U.S.C. §6320(b). The taxpayer can challenge the underlying liability in this appeal because the taxpayer "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." 26 U.S.C. §§ 6320(c), 6330(c)(2)(B). See *Callahan v. Commissioner*, 130 T.C. No. 3 (2008). If the taxpayer is not satisfied with the results of this administrative appeal, the taxpayer may file a petition in Tax Court and may challenge the liability. 26 U.S.C. §§ 6320(c), 6330(d). Until the litigation is resolved, the government is generally precluded from taking forced collection action against the taxpayer. 26 U.S.C. § 6330(e).

The government also has the ability to levy on a taxpayer's assets if the taxpayer does not pay an assessment after notice and demand for payment. 26 U.S.C. § 6331. As a general matter, before the government can issue a levy, it must send the taxpayer a notice of intent to levy and wait 30 days. 26 U.S.C. § 6330(a). This notice, like the notice regarding the filing of a notice of federal tax lien, triggers a taxpayer's right to file an administrative appeal. 26 U.S.C. § 6330(b). The taxpayer can challenge the underlying liability in this appeal because the taxpayer "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." 26 U.S.C. §6330(c)(2)(B). *Callahan v. Commissioner*, *supra*. If the taxpayer is not satisfied with the results of this administrative appeal, the

taxpayer may file a petition in Tax Court and may challenge the liability. § 6330(d). Until the litigation is resolved, the government is generally precluded from taking forced collection action against the taxpayer. 26 U.S.C. § 6330(e).

Because forced collection of liabilities and penalties assessed without regard to the deficiency proceedings are statutorily enjoined while these prepayment administrative and judicial challenges to the liability are brought by taxpayers, it does not do violence to the Anti-Injunction Act to permit the private litigants who could be subjected to the penalty under section 5000A(b) to challenge the constitutionality of this penalty now. *Amici* Tax Law Professors, at pages 25-29 of their brief, correctly describe the practical obstacles that prevent the government from collecting unpaid penalties assessed under section 5000A(b), but *amici* draw the wrong conclusion from the fact that Congress effectively has prevented the government from taking meaningful collection action against those taxpayers who refuse to pay penalties assessed under section 5000A(b).

Ironically, Congress deprived the private litigants in this case of the ability to make a prepayment challenge to the penalty imposed by section 5000A(b) under the Collection Due Process procedures discussed above when Congress prohibited the government from filing notices of federal tax lien and prohibited the government from taking levy action with respect to unpaid penalties imposed by section 5000A(b). But that does not

indicate a Congressional intent to prohibit the private litigants from challenging the section 5000A(b) penalty here.

To the contrary, this prohibition on forced collection activity by the IRS, coupled with the prohibition on criminal prosecution for an intentional failure to pay the section 5000A(b) penalty, effectively neuters the ability of the IRS to collect the penalty imposed by section 5000A(b) from those taxpayers who refuse to pay. Congress has in effect statutorily enjoined the IRS from taking meaningful collection action to collect penalties imposed by section 5000A(b) which remain unpaid. As the following section of this brief will explain in detail, the government can not take any meaningful collection action to collect a penalty assessed under section 5000A(b). Thus, allowing the private litigants to bring this suit is not inconsistent with the Anti-Injunction Act.

B. The Provisions Unique To The Penalty Imposed By Section 5000A, Which Effectively Prohibit The IRS From Taking Active Collection Measures, Demonstrate An Intent By Congress To Create a New Exception To The Anti-Injunction Act

The Anti-Injunction Act, 26 U.S.C. § 7421, does not bar the current challenge to the minimum coverage provision of the Patient Protection and Affordable Care Act by the private litigants. It is apparent from the statutory scheme that Congress

intended to except the penalty imposed by section 5000A(b) from the application of the Anti-Injunction Act.

Congressional intent to except the section 5000A(b) penalty from the application of the Anti-Injunction Act is expressed in the form of the provisions in section 5000A(g)(2). These provisions, which are unique to the penalty imposed by section 5000A(b), provide as follows.

First, the IRS may not criminally prosecute any taxpayer for their failure to timely pay the penalty imposed by section 5000A(b). 26 U.S.C. §5000A(g)(2)(A). To the best of the knowledge of CFAT, such a provision is virtually unprecedented in the history of the Internal Revenue Code. The IRS vigorously pursues criminal prosecution of those persons whom it believes have intentionally violated the internal revenue laws. The Tax Division of the Department of Justice routinely issues press releases announcing major criminal prosecutions and trumpets its astronomically high conviction rate in its annual reports. *See U.S. Department of Justice Tax Division Press Room Page*, www.justice.gov/tax/TEN.htm (last viewed Feb. 12, 2012); *U.S. Department of Justice Tax Division, FY 2011 Congressional Budget*, at 14-25, *available at* www.justice.gov/jmd/2011justification/pdf/fy11-tax-justification.pdf. All of this is done to persuade taxpayers that they should comply with the tax

laws.[2] The fact that Congress has prohibited the government from criminally prosecuting taxpayers who intentionally fail to pay the penalty imposed by section 5000A(b), thereby depriving the government of its most effective "stick" to compel compliance with the tax laws, is most unusual.

The government is also prohibited from levying, or filing notices of federal tax lien against taxpayers who fail to pay the penalty imposed by section 5000A(b) after that penalty has been assessed. 26 U.S.C. §5000A(g)(2)(B). In this regard, CFAT notes that the IRS collection process has been very well described at pages 10-18 of the Tax Law Professors *amicus* brief. CFAT will not repeat those discussions here.

The prohibitions on the filing of notices of federal tax lien and on issuing levies to collect unpaid penalties assessed under section 5000A(b) are likewise unprecedented. No other liability imposed by the Tax Code, whether denominated a "tax" or a "penalty," is subject to these type of collection restrictions if the person assessed fails to pay the liability after it has been assessed.

Some courts have interpreted these unique restrictions on the ability of the government to pursue collection of penalties assessed under section 5000A(b) to mean that this penalty is not a "tax" for

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[2] At least to the extent that the tax laws can be comprehended by humans.

purposes of the Anti-Injunction Act. *See, e.g., Florida v. HHS*, 716 F.Supp. 2d 1120, 1141 (N.D. Fla. 2010). A more logical interpretation of these unique restrictions on the ability of the government to collect unpaid section 5000A(b) penalties is that Congress, in enacting the minimum coverage provisions, never intended the Anti-Injunction Act to apply to suits involving the section 5000A(b) penalty such as those brought by the private litigants in this case.

As the Tax Law Professor *amici* explain quite well in their brief at pages 25-29, Congress has effectively neutered the ability of the IRS to collect penalties assessed under section 5000A(b) from unwilling taxpayers. Contrary to what is argued by *amicus* Long, the government has no other effective means of collecting these types of penalties.

The only two methods of forced collection activity not explicitly prohibited by section 5000A(g) are setoffs and suits to reduce the assessment to judgment. *See* Tax Law Professors *amicus* brief at 27-28. Setoff refers to the practice of taking a taxpayer's tax refund for a separate tax period and applying it to an unpaid assessment, such as a penalty assessment under section 5000A(b). A suit to reduce an assessment to judgment is brought by the Department of Justice under 26 U.S.C. §7403 after the IRS has referred the matter to the Department of Justice. Tax Law Professors *amicus* brief at 16.

Neither of these tools allows the government to take effective collection action to collect unpaid penalty assessments under section 5000A(b) against

unwilling taxpayers. Setoff is not an effective collection tool against unwilling taxpayers because most taxpayers who wish to avoid generating a tax refund for a particular tax period can easily do so. Thus, individual taxpayers typically pay their income taxes through withholding at the source, in the case of wages, or through estimated tax payments, in the case of self-employed taxpayers or taxpayers who have no wage income.

It is a simple matter for taxpayers to adjust their withholding from their wages so that they do not have a refund for a particular tax year. A taxpayer merely needs to obtain from a tax professional an estimate of the tax they will owe for that year, based on the taxpayer's anticipated income and deductions. The taxpayer can then adjust the withholding from his or her wages, using a Form W-4, so that the total amount withheld for the year does not exceed the estimated tax liability. Similarly, a self-employed person can use a similar process to calculate their estimated tax payments so that the total payments for a particular tax year do not exceed the estimated tax liability for that year. The taxpayer's estimation process can easily take into account refundable tax credits, such as the home buyer credit allowed under 26 U.S.C. §36. See also Tax Law Professors *amicus* brief at pages 24-29.

There are certain low income taxpayers, such as those receiving the earned income credit allowed under 26 U.S.C. §32, who cannot avoid receiving a refund, because of the nature of the credit. But the government will rarely if ever be collecting a section

5000A(b) penalty from taxpayers receiving these types of credits.

For a taxpayer to receive the EITC, he must satisfy certain income limits and maximum credit amounts. *EITC Income Limits, Maximum Credit Amounts and Tax Law Updates*, www.irs.gov/individuals/article/0,,id=150513,00.html (last visited Feb. 12, 2012). More specifically, for the 2011 tax year a taxpayer wishing to receive the EITC must have earned less than $13,600 ($18,740 if married filing jointly) if he had no qualifying children. *Id*. The amount of the income limit increases slightly as the number of qualifying children increases, but the income limit is still relatively low.

Thus, taxpayers who are eligible for these refundable credits likely cannot afford coverage, are below the filing threshold, or both. Section 5000A(e) exempts taxpayers who cannot afford coverage from paying the penalty. 26 U.S.C. § 5000A(e)(1). Under §5000A(e)(2), taxpayers earning less than the filing threshold are exempt from the 5000A penalty. The current filing threshold is $9,500 for single taxpayers; $19,000 if married filing jointly. *Your Federal Income Tax, Publication 17* (2011), *available at* http://www.irs.gov/publications/p17/ch01.html #en_US_2011_publink1000170407. Although these taxpayers will still file their returns to receive their credits, their status below the filing threshold prevents the IRS from asserting any 5000A(b) penalties. Thus, the setoff power of the IRS is not an

effective collection method for collecting unpaid penalties assessed under section 5000A(b).

Similarly, filing suit to reduce unpaid section 5000A(b) penalty assessments to judgment under section 7403 is not an effective collection tool. As noted by *amici* Tax Law Professors at pages 17-18 of their brief, it is very unlikely as a practical matter that these type of suits will be brought by the Department of Justice. Furthermore, even if a judgment is obtained, it is far from clear that any effective actions could be taken to collect that judgment, in light of the prohibitions on collection contained in section 5000A(g).

Given that Congress has effectively neutered the ability of the government to collect unpaid penalties assessed under section 5000A(b), it is apparent that Congress did not intend for the Anti-Injunction Act to bar the suit brought by the private litigants. The IRS has been deprived of all effective collection tools, having been effectively enjoined statutorily from collecting these unpaid penalty assessments. Thus, the Anti-Injunction Act does not bar the suit brought by the private litigants.

C. Because The Provisions Contained In Section 5000(A)(g) Are Found Nowhere Else In The Internal Revenue Code, This New Exception To The Anti-Injunction Act Can Be Construed Narrowly, So That The Collection Of All Other "Penalties" Imposed By The Internal Revenue Code Will Remain Subject To The Anti-Injunction Act

The United States has traditionally argued for a broad interpretation of the Anti-Injunction Act and for a narrow interpretation of exceptions to the Anti-Injunction Act. The United States has done so for reasons of efficient tax administration. Significant, broad exceptions to the Anti-Injunction Act make it more difficult for the government to collect taxes, so it is no surprise that the United States typically opposes efforts to limit the application of the Anti-Injunction Act.

The exception to the Anti-Injunction Act for which CFAT advocates is an extremely narrow one. Because the statutory provisions upon which CFAT's argument is based apply only to penalties assessed under section 5000A(b), there is no risk of confusion regarding the scope of this exception. The prohibitions on criminal prosecution and collection activity contained in section 5000A(g) apply to no other liability imposed by the Internal Revenue Code. And it is unlikely that Congress will extend the provisions of section 5000A(g) to other liabilities imposed by the Internal Revenue Code.

This contrasts with the exception to the Anti-Injunction Act advocated by the all of the litigants, including the United States, for penalties assessed under section 5000A(b). The basis of this advocated exception is that the section 5000A(b) penalty is a "penalty" and not a "tax." Because the Anti-Injunction Act only prohibits the assessment and collection of "taxes," Congress supposedly did not intend the Anti-Injunction Act to apply to penalties assessed under section 5000A(b).

The United States is a bit more careful than the private litigants and the States are in crafting its argument on this point, because the United States, unlike the private litigants and the States, will have to deal with a great deal of future litigation involving the Anti-Injunction Act. But the arguments of both the United States and the other litigants are flawed and, if accepted by this Court, could result in significant adverse effects on the administration of the tax laws.

The arguments made by the United States in support of its position that the penalty imposed by section 5000A(b) is exempt from the operation of the Anti-Injunction Act because it is a "penalty," arguments which are echoed by the private litigants and the States, are problematical. This point is effectively acknowledged by the United States itself in footnote 21 of its brief. The briefs of *amici* Long, and Caplin and Cohen, effectively rebut the arguments made by the United States. The reasoning offered by Judge Kavanaugh in his dissent in *Seven Sky* is also persuasive.

There are significant potential adverse effects on the administration of the tax laws if this Court were to accept the arguments advanced by the United States, the private litigants, and the States. As noted by *amicus* Long at page 35 of his brief, the Internal Revenue Code contains a "mind-numbing" number of penalties.[3] A recent Lexis search of the federal courts using the terms "Anti-Injunction Act" and "penalty" produced a total 1,240 cases. It is likely that a significant portion of these cases involve a situation where the plaintiff was seeking to enjoin the assessment or collection of a penalty of some sort.

If this Court were to conclude that "penalties" such as the penalty imposed by section 5000A(b) were exempt from the operation of the Anti-Injunction Act, the courts could be flooded with cases in which taxpayers claim that "penalties" which have been assessed against them are not subject to the Anti-Injunction Act. This potential flood of litigation would divert precious resources of the courts and government employees who assist in the administration of the tax laws. It would also have an adverse effect on those persons who have bona fide tax (and other) disputes which must be resolved by the courts.

For these reasons, the argument advanced by CFAT in favor of this Court holding that the Anti-

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[3] A recent on-line word search of the Internal Revenue Code by CFAT for the word "penalty" returned 665 different hits.

Injunction Act does not bar the suit by the private litigants is far superior to the arguments advanced by the litigants, both as a matter of logic, and as a matter of minimizing the potential for problems in the administration of the tax laws after this Court issues its opinion in this matter.

II. MANY OF THE ARGUMENTS ADVANCED BY THE PARTIES IN SUPPORT OF THEIR POSITION THAT THE SUITS ARE NOT BARRED BY THE ANTI-INJUNCTION ACT ARE NOT PERSUASIVE AND, IF ACCEPTED BY THIS COURT, COULD IMPAIR THE EFFECTIVE ADMINISTRATION OF THE TAX LAWS

A. The Anti-Injunction Act Is Either Jurisdictional Or a Non-Waivable Claims Processing Statute; In Either Event, Its Application Can Not Be Waived By The Executive Branch

The more recent jurisprudence of this Court on the Anti-Injunction Act clearly states that the Anti-Injunction Act is jurisdictional in nature. *See, e.g., Commissioner v. Shapiro,* 424 U.S. 614 (1976), *Bob Jones University v. Simon,* 416 U.S. 725 (1974), *Enochs v. Williams Packing & Navigation Co.,* 370 U.S. 1 (1962). Nevertheless, this Court has in the past permitted the Solicitor General to "waive" the application of the Anti-Injunction Act, which suggests that the Anti-Injunction Act is not a jurisdictional limitation on the courts' ability to

resolve disputes that fall within the scope of that Act. *Helvering v. Davis,* 301 U.S. 619 (1937).

Regardless of whether the Anti-Injunction Act is jurisdictional or is merely a "claims processing statute," there is no evidence that Congress intended to grant the Solicitor General (or anyone else in the Executive Branch) the authority to waive the application of the Anti-Injunction Act where that Act would otherwise bar a suit. Thus, this Court should disavow its prior case law which permitted a member of the Executive Branch to "waive" the application of the Anti-Injunction Act.

There are very good reasons why Congress would not have intended to grant any member of the Executive Branch the authority to waive the application of the Anti-Injunction Act. First, construing the Anti-Injunction Act in manner which permits the Solicitor General or any other member of the Executive Branch to waive the application of the Act in a particular lawsuit would invite a virtual mountain of litigants to file suits to enjoin collection of taxes and ask that the Solicitor General (or other member of the Executive Branch) waive the application of the Anti-Injunction Act, claiming that their case is that "special" case which is so important that the application of the Anti-Injunction Act should be waived. It is doubtful that Congress intended to place such a burden on the courts or that Congress intended to burden the member(s) of the Executive Branch who would have to decide whether to waive the application of the Anti-Inunction Act in each case where such a waiver was sought.

To the best of CFAT's knowledge, there are no Delegation Orders applicable to the Executive Branch which address the question of who would be the person responsible for deciding whether to grant a waiver of the application of the Anti-Injunction Act. Thus, it is not even clear who would have the authority to waive the application of the Anti-Injunction Act if such authority had been granted by Congress.

Second, allowing the Executive Branch to pick and choose which cases in which to apply the Anti-Injunction Act invites political favoritism, or at least the perception of political favoritism, either of which could destroy the fabric of the voluntary compliance system. There is no doubt that the application of the Anti-Injunction Act can work serious hardships at times. *See, e.g., Commissioner v. Shapiro, supra.* But if the Anti-Injunction Act is applied consistently, taxpayers will at least understand that they are all subject to the same rules.

If taxpayers perceive that that the Executive Branch is "playing games" with the application of the Anti-Injunction Act, taxpayers are less likely to remain compliant with the tax laws. Because our system of taxation depends heavily on "voluntary compliance," a decline in the willingness of taxpayers to voluntary comply with the tax laws could have significant adverse consequences for the administration of the tax laws.

For these same reasons, the suggestion by the majority in *Seven Sky v. Holder,* 661 F.3d 1, 33-35 (D.C. Cir. 2011), that the courts defer to the

Executive Branch's interpretation of the Anti-Injunction Act should be rejected. If the Executive Branch has the *de facto* ability to decide when the Anti-Injunction Act applies as the result of courts "deferring" to the Executive Branch's interpretation of that Act, it could result in political favoritism in the administration of the tax laws, or at least the perception of such favoritism. This, in turn, would have an adverse effect on the administration of the tax laws. In this situation, it is appropriate for the courts to have the ultimate say as to what the law is. *Marbury v. Madison*, 5 U.S. 137 (1803).

Both the private litigants and the States argue that the existence of a "judicially created" exception to the Anti-Injunction Act, as set forth in *Enochs v. Williams Packing & Navigation Co., supra,* means that the Anti-Injunction Act is not jurisdictional. CFAT strongly disagrees.

The exceptions to the bar of the Anti-Injunction Act set forth in this Court's opinions are grounded in the Due Process Clause of the Constitution. *See, e.g., Commissioner v. Shapiro, supra,* 424 U.S. at 624-633. The notion that statutes such as the Anti-Injunction Act should be construed in a manner so as to avoid a conflict with the Due Process Clause of the Constitution is not a novel concept. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678 (2001). Accordingly, the arguments raised by the private litigants and the States on this point are without merit.

B. The Purpose For Which The Suit Is Maintained Is Irrelevant For Purposes Of Determining Whether The Anti-Injunction Act Applies

Both the private litigants and the States contend that the Anti-Injunction Act does not bar their suits because they have brought their suits for purposes other than to restrain the assessment or collection of the penalty imposed by section 5000A(b). This Court should reject these arguments for purposes of determining whether the Anti-Injunction Act bars the actions by the private litigants and the States.

Amici who are urging *vacatur* adequately explain why this contention has no merit, *i.e.,* why the motive of a party bringing suit is irrelevant if the effect of the suit is to restrain the assessment or collection of a liability that is subject to the Anti-Injunction Act. CFAT will not repeat here what has already been argued by these *amici*. CFAT merely wishes to point out the adverse effect on the administration of the tax laws that would result if the Court were to accept the arguments advanced by the private litigants and the States.

If taxpayers and other interested parties could avoid the application of the Anti-Injunction Act merely by asserting that their purpose in bringing suit was some purpose other than to restrain the assessment or collection of taxes, then the courts would be flooded with lawsuits filed by taxpayers who claim that they are bringing suit for a purpose other than to restrain the assessment or collection of

a tax, even though the effect of the suit, if successful, would be to restrain the assessment or collection of the tax. Countless numbers of depositions would be taken for the purpose of "ascertaining" the true intent of the parties bringing suit. The courts would become hopelessly bogged down with these types of suits, the vast majority of which would prove to be meritless, to the detriment of those who have bona fide tax (and other) disputes which must be decided by the courts.

The application of the bar of the Anti-Inunction Act should not turn on the creativity of taxpayers and their counsel in developing a "reason" for bringing a suit other than to restrain the assessment or collection of taxes whenever a suit is brought that has the effect of restraining the assessment or collection of taxes. Thus, this particular argument made by the private litigants and the States is untenable.

C. This Court Need Not Decide Whether Penalties Such As The One Imposed By Section 5000A(b) Are Subject To The Anti-Injunction Act In The Same Manner As "Taxes", But If The Court Reaches This Issue, The Penalty Imposed By Section 5000A(b) Should Not Be Exempted From The Application Of The Anti-Injunction Act Merely Because It Is a "Penalty" And Not a "Tax"

Should this Court accept the argument made by CFAT above in parts I B and I C of this brief, this Court need not decide whether penalties such as the one imposed by section 5000A(b) are subject to the Anti-Injunction Act in the same manner as "taxes." CFAT urges the Court to avoid addressing this particular question. If the Court does address the question of whether penalties such as those imposed by section 5000A(b) should be treated like a "tax" for purposes of the Anti-Injunction Act, however, the Court should hold that this penalty is not exempted from the application of the Anti-Injunction Act merely because it is a "penalty" and not a "tax."

CFAT has outlined above in Part IC the reason why this Court should reject this argument. The potential harm to the administration of the tax laws is particularly acute given the textual weaknesses in the United States' argument pointed out by *amici* and by Judge Kavanaugh in his dissent in *Seven Sky*. This Court should not base its holding

on an argument which would, if accepted by the Court, encourage taxpayers to pursue fruitless efforts to enjoin the assessment and collection of tax penalties.

D. This Court Need Only Decide That The Exception To The Anti-Injunction Action In *South Carolina v. Regan* Applies For Purposes of Deciding Whether the Anti-Injunction Act Bars the Suit By The States

This Court, in order to conclude that the Anti-Injunction Act does not bar the suit brought by the States, need decide only that the exception to the Anti-Injunction Act discussed in *South Carolina v. Regan* applies in this case. CFAT supports the States in their efforts to come within the exception to the Anti-Injunction Act contained in *South Carolina v. Regan*. The States should not be deprived of a judicial remedy in this situation. Because the States adequately present this argument in their brief, CFAT will not repeat their arguments here.

CFAT urges the Court to not address any issue beyond the issue of whether the exception to the Anti-Injunction Act contained in *South Carolina v. Regan* applies, an issue which should be resolved in favor of the States. If this Court determines that the exception to the Anti-Injunction Act set forth in *South Carolina v. Regan* does not apply, however, the Court should conclude that the action brought by the States is barred by the Anti-Injunction Act.

CONCLUSION

For the reasons set forth above, this Court should conclude that the action brought by the private litigants is not barred by the Anti-Injunction Act, by virtue of the new exception to the Anti-Injunction act created when Congress enacted the law at issue in this case. This Court should reject all other reasons offered by the private litigants in support of their position that the Anti-Injunction Act does not bar their suit. This Court should further conclude that the suit brought by the States is not barred by the Anti-Injunction Act by virtue of the exception to the Anti-Injunction Act set forth in *South Carolina v. Regan*. This Court should reject all other reasons offered by the States in support of their position that the Anti-Injunction Act does not bar their suit.

Respectfully submitted,

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