No. 11-398

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

STATE OF FLORIDA, *et al.*,

Respondents.

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

BRIEF FOR *AMICI CURIAE* TAX LAW PROFESSORS SUPPORTING VACATUR (ANTI-INJUNCTION ACT)

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INTEREST OF AMICI CURIAE[1]

Amici curiae are professors of law who specialize in the area of tax procedure and administration. They have expertise in the statutory language and application of Subtitle F of the Internal Revenue Code as well as the related doctrines developed by the Supreme Court. Amici's interest in this case is that I.R.C. § 7421, the Anti-Injunction Act, be understood, in the proper perspective of tax enforcement generally, as a bar to the suit brought by Respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act, I.R.C. § 5000A.

Amici offer their view on the application of Section 7421 only. Amici provide their institutional affiliations for identification purposes only. Amici include:

- Jordan M. Barry, Associate Professor of Law, University of San Diego School of Law
- Patricia A. Cain, Inez Mabie Distinguished Professor of Law, Santa Clara University School of Law
- Bryan T. Camp, George H. Mahon Professor of Law, Texas Tech University School of Law
- T. Keith Fogg, Professor of Law, Villanova University School of Law

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than amici or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties have filed notices with this Court consenting to the filing of amicus curiae briefs.

SUMMARY OF ARGUMENT

Several judges in the various cases arising out of challenges to the Patient Protection and Affordable Care Act ("ACA") determined that the Anti-Injunction Act ("Section 7421") should bar lawsuits against the ACA's Section 5000A penalty. In particular, these courts have thought it significant that Section 5000A(g)(1) dictates that the 5000A penalty "be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68," subject to some additional collection rules discussed below. I.R.C. § 5000A(g)(1). Section 6671(a), which is contained in Subchapter B of Chapter 68 of the Code, states: "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." I.R.C. § 6671(a). Section 6201, which grants the IRS its tax assessment authority, expressly includes "assessable penalties" within its definition of "tax." I.R.C. § 6201(a). Both the Fourth Circuit and Judge Kavanaugh, of the D.C. Circuit, determined that these provisions compel the conclusion that the Section 5000A penalty is a tax for purposes of Section 7421: The ACA penalty is to be treated like an assessable penalty, and an assessable penalty is to be treated like a tax, to which Section 7421 applies. *See Liberty Univ., Inc. v. Geithner*, 2011 WL 3962915, at *18-20 (4th Cir. Sept. 8, 2011); *Seven-Sky v. Holder*, 661 F.3d 1, 31 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("[A]s we learn in logic class, when A=B and B=C, then A=C.").

In our view, this argument is correct. But even if this Court determines that Sections 6671 and 6201 are not dispositive and do not render the 5000A penalty a tax for purposes of Section 7421, that does not establish that the 5000A penalty is not a tax for purposes of Section 7421. Both Section 6671 and Section 6201 are inclusive provisions that, by their terms, do not operate to exclude anything from the definition of tax. I.R.C. § 6201(a); I.R.C. § 6671(a); *see also* I.R.C. § 7701(c) ("The terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined.").

The Court would still need to evaluate whether the 5000A penalty constitutes a tax for Section 7421 purposes by looking at the relationship between the penalty and other federal tax laws.

Several judges who concluded that Section 7421 *does not* apply to the 5000A penalty reached that conclusion, in part, because they thought it significant that Congress limited the IRS's ability to collect the 5000A penalty. *See, e.g.*, *Seven-Sky v. Holder*, 661 F.3d 1, 6 (D.C. Cir. 2011) ("Though the shared responsibility payment penalty is codified as part of the Internal Revenue Code, Congress prohibited the IRS from using traditional criminal enforcement or levying powers to collect the payment."); *Florida v. U.S. Dep't of Health and Human Services*, 716 F. Supp. 2d 1120, 1141 (N.D. Fla. 2010). These courts determined that these restrictions on collection bolster the conclusion that the 5000A penalty is not a tax for purposes of Section 7421. *Id.* While this approach may make sense in the abstract, it is misguided in this particular case.

We submit that the limitations actually support the exact opposite result in three distinct ways.

First, the fact that Congress thought it important to include these limitations strongly implies Congressional understanding that the 5000A penalty operates as a tax for purposes of key tax administrative provisions. This in turn suggests that the 5000A penalty is a tax within the scope of Section 7421, since the purpose of Section 7421 is to protect federal tax administration.

Second, Section 5000A is structured to avoid every procedure that a taxpayer could use to challenge liability before paying it. Unlike myriad other taxes and penalties for which Congress has specifically provided relief from the general "pay first, litigate later" regime, the language used in Section 5000A demonstrates that Congress did not intend the 5000A penalty to be exempt from the general pay-first rule. In addition, the collection restrictions of Section 5000A(g)(2) also ensure that taxpayers will not be able to challenge the 5000A penalty through other avenues that the Code provides to allow taxpayers to dispute tax liabilities before paying them. Since Section 7421 is an integral part of the general pay-first regime, it follows that it applies to the 5000A penalty.

Last, when one considers which taxpayers can actually be forced to pay the 5000A penalty, given the effects of the specific limitations that Congress imposed on its collection, the 5000A penalty looks increasingly like a true tax measure, regardless of its label. As a practical matter, the 5000A penalty will largely operate like a reduction of refundable credits for taxpayers who fail to maintain minimum coverage. Section 7421 would bar taxpayer attempts to contest determinations about refundable credits. Since the 5000A penalty is functionally very similar, the Section 7421 analysis should be the same.

ARGUMENT

I. FEDERAL COURT JURISDICTION TURNS ON WHETHER THE 5000A PENALTY CONSTITUTES A "TAX" FOR PURPOSES OF SECTION 7421

The ACA creates a new section in the Internal Revenue Code (the "Code"), that requires certain taxpayers to maintain minimum healthcare coverage for themselves and their dependents. I.R.C. § 5000A(a). Section 5000A(b) requires those taxpayers who fail to do so to pay an additional sum (the "5000A penalty") to the Internal Revenue Service (the "IRS") when they file their federal tax returns.

Section 7421, also known as the Anti-Injunction Act, provides that "[e]xcept as provided in [fourteen provisions that are not relevant here], no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." I.R.C. § 7421(a). This Court has previously held that, when it applies, Section 7421 strips federal courts of subject matter jurisdiction. *See Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962).

Similarly, the Declaratory Judgment Act, 28 U.S.C. § 2201, which governs how and under what circumstances federal courts can issue declaratory judgments, contains an explicit exception that prohibits federal courts from issuing declaratory judgments that pertain to tax laws. 28 U.S.C § 2201(a). This Court has stated that this exception is at least coterminous with, and may be even broader than, Section 7421's prohibition. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n.7 (1974). Accordingly, if Section 7421 bars challenges to the 5000A penalty, any challenges to Section 5000A(a)'s mandatory coverage provision would not be allowed under the Declaratory Judgment Act.

Thus, assuming that Section 7421's prohibition on lawsuits is jurisdictional, as this Court has previously held, federal courts' jurisdiction over the lawsuits that challenge the individual mandate and the 5000A penalty hinges on whether the 5000A penalty constitutes a tax for purposes of Section 7421. An analysis of the enforcement mechanisms of Section 5000A reveals that the 5000A penalty is in fact a tax under Section 7421, an analysis to which we now turn.

II. A BRIEF OVERVIEW OF THE TAX ASSESSMENT AND COLLECTION PROCESS

Tax administration divides into two functions: tax determination and tax collection. The first involves the IRS making a formal administrative determination of a taxpayer's liability. This process culminates in an assessment, a formal recording of the taxpayer's liability for a particular tax in the IRS's records. I.R.C. § 6203. The assessment also marks the beginning of the administrative collection process. A proper assessment enables the tax lien to arise. I.R.C. § 6321. It allows the IRS to begin seizing taxpayer property under its levy authority. I.R.C. § 6331. Finally, a proper assessment starts the running of a 10-year statute of limitations for collections. I.R.C. § 6502. In contrast, if no proper assessment is made within the applicable assessment limitations period in Section 6501 (generally 3 years), the taxpayers' liabilities are extinguished. *See Illinois Masonic Home v. Comm'r*, 93 T.C. 145, 149-50 (1989) (expiration of the statute of limitations period for assessment extinguishes liability). *See generally* Bryan T. Camp, *Tax Return Preparer Fraud and the Assessment Limitation Period*, 116 TAX NOTES 687 (2007) (tracing the history of assessment limitation statutes from 1862 to show their operation as statutes of repose); William D. Elliot, FEDERAL TAX COLLECTION, LIENS, AND LEVIES 2-4 (2d ed. 2008) ("The tax assessment is a predicate to collection of the tax; tax collection follows assessment").

A. The Process of Assessment: Tax Determination

Since the Civil War, language now found in Section 6201 has authorized the IRS to make the inquiries, determinations, and assessments of all taxes. Currently, Section 6201 makes clear that the term "taxes" is defined broadly, and encompasses "interest, additional amounts, additions to the tax, and assessable penalties." I.R.C § 6201(a). Therefore, Section 6201 establishes that assessable penalties and taxes are essentially treated the same for purposes of tax administration.[2]

[2] Accordingly, as argued by the court-appointed amicus curiae, if the 5000A penalty constitutes either a tax or an assessable penalty under Section 6201 it should be treated as a tax under Section 7421. Brief for Court-Appointed Amicus Curiae Supporting Vacatur (Anti-Injunction Act) at 12-13, U.S. *Dep't of Health and Human Services v. Florida*, __ U.S. __ (2012).

At one level, an assessment is simply the formal recordation of a tax liability by the IRS. I.R.C. § 6203; *see also Brafman v. United States*, 384 F.2d 863, 865 n.4 (5th Cir. 1967). But assessments are not ministerial acts. They reflect the IRS's judgment of taxes due and, with only narrow exceptions, are contestable in court only after full payment. *Flora v. United States*, 362 U.S. 145 (1960) (full payment of tax required before federal court will have jurisdiction over refund suit); *Cheatham v. United States*, 92 U.S. 85, 89 (1875) ("payment of the tax claimed [is] a condition precedent to a resort to the courts by the party against whom the tax is assessed"). Justice Owen Roberts explained the strong pay-first rule in *Bull v. United States*, 295 U.S. 247, 260 (1935):

> The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt. * * * Thus the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer. The assessment supersedes the pleading, proof and judgment necessary in an action at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for

> unjust administrative action is the right to claim restitution.

Contrary to many taxpayers' beliefs, since the income tax was first introduced in 1862, federal income taxes have never been "self-assessed" by taxpayers as either a legal or practical matter. For the first fifty years of the income tax's existence, the IRS made assessments of income tax liabilities by recording its judgment of the amount due in its books and presenting taxpayers with a bill. The Anti-Injunction Act, now Section 7421, was enacted almost immediately after Congress first allowed for income tax refunds. Its language, largely unchanged since its enactment in 1867, requires taxpayers who disagree with their assessed tax liability to pay the tax and sue for a refund. The general rule has always been that taxpayers must pay first, litigate later.

In 1924, Congress created the "deficiency procedure," now codified in Sections 6211–6216, to allow taxpayers to obtain judicial review of their potential liability for a carefully limited set of taxes. When these procedures apply, they prevent the IRS from making an assessment until the taxpayer has had an opportunity to seek judicial review of the liability in the Tax Court. I.R.C. §§ 6211–6216. They are thus a specific exception to the longstanding rule that taxpayers must pay first and then litigate through the refund procedure.

B. The Process of Collection: Tax Enforcement

The completion of an assessment marks the end of the tax determination process and begins the collection process, in which the IRS attempts to enforce the assessed liability. To collect taxes, the IRS first uses four administrative tools: notices, the federal tax lien, levies, and setoffs. In certain circumstances, if its administrative collection tools are insufficient, the IRS then turns to the courts for aid.

Notices

First, the IRS simply asks the taxpayer to pay the assessed liability. Section 6303 requires the IRS to send the taxpayer notice and demand for payment; the IRS generally sends multiple automatically generated notices of increasing intensity. Most of the time, the notice, combined with the threat of penalties for failure to pay, is sufficient to induce payment. *See* INTERNAL REVENUE SERVICE, DATA BOOK 2006, Table 16 (2006), *available at http://www.irs.gov/taxstats/article/0,,id=168610,00.html* (showing that the "Total amount collected" for FY2005 was $40.8 billion, of which $28.7 billion came from first and subsequent notices of balance due, and $12.1 billion came from other collection actions).

The Federal Tax Lien

The tax lien is an effective security device that protects the interest of the United States by securing the government's place in line among creditors. *United States v. Brosnan*, 363 U.S. 237, 241 (1960). Section 6321 creates the federal tax lien and provides that

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to

> tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

I.R.C. § 6321.

The statutory language of Section 6321 is intentionally broad, creating a single federal tax lien with an almost unlimited scope. *See id.* All of the taxpayer's property, the taxpayer's rights to property, and even property that the taxpayer receives during the existence of the lien are subject to the federal tax lien. *Id.* Therefore, the lien can attach to nearly all of the taxpayer's property, including, but not limited to, real property, monies in any bank or brokerage accounts, salaries and wages, rights to accounts receivable, commingled property, escrowed property, certain future interests (including reversions, remainders, and revocable interests) in property, and beneficial interests in trust. *See Citizen's State Bank of Barstow, Tex. v. Vidal*, 114 F.2d 380, 383 (10th Cir. 1940) ("The statute covering collection of taxes is broad and comprehensive and Congress intended to subject all of a taxpayer's property, except that specifically exempt to the payment of taxes."); William D. Elliot, FEDERAL TAX COLLECTION, LIENS, AND LEVIES 9-29 – 9-60 (2d ed. 2008). The lien arises automatically and is deemed perfected once a proper assessment is made, enabling the lien to relate back to the date of assessment. I.R.C. § 6321; I.R.C. § 6322; *Flora v. United States*, 357 U.S. 63 (1958), *aff'd on rehearing*, 362 U.S. 145 (1960). Once it arises, the lien remains in effect until either the tax liability is satisfied in full or the statute of limitations expires. *Id.*; I.R.C. § 6502; *see also Hudgins v. IRS*, 967 F.2d 973 (4th Cir. 1992).

It is important to understand the relationship between the federal tax lien and a notice of federal tax lien. There is only one tax lien securing a given tax liability, and it arises automatically by operation of law. I.R.C. §6321. *See generally United States v. Sec. Trust & Sav. Bank*, 340 U.S. 47 (1950). At this stage, the tax lien is a "secret" lien because, although it is perfected when it first arises, there is no public record of its existence at that time.

Concerned with the potential unfairness that the invisible federal tax lien could cause to the taxpayer's other creditors, Congress provided a special rule for purchasers for value, mechanics lienors, holders of security interests, and judgment lien creditors. I.R.C. § 6323(a). The federal tax lien is only enforceable against these creditors if the IRS files a notice of federal tax lien before it perfects its interests. The notice of federal tax lien is a public document that makes the lien visible, thereby preventing unfair surprise. For example, if a taxpayer takes out a home equity loan and the bank properly files its security interest before the IRS files the notice of federal tax lien, the bank's lien takes priority over the tax lien. *See, e.g.*, *Middlesex Sav. Bank v. Johnson*, 777 F. Supp. 1024 (D. Mass. 1991) (applying lien rules to a variety of competing creditors).

The IRS generally files notices of federal tax lien when its computers detect sufficient assets to justify the cost of filing. In fiscal year 2010, the IRS filed over one million notices of federal tax lien with respect to over nine million delinquent taxpayer accounts. INTERNAL REVENUE SERVICE, DATA BOOK 2010, Table 16 (2011), *available at* http://www.irs.gov/pub/irs-soi/10databk.pdf. While there is only a single federal tax lien that applies to all of a taxpayer's property, the IRS may file multiple public notices with respect to that lien, depending on how much property the taxpayer has and in what locations. The IRS never files a tax lien. It only files the notice of federal tax lien, which brings the already existing tax lien to light.

The Administrative Levy

Although they coexist independently of one another, the federal tax lien works closely with the IRS's levy power. I.R.C. § 6331. The levy power allows the IRS to seize and sell any property or rights to property held by the taxpayer. It provides the IRS with a "quick and relatively inexpensive" way to collect on its security interest in the taxpayer's property by "bring[ing] the property into the Service's legal custody." *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 211 (1983); *United States v. Rogers*, 461 U.S. 677, 699 (1983). After seizure, the IRS then sells the property in order to satisfy the taxpayer's liability. I.R.C. § 6331(b).

The levy power is available independently of the federal tax lien, so the IRS may still levy to satisfy an assessed liability even if it has released its lien. I.R.C. § 6331. But any property or right to property subject to the federal tax lien may be seized and sold by the IRS pursuant to its levy power. I.R.C. § 6331.

Like the federal tax lien, the levy power is a potent collection tool. The IRS's levy power has an expansive scope and is easy for the IRS to wield; in practice, the levy power is mostly automated. The only substantive limitations on the levy power are a few very specific and narrow limitations intended to protect the taxpayer and minor children from extreme poverty. I.R.C. §§ 6334(a) - (e). The IRS can easily levy against the taxpayer's property or rights to property even if the property is in the possession of a third party. In practice, nearly all IRS levies are made against taxpayer property in the possession of third parties, such as bank accounts and wages. I.R.C. § 6332; *see also* INTERNAL REVENUE SERVICE, DATA BOOK 2010, Table 16 (2011), *available at* http://www.irs.gov/pub/irs-soi/10databk.pdf (indicating that, in 2010, the IRS served over 3.6 million notice of levies on third parties and enforced only 605 "seizures," which is the term the IRS uses for levies against property that is to be sold at auction).

The Setoff Power

The IRS also has a setoff power under both Section 6402 and common law. *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947). This power allows the IRS to setoff a taxpayer's "overpayments" of certain tax liabilities against the taxpayer's other outstanding tax liabilities. This Court has defined the term "overpayment" as "any payment in excess of that which is properly due," regardless of the manner in which the overpayment arose. *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947). The Code reinforces this broad definition, specifically noting that it encompasses payments for any tax liabilities assessed or collected after the expiration of the applicable statute of limitations and any refundable credits that exceed a taxpayer's tax liability. I.R.C. § 6401(b).

Section 6402 enables the IRS to employ its setoff power with great administrative and logistical ease. If the IRS computers find any assessed but unpaid liabilities attributed to the taxpayer, the computers automatically setoff the overpayment against the liability. Generally, the IRS need not inform the taxpayer of how it will employ its setoff power prior to doing so and need only inform the taxpayer of the setoff after the fact. I.R.C. §§ 6402(c), (d)(1)(C), (f)(1)(C). Since taxpayers will generally have no way of knowing of a pending setoff, they will not be able to take steps to prevent it from happening. Once made, taxpayers have no recourse to contest a setoff except by filing a claim for refund. *Sunoco Inc. v. Comm'r*, 663 F.3d 181 (3d Cir. 2011) (IRS's decision to setoff cannot be challenged in the Tax Court). *See generally Estate of Bender v. Comm'r*, 827 F.2d 884 (3d Cir. 1987). Not even the National Taxpayer Advocate can force the IRS to reverse a setoff. Treas. Reg. §301.7811-1(c)(3) (describing limits of Taxpayer Advocate Orders).

Judicial Enforcement of Tax Collection: Section 7403

Although the IRS's administrative enforcement tools are at the heart of federal tax collection, the IRS can seek judicial assistance to enforce a tax liability through a federal lawsuit under Section 7403. The IRS has proved reluctant to use Section 7403. It generally requires its agents to fully pursue administrative remedies before turning to judicial action. *See* Internal Revenue Manual §§ 5.17.4.7, 25.3.2.3.

The IRS most often uses Section 7403 when it needs to extend the ten-year statute of limitations for collecting assessed liabilities. A levy's timeliness is measured with respect to the date that the levy is made, but an action under Section 7403 is timely so long as the action is commenced within the limitations period. I.R.C. § 6502(b); Internal Revenue Manual § 5.17.4.7. Also, if the IRS succeeds, it secures a judgment lien against the taxpayer's property. This judgment lien has its own additional independent and lengthy statute of limitations and also extends the life of the federal tax lien, which continues its independent existence. 28 U.S.C. § 3201 (providing that the judgment lien is effective, unless satisfied, for 20 years and may be renewed for one additional period of 20 years by filing a notice of renewal); *United States v. Overman*, 424 F.2d 1142 (9th Cir. 1970); *United States v. Hodes*, 355 F.2d 746 (2d Cir. 1966), *cert. dismissed*, 386 U.S. 901 (1967).

Because the IRS only employs Section 7403 in limited circumstances, a taxpayer is unlikely to be subject to a Section 7403 action. For example, in 2010, the IRS filed roughly 1.1 million notices of federal tax lien and filed 3.6 million notices of levy on third parties, but civil actions under Section 7403 produced only 46 judicial opinions. INTERNAL REVENUE SERVICE, DATA BOOK 2010, Table 16 (2011), *available at* http://www.irs.gov/pub/irs-soi/10databk.pdf; NATIONAL TAXPAYER ADVOCATE, DEP'T OF THE TREASURY, 2010 ANNUAL REPORT TO CONGRESS, EXECUTIVE SUMMARY, at 43, *available at* http://www.irs.gov/pub/irs-pdf/p2104c.pdf. There are two chief reasons why the IRS only uses Section 7403 after it exhausts its statutory methods of administrative collection. First, as Section 7421 recognizes, a federal lawsuit to enforce a lien can be a potentially long and drawn out adversarial process. Second, the IRS cannot, itself, bring an action in federal court to enforce the lien through foreclosure. I.R.C. § 7401. Instead, the IRS must persuade the Department of Justice, which has its own priorities and demands on its resources, to commence the action on behalf of the United States. *Id.*

III. SECTION 5000A'S MODIFICATIONS TO THE TAX COLLECTION PROCESS FOR THE 5000A PENALTY ESTABLISH THAT THE 5000A PENALTY CONSTITUTES A TAX UNDER SECTION 7421

In considering the applicability of Section 7421, several courts below have argued that the ACA's modifications to the traditional IRS enforcement scheme show that the 5000A penalty is not a tax. *See, e.g.*, *Seven-Sky v. Holder*, 661 F.3d 1, 6 (D.C. Cir. 2011) (distinguishing the 5000A penalty from a tax because "Congress prohibited the IRS from using traditional criminal enforcement or levying powers to collect the payment"); *Florida v. U.S. Dep't of Health and Human Services*, 716 F.Supp. 2d 1120, 1141 (N.D. Fla. 2010) ("[T]he penalty is obviously not to be collected and treated 'in the same manner as taxes' in light of the fact that Congress specifically divorced the penalty from the tax code's traditional collection and enforcement mechanisms."). The court-appointed amicus has taken a more agnostic view. Brief for Court-Appointed Amicus Curiae Supporting Vacatur (Anti-Injunction Act) at 32, U.S. *Dep't of Health and Human Services v. Florida*, __ U.S. __ (2012). ("No intent to allow pre-enforcement challenges to the Affordable Care Act can be inferred from Congress's decisions to prohibit criminal prosecutions, notice of liens with respect to any property of a taxpayer, or levying any property of a taxpayer for failing to pay the Section 5000A penalty.").

In our view, Congress's changes to the traditional enforcement mechanisms—rather than suggesting that the 5000A penalty is not a tax—support the opposite conclusion. We submit that these limitations show that Congress intended the penalty to be a tax within the meaning of Section 7421 for three distinct reasons discussed below.

A. The Limitations on the IRS's Powers to Enforce the 5000A Penalty Show That Congress Intended for Those Powers to Be Otherwise Available, Implying That the Penalty Is a Tax Under Those Provisions

Section 5000A(g)(2) imposes specific limitations on the use of the IRS's levy power and the federal tax lien to collect the 5000A penalty. These limitations strongly imply that both of these collection tools would otherwise be available to enforce the 5000A penalty.

It takes a tax to trigger the levy power. Section 6331(a) allows the IRS to use its levy power when "any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand." If the 5000A penalty did not constitute a tax for purposes of Section 6331, the IRS would not be authorized to levy to collect it. The fact that Congress took deliberate steps to prevent the

IRS from using its levy power indicates that the IRS's levy power would otherwise be available to enforce the 5000A penalty. Accordingly, Section 5000A(g)(2)'s prohibition on the use of levies to enforce the 5000A penalty indicates that the 5000A penalty constitutes a tax for purposes of Section 6331.

It also takes a tax to trigger the federal tax lien. Section 6321 provides that the lien only arises "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand." If the 5000A penalty did not constitute a tax for purposes of Section 6321, failure to pay the 5000A penalty would not give rise to a federal tax lien and there would be no need to restrict the IRS's ability to file notice of lien with respect to taxpayer's assessed 5000A penalty liability. The fact that Congress took deliberate steps to prevent the IRS from filing notice of lien with respect to an unpaid 5000A penalty liability indicates that failure to pay the 5000A penalty gives rise to a federal tax lien. Accordingly, Section 5000A(g)(2)'s restriction on the IRS's ability to use the federal tax lien to enforce the 5000A penalty indicates that the 5000A penalty constitutes a tax for purposes of Section 6321.

It is also worth noting that, in the past, Congress has made specific provisions to allow the setoff power to be used to help collect specific non-tax liabilities, such as child support. *See* I.R.C. §§ 6402(c)–(f). However, Section 6402 sets out separate provisions for each of these liabilities and specifically excludes them from the definition of tax. *See id.*; §§ 6402(c)–(g). Nor are they treated as taxes for purposes of other Code provisions. In stark contrast, there is no separate provision in Section 6402 for the

5000A penalty, and it constitutes a tax for several other provisions of the Code. This lends additional strong support to the conclusion that the 5000A penalty is an "internal revenue tax" within the meaning of Section 6402(a).

Section 5000A(g)(2)'s proscriptions on collection therefore indicate that the 5000A penalty is a "tax" for purposes of both the federal tax lien and the federal tax levy, two of the IRS's chief collection tools. Since the purpose of Section 7421 is to prevent interference with the process of federal tax collection, the fact that the 5000A penalty constitutes a tax for both of these collection provisions strongly favors treating the 5000A penalty as a tax for purposes of Section 7421.

B. Congress Structured 5000A to Deny Taxpayers Any Opportunity to Challenge Their Liability for the 5000A Penalty, Which Suggests That Section 7421 Should Apply and Bar This Suit

Federal tax administration is fundamentally a "pay first, litigate later" regime. Section 7421 is an integral part of that regime. Section 7421 has two principal purposes: "[1] to allow the federal government to assess and collect allegedly due taxes without judicial interference and [2] to compel taxpayers to raise their objections to collected taxes in suits for refunds." *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 584 (4th Cir. 1996); *accord South Carolina v. Regan*, 465 U.S. 367, 376 (1984); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974). The strong "pay first, litigate later" regime allows the IRS to more efficiently administer a hugely complex tax apparatus. *Flora v. Comm'r*, 362 U.S. 145 (1960) (holding that full payment of a liability is required before federal court will have jurisdiction over a refund suit).

Two features of the language Congress employed in §5000A(g) explicitly invoke this fundamental rule, and nothing Congress wrote in Section 5000A suggests to the contrary. First, as to assessment, Congress instructed the IRS to assess the Section 5000A penalty "in the same manner as an assessable penalty." I.R.C. § 5000A(g)(1). Second, as to collection, Congress limited how the IRS could collect the tax by forbidding the use of criminal penalties and of two (of its four) administrative collection tools. Section 7421 itself speaks in those terms, forbidding suits either for the purpose of restraining the "assessment" or "collection" of any tax.

By codifying Section 5000A in subtitle D, chapter 48 of the Code, and providing that the 5000A penalty is to be assessed and collected "in the same manner as an assessable penalty under subchapter B of chapter 68," Congress chose to place the 5000A penalty outside the scope of the Code's deficiency procedures. By doing so, it precluded taxpayers from being able to challenge their liability for the 5000A penalty before the IRS makes an assessment. Taxpayers must instead follow the pay-first rule.

Congress accomplished a similar result through the limitations it imposed on the collection of the 5000A penalty. Section 5000A(g)(2) forbids the IRS from levying and from filing notices of federal tax lien with respect to unpaid 5000A penalty liability. At the same time, however, Congress left the other major administrative collection tools—the notices and the setoff power—untouched. As with Congress's choice on assessment, this choice about collection has a similar consequence: taxpayers will not be able to obtain judicial review of IRS collection decisions before payment. If Congress had allowed the IRS to file notices of lien or to levy, taxpayers would be able to use the Collection Due Process ("CDP") provisions of the Code to contest those collection decisions pre-payment. Congress added the CDP procedures in 1998 to ensure that taxpayers had the ability to challenge certain IRS collection decisions before payment. *See generally* Bryan T. Camp, *The Failure of Adversary Process in the Administrative State*, 57 IND. L.J. 1 (2009) (reviewing the history and purpose of CDP enactment).

Whenever the IRS files the first notice of lien with respect to any federal tax lien, Section 6320 provides the taxpayer with an opportunity to request a CDP hearing. At the CDP hearing, the taxpayer can try to persuade the IRS to remove the notice of lien. I.R.C. § 6320(c) (citing to Section 6330(c)(2)(A), which indicates that "challenges to the appropriateness of collection actions" is one of the possible issues for discussion at the hearing). Generally, a taxpayer may not contest the merits of a tax assessment at a CDP hearing. However, if the taxpayer did not have a statutory opportunity to contest the underlying tax liability pre-assessment—as is the case with the 5000A penalty—the taxpayer may challenge the assessed liability. I.R.C. § 6320(c) (citing to Section 6330(c)(2)(B)). If the IRS refuses to withdraw the notice of federal tax lien, the taxpayer may obtain judicial review of that decision in Tax Court. Thus, the CDP procedure provides a special exception to the "pay first, litigate later" structure of tax collection, and Congress's restrictions on the enforcement of the 5000A penalty ensure that this exception will not be available. I.R.C. § 6320(c).

Similarly, before the IRS attempts to make its first levy with respect to an outstanding tax liability, Section 6330 provides the taxpayer with an opportunity to request a CDP hearing. At the CDP hearing, the taxpayer can try to persuade the IRS to refrain from using its levy power. I.R.C. § 6330(c)(2)(A)(ii). Generally, a taxpayer may not contest the merits of a tax assessment at a CDP hearing. However, if the taxpayer did not have a statutory opportunity to contest the underlying tax liability pre-assessment—as is the case with the 5000A penalty—the taxpayer may challenge the assessed liability. I.R.C. § 6330(c)(2)(B). If the IRS decides to continue with the levy, the taxpayer may obtain judicial review of that decision in Tax Court and the IRS may not proceed with the levy until that review is concluded. I.R.C. § 6330(d)(1), (e).

Section 5000A imposes no restrictions on the IRS's use of its notice and setoff powers. But, unlike the lien and levy powers, taxpayers generally cannot stop the IRS from making setoffs or sending notices without first paying the tax liability at issue. *See, e.g.*, *Sunoco Inc. v. Comm'r*, 663 F.3d 181 (3d Cir. 2011) (as to setoffs); *Pagonis v. United States*, 575 F.3d 809 (8th Cir. 2009) (as to notices). Similarly, the IRS need not inform the taxpayer of how it will employ its setoff power prior to doing so and taxpayers have little recourse to contest a setoff once made except to file a claim for overpayment. Not even the National Taxpayer Advocate can force the reversal of a setoff. Treas. Reg. § 301.7811-1(c)(3) (describing the limits of Taxpayer Advocate Orders).

By prohibiting the IRS from engaging in these particular collection actions with respect to the 5000A penalty, Section 5000A(g)(2) prevents taxpayers from challenging their 5000A penalties until after they have paid. The logical consequence of the alterations Congress made to the assessment and collection structure, combined with the general policy of forcing taxpayers to pay taxes before challenging them that Section 7421 embodies, supports holding that Section 7421 bars this suit.

C. Section 7421 Should Bar Review of the 5000A Penalty Because the Limitations on the 5000A Penalty's Enforcement Render It Functionally Similar to a Reduction in Refundable Tax Credits

Section 5000A(g)(2)'s limitations on the enforcement mechanisms that can be used to collect the 5000A penalty, particularly its restrictions on the use of liens and levies, will shift IRS collection efforts to the setoff power. As explained below, this reliance on setoff makes the 5000A penalty function very much like a reduction on refundable credits. Since Section 7421 would bar a suit challenging a provision that reduced refundable credits before such a provision has gone into effect, it should also bar suits challenging the 5000A penalty.

Careful consideration of the enforcement tools available to the IRS with respect to the 5000A penalty reveals that there are surprisingly few instances in which the IRS can compel taxpayer compliance with the 5000A penalty. First, note that Section 5000A(g)(2)(A) clearly and unequivocally provides that no taxpayer may be subjected to criminal penalties for failure or refusal to pay the 5000A penalty. I.R.C. § 5000A(g)(2)(A) ("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."). Thus, the most severe penalties that noncompliant taxpayers can face are explicitly eliminated with respect to the 5000A penalty. The IRS is thus relegated to its civil enforcement powers.

Similarly, the IRS cannot use its levy power to enforce the 5000A penalty. I.R.C. § 5000A(g)(2)(B) ("The Secretary shall not … levy on any [taxpayer] property with respect to such failure [to pay the penalty]."). This means that a taxpayer who refuses to pay the 5000A penalty will never face a seizure of property as a result of refusing to pay the penalty. For the taxpayer, the second most severe penalty that one can face for not paying taxes—the seizure of that taxpayer's property—is also not a possibility under the 5000A penalty scheme.

Section 5000A does not prevent the federal tax lien from arising with respect to a taxpayer who refuses to pay a properly assessed 5000A penalty after notice and demand. To the contrary, Section 5000A implies that the federal tax lien would arise in such a scenario. Nonetheless, as a practical matter, the lien will typically prove to be of little value in enforcing the 5000A penalty. As noted above, the IRS generally uses the federal tax lien in conjunction with the levy power: The federal tax lien supports the levy power because, with a few small exceptions, all property subject to the federal tax lien automatically becomes subject to levy by the IRS simply by virtue of the federal tax lien attaching to that property. I.R.C. § 6331(a). In addition, it is the IRS's power to levy property touched by the federal tax lien that allows the government to vindicate its security interest. But without the ability to levy on a particular taxpayer's property, this system breaks down. A claim on another's property is worth less if that property can never be seized. Thus, the ACA's restrictions on levy severely limit the importance of the federal tax lien.

It might be possible to enforce a particular federal tax lien by bringing a Section 7403 action. It is unlikely that this option will prove a useful tool in many cases involving the 5000A penalty unless significant policy changes occur. The IRS currently uses Section 7403 chiefly to prevent the statute of limitations from lapsing when administrative collection efforts have not proven successful. Internal Revenue Manual § 5.17.4.7. Since the statute of limitations for collecting an assessed liability is ten years, and the earliest an assessment could be made is 2015, one would not expect to see actions filed under Section 7403 until approximately the year 2025. Also, recall that the IRS cannot itself bring suit, but must persuade the Department of Justice to do so. The IRS currently has a policy of not requesting the Department of Justice to file suit, and the Department of Justice has a policy of not filing such suits, unless the federal tax liability in question exceeds a threshold amount. Although the exact amount is not public knowledge, it is widely agreed that this threshold is significantly larger than the maximum penalty that may be imposed on a taxpayer who fails to obtain minimum essential coverage under the ACA. Admittedly, a taxpayer who did not have insurance for a sufficiently large number of years, or who had significant unrelated outstanding federal income tax liabilities, could meet this threshold, or the IRS and Department of Justice could change their policies. But, given the rarity with which the IRS currently invokes judicial process to collect taxes and the administrative costs of filing a large number of lawsuits to enforce small liabilities, this seems unlikely.

That leaves only two weapons in the IRS's collection arsenal: notices and the setoff power. While notices are generally quite effective at inducing taxpayers to pay their outstanding liabilities, this success must be evaluated in light of the government's ability to compel payment (through levy, potential criminal penalties, etc.) if taxpayers continue to refuse to pay their taxes. Since these consequences do not apply to the 5000A penalty, notices would likely be a far less effective enforcement tool.

Thus, the IRS is left to rely primarily on the final arrow in its quiver, the setoff power. If a taxpayer has overpaid other federal taxes for a given year, the IRS can reduce the amount of the refund that the taxpayer would otherwise receive by the amount of the 5000A penalty liability. The IRS has already publicly indicated that it intends to use the setoff power to enforce the 5000A penalty. *See, e.g.*, Chris Rizo, *Obamacare Scofflaws to Have Tax Refunds Withheld*, LEGAL NEWS ONLINE (Apr.15, 2010, 7:00 PM), http://www.legalnewsline.com/news/226663-obamacare-scofflaws-to-have-tax-refunds-withheld; NATIONAL TAXPAYER ADVOCATE, DEP'T OF THE TREASURY, 2010 ANNUAL REPORT TO CONGRESS, TAX

RESEARCH AND RELATED STUDIES at 26, *available at* http://www.irs.gov/pub/irs-utl/vol_2_tasresearchandrelatedstudies2010arc.pdf.

There are two groups of taxpayers against whom the IRS will be able to use its setoff power to enforce the 5000A penalty. The first group consists of those taxpayers who have an affirmative tax liability in a given year but who have paid more to the IRS than they owe. The second group consists of those who are entitled to refundable credits, such as the earned income tax credit, that exceed their federal income tax liability for a given year, so that, on net, they are entitled to receive a payment from the federal government instead of owing a tax liability.

The overwhelming majority of taxpayers who fall into the first group do so because of employer withholding on wages. NATIONAL TAXPAYER ADVOCATE, DEP'T OF THE TREASURY, TAX YEAR 2008 CONGRESSIONAL DISTRICT STATISTICS, *available at* http://www.irs.gov/advocate/article/0,,id=97404,00.html (documenting that in 2008, more than 122 million taxpayers had employer withholdings, while 24 million were entitled to the Earned Income Tax Credit). There are several reasons why taxpayers may choose to have more withheld from their paychecks than their actual federal income tax liability. For example, they may wish to avoid having to write large checks when filing their federal income tax returns, or they may wish to use withholding as a tool to force them to save money. Taxpayers could, of course, easily avoid this outcome by asking employers to withhold less money from their paychecks. *See* I.R.C § 3402(m) (entitling an employee to decrease the amount withheld by employers to reflect anticipated federal income tax liability). Thus, individuals who place themselves in the position of having significant withholding against which the 5000A penalty can be setoff are in that position because of an affirmative choice they have made, raising the question of whether they actually have standing to contest the 5000A penalty.[3]

In contrast, the second group of taxpayers subject to the setoff power does not have the ability to avoid paying the 5000A penalty. Even if such taxpayers were to make no payments to the government in a given year, they would still be forced to pay the 5000A penalty because the IRS would reduce the amount of the refundable credit that they receive. For example, taxpayers who are entitled to the Earned Income Tax Credit and are required to buy health insurance but fail to do so would have their Earned Income Tax Credit reduced

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[3] This Court's Article III jurisprudence makes clear that an individual cannot claim standing based on a self-inflicted injury. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam) (denying a plaintiff standing based on "damage inflicted by its own hand"). The individual respondents in this case claim standing based on the fact that they are modifying their behavior in anticipation of having to pay the 5000A penalty. *See Florida v. U.S. Dep't of Health and Human Services*, 716 F.Supp. 2d 1120, 1145 (N.D. Fla. 2010). While changing one's behavior to comply with a future law can constitute an injury under standing doctrine, our analysis suggests that such a behavioral change might be an unreasonable one, particularly if the individual respondents are not entitled to refundable tax credits. This case therefore raises the question as to whether a person who modifies one's behavior based on a misunderstanding of a future law actually has standing to challenge that law.

for failure to pay the penalty. *See* I.R.C. § 32 (providing for certain low-income individuals to receive the earned income tax credit). However, to the extent that the 5000A penalty is merely a reduction of or limitation on refundable credits, a lawsuit challenging it at this point would constitute a restraint of the collection and assessment of the federal taxes against which the refundable credit was applicable.

More generally, the central role of refund calculations in the 5000A penalty scheme suggests that Section 7421 should apply, regardless of whether the taxpayer is entitled to refundable credits. The IRS's calculation of refunds is a central facet of the nation's tax scheme, and a lawsuit seeking to challenge the amount of that refund before the refund is even calculated violates the central purpose of Section 7421. *See, e.g.*, *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974) ("The Court has interpreted the principal purpose of [Section 7421] to be the protection of the Government's need to assess and collect taxes as expeditiously as possible."). Accordingly, challenges to the 5000A penalty should be barred by Section 7421's broad umbrella of protection until a taxpayer has paid the tax and sued for a refund.

CONCLUSION

For the foregoing reasons, the Court should find that Section 7421 applies and should, therefore, dismiss the Respondents' suit for lack of jurisdiction.

Respectfully submitted,

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