No. 11-398

# In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

v.

FLORIDA, ET AL.,

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## REPLY BRIEF FOR PRIVATE RESPONDENTS ON THE ANTI-INJUNCTION ACT


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## REPLY BRIEF FOR PRIVATE RESPONDENTS ON THE ANTI-INJUNCTION ACT

As explained in Private Respondents' opening AIA brief, there are multiple reasons why this suit against the ACA's individual insurance mandate is not barred by the AIA's ban on "suit[s] for the purpose of restraining the assessment or collection of any tax," 26 U.S.C. § 7421(a). The Government has correctly identified one such reason—*i.e.*, for AIA purposes, the mandate's monetary sanction is neither labeled a "tax" nor otherwise rendered a "tax" through any cross-reference in the Tax Code. *See* Govt. AIA Br. 20-38; *accord* Private Resps. AIA Br. 26-41. But the Government has incorrectly rejected two simpler and more fundamental reasons why the AIA is no barrier here.

*First*, the AIA is not jurisdictional, which means that the Solicitor General's express agreement with the challengers that the AIA is inapplicable obviates any need for this Court to consider whether the statute nevertheless applies. *See* Private Resps. AIA Br. 41-58. The Government fails in its various efforts to demonstrate—as this Court now requires—a clear indication that the AIA is jurisdictional. Instead, every relevant indicia of jurisdictional status is clearly absent. Moreover, the Solicitor General's express concession that the AIA is inapplicable authorizes this Court to adjudicate this suit *regardless* of whether the AIA is "jurisdictional," given that this Court in the past has accepted indistinguishable AIA waivers by the Solicitor General even when loosely labeling the AIA as "jurisdictional."

*Second*, the AIA does not apply because Private Respondents' purpose is to invalidate the mandate's freestanding legal "requirement" that they must purchase costly insurance, 26 U.S.C.A. § 5000A(a), not to avoid the alleged tax "penalty" that would be imposed if they were to fail to comply with that requirement, *id.* § 5000A(b), which they have no intention of doing. *See* Private Resps. AIA Br. 10-25. Faced with this critical distinction between the mandate's "requirement" and its "penalty," the Government has two primary responses, both of which are meritless.

The Government's initial position is that the distinction is irrelevant under the AIA: it contends that it is sufficient that invalidation of the mandate's requirement would "necessarily preclude" collection of the alleged tax penalty. That contention, however, is refuted by the AIA's text and context. It would require judicially rewriting the AIA's "purpose" element as a "necessary effect" element, and it would perversely force challengers of substantive legal requirements enforced through the Tax Code to violate the law before they could sue. Unsurprisingly, therefore, the Government quickly retreats to the position that the mandate's requirement is meaningless under the ACA apart from the penalty: it contends that, notwithstanding the statute's express imposition of a mandatory "requirement," it merely offers taxpayers a lawful economic choice between the price of insurance or the "penalty." That contention, however, is refuted by the ACA's text and context. Every relevant tool of statutory interpretation unambiguously establishes that Congress made it unlawful for individuals

covered by the mandate to be uninsured, whether or not they are willing to pay the penalty.

In sum, this Court could hold that the mandate's penalty should not be treated like an AIA tax, but it is more straightforward to hold either that the Government has abandoned any available AIA defense or that the AIA does not bar this challenge to the mandate's requirement to obtain insurance.

## ARGUMENT

### I. THE AIA IS NOT JURISDICTIONAL, AND THIS COURT CAN ACCEPT THE SOLICITOR GENERAL'S EXPRESS DISAVOWAL OF THE AIA REGARDLESS

In our opening brief, we demonstrated that the AIA lacks "a[] 'clear' indication" of jurisdictional status, *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011), given its text, location, character, and judicially created exceptions. *See* Private Resps. AIA Br. 41-58. The Government fails to refute that showing.

**A.** The Government first contends that the AIA speaks in jurisdictional terms, simply because it "bar[s] the very 'maint[enance]' of pre-enforcement tax challenges." *See* Govt. AIA Br. 10-11 (quoting 26 U.S.C. § 7421(a)). "Jurisdiction," however, refers to the "adjudicatory authority" of federal courts over the "subject-matter" of a case. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243 (2010). And the AIA does not even purport to deprive federal courts of the *power to decide* challenges to federal taxes, let alone does it use the term "jurisdictional." Rather, it merely imposes a "threshold requirement[] that claimants must complete, or exhaust, before filing a lawsuit"—namely, payment of the protested

tax—which is "a type of precondition to suit" that this Court typically treats as a non-jurisdictional "claim-processing" rule. *See id.* at 1246-47; *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (holding non-jurisdictional the requirement in Title VII that discrimination plaintiffs must file a timely EEOC charge before filing a judicial action).

The AIA's fundamentally non-jurisdictional character is in no way altered by the fact that it bars pre-enforcement challenges from being "maintained." *See* 26 U.S.C. § 7421(a). The object of that claim-processing restriction is still the plaintiff's "suit," *id.*, not the "court" or its "jurisdiction." And, with respect to a court's *adjudicatory authority*, there is obviously no material distinction between a bar on "instituting" a claim and a bar on "maintaining" a claim. For example, in *Reed Elsevier*, it clearly would have made no difference if the Copyright Act had stated that "no civil action for infringement … shall be ~~instituted~~[*maintained*] until preregistration or registration of the copyright claim has been made," *compare* 17 U.S.C. § 411(a)—either way, the statute would "say[] nothing about whether a federal court has subject-matter jurisdiction to adjudicate claims for infringement of unregistered works." *See* 130 S. Ct. at 1245.

Nor does *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012), support the Government's argument that the AIA's text speaks in jurisdictional terms, because that case turned on the habeas statute's historical context, not its text. It is true that *Gonzalez* stated (in *dicta*) that the federal habeas statute speaks with "'clear' jurisdictional language" in providing that "an appeal may not be taken to the court of appeals"

"[u]nless a circuit justice or judge issues a certificate of appealability." *Id.* at 649 (quoting 28 U.S.C. § 2253(c)(1)). But this Court plainly did not base that jurisdictional characterization on the *text* of the habeas statute's COA requirement. After all, that text, like the AIA, is semantically indistinguishable from countless statutory restrictions that impose mandatory claim-processing rules, such as the Copyright Act's registration requirement. *See Reed Elsevier*, 130 S. Ct. at 1245 ("no civil action … shall be instituted until …"). Instead, this Court relied on the historical "context" of the habeas statute—namely, that "the requirement of a COA … dates back to 1908" and always "was jurisdictional." *See Gonzalez*, 132 S. Ct. at 648 n.3; *see also Henderson*, 131 S. Ct. at 1203 (rules "concern[ing] an appeal from one court to another court" historically have been treated as jurisdictional). Here, by contrast, the context provided by this Court's past precedent confirms that the AIA's text is not properly treated as jurisdictional. *See* Private Resps. AIA Br. 48-57; *infra* at 8-9.

**B.** The Government next contends that the AIA's purpose demonstrates its jurisdictional nature, simply because Congress viewed the mere maintenance of a pre-enforcement tax challenge as an impediment to effective revenue collection. *See* Govt. AIA Br. 10-11. But that observation just explains why Congress enacted the AIA in the first place; it says nothing about whether Congress' "purpose" was to make the AIA an inflexible jurisdictional bar foreclosing *any* exceptions.

In particular, the fact that the AIA *generally* serves Congress' purpose in protecting revenue

collection does not suggest that Congress intended to foreclose pre-enforcement suits in the rare scenario where, as here, the Government contends that the maintenance of such a suit should be allowed and would better serve Congress' revenue-protection purpose. To the contrary, the Government itself has long said, and this Court has long agreed, that in certain circumstances "the litigation of an injunction suit is more important for the protection of the revenues than insistence upon adherence to the ordinary procedure of payment followed by a suit for refund." *See id.* 17. Indeed, the Government concedes that this case presents just such a circumstance, because resolving the mandate's legal status will provide clarity to the Nation regarding the ACA, while the collection of the mandate's penalty is delayed until April of 2015 regardless. *See id.* 29-31. Given the existence of such situations, the AIA's revenue-protection purpose is better served by declining to treat its bar on pre-enforcement challenges as an unyielding jurisdictional constraint. *Cf. Dolan v. United States*, 130 S. Ct. 2533, 2539-40 (2010) (sentencing courts are not jurisdictionally foreclosed from awarding restitution after missing a mandatory statutory deadline because the deadline's primary purpose is to benefit victims, not protect defendants).

**C.** The Government also tries to draw a contextual inference from the jurisdictional status of "provisions closely related to the AIA." *See* Govt. AIA Br. 12-14. As for the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, we have already demonstrated why its stark contrasts with the AIA instead confirm the AIA's non-jurisdictional status. *See* Private Resps. AIA Br. 46-47. As for the statutory restrictions on

tax-refund actions, *see, e.g.*, *United States v. Dalm*, 494 U.S. 596, 608-10 (1990) (citing 26 U.S.C. §§ 6511(a), 7422(a)), that attempted analogy is doubly inapposite: tax-refund cases implicate sovereign-immunity concerns that are not present here and that this Court's modern precedents no longer treat as a valid basis for applying the "jurisdictional" label.

As noted, the statutory restrictions on tax-*refund* actions "limit[] the scope of a governmental waiver of sovereign immunity." *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (thus describing the restriction in *Dalm*). That "broader system-related" reason for treating those restrictions as "jurisdictional," *see id.*, simply is not implicated by the AIA's bar on *pre-enforcement* tax challenges, which raise no sovereign-immunity concerns because they fall squarely within the *Ex Parte Young* exception, *see Va. Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011). Furthermore, this Court has repudiated its reflexive attribution of jurisdictional status to limitations on sovereign-immunity waivers, leaving *stare decisis* as the sole ground supporting the types of decisions cited by the Government. *See John R. Sand & Gravel*, 552 U.S. at 136-39; *see also id.* at 144-46 (Ginsburg, J., dissenting) (advocating that such earlier cases be overruled in light of this Court's "recent efforts to apply the term 'jurisdictional' with greater precision"). In sum, the Government is essentially seeking to extend moribund "jurisdictional" holdings to the AIA, even though the AIA does not implicate the sovereign-immunity concerns that motivated the discredited doctrine in the first place.

**D.** Finally, the Government denies that this Court has created judicial exceptions to the AIA. *See* Govt. AIA Br. 15-20. As for this Court's decision establishing an indefensible-tax exception in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 6-7 (1962), the Government reprises its cert-stage argument recasting that decision as a textual interpretation of the word "tax," and we have already refuted that argument. *See* Private Resps. AIA Br. 52-57. As for this Court's acceptance of the Solicitor General's express waiver in *Helvering v. Davis*, 301 U.S. 619, 638-40 (1937), the Government does make some additional arguments beyond the cert-stage arguments to which we have already responded, *see* Private Resps. AIA Br. 49-52, but those new arguments are equally flawed.

The Government principally argues that *Davis* is no longer good law. It speculates that *Davis* was implicitly premised on the suggestion in *Miller v. Standard Nut Margarine Co. of Fla.*, 284 U.S. 498, 509-10 (1932), that the AIA does "nothing more" than codify equitable principles, *see* Govt. AIA Br. 18-19, which was an overly flexible construction that has since been *partly* repudiated, *see* Private Resps. AIA Br. 52-53 (describing how *Williams Packing* cabined the equitable exceptions authorized by *Standard Nut*). But *Davis* did not even cite *Standard Nut*, let alone intimate any reliance on the particularly expansive equitable reasoning in *Standard Nut* that was later rejected. *See Davis*, 301 U.S. at 639-40. Rather, this Court plainly relied on the more modest proposition advanced by the Solicitor General—namely, that the Government should be allowed to expressly waive the protections of a statute designed to protect the Government. *See id.*; Govt. AIA Br. 17

(quoting *Davis* brief). That narrow exception to the AIA—like the narrow indefensible-tax exception—is still the law and is in no way undermined by this Court's subsequent rejection of *Standard Nut's* theory of *unbounded* judicial authority to recognize equitable AIA exceptions.

The Government alternatively argues that it is "theoretically possible to read the AIA as both depriving the courts of jurisdiction *and* subject to affirmative and explicit waiver by the government." *See* Govt. AIA Br. 19. To the contrary, however, the most defining characteristic of "jurisdictional" rules is that they "can never be forfeited or waived." *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). The Government thus cannot cite a single example of a hybrid statute that allows the Government to effectuate an express waiver but that is otherwise fully subject-matter jurisdictional.

Moreover, even assuming that *Davis* stood for the proposition that the AIA is a "jurisdictional" statute that nevertheless can be expressly waived by the Solicitor General, that holding would equally allow this Court to accept the Solicitor General's express concession that the AIA should not bar this suit. After all, this is *not* a case where there has been a "mere failure by the government to raise [the AIA] as a defense." *See* Govt. AIA Br. 19 n.11. Rather, just as in *Davis*, the Solicitor General has expressly contended that the AIA should not bar this suit, despite full knowledge of all AIA arguments potentially available to him. Moreover, just as in *Davis*, the Solicitor General has correctly concluded that it will further federal interests to resolve this suit on the merits. *Compare id.* 17, 19 ("resolution of

the dispute [in *Davis*] further[ed] tax collection by eliminating constitutional doubts"), *with id.* 29-31 (resolution of this case "would facilitate the orderly implementation of the insurance market reforms and at the same time not unduly undermine the policies of the AIA in this particular context"). Thus, because there is no material distinction between the Solicitor General's position here and in *Davis*, this Court should accept the Solicitor General's express concession that the AIA should not bar this suit, regardless of whether the AIA is jurisdictional.

## II. THE AIA DOES NOT APPLY BECAUSE THIS SUIT'S "PURPOSE" IS TO INVALIDATE THE MANDATE'S "REQUIREMENT" TO OBTAIN INSURANCE, NOT TO RESTRAIN THE MANDATE'S ALLEGED "TAX" "PENALTY" FOR NON-COMPLIANCE

In our opening brief, we demonstrated that, under the AIA, it is *irrelevant* whether the penalty for non-compliance with the mandate should be treated like a "tax," because the "purpose" of this suit is to invalidate the mandate's antecedent legal requirement to buy insurance. *See* Private Resps. AIA Br. 10-25. In particular, we explained that: (1) Private Respondents' "purpose" as law-abiding citizens is to eliminate their legal duty to buy costly insurance, rather than to avoid a non-compliance penalty that they have no intention of incurring, *see id.* 10-15, 19-22; (2) it is immaterial that success in this suit will have the inevitable *effect* of invalidating the alleged tax penalty for other individuals who would have failed to comply, *see id.* 16-19; and (3) requiring the use of post-enforcement refund actions for challenges to substantive legal

duties enforced through the Tax Code would force plaintiffs to become law-breakers, *see id.* 22-25. The Government has two principal responses why the status of the mandate's "penalty" under the AIA is relevant in this challenge to the mandate's "requirement." They are both meritless.[1]

**A.** The Government initially contends that, "if the relief [plaintiffs] seek 'would necessarily preclude the collection' of 'taxes' within the meaning of the AIA," then "'a suit seeking such relief falls squarely within the literal scope of the [AIA].'" *See* Govt. AIA Br. 39 (quoting *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 (1974), and citing *Alexander v. 'Americans United' Inc.*, 416 U.S. 752, 760 (1974)). But the Government fails to support that contention in any real way, to the point of virtually conceding its error.

Most obviously, the Government never even tries to explain how the statute's "literal" text covers any suit seeking relief that would "necessarily preclude" the collection of taxes. *See id.* To the contrary, after all, the AIA prohibits *only* suits brought "for the purpose of ~~restraining the assessment or collection of~~[*invalidating*] any ~~tax~~[*legal requirement, if that relief would necessarily preclude the collection of any tax*]." *See* 26 U.S.C. § 7421(a). The Government's position would therefore require rewriting the AIA to

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[1] The Government also suggests in passing that the complaint belies our contention that this suit's "purpose" is to invalidate the mandate's requirement rather than its alleged tax penalty. *See* Govt. AIA Br. 38-39. We have already demonstrated why such reliance on the complaint is misplaced and mistaken. *See* Private Resps. AIA Br. 16.

replace its "purpose" element with a "necessary effect" element. *See* Private Resps. AIA Br. 18-19.

Moreover, the Government ignores the absurd and perverse results of its "necessary effect" interpretation. As for absurdity, the AIA would bar an APA challenge to EPA's diesel-fuel regulations that are enforced through a "penalty" that is deemed a "tax" for all Tax Code purposes, *see* 26 U.S.C. §§ 6671(a), 6720A(a), because invalidation of those regulations would "necessarily preclude" the IRS' collection of the penalty-deemed-tax. *See* Private Resps. AIA Br. 13-14, 19. As for perversity, the AIA would force plaintiffs challenging substantive legal requirements enforced through the Tax Code to become law-breakers, because the only way of incurring the alleged tax penalty that would be the prerequisite for a refund action would be to engage in the very conduct that had been proscribed. *See id.* 22-24. For example, challengers of the diesel-fuel regulations would be compelled to sell fuel that failed to satisfy EPA's environmental standards, and individuals challenging the ACA's mandate would be compelled to remain uninsured, contrary to Congress' intent to achieve near-universal coverage, *see* Private Resps. Mandate Br. 1-5; 42 U.S.C.A. § 18091(a)(2)(C),(I). The Congress that enacted the AIA would not have wanted to compel Americans to violate the laws of the United States in order to bring a lawsuit to vindicate the Constitution of the United States, even if the Government here is willing to endorse that lawless result.

Nor can the Government claim that such atextual and bizarre results are compelled by *Bob Jones* and *'Americans United'*. Instead, as we have

previously explained, those suits challenging the loss of organizations' tax-exempt status were not barred on the sole ground that they would have had the *incidental effect* of "necessarily precluding" the collection of third-party taxes from the organizations' donors; rather, the suits were barred because their *obvious and indisputable "purpose"* was to restrain the collection of those very taxes, which were causing the organizations' financial injuries by decreasing the amount of charitable contributions the donors were willing to make. *See* Private Resps. AIA Br. 16-18. In other words, *Bob Jones* and *'Americans United'* do not support the proposition that the AIA applies if a suit will have the "inevitable effect" of precluding the collection of taxes, *even where* the suit's "purpose" is unrelated to *anyone's* taxes. Rather, those cases stand only for the correct proposition that where a plaintiff's clear "purpose" is to "restrain[] the … collection of a[] tax," 26 U.S.C. § 7421(a), it is irrelevant that the "tax" is imposed on a third party and that the plaintiff's injury flows from that third-party taxation.

Indeed, the Government itself virtually concedes that its portrayal of *Bob Jones* and *'Americans United'* is untenably overbroad. The Government never disputes that those cases involved suits lacking *any* non-"tax"-related "purpose." Nor does the Government expressly contend that those cases should be *extended* to suits that, while brought for a non-"tax"-related "purpose," would nevertheless have a "necessary effect" on "taxes." Rather, the Government's *sole* rejoinder is that this is not the latter type of suit, because Private Respondents' "purpose" supposedly is "inextricably linked" to the alleged tax penalty. *See* Govt. AIA Br. 39-40. In

particular, the Government claims that the mandate does not actually impose a "discrete regulatory requirement" to buy insurance, but merely affords individuals a lawful economic choice whether to do so or pay the penalty, such that the only reason for challenging the mandate would be to avoid paying the penalty. *See id.* 39-41. Notably, however, the Government does not argue that the AIA bars this suit *if*, instead, the mandate *does* impose a freestanding duty to purchase insurance.

Ultimately, therefore, the Government is not really advancing the general argument that the AIA bars any suit that will "necessarily preclude" the collection of taxes. Instead, its position that this Court must focus on the status of the mandate's "penalty" rests *exclusively* on its specific argument that the ACA does not contain a separate "requirement" to buy insurance, an argument to which we now turn.

**B.** The Government is demonstrably wrong in claiming that the ACA affords individuals a *lawful choice* to remain uninsured so long as they are willing to pay the "penalty." As we have previously explained in detail, every relevant aspect of the ACA's text, structure, and context confirms that the mandate's "requirement" to buy insurance has legal force and effect wholly independent from the mandate's "penalty" for non-compliance. *See* Private Resps. AIA Br. 1-5, 19-22, 32-33.

To briefly summarize: (1) Congress imposed an unconditional "requirement" to buy insurance that is enforced through a "penalty" for unlawful non-compliance, rather than imposing a "tax" on individuals who make the lawful choice to remain

uninsured, *see id.* 1-3, 20; (2) Congress specifically exempted different sets of people from the mandate and the penalty, which is rational only if all individuals subject to the mandate must comply, regardless of whether they are exempt from the penalty, *see id.* 2-3, 21; (3) Congress structured earlier versions of the ACA's individual "responsibility" provision, as well as the final version of the ACA's employer "responsibility" provision, to allow a choice between buying insurance and paying a monetary exaction, but it ultimately decided not to use that structure in § 5000A, *see id.* 3-4, 21; (4) Congress knew that structuring the mandate as a legal requirement would cause many law-abiding citizens to purchase insurance even though they would have been willing to pay a tax to remain uninsured, and it also knew that this structure would permit the President to keep his campaign pledge of not raising taxes on the middle-class, *see id.* 4-5, 20-21; and (5) Congress consistently refrained from treating the mandate's penalty as a tax in the ACA, *see id.* 5, 33.

In the face of this overwhelming and unambiguous evidence of Congressional intent, the Government's various efforts to conflate the mandate's "requirement" with its "penalty" all fail.

**1.** The Government emphasizes that the provision containing the exemptions from the penalty refers to the "penalty [as] imposed under *subsection (a)*" (where the "requirement" is located), rather than "under subsection (b)" (where the "penalty" is located). *See* Govt. AIA Br. 41 (quoting 26 U.S.C.A. § 5000A(e)). But that fleeting cross-reference does not remotely support the

Government's suggested inference that Congress treated payment of the mandate's "penalty" as equivalent to compliance with the mandate's "requirement."

Most importantly, no cross-reference can change the fact that the mandate imposes an unconditional "requirement" that virtually all Americans "shall" obtain insurance. 26 U.S.C.A. § 5000A(a). That freestanding provision plainly establishes a binding legal duty to buy insurance that exists independently of the non-compliance penalty, regardless of the particular subsection of § 5000A "under" which that penalty is imposed. Nor does this cross-reference in any way undermine Congress' unequivocal and deliberate choice to make the mandate's requirement legally distinct from its penalty, as expressed through the critical decisions to exempt different people from each one and to eschew a structure that would have conflated the two. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Indeed, that Congress viewed the requirement and penalty as legally separate is vividly illustrated by a provision in the ACA authorizing "certification[s] …attesting that, for purposes of the individual responsibility requirement under [26 U.S.C.A. § 5000A], an individual is entitled to an exemption from *either* the individual responsibility requirement *or* the penalty imposed by such section." 42 U.S.C.A. § 18081(a)(4) (emphases added). There is no conceivable reason why Congress would have

drafted the provision in the disjunctive if the requirement and the penalty are one and the same.

Furthermore, there are far better explanations for why § 5000A(e) says that penalties are imposed "under" § 5000A(a). For example, this Court has recognized that "[t]he word 'under' is [a] chameleon," because it can mean "specified in," but it also can mean "pursuant to," such that the proper meaning must be "draw[n] … from its context." *See Kucana v. Holder*, 130 S. Ct. 827, 835 (2010). Here, given the "context" described above, Congress in § 5000A(e) could have referred to the "penalty" as being imposed "under" § 5000A(a), even though it is "specified in" § 5000A(b), because it is nevertheless imposed "pursuant to" an individual's failure to satisfy the "requirement" in § 5000A(a). Or, more simply, the cross-reference could just reflect a minor lack of precision attributable to the frenzied process by which the ACA was enacted. *See* Private Petrs. Severability Br. 7-10.

In sum, the ambiguous cross-reference upon which the Government relies fails to refute what is unambiguous from the ACA's text, structure, and context: Congress intended to impose a legal "requirement" to buy insurance that is enforced through a "penalty," rather than affording individuals a lawful economic choice whether to buy insurance or pay that monetary exaction.[2]

**2.** The Government further argues that Congress' decision to exempt certain low-income

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[2] For the same reason, the Government's invocation of *New York v. United States*, 505 U.S. 144 (1992), *see* Govt. AIA Br. 41, is equally unavailing, *see* Private Resps. AIA Br. 21-22.

individuals from the penalty proves that Congress did not view the mandate's requirement as a free-standing legal duty, because Congress would not have wanted to force such individuals to buy costly insurance. *See* Govt. AIA Br. 41. This argument is flawed at every level.

It falters at the threshold on the fact that Congress exempted *other* individuals from the requirement itself, but exempted low-income individuals *only* from the penalty. *Compare* 26 U.S.C.A. § 5000A(d) (exempting from the requirement illegal aliens, incarcerated individuals, and certain religious objectors), *with id.* § 5000A(e) (exempting certain low-income individuals, and others, from the penalty but not the requirement). That critical structural distinction proves that Congress viewed the mandate's requirement as having legal significance distinct from its penalty; otherwise, Congress would not have exempted some individuals from the requirement and some from the penalty. Thus, regardless of the reason why Congress exempted certain low-income individuals from the penalty rather than the requirement, its rationale could not support the Government's inference that the requirement has no independent significance whatsoever.

To the contrary, the fact that Congress created an exemption from the mandate's requirement for illegal aliens, incarcerated individuals, and certain religious objectors, but declined to include low-income individuals within that exemption, starkly confirms that Congress intended for such individuals to comply with the requirement. Otherwise, it surely would have exempted them from the requirement

itself, just as it did for the other groups whom it did not intend to subject to that duty.

Moreover, Congress was not acting inconsistently when it decided to subject certain low-income individuals to the mandate's requirement but not its penalty. Instead, it was simply balancing competing interests. On the one hand, Congress wanted even those individuals to obtain insurance, in furtherance of its goal of achieving near-universal coverage. *See* Private Resps. Mandate Br. 1-5; 42 U.S.C.A. § 18091(a)(2)(C),(I). It knew that, despite the financial sacrifice, many law-abiding citizens with limited incomes would try to "comply with a mandate, even in the absence of penalties, because they believe in abiding by the nation's laws." *See* Private Resps. AIA Br. 4 (quoting CBO report). Plus, the burden would be minimal for those penalty-exempt individuals who are eligible for (the ACA-expanded) Medicaid. *See* Govt. Medicaid Br. 49-50. On the other hand, though, Congress did not want to pay the political price for *penalizing* people of limited means who failed to comply with the mandate. In fact, this imperative to avoid the appearance of draconian federal enforcement similarly explains why the IRS was stripped of its most effective, yet most onerous, enforcement tools. *See* 26 U.S.C.A. § 5000A(g)(2) (barring criminal prosecutions, liens, and levies). More generally, Congress also did not want to convert the mandate from a "requirement" enforced by a "penalty" into a "tax" on a voluntary choice, because that would have violated the President's campaign pledge not to raise "taxes" on families making less than $250,000 annually. *See* Private Resps. AIA Br. 4-5.

The Government can hardly deny that such a delicate balance between policy and politics was motivating Congress. After all, the Executive Branch itself has continued that balancing act throughout the pendency of this litigation. To give the most recent example, on February 15, 2012—slightly more than a week after the Solicitor General filed his latest brief in this Court opining that the mandate's penalty is a constitutional "tax," *see* Govt. AIA Br. 21—the Acting Director of the Office of Management and Budget testified under oath before Congress that the mandate's penalty is *not* a "tax."[3] If the Executive Branch is comfortable taking such seemingly irreconcilable positions, it cannot possibly suggest that the Legislative Branch was acting inconsistently when it subjected certain low-income individuals to the mandate's requirement but then exempted them from its penalty.

In all events, there are other people who are exempt only from the mandate's penalty, yet who are indisputably capable of complying with the mandate's requirement—namely, members of defined Indian Tribes and individuals who are uninsured during coverage gaps of less than three months. *See* 26 U.S.C.A. § 5000A(e)(3),(4). Congress' decision to exempt *those* people *only* from the penalty—likely due to enforcement and administrative concerns—is indisputable evidence that Congress expected them to comply with the requirement: that decision cannot possibly be

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[3] *See* Philip Klein, *OMB Director Undercuts Legal Case for Obamacare*, WASH. EXAMINER, Feb. 15, 2009, http://campaign2012.washingtonexaminer.com/blogs/beltway-confidential/omb-director-undercuts-legal-case-obamacare/376561.

equated with an atextual intention to exempt them from the requirement itself.

**3.** The Government also observes that, under the ACA, "the only consequence of noncompliance with Section 5000A(a) is the penalty prescribed by Section 5000A(b)." *See* Govt. AIA Br. 40. That is entirely true and entirely irrelevant. To tweak an earlier example, even if the *only* consequence of violating the EPA's diesel-fuel regulations was the penalty-deemed-tax in 26 U.S.C. § 6720A(a), that would not in any way change the fact that those regulations "establish[] [an] independently [binding] legal obligation." *See* Govt. AIA Br. 40. A freestanding legal duty does not lose its mandatory character simply because its sole means of enforcement is placed in the Tax Code.

Put differently, when determining whether a federal law compels conduct or merely attaches adverse "tax" consequences to the failure to engage in that conduct, the relevant legal question is not the *consequence* of refraining from the conduct, but whether the *freedom* to refrain exists. Indeed, the Government can hardly contend that a direct mandate to act enforced through a monetary penalty may be equated with an indirect monetary incentive to act, because its primary defense of the ACA's Medicaid expansion is that acceptance of federal funding with regulatory conditions is "voluntary" in theory, no matter how "coercive" in fact. *See* Govt. Medicaid Br. 31-48.

More generally, it is startling and disheartening that the Department charged with enforcing the Nation's laws would argue to this Court that there is no real difference between violating a duty enshrined

in federal law and making a purely economic decision based on its "tax" consequences. There is instead a palpable difference—directly affecting the behavior of law-abiding citizens—between a statute that imposes a $5-per-pack "tax" on the lawful act of buying cigarettes and a statute that enforces through a $5-per-pack "penalty" a legal ban on the purchase of cigarettes. *See* Private Resps. AIA Br. 20-21. Thus, when Congress imposed a legal "requirement" to buy health insurance with the goal of forcing virtually every American into the Nation's health-insurance risk pools, Congress surely did not share the Government's view that Americans could lawfully frustrate that goal by remaining uninsured and (at most) paying some money into the federal treasury instead.

**4.** Similarly, the Government gains nothing by observing that the mandate's penalty will generate revenue. *See* Govt. AIA Br. 40. So will the Tax Code's diesel-fuel penalties, 26 U.S.C. § 6720A(a), as will all "[c]riminal fines, civil penalties, [and] civil forfeitures," *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 778 (1994). The fact that the "penalty" for non-compliance with a regulatory "requirement" will generate revenue does not somehow render the "requirement" voluntary. Individuals are paying the "penalty" because they have *violated* the law, not because they are *complying* with it.

The Government thus gets matters precisely backwards by invoking this Court's abandonment of the distinction between "regulatory and revenue-raising taxes." *See* Govt. AIA Br. 40. Just as this Court refuses to inquire whether Congress had a

hidden "regulatory" motive in enacting a "tax" not formally imposed as punishment for unlawful conduct, *see* Private Resps. AIA Br. 26-27, 30-32, so too should this Court refuse to inquire whether Congress had a hidden "tax" motive in enacting a "penalty" that is formally imposed as punishment for unlawful conduct.

**5.** Finally, it warrants emphasis that, elsewhere in its brief, the Government implicitly concedes that the mandate imposes a freestanding legal "requirement," distinct from its "penalty." Certain *amici* have argued that allowing this suit to proceed will also authorize future pre-enforcement challenges to the penalty's application in individual circumstances (if the mandate is facially upheld here). *See* Caplin/Cohen AIA Br. 7-8, 36. In response, the Government asserts that, unlike this suit, such a future pre-enforcement "challenge to the calculation or imposition of a particular penalty under Section 5000A" "would be barred on any of a host of grounds," including the existence of "adequate [post-enforcement] remed[ies]," the "failure to exhaust administrative remedies," the existence of "a special statutory administrative and judicial review procedure for raising such issues," and "the absence of 'final agency action.'" *See* Govt. AIA Br. 36-37.

The Government's response, however, is necessarily premised on the legal distinction between the mandate's requirement and its penalty, because that is the only material difference between this suit and future challenges to individual penalties. After all, if, as the Government claims, even our "general challenge" to § 5000A is "'inextricably linked' with the penalty provision" because there is no "discrete

regulatory requirement," *see id.* 39-40, then the "host of grounds" that bar specific challenges to a penalty would apply with equal force to this general challenge. Under the Government's own reasoning, therefore, it is precisely because this suit challenges the mandate's requirement to buy insurance, rather than its penalty for non-compliance, that there is no bar on review here. Thus, just as the Government virtually admits that its "necessary effect" interpretation of the AIA is wrong, *supra* at 13-14, it virtually admits that its conflation of the mandate's "requirement" and "penalty" is also wrong.

## CONCLUSION

Preferably for the foregoing reasons, but at least for the reason given by the Government, this Court should hold that the AIA does not bar this suit and then review the judgment below on the merits.

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