Brief of Amicus Curiae CATO Institute Supporting Respondents (Anti-Injunction Act Issue)

By: Cato Institute on 2/10/2012

Cato's third Supreme Court brief in the Obamacare litigation concerns the issue of whether the Anti-Injunction Act prevents federal courts from timely reviewing Congress's most egregious attempt to exceed its power to regulate interstate commerce. The AIA bars courts from enjoining "any tax" before that tax is assessed or collected. One would think that such a law would have no application to the penalty that enforces the individual health insurance mandate, which is not a tax but rather a punishment for not complying with the mandate. Accordingly, most of the courts to consider the issue have found the AIA to be inapplicable to individual mandate challenges. Moreover, *the government itself has long conceded that the AIA does not bar these suits*. A Fourth Circuit majority and the dissenting Judge Brett Kavanaugh in the D.C. Circuit, however, reached a contrary conclusion, reasoning that the AIA applies to all exactions assessed under the Internal Revenue Code, including "penalties." Out of an abundance of caution, and because the AIA may be a jurisdictional bar, the Supreme Court appointed an *amicus curiae* to argue for the position that the AIA bars these suits. The plaintiffs here — the 26 states, the National Federation of Independent Business, and several individuals — have advanced several strong arguments for why the AIA doesn't apply. Cato's brief expands on one of those arguments: that the words "any tax" in the AIA do not include "penalties" simply because they may be codified in the Code. First, we demonstrate that the Supreme Court has always held that "taxes" and "penalties" are not interchangeable for AIA purposes. Second, we show that, with one exception, all of the cases cited in the amicus briefs filed by two former IRS commissioners, Mortimer Caplin and Sheldon Cohen — which appear to have heavily influenced the Fourth Circuit and Judge Kavanaugh — concerned penalties that were statutorily defined as taxes. This refutes the commissioners' erroneous claim that those cases concerned penalties that were not defined as taxes. As we say in our brief, "the influence of *Amici* Caplin & Cohen's [D.C. Circuit] brief is surpassed only by its misdirection." The one

exception is the Mobile Republican case (Eleventh Circuit 2003), which we explain is properly understood as applying the AIA to penalties that enforce substantive tax provisions. In short, the AIA cannot bar suits to enjoin the individual mandate penalty because that penalty neither is defined as a tax nor enforces a substantive tax provision.

Please see full brief below for more information.

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 OF *AMICUS CURIAE* CATO INSTITUTE SUPPORTING RESPONDENTS (ANTI-INJUNCTION ACT ISSUE)

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QUESTION PRESENTED

Whether the majority of the courts of appeal to have considered the issue correctly determined that the Anti-Injunction Act does not bar pre-enforcement judicial review of the penalty for fail-ing to comply with the individual health insurance mandate because that penalty has not been ex-pressly defined as a tax for these purposes and does not enforce a substantive tax provision.

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INTEREST OF *AMICUS CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedi-cated to advancing the principles of individual lib-erty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitu-tional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs. This case is of central con-cern to Cato because it involves the federal govern-ment's most egregious attempt to exceed its constitu-tional power to regulate commerce—and the issue that is the subject of this brief concerns the ability to timely challenge that *ultra vires* action.

STATEMENT

Although most of the courts to consider the issue have held that the AIA is inapplicable to the individ-ual mandate penalty, a divided Fourth Circuit con-cluded that the AIA bars consideration of suits chal-lenging the individual mandate, reasoning that the AIA is jurisdictional and applies to all exactions as-sessed under the Internal Revenue Code ("the Code"). *See Liberty Univ., Inc. v. Geithner*, __ F.3d __, 2011

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

WL 3962915, at *5 (4th Cir. Sept. 8, 2011); *see also Seven-Sky v. Holder*, 661 F.3d 1, 22, 38 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (similar). Accord-ingly, when the Court granted certiorari, it appointed an *amicus curiae* ("*Amicus* Long") to defend the posi-tion that the AIA bars pre-enforcement consideration of the constitutionality of the individual mandate.

Private and state respondents contend that the AIA is inapplicable to suits challenging the constitu-tionality of the individual mandate for several rea-sons. *See* Cert. Pet. at 15, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, No. 11-393 (U.S. Sept. 28, 2011) (contending that there is considerable doubt as to whether the AIA is jurisdictional and, thus, not subject to waiver by petitioners; that the individual mandate penalty is not a "tax" for AIA purposes; that the challenge is to the mandate, which has legal force even without the penalty; and that some plaintiffs will have no other way of challenging the individual mandate because they will be subject to the mandate but not the pen-alty); Cert. Pet. at 37 n.3, *Florida v. H.H.S.*, No. 11-400 (U.S. Sept. 27, 2011) (contending that the AIA should not bar suits brought by states). Although the Court can find the AIA inapplicable for any of these reasons, this brief only addresses whether the pen-alty for failing to comply with the individual mandate is a "tax" for AIA purposes.

SUMMARY OF ARGUMENT

The argument that all penalties assessed under the Internal Revenue Code are subject to the AIA fundamentally departs from the traditional analysis of penalties under the Code. Federal courts have long understood that "penalties" are not interchangeable with "taxes" for AIA purposes. Moreover, before this litigation, no court has ever relied on the alternative argument that the Code's grant of penalty assess-ment authority to the Secretary of the Treasury, 26 U.S.C. § 6201, is sufficient to make the AIA apply to penalties.

This Court has acknowledged that the terms "tax" and "penalty" "are not interchangeable one for the other." *United States v. La Franca*, 282 U.S. 568, 572 (1931). Acknowledging this, *Lipke v. Lederer*, 259 U.S. 557 (1922), held that the AIA did not bar a suit to enjoin the enforcement of a "tax" for violating the Prohibition Act because the exaction there was a pe-nalty and not a tax. *See id.* at 562.

Lipke's holding cannot be distinguished as apply-ing only to criminal penalties because *Lipke* did not purport to create a narrow "due process" exception to the AIA. Rather, *Lipke* construed the AIA as not ap-plying to penalties in part to avoid this "due process" violation. Further, at least two courts of appeal have recognized that *Lipke*'s core AIA holding applies to both criminal and civil penalties. *See Mobile Republi-can Assembly v. United States*, 353 F.3d 1357, 1362 n.5 (11th Cir. 2003) (distinguishing *Lipke* on other grounds); *Reams v. Vrooman–Fehn Printing Co.*, 140 F.2d 237, 240–41 (6th Cir. 1944) (same).

Before this litigation, and with the exception of cases applying the AIA to suits to enjoin penalties

that enforce substantive tax provisions, courts have only applied the AIA to penalties that were expressly defined as taxes for AIA purposes by specific statutory provisions. The most prominent of these provi-sions are § 6665(a)(2) and the second sentence of § 6671(a), which together provide that penalties in chapter 68 of the Code are defined as taxes.

With the sole exception of *Mobile Republican*, all of the cases cited by former Commissioners Caplin and Cohen applied the AIA to penalties that were expressly defined as taxes. The commissioners' contrary claim—that the penalties were not statutorily defined as taxes—is erroneous. Moreover, almost all of the cases cited by the former commissioners explicitly re-ly on provisions that define the penalties or other payments at issue in those cases as taxes for AIA purposes.

Mobile Republican is also unavailing because that case, and *Reams* before it, merely held the AIA appli-cable to suits seeking to enjoin penalties that enforce substantive tax provisions. The Fourth Circuit thus misread *Mobile Republican* as supporting its position that all Code penalties are subject to the AIA. *See Liberty Univ.*, 2011 WL 3962915, at *10 (citing *Mobile Republican*, 353 F.3d at 1362 n.5).

Reams also shows how the Fourth Circuit misin-terpreted the legislative history of what is now § 6665(a)(2) and the second sentence of § 6671(a), and thus incorrectly inferred that the AIA applies to all Code penalties. That is, when Congress enacted those provisions—which define chapter 68 penalties as taxes for AIA purposes—the *Reams* exception would have likely applied to all penalties then codified in chapter 68 *because those penalties all enforced sub-*

stantive tax provisions. It is, therefore, not surprising that Congress did not think that it was changing the law as to any then-existing penalty—and did not an-ticipate that chapter 68 would ever include penalties that did not enforce substantive tax provisions.

Tellingly, *Amicus* Long cites no cases applying the AIA to suits to enjoin exactions denominated as pen-alties that have not been statutorily defined as taxes. Instead, *Amicus* Long resorts to statutory arguments that have not been considered before this litigation. This Court should not abandon the reasoned analysis that courts have traditionally used in applying the AIA to penalties under the Code in favor of novel ar-guments that are neither sound nor prudent.

As the overwhelming majority of courts to con-sider the issue have concluded, the AIA is inapplica-ble to suits to enjoin the § 5000A(b)(1) individual mandate penalty because that penalty is not ex-pressly defined as a tax by any Code provision and it does not enforce a substantive tax provision. The in-dividual mandate itself is not a substantive tax provi-sion because it is not "an enforced contribution to provide for the support of government." *La Franca*, 282 U.S. at 572.

Amici have been unable to find *any* case that *ever* applied the AIA to penalties that are neither ex-pressly defined as taxes nor enforce substantive tax provisions. The implication for AIA jurisprudence is clear: The AIA is inapplicable to suits to enjoin penal-ties that are neither expressly defined as taxes nor enforce substantive tax provisions. The § 5000A(b)(1) penalty for failing to comply with the individual mandate is such a provision, and thus the AIA is in-applicable to suits seeking to enjoin it.

ARGUMENT

THE ARGUMENT THAT THE INDIVIDUAL MANDATE PENALTY IS SUBJECT TO THE ANTI-INJUNCTION ACT SIMPLY BECAUSE IT APPEARS IN THE INTERNAL REVENUE CODE FUNDAMENTALLY DEPARTS FROM HOW COURTS HAVE LONG APPLIED THE AIA

The argument that all penalties assessed under the Internal Revenue Code are subject to the AIA, as the Fourth Circuit held in *Liberty University, Inc. v. Geithner*, 2011 WL 3962915, Judge Kavanaugh con-cluded in *Seven-Sky v. Holder*, 661 F.3d at 21, and *Amicus* Long urges, *see* Br. for Court-Appointed A*micus Curiae* Supporting Vacatur (Anti-Injunction Act), *H.H.S. v. Florida*, No. 11-398 (U.S. Jan. 6, 2012) [hereinafter Br. for *Amicus* Long], fundamentally de-parts from the traditional analysis of penalties under the Code for AIA purposes.

The argument at issue has been articulated in two ways: First, the Fourth Circuit and *Amicus* Long have said that the AIA's use of the term "any tax," 26 U.S.C. § 7421(a), "forbids actions that seek to restrain the Secretary from exercising his statutory authority to assess exactions imposed by the Internal Revenue Code," *Liberty Univ.*, 2011 WL 3962915, at *6; *see* Br. for *Amicus* Long at 36, including exactions labeled as penalties.[2] Second, the Fourth Circuit, Judge Kava-

[2] Neither the Fourth Circuit nor *Amicus* Long have explained why their broad construction of the term "any tax" would not subject *every* civil penalty to the AIA. After all, the AIA was en-acted well before the codification of the Code and does not refer-ence the Code itself, but rather to "any tax." 26 U.S.C. § 7421(a). *Compare Lipke*, 259 U.S. at 561–62 (discussing whether a provi-sion in the Prohibition Act was a tax for AIA purposes) *with Fed.*

naugh, and *Amicus* Long have said that the AIA ap-plies to penalties under the Internal Revenue Code because such penalties are "taxes," "as defined in the Code's assessment provisions." *Liberty Univ.*, 2011 WL 3962915, at *6 (citing 26 U.S.C. § 6201); *Seven-Sky*, 661 F.3d at 22, 38 (same); Br. for *Amicus* Long at 39 (same). Both of these articulations fundamen-tally depart from the analysis that federal courts have traditionally employed when considering whether the AIA applies to penalties under the Code.

Contrary to the Fourth Circuit and *Amicus* Long's assertion that the AIA's use of the term "any tax" in-cludes all penalties included in the Code, courts have long understood—based, in part, on this Court's pre-cedents—that "penalties" are not interchangeable with "taxes" for AIA purposes. Moreover, before this litigation, no court had ever relied on the alternative argument advanced by the Fourth Circuit, Judge Kavanaugh, and *Amicus* Long that the Code's grant of penalty assessment authority to the Secretary of the Treasury, 26 U.S.C. § 6201, is sufficient to make the AIA applicable to penalties notwithstanding this Court's previous conclusion to the contrary.

Instead, courts have only found the AIA applicable to suits to enjoin penalties under the Code in two dis-tinct—though at times overlapping—circumstances. First, courts have applied the AIA to suits seeking to enjoin penalties that have been expressly defined as "taxes" for AIA purposes by specific statutory provi-sions. In almost all of these cases, courts have explic-itly relied on those express statutory provisions. *See,*

Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 558 n.9 (1976) (fee imposed by the Trade Expansion Act of 1962 was not a tax for AIA purposes because it was not in the Code).

e.g., *Souther v. Mihlbachler*, 701 F.2d 131, 132 (10th Cir. 1983) (citing 26 U.S.C. § 6671(a)); *Shaw v. United States*, 331 F.2d 493, 496 (9th Cir. 1964) (citing former 26 U.S.C. § 6659(a)(2) (now codified at 26 U.S.C. § 6665(a)(2))); *Botta v. Scanlon*, 314 F.2d 392, 393 (2d Cir. 1963) (citing 26 U.S.C. § 6671(a)). Sec-ond, some courts have held that suits to enjoin penal-ties that enforce substantive tax provisions are barred by the AIA. *See, e.g.*, *Mobile Republican*, 353 F.3d at 1362 n.5; *Reams*, 140 F.2d at 240–41.

A. "Taxes" and "Penalties" Are Not Inter-changeable for AIA Purposes

This Court has acknowledged that the terms "tax" and "penalty" "are not interchangeable." *La Franca*, 282 U.S. at 572. As this Court has repeatedly explained, the distinction between "tax" and "penalty," is that "[a] 'tax' is an enforced contribution to provide for the support of government; a 'penalty,' . . . is an exaction imposed by statute as punishment for an unlawful act." *See, e.g.*, *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (quoting *La Franca*, 282 U.S. at 572). Further, this distinction between taxes and penalties is en-tirely consistent with the definition of the word "tax" put forth by *Amicus* Long. *See* Br. for *Amicus* Long at 37 (citing Noah Webster, *An American Dictionary of the English Language* 1132 (rev. by Chauncy A. Goodrich) (1860) (the term tax "include[es] almost every species of imposition on persons or property *for supplying the public treasury*") (emphasis added)).

The Fourth Circuit and *Amicus* Long cite *Phillips v. Commissioner*, 283 U.S. 589 (1931), for the proposi-tion that the "any tax" includes any "exaction [that] is made under color of their offices by revenue officers

charged with the general authority to assess and col-lect the revenue." *Liberty Univ.*, 2011 WL 3962915, at *5 (quoting *id.* at 596 (alteration in original) (citing *Snyder v. Marks*, 109 U.S. 189 (1883))); Br. for *Ami-cus* Long at 37 (same). But the exactions at issue in *Phillips* and *Snyder* were ordinary taxes, not penal-ties. *See Phillips*, 283 U.S. at 591 (concerning a tax on transferee of liquidated corporation's assets); *Sny-der*, 109 U.S. at 189 (concerning a tax on sale of to-bacco). Similarly, *Bailey v. George*, 259 U.S. 16 (1922), which *Amicus* Long also cites to demonstrate "the broad scope of the [AIA]," Br. for *Amicus* Long at 38 (citing *id.*), concerned an exaction that was for-mally a tax, and not a penalty. *See Bailey*, 259 U.S. at 19 (concerning a tax on businesses that employed child labor).[3] Accordingly, these cases do not in any way undermine the longstanding distinction between "taxes" and "penalties" for AIA purposes.

Recognizing this distinction, this Court, in *Lipke v. Lederer*, held that the AIA did not bar a suit to en-join the enforcement of a "tax" for manufacturing or selling liquor in violation of the Prohibition Act be-cause the exaction at issue was a penalty and not a tax. *See Lipke*, 259 U.S. at 562 ("The collector de-

[3] *Bailey v. George* did not hold, therefore, that the AIA "reaches a *broader* range of exactions than does the term 'tax' in the Con-stitution." *Liberty Univ.*, 2011 WL 3962915, at *9. Rather, as this Court explained in *Bob Jones University v. Simon*, *Bailey v. George* merely held that the AIA barred a suit to enjoin a *tax* even when "the tax was challenged as a regulatory measure be-yond the taxing power of Congress." 416 U.S. 725, 740 (1974). Indeed, notwithstanding *Bailey v. George*, even a statute that is formally a tax can be considered a penalty for AIA purposes un-der certain circumstances. *See Seven–Sky*, 661 F.3d at 7 n.12 (majority opinion) (citing *Lipke*, 259 U.S. 557).

manded payment of a penalty, and section 3224 [of the Revised Statutes], which prohibits suits to re-strain assessment or collection of any tax, is without application."); *see also Liberty Univ.*, 2011 WL 3962915, at *28–29 (Davis, J., dissenting) (explaining why the Fourth Circuit majority opinion is in conflict with *Lipke*). Indeed, as *Lipke* is in apparent conflict with *Amicus* Long's argument, it is somewhat sur-prising that *Amicus* Long neither cites *Lipke* nor makes any attempt to distinguish the case.

The Fourth Circuit, meanwhile, tried to distin-guish *Lipke* by reasoning that the case's AIA holding only applies to criminal penalties, not civil ones. *See Liberty Univ.*, 2011 WL 3962915, at *8–9 (majority opinion). But *Lipke* did not purport to create a narrow "due process" exception to the AIA. Rather, it con-strued the AIA as not applicable to penalties both be-cause a "penalty" is not a "tax," *see Lipke*, 259 U.S. at 562, and because this construction avoided a "due process" violation, *see id.*; *Liberty Univ.*, 2011 WL 3962915, at *28–29 (Davis, J., dissenting).

Moreover, at least two courts of appeal have pre-viously recognized that *Lipke*'s core AIA holding ap-plies to both criminal and civil penalties. *See Mobile Republican*, 353 F.3d at 1362 n.5 (distinguishing *Lipke* on other grounds); *Reams*, 140 F.2d at 240–41 (same). Significantly, neither *Reams* nor *Mobile Re-publican* distinguished *Lipke* as a due process case that only applies to criminal penalties. Indeed, as the D.C. Circuit majority observed, "aside from the Fourth Circuit's recent decision, no court has ever held that 'any tax' under the Anti–Injunction Act in-cludes exactions that Congress deliberately called 'penalties.'" *Seven-Sky*, 661 F.3d at 7.

B. Courts Have Only Applied the AIA to Penalties That Are Expressly Defined as Taxes for AIA Purposes and to Penalties That Enforce Substantive Tax Provisions

With the exception of cases that applied the AIA to suits to enjoin penalties that enforce substantive tax provisions, courts, prior to this litigation, have only applied the AIA to penalties that have been ex-pressly defined as taxes for AIA purposes by specific statutory provisions. Moreover, in almost all of those cases, courts have explicitly relied on these specific statutory provisions and do not rely, as two former IRS commissioners disingenuously suggest, on the argument that the AIA applies to all Code penalties.

1. With the Exception of *Mobile Republi-can*, All of the Cases Cited by Former Commissioners Caplin and Cohen Concerned Penalties That Were Ex-pressly Defined as Taxes

Two former IRS Commissioners, Mortimer Caplin and Sheldon Cohen, filed an *amicus* brief here—building on the one they filed in the D.C. Circuit—asserting that the AIA bars suits to enjoin the as-sessment and collection of all Code penalties. *See Amici* Br. of Mortimer Caplin and Sheldon Cohen Urging Vacatur on the Anti-Injunction Act Issue in Supp. of Neither Side, *H.H.S. v. Florida*, No. 11-398 (U.S. Jan. 12, 2012) [hereinafter Caplin & Cohen *Amici* Br.]; Br. for Mortimer Caplin & Sheldon Cohen as *Amici Curiae* in Supp. of Appellees, *Seven–Sky v. Holder*, No. 11–5047 (D.C. Cir. July 1, 2011). *Amici* Caplin & Cohen's *Seven-Sky* brief has proven influen-tial, being cited twice by the Fourth Circuit and by both the D.C. Circuit majority and dissent. *See Lib-*

erty Univ., 2011 WL 3962915, at *9, *14; *Seven–Sky*, 661 F.3d at 5 n.5; *id.* at 26 n.4 (Kavanaugh, J., dis-senting). As demonstrated below, however, the influence of *Amici* Caplin & Cohen's *Seven-Sky* brief is surpassed only by its misdirection. *Amici* Caplin & Cohen have compounded their error by submitting an even more misleading brief here.

With the sole exception of *Mobile Republican As-sembly v. United States*, 353 F.3d 1357—which will be explained below as holding the AIA applicable to penalties that enforce substantive tax provisions—all the cases cited by *Amici* Caplin & Cohen applied the AIA to penalties that have been expressly defined as taxes by specific statutory provisions, most notably § 6665(a)(2) and the second sentence of § 6671(a). Fur-ther, almost all of those cases explicitly rely on those particular provisions.

Amici Caplin & Cohen erroneously state that these cases concern penalties not in the Code's chap-ter 68, and are thus not easily distinguished as cases applying the express command of §§ 6665(a)(2) and 6671(a). *See* Caplin & Cohen *Amici* Br. at 18 ("But that does not justify the treatment under section 7421 of other penalties not in chapter 68, such as in the cases cited above (at 16–17)."). Their analysis is wrong because, with the sole exception of *Mobile Re-publican*, the penalties in those cases are expressly defined as taxes—either because they are, in fact, in chapter 68 and are defined as taxes by § 6665(a)(2) or the second sentence of § 6671(a), or because an analogous provision defines the penalty or other payment at issue as a tax for AIA purposes.

a. *Shaw v. United States* and *Botta v. Scanlon*

The first two cases cited by *Amici* Caplin & Cohen as "[p]erhaps the best illustration of section 7421's breadth" concern the application of the AIA to suits to enjoin penalties on corporate officers, under § 6672, for the failure of a discontinued business to pay over its employee's withheld taxes to the IRS. Caplin & Cohen *Amici* Br. at 15–16 (citing *Shaw v. United States*, 331 F.2d 493; *Botta v. Scanlon*, 314 F.2d 392). But both *Shaw* and *Botta* grounded their decisions in express statutory provisions defining § 6672 penalties as taxes. *See Shaw*, 331 F.2d at 496 (citing former 26 U.S.C. § 6659(a)(2) (now codified at 26 U.S.C. § 6665(a)(2))); *Botta*, 314 F.2d at 393 (citing 26 U.S.C. § 6671(a)). To their credit, *Amici* Caplin & Cohen be-latedly concede that *Shaw* and *Botta* might be distin-guishable, *see* Caplin & Cohen *Amici* Br. at 18 (con-ceding that § 6671(a) defines § 6672 penalties as tax-es), but this does not excuse their misrepresentation of *Shaw* and *Botta* in the first instance.

b. *Transport Manufacturing v. Trainor*

The third case cited by *Amici* Caplin & Cohen con-cerns the application of the AIA to suits to enjoin in-terest due on interest. *See* Caplin & Cohen *Amici* Br. at 16 (citing *Transp. Mfg. & Equip. Co. v. Trainor*, 382 F.2d 793 (8th Cir. 1967)). Although interest due on interest is not in chapter 68, *Transport Manufac-turing* explicitly relies on another provision, § 294(b) of the 1939 Internal Revenue Code, which expressly provides that interest due on interest is considered part of the tax due. *See Transp. Mfg.*, 382 F.2d at 797 n.8 (citing 26 U.S.C. § 294(b) (1952) ("Where the amount determined . . . as the tax imposed by this

chapter . . . is not paid on or before the date pre-scribed for its payment, there shall be collected as a part of the tax, interest upon such unpaid amount . . . .")); *see also* 26 U.S.C. § 6601(e)(1) (deeming interest to be a tax under the current Code).[4]

c. *Professional Engineers v. United States*

The fourth case cited by *Amici* Caplin & Cohen concerns the application of the AIA to suits to enjoin penalties for failure to file tax returns. *See* Caplin & Cohen *Amici* Br. at 16 (citing *Prof'l Eng'rs, Inc. v. United States*, 527 F.2d 597 (4th Cir. 1975)). But that penalty is in chapter 68, 26 U.S.C. § 6651—and *Professional Engineers* explicitly relies on the provision that defines § 6651 penalties as taxes for AIA pur-poses. *See Prof'l Eng'rs*, 527 F.2d at 599 (citing for-mer 26 U.S.C. § 6659 (now codified at 26 U.S.C. § 6665)).

d. *Herring v. Moore*

The fifth case cited by *Amici* Caplin & Cohen con-cerns the application of the AIA to suits to enjoin pe-nalties for filing fraudulent W-4 withholding forms. *See* Caplin & Cohen *Amici* Br. at 16 (citing *Herring v. Moore*, 735 F.2d 797 (5th Cir. 1984)). But the penalty for false statements with respect to withholding taxes

[4] Even had interest due on interest not been expressly defined as part of the tax due, the *Reams–Mobile Republican* exception, which is discussed below, would have applied. *See Reams*, 140 F.2d at 240–41 (holding that suits to enjoin penalties and inter-est on tax due for failing to pay over Social Security taxes were AIA-barred because they were interwoven with the underlying tax); *Voss v. Hinds*, 111 F. Supp. 679, 681 (W.D. Okla. 1953) (cit-ing *Reams*, 140 F.2d 237).

is also in chapter 68, 26 U.S.C. § 6682—and although *Herring* does not discuss its reasoning, it does explic-itly rely on *Souther v. Mihlbachler*. *See Herring*, 735 F.2d at 798 (citing *Souther v. Mihlbachler*, 701 F.2d 131). *Souther*, in turn, explicitly relies on the provi-sion that defines § 6682 penalties as taxes for AIA purposes. *See Souther*, 701 F.2d at 132 (citing 26 U.S.C. § 6671(a)).

e. *Crouch v. Commissioner*

The sixth case cited by *Amici* Caplin & Cohen con-cerns the application of the AIA to suits to enjoin pe-nalties on return preparers that fail to include their Social Security numbers on returns. *See* Caplin & Cohen *Amici* Br. at 16 (citing *Crouch v. Comm'r*, 447 F. Supp. 385 (N.D. Cal. 1978)). That penalty is also in chapter 68, 26 U.S.C. § 6695(c)—and *Crouch* explic-itly relies on the provision that defines § 6695(c) pen-alties as taxes for AIA purposes. *See Crouch*, 447 F. Supp. at 386 (citing 26 U.S.C. § 6671(a)).

f. *National Commodity v. United States*

The seventh case cited by *Amici* Caplin & Cohen concerns the application of the AIA to suits to enjoin penalties for promoting abusive tax shelters. *See* Cap-lin & Cohen *Amici* Br. at 16 (citing *Nat'l Commodity & Barter Ass'n v. United States*, 625 F. Supp. 920 (D. Colo. 1986)). But the penalty for promoting abusive tax shelters is also in chapter 68, 26 U.S.C. § 6700—and *National Commodity* explicitly relies on the pro-vision that defines § 6700 penalties as taxes for AIA purposes. *See Nat'l Commodity*, 625 F. Supp. at 921 (citing 26 U.S.C. § 6671).

g. *Spencer v. Brady*

The eighth case cited by *Amici* Caplin & Cohen concerns the application of the AIA to suits to enjoin penalties on parents who fail to provide Social Security numbers for their claimed dependants. *See* Cap-lin & Cohen *Amicus* Br. at 16–17 (citing *Spencer v. Brady*, 700 F. Supp. 601 (D.D.C. 1988)). But the (for-mer) penalty for failing to supply the "TIN" (Tax-payer Identification Number) of any dependant was in subchapter B of chapter 68, 26 U.S.C. § 6676(e) (1988), and is thus defined as a tax for the purposes of the AIA. *See* 26 U.S.C. § 6671(a). *Spencer* does not discuss the distinction between penalties and taxes, but that is mostly because the taxpayers in *Spencer* were challenging much more than the $5 penalty for failing to include their children's Social Security numbers on their tax returns. Rather, the *Spencer* taxpayers were challenging the potential denial of deductions for failing to supply those numbers—and the court rightly recognized that this was really a suit to enjoin the assessment and collection of actual taxes because enjoining the denial of deductions is the equivalent of enjoining the tax itself. *See Spencer*, 700 F. Supp. at 603.

h. *Mobile Republican v. United States*

The final case cited by *Amici* Caplin & Cohen is *Mobile Republican*, *see* Caplin & Cohen *Amici* Br. at 16–17, which will be explained below as applying the AIA to suits to enjoin penalties that enforce substan-tive tax provisions.

2. *Mobile Republican* and *Reams* Only Applied the AIA to Penalties That En-force Substantive Tax Provisions

Amici Caplin & Cohen's reliance on *Mobile Repub-lican* is similarly unavailing because *Mobile Republi-can* did not hold that all penalties under the Code are taxes for AIA purposes. Rather, *Mobile Republican* simply held that the AIA bars suits to enjoin penal-ties that enforce substantive tax provisions. That is, by recognizing *Lipke v. Lederer* as a case in which a penalty enforced a non-tax provision, *Mobile Republi-can*, and *Reams* before it, both observe the rule that the AIA does not bar suits to enjoin civil penalties under the Code and also establish an exception to that rule: that the AIA bars suits to enjoin penalties that enforce substantive tax provisions. *See Mobile Republican*, 353 F.3d at 1362 n.5; *Reams*, 140 F.2d at 240–41; *see also Thomas More Law Center v. Obama*, 651 F.3d 529, 540 (6th Cir. 2011) (similarly explain-ing *Mobile Republican*'s reasoning); *Seven–Sky*, 661 F.3d at 7 (same).[5]

[5] The penalties found in §§ 5114(c)(3) (penalty for failure to comply with requirements of nonbeverage domestic drawback claimant provisions), 5684(b) (penalty for failure to pay or collect liquor taxes), and 5761(e) (penalties for failure to pay tobacco taxes and for buying and for selling tobacco products marked for export within the United States) enforce substantive tax provi-sions and would, thus, be subject to the AIA under the *Reams–Mobile Republican* line of cases. In addition, as the government has argued, *see* Appellee's Supp. Br. at 4, *Liberty Univ.*, 2011 WL 3962915 (No. 10-2347), these provisions could be subject to the AIA because these provisions explicitly provide that these penalties should be paid, assessed, and collected, "as provided in 6665(a)." This otherwise superfluous cross-reference to the en-tire § 6665(a) could conceivably be construed as defining these penalties as taxes, as provided in § 6665(a)(2).

In *Reams*, the Sixth Circuit distinguished a civil penalty, under the 1939 Internal Revenue Code, for failing to pay over Social Security taxes from the penalty at issue in *Lipke* on the grounds that the Social Security penalty is "an integral part of the tax and interwoven into it." *Reams*, 140 F.2d at 240–41. Simi-larly, in *Mobile Republican*, the Eleventh Circuit dis-tinguished the civil penalty for failing to meet the § 527 disclosure requirements, *see* 26 U.S.C. § 527(j), from the penalty at issue in *Lipke* on the grounds that the penalty in *Lipke* "involve[d] tax penalties imposed for substantive violations of laws not directly related to the tax code," whereas the § 527(j) penalty enforced the § 527 disclosure requirements that "form part of the overall tax subsidy scheme." *Mobile Re-publican*, 353 F.3d at 1362 n.5.

a. The Fourth Circuit Misread *Mobile Republican* as Supporting Its Posi-tion That All Penalties under the Code Are Subject to the AIA

The Fourth Circuit thus misread *Mobile Republi-can* as supporting its position that all penalties under the Code are subject to the AIA. *See Liberty Univ.*, 2011 WL 3962915, at *10 ("The Eleventh Circuit agreed and dismissed the suit because the exaction was based 'squarely upon the explicit language of the Internal Revenue Code' and 'form[ed] part of the overall tax subsidy scheme.'" (quoting *Mobile Repub-lican*, 353 F.3d at 1362 n.5)). What *Mobile Republi-can* meant when it observed that the exaction was based "squarely upon the explicit language of the In-ternal Revenue Code," *Mobile Republican*, 353 F.3d at 1362 n.5, was simply its conclusion that, as in *Bob Jones*, the IRS's position in that case was a "good-

faith effort to enforce the technical requirements of the tax laws." *Id.* (quoting *Bob Jones*, 416 U.S. at 739–40). This point was only important because, presumably, had the position of the IRS been in "bad-faith," the AIA would have been inapplicable for the simple reason that the IRS would not have been try-ing to assess or collect "any tax." 26 U.S.C. § 7421(a). Thus, the crucial factor in *Mobile Republican*—and how it distinguished *Lipke*—was the fact that the § 527(j) penalty enforced the § 527 disclosure require-ments, which "form part of the overall tax subsidy scheme." *Mobile Republican*, 353 F.3d at 1362 n.5.

b. When Congress Defined Chapter 68 Penalties as Taxes, the *Reams* Ex-ception Would Have Applied to Those Penalties Because They All Enforced Substantive Tax Provisions

When Congress first added what is now § 6665(a)(2) and the second sentence of § 6671(a)—which define chapter 68 penalties as taxes for the purposes of the entire Code, including the AIA—the *Reams* exception would have likely applied to all pe-nalties then codified in chapter 68 *because those pen-alties all enforced substantive tax provisions*. *See* Of-fice of Tax Policy, Dep't of the Treasury, *Report to the Congress on Penalty & Interest Provisions of the In-ternal Revenue Code* 19–21 (1999) [hereinafter *Pen-alty Report*], *available at* http://www.treasury.gov/resource-center/tax-policy/Documents/intpenal.pdf (noting that there were only 13 penalties in the origi-nal 1954 Code and describing how those penalties functioned). It is therefore unsurprising that when it added those provisions, Congress did not think that it

had changed existing law as to any then-existing penalty. *See* H.R. Rep. No. 83-1337, at A420 (1954); S. Rep. No. 83-1622, at 595–96 (1954). Nor could Congress have contemplated that at some future time, chapter 68 would include penalties enforcing any-thing other than substantive tax provisions. Thus, no inference can be drawn that Congress thought that all Code penalties were to be automatically treated as taxes for AIA purposes. *Cf. Liberty Univ.*, 2011 WL 3962915, at *11 (drawing such an inference).

With time, however, Congress enacted dozens of new civil penalties in the Code, some of which relate weakly, if at all, to underlying substantive tax provi-sions.

See Penalty Report at 21–32.[6] Accordingly, the *Reams–Mobile Republican* exception would likely not have made the AIA applicable to some of these penalties. Still, because Congress almost invariably placed such provisions in chapter 68—and they are thus de-fined as taxes for AIA purposes, *see* 26 U.S.C. §§ 6665(a)(2), 6671(a)—courts continued to hold that the AIA barred suits to enjoin such penalties, even when they may not have enforced an underlying substantive tax provision. *See Crouch*, 447 F. Supp. 385 (ap-plying the AIA to a § 6695(c) penalty on a return pre-parer for failing to include his Social Security number on a return he prepared because the penalty was co-dified in subchapter B of chapter 68 despite the fact

[6] *See, e.g.*, 26 U.S.C. §§ 6695(c) (penalty on return preparer for not including identification number), 6711 (penalty for failure of tax-exempt organization to disclose that information or services it sells can be obtained for free from federal government), 6713 (penalty on return preparers for disclosing or using taxpayer information), 6720A (penalty for selling fuels that do not meet EPA standards), & 6720C (penalty for failing to notify health plan of cessation of eligibility for COBRA premium assistance).

that the "penalty [was] against the tax preparer, not the taxpayer, and the penalty [was] imposed for the failure to supply a Social Security number, not the failure to pay a tax").

3. *Amici* Cite No Cases Applying the AIA to Penalties That Are Neither Statuto-rily Defined as Taxes Nor Enforce Sub-stantive Tax Provisions

Neither *Amici* Caplin & Cohen nor *Amicus* Long have cited *any* case applying the AIA to penalties that are not defined as taxes and that do not enforce substantive tax provisions. Of the nine cases cited by *Amici* Caplin & Cohen, only *Mobile Republican* and *Transport Manufacturing* concern penalties not in chapter 68. *Transport Manufacturing* explicitly relies on a Code provision that treats interest due on inter-est as part of the tax due, *see Transp. Mfg.*, 382 F.2d at 797 n.8 (citing 26 U.S.C. § 294(b) (1952)), and is thus analogous to the chapter 68 penalties and *Mo-bile Republican* concerned a penalty that enforced substantive tax provisions. Moreover, of all the chap-ter 68 penalty cases cited by *Amici* Caplin & Cohen, only *Spencer* did not explicitly rely on the specific provisions that expressly define those penalties as taxes for AIA purposes—and *Spencer* is not really a penalty case in the first place.[7]

For his part, *Amicus* Long cites no cases applying the AIA to suits to enjoin exactions denominated as

[7] *Amici* Caplin & Cohen's misleading citation of legal authority should inform this Court's evaluation of their factual represen-tations as well. *Cf. Liberty Univ.*, 2011 WL 3962915, at *14 ("As former IRS Commissioners warned in a recent brief, allowing these suits would severely hamper IRS collection efforts." (citing Caplin & Cohen *Amici* Br., *Seven–Sky*)).

penalties that have not been statutorily defined as taxes. *See* Br. for *Amicus* Long at 36–43. *Amicus* Long does not even cite *Mobile Republican*, presuma-bly because he recognizes that *Mobile Republican* on-ly applied the AIA to the § 527(j) penalty because that penalty enforces substantive tax provisions. In-deed, *Amicus* Long avoids all discussion of the rele-vant case law, presumably because almost all of those cases rely on specific provisions that define the penal-ties at issue as taxes for AIA purposes. *See* Br. for *Amicus* Long at 36–43. Instead, *Amicus* Long resorts, as did the Fourth Circuit and Judge Kavanaugh, to statutory arguments that have never before been considered. This Court should not abandon the rea-soned analysis that courts have traditionally used in applying the AIA to Code penalties in favor of novel arguments that are neither sound nor prudent.

C. The AIA Is Inapplicable to Suits Seeking to Enjoin the Individual Mandate Penalty Because That Penalty Has Not Been Statutorily Defined as a Tax and Does Not Enforce a Substantive Tax Provision

As the overwhelming majority of courts to con-sider the issue have concluded, the AIA is inapplica-ble to suits seeking to enjoin the § 5000A(b)(1) indi-vidual mandate penalty because—under the tradi-tional analysis that courts have used in applying the AIA—it is not expressly defined as a tax by any Code provision and it does not enforce a substantive tax provision. *See Thomas More Law Center v. Obama*, 651 F.3d at 539 (holding that the penalty for failing to comply with the individual mandate is not a tax for AIA purposes); *Seven-Sky v. Holder*, 661 F.3d at 5 (same); *Goudy–Bachman v. H.H.S.*, 764 F. Supp. 2d

684, 694 (M.D. Pa. 2011) (same); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 627 (W.D. Va. 2010) (same); *U.S. Citizens Ass'n v. Sebelius*, 754 F. Supp. 2d 903, 909 (N.D. Ohio 2010) (same); *Florida ex rel. McCollum v. H.H.S.*, 716 F. Supp. 2d 1120, 1130 (N.D. Fla. 2010) (same); *see also Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882, 890 (E.D. Mich. 2010) (rejecting application of the AIA to indi-vidual-mandate suit for other reasons); *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 603 (E.D. Va. 2010) (same).

The § 5000A(b)(1) individual mandate penalty is not expressly defined as a tax. Unlike most penalties in the Code, the § 5000A(b)(1) penalty was not placed in chapter 68 and has, thus, not been defined as a tax for the purposes of the AIA by either § 6665(a)(2) or the second sentence of § 6671(a). This is significant because courts have explicitly relied on these provi-sions, which together define chapter 68 penalties as taxes for Code purposes, in concluding that suits to enjoin particular penalties were barred by the AIA. *See, e.g.*, *Souther*, 701 F.2d at 132 (citing 26 U.S.C. § 6671(a)); *Shaw*, 331 F.2d at 496 (citing former 26 U.S.C. § 6659(a)(2) (now codified at 26 U.S.C. § 6665(a)(2))); *Botta*, 314 F.2d at 393 (citing 26 U.S.C. § 6671(a)).

The § 5000A(b)(1) individual mandate penalty does not enforce a substantive tax provision because the requirement that private individuals purchase insurance policies from private companies cannot be a tax. The penalty cannot be a tax because it is not "an enforced contribution to provide for the support of government." *La Franca*, 282 U.S. at 572. Indeed, the government, in its merits brief, does not contend that

the command to purchase a product or service from a private company can itself be a tax. *See* Pet. Br. (Min-imum Coverage Provision) at 52–62, *H.H.S. v. Flor-ida*, No. 11-398 (U.S. Jan. 6, 2012) (arguing that the individual mandate penalty is a tax—even though Congress called it a penalty—but not arguing that the mandate itself is a tax). Because the individual mandate penalty does not enforce a substantive tax provision, it cannot qualify for protection under the *Reams–Mobile Republican* line of cases, which, as ex-plained above, apply the AIA to suits to enjoin penal-ties that enforce substantive tax provisions. *See Mo-bile Republican*, 353 F.3d at 1362 n.5; *Reams*, 140 F.2d at 240–41.

Moreover, *Amici* have been unable to find *any* case that has *ever* applied the AIA to penalties that are not expressly defined as taxes in the Code and that do not enforce substantive tax provisions. The implication of this dearth of precedent is clear: The AIA is inapplicable to suits seeking to enjoin penal-ties that are neither defined as taxes nor enforce sub-stantive tax provisions. The penalty for failing to comply with the individual mandate is such a pen-alty—and so the AIA is inapplicable here.

CONCLUSION

For the foregoing reasons, the AIA does not bar suits seeking to enjoin the penalty that enforces the individual mandate.

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