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

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Brief Of Amici Liberty University, Inc., Michele Waddell And Joanne Merrill In Support Of The Petitioners And Respondents On The Anti-Injunction Act

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Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Liberty Counsel
1055 Maitland Center Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
court@lc.org

Stephen M. Crampton
Mary E. McAlister
Liberty Counsel
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org

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INTEREST OF AMICI CURIAE[1]

Amici Liberty University, Inc., Michele G. Waddell and Joanne V. Merrill are plaintiffs in *Liberty University, Inc. et al v. Timothy Geithner, et. al.,* 2011 WL 3962915 (4th Cir. 2011), *petition for cert. filed,* (No. 11-438). Amici filed the first private party lawsuit challenging provisions of the Patient Protection and Affordable Care Act (the "Act") on the day it was enacted. Amici also brought the only lawsuit that challenged both the individual and employer insurance mandates on the grounds that the provisions violate the First Amendment as well as being *ultra vires* acts exceeding Congress' enumerated powers under Article I §8 of the United States Constitution.

Amici's lawsuit is the only challenge to the Act that was dismissed based upon the

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[1] Counsel for a party did not author this Brief in whole or in part, an no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this Brief. The parties have filed consents to the filing of Amicus Briefs on behalf of either party or no party.

Anti-Injunction Act, 26 U.S.C. §7421(a) ("AIA"). In fact, the Fourth Circuit's determination that the AIA barred Amici's claims represents the only time that a federal court reviewing the AIA in the context of challenges to the Act found that the AIA applied. The Fourth Circuit found the AIA applicable even though both parties agreed that it was not. In fact, the government respondents who had asserted the AIA in the district court specifically told the Fourth Circuit that they had determined that the AIA did not apply to Amici's claims.

As the only parties to have had their claims dismissed based upon the AIA, Amici have a unique perspective on and direct stake in the outcome of this Court's determination of the question of whether the AIA is a jurisdictional bar to challenges to the Act. Consequently, Amici can provide this Court with a more complete picture of the effects of its decision regarding the AIA.

Amici have extensively researched the AIA and developed information that will greatly assist the Court in addressing the issue that is pivotal to Amici's challenge. Amici respectfully submit this Brief for the Court's consideration.

SUMMARY OF ARGUMENT

The extant controversy regarding whether the AIA should be applied to challenges to the Act is reflective of an ongoing problem with profligate use of the term "jurisdiction" which has transformed a basic procedural concept into a word with so many meanings and applications as to be almost meaningless as a legal construct.

This Court has worked to rein in the over-use of the term in recent years, and should do so again in this case by finding, consistent with its precedents and every other federal court save the Fourth Circuit, that the AIA is not a jurisdictional bar to challenges to the insurance mandates and other provisions of the Act.

ARGUMENT

I. THIS COURT'S PRECEDENTS CALLING FOR A MORE PRECISE UNDERSTANDING OF THE CONCEPT OF "JURISDICTION" COMPEL THE CONCLUSION THAT THE AIA IS NOT A JURISDICTIONAL BAR.

The unusual alignment of the parties on the question of whether the AIA applies–all parties

agree that it does not so that an Amicus must argue that it does–elucidates how what should be a clear distinction between "jurisdictional conditions and claim-processing rules can be confusing in practice." *Reed-Elsevier v. Muchnick*, 130 S.Ct. 1237, 1243 (2010). That confusion is the result of imprecise use of the term "jurisdiction" so that it has become a word of "many, too many, meanings." *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90 (1998). The present controversy illustrates how casual use of what should be a precise legal concept can create conflict and confusion. This Court has recognized the scope of the problem and consistently called for greater precision in use of the term "jurisdiction." The present analysis of the AIA should be examined in light of those precedents, which compel the conclusion that the AIA is not jurisdictional and does not bar challenges to the Act.

In *Steel Co.,* this Court addressed confusion that had arisen when a lower court referred to the absence of a viable cause of action as being a "jurisdictional" problem. 523 U.S. at 88-89. This Court explained that the absence of a valid cause of action does not implicate subject-matter jurisdiction, which is the courts' statutory or constitutional power to adjudicate the case. *Id.* at 89. The Court rejected the argument that reference to a court's "jurisdiction" in a statute delineating remedies

for violation of an environmental regulation somehow transformed the elements of the cause of action into a jurisdictional prerequisite. *Id.* at 90. Casually referring to such statutes as "jurisdictional" are no more than "drive by jurisdictional rulings" that have no precedential value. *Id.* at 91. "Jurisdiction," properly defined is the "power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* at 94 (citing *Ex parte McCardle*, 7 Wall. 506, 514 (1868).

Far from being a question of whether a party before the court has stated a viable claim, jurisdiction is the fundamental issue of whether Article III permits a party to petition the court at all. *See id.* at 101. For example, if a party's claim does not meet the minimum threshold for damages, then a district court has no power to consider the claim. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 276 (1977). Similarly, if the parties do not have diversity of citizenship, then the court has no authority to hear the case. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900). Critical to each of these factors is that they cannot be waived and are not subject to any exceptions. *Id.* If a case lacks any of these elements, the court has no authority.

By contrast, rules such as filing deadlines are "claim-processing rules that do not delineate what cases…courts are competent to adjudicate." *Kontrick v. Ryan*, 540 US 443, 454 (2004). "Classifying time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction' can be confounding." *Id.* at 455. Citing the statement from *Steel Co.* that jurisdiction "is a word of many, too many, meanings," this Court clarified that "jurisdiction" should be reserved solely for "prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Id.* (citing *Steel Co.* 523 U.S. at 90).

Citing *Kontrick,* this Court further clarified that the question of whether a party was time-barred from seeking attorneys' fees "does not concern the federal courts' "subject-matter jurisdiction." *Scarborough v. Principi,* 541 U.S. 401, 413 (2004). "Rather, it concerns a mode of relief (costs including legal fees) ancillary to the judgment of a court that has plenary jurisdiction of [the civil] action in which the fee application is made." *Id.* More particularly, the dispute presented a question of time, *i.e.,* when a fee applicant had to make his claim, not whether he could make the claim. *Id.* The provision at issue did not describe what classes of cases the court was competent to

adjudicate, but, rather, post-judgment proceedings for cases already under consideration. *Id.* at 414. Consequently, the provision's deadlines and other specifications could not be classified as "jurisdictional." *Id.*

This Court further emphasized the need for precision in use of the term "jurisdictional" in the context of the confusion caused by over-use of the term "mandatory and jurisdictional" when referring to "emphatic" time prescriptions in rules of court. *Eberhart v. United States*, 546 U.S. 12, 18 (2005). Courts have been less that meticulous in using the term "jurisdictional," and the resulting imprecision has often obscured the true meaning of such time limits, *i.e.,* that parties must be meticulous about complying and the government must be meticulous about objecting to untimely filings. *Id.*

Citing *Kontrick*, *Scarborough* and *Eberhart*, this Court rejected a lower court's categorization of the 15-employee minimum for claims under Title VII as "jurisdictional." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 504 (2006). The numerical threshold does not circumscribe federal-court subject-matter jurisdiction, but relates to the substantive adequacy of a Title VII claim. *Id.* It cannot be raised defensively for the first time at the end of trial. *Id.*

In the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy, this Court and others have been less than meticulous. "Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief-a merits-related determination." 2 J. Moore et al., MOORE'S FEDERAL PRACTICE § 12.30[1], p. 12-36.1 (3d ed.2005) (hereinafter Moore). Judicial opinions, the Second Circuit incisively observed, "often obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim." *Da Silva [v. Kinsho International Corporation*], 229 F.3d [358], at 361 [(2d Cir. 2000)]. We have described such unrefined dispositions as "drive-by jurisdictional rulings" that should be accorded "no precedential effect" on the question

> whether the federal court had authority to adjudicate the claim in suit. *Steel Co.*, 523 U.S., at 91.

Id. at 511. The Court further explained that since subject matter jurisdiction involves a court's power to hear a case it can never be forfeited or waived. *Id.* at 514. Consequently, requirements such as the monetary minimum for damages in a diversity case cannot be waived since they truly are jurisdictional, but provisions such as the 15-employee threshold can be waived since they are not. *Id.* at 515.

This Court again cautioned against the profligate use of "jurisdiction" in *Union Pacific Railroad Co., v. Brotherhood of Locomotive Engineers and Trainmen*, 130 S.Ct. 584, 596 (2009). In *Union Pacific*, the Court found that an agency had improperly labeled a statutory requirement for pre-litigation settlement conferences as "jurisdictional." *Id.* at 599. "In this case . . . our grant of certiorari enables us to address a matter of some importance: We can reduce confusion, clouding court as well as Board decisions, over matters properly typed 'jurisdictional.'" *Id.* at 596. "Not all mandatory 'prescriptions, however emphatic, are . . . property typed jurisdictional.'" *Id.* (citation omitted). Subject matter jurisdiction, properly understood, refers to a court's power to hear a case, something which can never be forfeited or

waived. *Id.* By contrast, a "claim-processing rule . . . even if unalterable on a party's application, does not reduce the adjudicatory domain of a tribunal and is ordinarily forfeited if the party asserting the rule waits too long to raise the point." *Id.*

In *Reed Elsevier*, this Court again referred to the difference between a claims processing rule, such as the requirement that copyright holders register their works before suing for infringement, and a jurisdictional requirement. 130 S.Ct. at 1243-1244. "Jurisdiction" refers to "a court's adjudicatory authority," so the term "jurisdictional" properly applies only to "prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)" implicating that authority. *Id.* at 1243. While courts sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, "[o]ur recent cases evince a marked desire to curtail such 'drive-by jurisdictional rulings, which too easily can miss the 'critical difference[s]' between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Id.* (citations omitted).

The *Reed Elsevier* Court looked at three factors to determine whether the copyright registration requirement was jurisdictional or

non-jurisdictional: (1) Whether the statute clearly said that it was jurisdictional; (2) Whether the statute is located separately from the provisions that grant the federal courts jurisdiction over the respective claims and (3) Whether there are exceptions to the prohibition on civil actions. *Id*. at 1245-1246. Applying those factors to the copyright registration statute, this Court found that the provision was not jurisdictional. *Id.* at 1247. The pertinent text of the statute under consideration in *Reed Elsevier* is particularly relevant to the Court's analysis of the AIA in this case:

> Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), *no civil action for infringement of the copyright in any United States work shall be instituted* until preregistration or registration of the copyright claim has been made in accordance with this title.

17 U.S.C. §411(a)(emphasis added). Similarly, the AIA provides:

> Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, *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.

26 U.S.C. § 7421(a)(emphasis added). Applying the *Reed-Elsevier* factors to the AIA yields the same result as did application of the factors to the copyright statute, *i.e.,* the AIA is not jurisdictional. Section 7421 does not clearly state that it is jurisdictional. Section 7421 is located in Title 26 of the United States Code, not in Title 28, which describes federal court jurisdiction. Finally, there are twelve listed exceptions as well as least two judicially created exceptions to the prohibition against injunctive relief. *See Enoch v. Williams Packing & Navigation Co.,* 370 U.S. 1 (1962), discussed *infra*. Under *Reed Elsevier*, the AIA is non-jurisdictional and does not bar the extant challenges to provisions in the Act.

"Because '[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system,' we are not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such." *Stern v. Marshall*, 131 S. Ct. 2594, 2606-07 (2011) (citing *Henderson v. Shinseki*, 131

S.Ct. 1197, 1201–03 (2011). The AIA is not framed as such and should not be so branded.

II. THIS COURT'S PRECEDENTS NARROWING THE CONCEPT OF "JURISDICTION" CAST DOUBT UPON *WILLIAMS PACKING*'S STATEMENT THAT THE AIA "WITDRAWS JURISDICTION FROM THE COURTS."

In light of these most recent pronouncements narrowing and clarifying the concept of jurisdiction, the Fourth Circuit's and Court-appointed Amicus' reliance upon *Williams Packing*'s 50-year-old statement that the AIA "withdraws jurisdiction" from the courts is, at best, questionable. *Williams Packing*, 370 U.S. at 5. This is particularly true in light of this Court's oft-repeated admonition that "drive-by jurisdictional rulings," *i.e.*, allusions to "jurisdiction" that are not pivotal to the outcome of the case and not accompanied by analysis, have "no precedential effect." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006). The *Williams Packing* statement upon which the Court-appointed Amicus and Fourth Circuit built their defense of the AIA is just such a "drive-by" ruling. Consequently, Amicus' and the Fourth Circuit's dogged reliance notwithstanding, the statement that the AIA "withdraws jurisdiction" from the courts should

be accorded "no precedential effect" on the question of whether courts have the authority to adjudicate the challenges to the Act. *Id.*

In *Williams Packing*, the pivotal question was whether the petitioner could pre-emptively escape liability for past due employment taxes by claiming that paying the taxes would bankrupt the business. *Williams Packing*, 370 U.S. at 5. In finding that the employer could not avoid tax liability merely by claiming that the payments would hurt its business, this Court stated that the object of the AIA was to "withdraw jurisdiction" from the courts to "entertain suits seeking injunctions prohibiting the collection of federal taxes." *Id.* The Court did not say that the lower courts were without power to hear the case, but determined that the employer had not established sufficient evidence to enjoin collection of taxes. *Id.* The Court's objective was not to establish that the courts had no power to hear the case, but to determine whether the party could obtain an injunction based merely upon an allegation that payment of taxes would cause irreparable injury to its business. *Id.* at 6. This Court answered that question in the negative, but said that a party can obtain an injunction if: 1. It is clear that under no circumstances could the Government ultimately prevail, and 2. Equity jurisdiction otherwise exists. *Id.* at 7. "Thus, in general, the Act prohibits suits for

injunctions barring the collection of federal taxes when the collecting officers have made the assessment and claim that it is valid." *Id.* at 8.

Placed in its proper context, therefore, *Williams Packing* does not restrict courts' power to hear cases, but clarifies the scope of exceptions to the AIA's general prohibition against pre-enforcement injunctions. *Bob Jones University v. Simon*, 416 U.S. 725, 737 (1974). In *Bob Jones*, this Court said that *Williams Packing* gave the AIA *almost* literal effect, not literal effect, and permitted injunctive relief when a party proved both irreparable injury and certainty of success on the merits. *Id.* Notably, in saying that the party could prove irreparable injury and certainty of success and proceed with a claim, the Court implicitly affirmed that the AIA does not divest the courts of authority to hear the claim, since a truly jurisdictional statute cannot contain exceptions. *Id.* Instead, under *Williams Packing* and *Bob Jones University*, the AIA acts like a claims processing rule which limits the court's ability to proceed with a claim if certain prerequisites are absent.

The Court's recognition of exceptions to the prohibition described in the AIA in *Williams Packing*, as well as the twelve enumerated statutory exceptions compels the

conclusion that the AIA is not "jurisdictional" in the proper sense of the term. *Bowles v. Russell*, 551 US 205, 212-213 (2007). "[T]his Court has no authority to create equitable exceptions to jurisdictional requirements." *Id.* at 214. Consequently, the creation and continuing recognition of exceptions to the AIA as described in *Williams Packing* means that the AIA is not jurisdictional.

Williams Packing's discussion of the purpose of the AIA further demonstrates the error in relying upon it to support the argument that the AIA should bar Respondents and Amici's challenges to the Act.

> [T]he manifest purpose of s 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention and to require that the legal right to the disputed sums be determined in a suit for a refund. In this manner the United States is assured of prompt collection of its lawful revenue.

Williams Packing, 370 U.S. at 7. In other words, the AIA is intended to protect the United States from judicially imposed delays in tax collection efforts. *Id.* However, if, as is true in this case, the United States is not invoking the AIA, but is saying that it does not apply,

then proceeding with the extant challenges to the Act will not thwart Congress' purpose in enacting the AIA. Since the United States is joining the parties in asking that the challenges proceed, the manifest purpose of the AIA would not be frustrated in this case, even if it could be found to be applicable (which it is not).

III. CASES ADDRESSING THE AIA SINCE *WILLIAMS PACKING* AND A COMPARATIVE ANALYSIS OF THE LANGUAGE OF THE AIA VIS-À-VIS THE PROHIBITORY LANGUAGE OF THE TAX INJUNCTION ACT FURTHER DEMONSTRATE THAT THE AIA IS NOT A JURISDICTIONAL BAR.

When addressing the applicability of the AIA to particular scenarios, this Court has consistently referred to the exceptions established in *Williams Packing* as just that, *i.e.,* exceptions to the prohibition on pre-enforcement challenges, further establishing that the AIA is not jurisdictional. In addition, a review of the language of and cases examining the Tax Injunction Act reveals substantial differences that belie claims that the AIA bars challenges to the Act.

A. This Court's Continuing Acknowledgment Of The Exceptions Created By *Williams Packing* Illustrates That The AIA Is Not Jurisdictional.

In two cases decided the same day, this Court re-affirmed that *Williams Packing* established a two-part exception to the AIA's prohibition against pre-enforcement injunctions. *Bob Jones University v. Simon*, 416 U.S. 725, 737 (1974), *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 761-62 (1974). The Court reiterated that a party seeking to avoid the AIA pre-enforcement bar must provide both irreparable injury and likelihood of success on the merits. *Bob Jones*, 416 U.S. at 745-746, *"Americans United,"* 416 U.S. at 763. Allowing a taxpayer to enjoin tax collection after showing only irreparable injury would render the AIA "quite meaningless." *Bob Jones*, 416 U.S. at 745-746. In addition, the question of whether there is an adequate legal remedy is an objective, not subjective, determination. *Id.* The fact that a refund suit might affect a taxpayer's financial solvency or otherwise be less than ideal is not sufficient to show "inadequacy" and therefore cannot establish even one part of the two-part *Williams Packing* exception. *"Americans United,"* 416 U.S. at 763. Most importantly, the

fact that the Court affirmed that *Williams Packing* set forth a judicially created exception to the AIA demonstrates that it cannot be jurisdictional. *See Bowles v. Russell*, 551 US 205, 214 (2007) ("this Court has no authority to create equitable exceptions to jurisdictional requirements").

That point was further established in *United States v. American Friends Service Committee*, 419 U.S. 7 (1974), where this Court found that the petitioner did not fall with the "*Williams Packing* exception." *Id.* "Here as in *'Americans United', supra*, the employees will have a 'full opportunity to litigate' their tax liability in a refund suit. *Id.* "Even though the remitting of the employees to a refund action may frustrate their chosen method of bearing witness to their religious convictions, a chosen method which they insist is constitutionally protected, the bar of the Anti-Injunction Act is not removed." *Id.* at 10-11. Implicit in that conclusion is the determination that the bar of the AIA can be removed, which means it cannot be jurisdictional.

In *Commissioner v. Shapiro*, 424 US 614, 627-628 (1976), this Court again held that the AIA did not require dismissal of a taxpayers' challenge. The Court characterized *Williams Packing* as permitting injunctive relief if the taxpayer shows that the government could not

ultimately prevail and that he would suffer irreparable injury. *Id.* at 627. In order for the taxpayer to make that showing, it is necessary for the government to disclose the information upon which it bases its assessment. *Id.* That does not mean, as the government claimed, that the burden of proof shifts to the government to prove a valid assessment. *Id.* Instead, it means only that the taxpayer needs access to the information in order to provide it to the court. *Id.* The taxpayer must still plead and prove facts establishing that his remedy in the Tax Court or in a refund suit is inadequate to repair any injury that might be caused by an erroneous assessment or collection of an asserted tax liability. *Id.* at 628. "In any event we are satisfied that under *the exception to the Anti-Injunction Act* described in the *Williams Packing* case this case may be resolved by reference to that Act alone." *Id.* (emphasis added). The government had done little more than assert that taxes were owed based upon a bank deposit and unsubstantiated claim that he had received income from selling drugs. *Id.* That did not provide the information necessary to determine whether the government had any chance of prevailing on the merits, *Id.* Consequently, the AIA did require that the suit be dismissed. *Id.* at 632.

This Court again confirmed that the AIA is subject to several exceptions, which means it

cannot be jurisdictional, in *Laing v. United States*, 423 U.S. 161, 185 n27 (1976). In *Laing*, the Court did not explicitly discuss the *Williams Packing* exception, but focused on one of the statutory exceptions under the Internal Revenue Code. *Id.* The AIA "does not forbid suits to enjoin the assessment of a deficiency, or a levy or proceeding in court for its collection, if the taxpayer has not been mailed a notice of deficiency and afforded an opportunity to secure a final Tax Court determination." *Id.* When the IRS fails to follow enumerated procedures for establishing a tax deficiency, then the AIA does not apply and a suit to enjoin the collection of the jeopardy deficiency may be brought. *Id.*

In rejecting taxpayers' attempt to use *Williams Packing* to shore up their challenge to refund proceedings, this Court again confirmed that the AIA is not a jurisdictional bar. *United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 12 (2008). "Despite that Act's [the AIA] broad and mandatory language, we explained that 'if it is clear that under no circumstances could the Government ultimately prevail,...the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the exaction is merely in 'the guise of a tax.'" *Id.* (citing *Williams Packing,* 370 U.S., at 7). Consequently, the AIA cannot be said to deprive the courts of jurisdiction, but merely to

limit judicial review to those situations where a taxpayer has demonstrated that the government cannot prevail and the taxpayer has no legally cognizable remedy to redress the injury that will occur if a tax is assessed. *Williams Packing,* 370 U.S. at 7.

The Fourth Circuit found that the AIA did not bar debtors' actions challenging the imposition of successor tax liability on companies purchasing their assets. *In re Leckie Smokeless Coal,* 99 F.3d 573, 584 (4th Cir. 1996). Since the debtors did not have any "alternative legal way" to challenge the imposition of tax liability on the purchasers, the AIA did not bar the district courts from reaching the merits of the cases and ordering the appropriate relief. *Id.*

One of the clearest statements of the non-jurisdictional nature of the AIA appears in *South Carolina v. Regan*, 465 US 367, 378-380 (1984), which the Fourth Circuit relied upon in *Leckie Smokeless Coal*. "In sum, the Act's purpose and the circumstances of its enactment indicate that Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." *Id.* at 378. In that case, if the state issued bearer bonds without resolving the question of the constitutionality of a tax on interest earned on bonds, then the bondholders,

not the state, would be liable for taxes on the interest earned. *Id.* at 379. "Under these circumstances, the State will be unable to utilize any statutory procedure to contest the constitutionality of § 310(b)(1). Accordingly, the Act cannot bar this action." *Id.* at 380.

Amici and the Respondents here face the same remedies problem under the Act. Many of the Act's provisions related to the insurance mandates have already gone into effect and are already affecting citizens' constitutional rights. Even the provisions that will not go into effect until 2014 require significant financial planning and restructuring which will not be recoverable in a later action for a refund of any penalties paid, as Judge Moon noted in his district court decision in *Liberty University v. Geithner:*

> Parts of the Act have already taken effect, and the employer and individual coverage requirements are to take effect in 2014. Plaintiffs' allegations plausibly state that, were the Act in force today, Plaintiffs would be obligated by the health insurance coverage requirements to purchase or provide coverage. Although Defendants are correct that there is some uncertainty whether, in 2014,

> Plaintiffs will continue to fall under the auspices of the Act, Plaintiffs' allegations, which I take as true, show that they have good reason to believe they will. Because the future expenditure required by the Act entails significant financial planning in advance of the actual purchase of insurance in 2014, Plaintiffs allege that they must incur the preparation costs in the near term, without knowledge of what their status under the Act will be in 2014.

Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611, 624 (W.D. Va. 2010) *vacated*, 2011 WL 3962915 (4th Cir. 2011), *petition for cert. filed*, (U.S. Oct. 7, 2011) (No. 11-438) (citing *Thomas More Law Ctr. v. Obama,* 720 F.Supp.2d 882, 889 (E.D. Mich. 2010)). Since the Act was signed into law on March 23, 2010, many provisions affecting employers such as Liberty University have already become effective, including provisions regarding annual coverage limits for health plans. Those limits posed problems for many employers who offered employees limited coverage, low cost plans, leading to hundreds of applications for waivers

of the requirements.[2] As of January 6, 2012, the Department of Health and Human Services ("HHS") had approved waivers for 1,231 employers, covering more than 2 million employees.[3] A refund action in 2015 would not remedy the injuries suffered by employers and employees who would have had to comply with the new limits or discontinue coverage between 2010 and 2014. With no adequate remedy, *Regan* instructs that challenges to the Act would not be barred by the AIA.

Similarly, a refund action will do nothing to redress the injuries caused by other regulations taking effect before 2014. For example, on January 20, 2012, HHS announced final regulations regarding the provision of contraceptives under mandated health insurance plans.[4] Effective August 1, 2012, most employers will be required to offer their employees health insurance plans that cover the costs of contraceptives with no copayments

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[2] http://cciio.cms.gov/resources/files/approved_applications_for_waiver.html (last visited January 30, 2012).

[3] *Id.*

[4] http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited January 30, 2012).

or deductibles.[5] Unless they meet a very narrow exemption, nonprofit employers like Liberty University which, based on religious beliefs, do not currently provide contraceptive coverage in their insurance plan, will be required to provide that coverage by August 1, 2013 in order for their health insurance plans to comply with the new law.[6] For those employers, waiting until the insurance mandate goes into effect, failing to comply, being assessed a penalty and then suing for a refund will do nothing to redress the injury they will suffer in having to choose between violating their religious beliefs or paying prohibitive penalties.

Consequently, under *Regan* and other precedents, it is clear that the AIA is not a jurisdictional bar.

B. This Court's Disallowance Of Exceptions To True Jurisdictional Statutes Further Demonstrates That The AIA Is Not Jurisdictional.

Cases such as *Bowles*, discussing a deadline for filing an appeal, and cases addressing the Tax Injunction Act, 28 U.S.C.

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[5] *Id.*

[6] *Id.*

§1341, *i.e.,* genuine jurisdictional statutes, further illustrate why the AIA is not jurisdictional. *Bowles*, 551 US at 214; *Arkansas v. Farm Credit Serv's of Central Arkansas,* 520 U.S. 821, 823-824 (1997); *Hibbs v. Winn*, 542 U.S. 88, 96 (2004).

In *Bowles,* this Court differentiated between its precedents clarifying the distinction between claims-processing rules and jurisdictional rules and "our longstanding treatment of statutory time limits for taking an appeal as jurisdictional." 551 U.S. at 210. "Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them," and particularly that a court cannot hear a case after a certain period has elapsed following final judgment. *Id.* at 212-213. "The timely filing of a notice of appeal in a civil case is a jurisdictional requirement," and since the Court has no authority to create equitable exceptions to jurisdictional requirements, it cannot use doctrines such as "unique circumstances" to excuse a party's failure to comply with the statute. *Id.* at 214. Notably, unlike the AIA, which is contained in 26 U.S.C., the time limit at issue in *Bowles* was contained in 28 U.S.C., in which Congress delineates the jurisdiction of the federal courts. *Id.* at 213.

Similarly, the Tax Injunction Act is contained with Title 28, and, therefore directly addresses the jurisdiction of the courts, unlike the AIA, which addresses the government's ability to raise revenues. "The Tax Injunction Act, 28 U.S.C. § 1341, restricts the power of federal district courts to prevent collection or enforcement of state taxes." *Arkansas Farm Credit*, 520 U.S. at 823. The Tax Injunction Act contains prohibitory language not present in the AIA: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. Unlike the AIA, the Tax Injunction Act does withdraw jurisdiction from the federal courts when it more properly lies with the state courts, so when organizations such as the Arkansas Farm Credit organization want to challenge a state tax assessment they must pursue state court remedies. *Id.* at 824.

In *Hibbs*, this Court analyzed the legislative history of the Tax Injunction Act and found that (unlike the AIA) there was a clearly stated congressional intent to limit the federal courts' ability to hear certain kinds of cases. 542 U.S. at 104. "The Act was designed expressly to restrict 'the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes.'" *Id.*

> Specifically, the Senate Report commented that the Act had two closely related, state-revenue-protective objectives: (1) to eliminate disparities between taxpayers who could seek injunctive relief in federal court–usually out-of-state corporations asserting diversity jurisdiction–and taxpayers with recourse only to state courts, which generally required taxpayers to pay first and litigate later; and (2) to stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances. *Id.*, at 1-2. In short, in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority.

Id. at 104-105. The *Hibbs* court went on to caution that the TIA did not "announce a sweeping congressional direction to prevent 'federal-court interference with all aspects of state tax administration.'" *Id.* (citations omitted). Instead, the TIA, like the AIA, applies only to challenges aimed at inhibiting the

collection of taxes, not to third party constitutional challenges to tax benefits. *Id.* at 108-110. Since the challenge at issue in *Hibbs* was a third party challenge to a state tax credit program, it did not fall within the TIA's prohibition and could proceed. *Id.* at 110-112.

Similarly, in this case, Respondents and Amici are not trying to inhibit the collection of taxes, but are challenging the constitutionality of the underlying statutory scheme, *i.e.*, the requirement that virtually all Americans acquire and maintain health insurance. Consequently, the challenges to the Act do not fall within the explicit language of the AIA, regardless of whether it is seen as jurisdictional or non-jurisdictional.

Prevailing precedent, however, compels the conclusion that the AIA is not jurisdictional. Instead, it operates similarly to a claim processing rule that does not deprive a court of the authority to hear a matter, but limits its authority to cases in which certain prerequisites are present.

IV. OTHER THAN THE FOURTH CIRCUIT, EVERY FEDERAL COURT TO HAVE ADDRESSED THE ANTI-INJUNCTION ACT HAS RULED CONSISTENTLY WITH PRECEDENT THAT IT DOES NOT BAR CHALLENGES TO THE ACT.

With the notable exception of the Fourth Circuit, every federal court that has addressed the applicability of the AIA to challenges to the Act has, consistently with precedent, found the AIA does not apply. Notably, even when the courts have agreed with the government regarding the constitutionality of the insurance mandates, they have still found that the AIA does not apply. *See Thomas More Law Center v. Obama*, 720 F.Supp.2d 882, 890-91 (E.D.Mich.2010) *aff'd,* 651 F.3d 529 (6th Cir. 2011); *Goudy-Bachman v. U.S. Dep't of Health & Human Servs*., 764 F.Supp.2d 684, 695 (M.D.Pa. 2011); *Liberty Univ., Inc. v. Geithner*, 753 F.Supp.2d 611 (W.D.Va. 2010*) vacated,* 2011 WL 3962915 (4th Cir. 2011), *petition for cert. filed,* (No 11-438)*; U.S. Citizens Assoc. v. Sebelius*, 754 F.Supp.2d 904, 909 (N.D.Ohio 2010); *Seven-Sky v. Holder*, 661 F.3d 1, 7 (D.C. Cir. 2011). While none of the lower court rulings are determinative of the issue, the contrast between those rulings, which generally track this Court's precedents, and the Fourth Circuit's contrary finding further strengthens

the conclusion that the AIA is not jurisdictional.

Citing to *Bob Jones University* and *Williams Packing,* the Michigan district court noted that "[c]ases in which the Anti–Injunction Act has been found to bar a suit all involve a challenge to an action of the IRS which resulted in, or was expected to result in, the assessment or collection of a tax." *Thomas More Law Ctr.* 720 F. Supp. 2d at 890. "Defendants have advanced no authority for applying the Anti–Injunction Act to bar lawsuits when no attempt to collect, or otherwise act affirmatively, has been taken by the IRS." *Id.* at 891. Not only had the IRS not taken any steps to assess or collect a "tax," such steps might never be taken since the plaintiffs in the *Thomas More* case indicated that they would purchase health insurance rather than pay the penalty. *Id.* Consequently, the AIA did not apply to the plaintiffs' challenges to the Act. *Id.*

In *Goudy-Bachman*, the Pennsylvania district court similarly described the nature of cases falling under the AIA and held that the AIA was not implicated in the plaintiffs' challenges to the mandate to purchase insurance. 764 F.Supp.2d at 695. "All of the cases upon which the government relies involve challenges to activities inextricably tied to the

assessment or collection of taxes, such as audits and investigations by the IRS, and attempts to collect taxes by the IRS." *Id.* The court noted that the plaintiffs were not trying to prevent any action by the IRS, but to enjoin the government from "forcing them to purchase health insurance, a purpose completely unrelated to the assessment or collection of taxes." *Id.* "The court finds that the individual mandate itself is not a tax, nor is it intimately connected with the assessment or collection of a tax. Therefore, it does not implicate the AIA bar." *Id.*

Other courts have concluded that the AIA is inapplicable based upon a distinction between a revenue raising tax, which is subject to the AIA, and penalties, which are not.[7] In

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[7] These decisions are consistent with President Obama's analysis that the mandate's payments are not taxes, as recounted by Judge Vinson in Florida: "When confronted with the dictionary definition of a "tax" during a much-publicized interview widely disseminated by all of the news media, and asked how the penalty did not meet that definition, the President said it was "absolutely not a tax" and, in fact, "[n]obody considers [it] a tax increase." *See, e.g.,* Obama: Requiring Health Insurance is Not a Tax Increase, CNN, Sept. 29, 2009, available at: http://www.cnn.com/2009/POLITICS/09/20/oba

upholding the lower court's ruling in *Thomas More*, the Sixth Circuit held that the payment for noncompliance with the insurance mandate is not a penalty treated as a "tax" as are other penalties in the Internal Revenue Code. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 540 (6th Cir. 2011). The court said it should and would respect Congress' distinction, particularly since the penalties under the Act, unlike other penalties listed in the IRC, have "nothing to do with tax enforcement." *Id.* Consequently, they do not implicate the AIA. *Id.*

Citing the Sixth Circuit's holding, the District of Columbia Circuit similarly held that Congress did not intend for the AIA to cover penalties such as those under the Act which are unconnected to tax liability or enforcement. *Seven-Sky v. Holder*, 661 F.3d at 7. "Taxes and penalties carry distinct meanings and Congress has been deliberate when it wants certain penalties to be treated as taxes." *Id.* Unlike the penalties that Congress has treated as taxes, the payment for noncompliance with the insurance mandate do not relate to noncompliance with tax payment and reporting

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ma.health.care/index.html." *Florida ex rel McCollum,* 716 F.Supp.2d at 1133 n5.

obligations. *Id.* Consequently, they are outside the scope of the AIA. *Id.*

In *Liberty University v. Geithner*, the district court also concluded that the payments for noncompliance with the insurance mandate "function as regulatory penalties–they encourage compliance with the Act by imposing a punitive expense on conduct that offends the Act." 753 F.Supp.2d at 629. Consequently, "the Anti–Injunction Act does not divest this Court of jurisdiction to hear the present challenge." *Id.*

The district court below likewise found that Congress' deliberate characterization of the payments for noncompliance with the insurance mandate as "penalties" meant that the AIA did not apply. *Florida ex. rel McCollum v. Dep't of Health and Human Servs.*, 716 F. Supp. 2d 1120, 1141-1142 (ND Fla. 2010), *aff'd in part, rev'd in part, sub nom. Florida ex. Attorney General v. Dep't of Health and Human Servs.*, 648 F.3d 1235 (11th Cir. 2011).

> It would be inappropriate to give tax treatment under the Anti–Injunction Act to a civil penalty that, by its own terms, is not a tax; is not to be enforced as a tax; and does not bear any meaningful relationship to the revenue-generating purpose of the tax code.

> Merely placing a penalty (which virtually all federal statutes have) in the IRS Code, even though it otherwise bears no meaningful relationship thereto, is not enough to render the Anti–Injunction Act (which only applies to true revenue-raising exactions) applicable to this case.

Id. The Ohio district court incorporated that language into its opinion as an appendix and relied upon it to reject the government's claim that the AIA barred plaintiff's challenge in *U.S. Citizens Assoc.*, 754 F.Supp.2d at 909.

In keeping with those precedents and this Court's precedents, Judge Davis, the dissenting vote on the Fourth Circuit panel in *Liberty University,* explained why the AIA is not applicable to the challenges to the Act. 2011 WL 3962915 at *25 (4th Cir. 2011) (Davis, J., dissenting).

> The Anti–Injunction Act was intended to "protect[ ] the expeditious collection of revenue." *South Carolina v. Regan*, 465 U.S. 367, 376, 104 S.Ct. 1107, 79 L.Ed.2d 372 (1984). Revenue from the individual mandate's penalty provision will not be assessed and collected until the year after the

mandate becomes operative–2015. Judicial review of the mandate in 2011 most assuredly will not frustrate "the expeditious collection of revenue" four years later. I also note that Congress forbid the Internal Revenue Service from employing its primary enforcement mechanisms to collect this penalty: the IRS may not seek the institution of criminal prosecutions by the Justice Department or impose a lien or levy on an individual's property for failure to pay the penalty. 26 U.S.C. § 5000A(g)(2). This indicates that Congress had scant concern for "the expeditious collection of revenue" from the penalty provision. A failure to provide immediate judicial review in reliance on a rather strained construction of the AIA, on the other hand, might undermine the core purpose of the Affordable Care Act. In the absence of a conclusive ruling from the federal courts, some individuals may well decide for themselves that the Act is unconstitutional and thus can be ignored. In the case of an ordinary tax this would simply result in some lost revenue and the

> costs of tax prosecutions; here, it would push the nation farther from Congress's goal of attaining near-universal health insurance coverage. And, as leaving the constitutionality of the Act unsettled would seem likely to create uncertainty in the health insurance and health care industries, which might depress these major sectors of the economy, it seems that application of the AIA would be at cross-purposes with the Act's reforms. Thus, I believe that there is ample reason for me to conclude that Congress had no design that the Anti–Injunction Act might apply to the individual mandate's penalty provisions.

Id. "In the final analysis, the majority's approach essentially imposes a clear-statement rule on Congress, making the AIA applicable to all exactions, regardless of statutory language and in disregard of apparent Congressional intent, unless Congress had the foresight to expressly exempt an exaction from the AIA." *Id.* at *33. "Given that the Supreme Court has never recognized such a clear-statement rule, it seems to me that this turns the ordinary principles of statutory interpretation on their head." *Id.* Judge Davis questioned the

majority's contention that permitting the challenge to proceed might have serious long-term consequences for revenue collection. *Id.* at *34. "I would simply note again that the Secretary of the Treasury is a party before us and argues that the AIA does not apply. Indeed, I cannot find a Supreme Court case where the AIA has been applied over the objection of the Secretary." *Id.*

The Fourth Circuit majority's conclusion that the AIA was a jurisdictional bar is not only contrary to the government's position, but also, and more importantly, in contravention of this Court's precedents interpreting the AIA and its more recent cases calling for precision in use of the word "jurisdiction."

As did the Court-appointed Amicus, the Fourth Circuit majority relied upon the statement in *Williams Packing* that the AIA "withdraws jurisdiction" from the courts without considering the statement in context of either the *Williams Packing* decision or this Court's recent precedents which have narrowed the concept of jurisdiction. As this Court has instructed, the term "jurisdiction" should be judiciously applied only to those statutes that truly limit the power of federal courts. "'Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system,'" so statutes should

not be interpreted as creating a jurisdictional bar unless they are explicitly worded in that manner. *Stern v. Marshall*, 131 S. Ct. 2594, 2606-07 (2011) (citing *Henderson v. Shinseki*, 131 S.Ct. 1197, 1201–03 (2011)). Both the explicit language and the presence of statutory and judicial exceptions in the AIA demonstrate that it is not intended to limit the power of federal courts. The parties, including the government, which is the intended beneficiary of the AIA, agree with that assessment, as should this Court.

CONCLUSION

As all but one of the courts to consider the issue have determined, the AIA is not a jurisdictional bar to challenges to the insurance mandate provisions in the Act. That determination is consistent with this Court's narrowing of the concept of jurisdiction.

Consequently, this Court should hold that the AIA does not apply to the challenges to the Act's insurance mandates.

February 2012.

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Liberty Counsel
1055 Maitland Center
Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
court@lc.org

Stephen M. Crampton
Mary E. McAlister
Liberty Counsel
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org