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MICHAEL C. DORF & NEIL S. SIEGEL

“Early-Bird Special” Indeed!: Why the Tax Anti-Injunction Act Permits the Present Challenges to the Minimum Coverage Provision

In view of the billions of dollars and enormous effort that might otherwise be wasted, the public interest will be best served if the Supreme Court of the United States reaches the merits of the present challenges to the Patient Protection and Affordable Care Act (ACA) during its October 2011 Term. Potentially standing in the way, however, is the federal Tax Anti-Injunction Act (TAIA), which bars any “suit for the purpose of restraining the assessment or collection of any tax.” The dispute to date has mostly turned on the fraught and complex question of whether the ACA’s exaction for being uninsured qualifies as a “tax” for purposes of the TAIA. We argue that the Supreme Court need not resolve this issue because the TAIA does not apply for a distinct reason: the present challenges to the ACA do not have “the purpose” of restraining tax assessment or collection. In order for the TAIA not to bar refund suits, the TAIA must be read to bar suits with the immediate purpose of restraining tax assessment or collection. The present challenges do not have such an immediate purpose because the very authority to assess or collect will not exist until long after the litigation is concluded. Among other virtues, this resolution of the TAIA question does not predetermine whether the tax power justifies the minimum coverage provision.

INTRODUCTION

The Patient Protection and Affordable Care Act (ACA)¹ requires most people lawfully living in the United States to obtain a certain level of health insurance coverage (the minimum coverage provision) or pay a certain amount of money each year (the shared responsibility payment), a payment the ACA labels a “penalty.”² These provisions go into effect on January 1, 2014. For all the heated disputes over their constitutionality, there ought to be universal agreement on the question of litigation timing. The public interest will be best served if the Supreme Court of the United States decides the constitutional questions sooner rather than later, in a pre-enforcement challenge to the law’s exaction for going without insurance, rather than in a post-enforcement challenge no earlier than 2015, when the first actions for refunds could be brought. Substantial delay would invite waste and chaos. Many federal agencies, states, insurers, providers, and individuals would have to endure years of legal uncertainty, during which time billions of dollars and enormous effort would be expended implementing the myriad provisions of the ACA.³ Some or all of these provisions may not survive if the minimum coverage provision is invalidated, in which case all that money and effort will have been wasted. This is no small price to pay, particularly in difficult economic times. Call this concern a “mere” policy argument; call it prudential, pragmatic, or practical. Call it what you will, but it is present, palpable, and powerful.

But is reaching the merits lawful? In *Liberty University, Inc. v. Geithner*,⁴ the U.S. Court of Appeals for the Fourth Circuit ruled that the plaintiffs’ constitutional challenge to the minimum coverage provision was barred by the federal Tax Anti-Injunction Act (TAIA).⁵ This statute, which was originally

1. Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified primarily in scattered sections of 42 U.S.C.).
2. *Id.* § 1501(b), 124 Stat. at 244 (to be codified at I.R.C. § 5000A).
3. For Congressional Budget Office estimations of some of these costs, see *infra* note 49.
4. No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011).
5. I.R.C. § 7421(a) (2006). Although courts often refer to the federal Tax Anti-Injunction Act as the AIA, we call it the TAIA to distinguish it from the Anti-Injunction Act, 28 U.S.C. § 2283 (2006), which is universally denominated the AIA and which provides that “[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” Both the TAIA and the AIA are distinct from the state Tax Injunction Act (TIA), 28 U.S.C. § 1341, which provides that “[t]he 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.”

enacted in 1867,⁶ provides in relevant part that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.”⁷ The Supreme Court has described the purpose of the TAIA as safeguarding “prompt collection of . . . lawful revenue” by precluding taxpayers from filing pre-enforcement challenges to “disputed sums.”⁸ The Fourth Circuit held that a federal exaction may qualify as a “tax” under the TAIA even if it falls outside of the constitutional power of Congress to lay and collect taxes.⁹ In other words, the court concluded that the meaning of the word “tax” in the TAIA is broader than its meaning in the Constitution. “[A]n exaction constitutes a ‘tax’ for purposes of the [T]AIA,” the court wrote, “so long as the method prescribed for its assessment conforms to the process of tax enforcement.”¹⁰ Because the method prescribed for assessment of the ACA exaction indeed conforms to the process of tax enforcement, the court held that it lacked jurisdiction to consider whether the minimum coverage provision falls within the tax power,¹¹ the Commerce Clause,¹² or the Necessary and Proper Clause.¹³

The federal judges who have disagreed with the Fourth Circuit majority have relied on a single set of arguments to show that the exaction is not a tax under either the TAIA or the Constitution.¹⁴ They have focused on the fact that Congress labeled the ACA exaction for going without insurance a “penalty” rather than a “tax.”¹⁵ These arguments about the statutory definition of the

6. *Bob Jones Univ. v. Simon (Bob Jones I)*, 416 U.S. 725, 731 (1974).

7. I.R.C. § 7421(a).

8. *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962).

9. *Liberty Univ.*, 2011 WL 3962915, at *5.

10. *Id.*

11. U.S. CONST. art. I, § 8, cl. 1.

12. *Id.* art. I, § 8, cl. 3.

13. *Id.* art. I, § 8, cl. 18.

14. Some judges have not reached the constitutional question of whether the exaction is a tax. See, e.g., *Liberty Univ.*, 2011 WL 3962915, at *24 n.2 (Davis, J., dissenting) (arguing that the ACA is constitutional under the Commerce Clause and not reaching the tax question). Judge Diana Motz, who authored the panel majority opinion, declined to reach the merits of any of the constitutional questions.

15. Compare, e.g., *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 539 (6th Cir. 2011) (“Congress’s choice of words—barring litigation over ‘tax[es]’ in section 7421 but imposing a ‘penalty’ in section 5000A—suggests that the former does not cover the latter.”), with, e.g., *id.* at 551 (Sutton, J., concurring in part and delivering the opinion of the court in part) (concluding that the exaction in the ACA for remaining uninsured was a penalty because, among other things, “that is what Congress said,” and its “central function . . . was *not* to raise revenue,” but “to change individual behavior by requiring all qualified Americans to

term “tax” in the TAIA closely parallel arguments that have been made regarding the constitutional question of whether the ACA’s minimum coverage provision and shared responsibility payment can be sustained as an exercise of Congress’s power to lay and collect taxes.¹⁶

This Essay takes a different approach. Rather than determining whether the meaning of the word “tax” in the TAIA is broader than, coextensive with, or sometimes narrower than its meaning in the Constitution, we focus on other language in the TAIA statute. We begin by noting that, to avoid absurdity, one must read the TAIA as if it barred suits having the *immediate* purpose of restraining the assessment or collection of any tax. One must read the statute this way because otherwise it would bar even post-enforcement constitutional challenges. Such challenges may have the primary purpose of preventing future assessments or collections in addition to the immediate purpose of avoiding payment of past assessments or collections, yet they are clearly permissible notwithstanding the literal language of the TAIA.

Once one accepts that the word “purpose” in the TAIA means “immediate purpose,” it becomes evident that the TAIA does not bar the present pre-enforcement challenges to the ACA. Even assuming *arguendo* that the ACA exaction for going without insurance qualifies as a “tax” for purposes of the TAIA, the present challenges do not have “the [immediate] purpose of restraining the assessment or collection”¹⁷ of this tax because the legal authority to assess and collect it will not exist until 2015. In other words, the most sensible reading of the TAIA’s text and purpose is that it does not apply until the authority to assess and collect taxes has come into being, just as it does not apply after that authority has been exercised. Rather than having the immediate purpose of restraining the assessment or collection of taxes, the present challenges to the minimum coverage provision have the immediate

obtain medical insurance”). *See also* *Seven-Sky v. Holder*, 661 F.3d 1, 6 (D.C. Cir. 2011) (“Nothing we have seen suggests that Congress intended for ‘any tax’ in the Anti-Injunction Act to include exactions *unrelated to taxes* that Congress labeled ‘penalties.’”). For a different view of the constitutional question, see generally Robert D. Cooter & Neil S. Siegel, *Not the Power To Destroy: A Theory of the Tax Power for a Court that Limits the Commerce Power* (2012) (unpublished manuscript) (on file with authors).

16. *See, e.g., Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1314-17 (11th Cir. 2011) (concluding that the exaction for failure to maintain minimum coverage is not an exercise of the power to tax, in substantial part because Congress called the exaction a “penalty” rather than a “tax”). Because it was not briefed by either party, the Eleventh Circuit nowhere addressed the question whether the TAIA barred pre-enforcement litigation.

17. I.R.C. § 7421(a) (2006).

purpose of seeking clarification from the courts about the present and future legal obligations of the many individuals and entities subject to the ACA.

Treating the present lawsuits as seeking clarification of rights and duties rather than restraint of tax assessment or collection by the Internal Revenue Service (IRS) does not run afoul of the Declaratory Judgment Act (DJA). The DJA bars suits “with respect to Federal taxes.”¹⁸ This language is no obstacle because there are good reasons to agree with the courts and other authorities that have deemed it coextensive with the TAIA’s timing rule.¹⁹ But even if one were to read the DJA bar as broader than the TAIA timing rule, that would mean only that the particular remedy of a declaratory judgment would be unavailable in tax litigation. It would not follow that an otherwise permissible suit for injunctive relief would be barred by the DJA simply because the immediate purpose of the suit was to obtain something—clarification of rights and duties—that might also be obtained through a declaratory action, if the latter were proper.

In any event, our core argument does not depend on the assertion that the current ACA challenges affirmatively *have* the immediate purpose of seeking clarification; the crucial claim is that, in light of their filing date, these challenges *do not have* the immediate purpose of restraining the assessment or collection of taxes. The Supreme Court could hold that the current immediate purpose of the lawsuits is to restrain the IRS from taking steps preliminary to making assessments and collecting taxes, but not yet to restrain assessing or collecting. Alternatively, the Court could hold that one or more of the current lawsuits have the immediate purpose of seeking to enjoin other federal agencies from implementing the ACA in reliance upon the minimum coverage provision.²⁰ Under either such reading, there is not even the hint of a conflict with the DJA.

18. 28 U.S.C. § 2201(a) (2006).

19. For a discussion of these decisions, see *infra* notes 70-75 and accompanying text. The Supreme Court has described the bar on declaratory action as “at least as broad” as the TAIA in its prohibition. *Bob Jones I*, 416 U.S. 725, 732 n.7 (1974).

20. None of the four leading federal appeals court cases originated with a complaint seeking relief solely against the IRS or Treasury Department. Each one named other agencies or department heads. See Amended Complaint, Florida *ex rel.* Bondi v. U.S. Dep’t of Health & Human Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (No. 3:10-cv-91-RV/EMT), 2010 WL 2114067; First Amended Complaint for Declaratory and Injunctive Relief, Mead v. Holder, 766 F. Supp. 2d 16 (D.D.C. 2011) (No. 1:10-cv-00950-GK), 2010 WL 5827944; First Amended Complaint, Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010) (No. 6:10-cv-00015-nkm), 2010 WL 5867473; Complaint, Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010) (No. 10-cv-11156), 2010 WL 4784409.

Under our proposed reading, the TAIA does not (yet) bar prepayment challenges to the minimum coverage provision. Textualists and purposivists alike can embrace this reading. So can those who believe the ACA falls within congressional power as well as those who believe it is unconstitutional. In other words, our argument for eliminating the TAIA as a procedural barrier does not predetermine the outcome of the constitutional analysis of whether the ACA exaction is a tax under the federal tax power. Our reading of the TAIA is also consistent with the Supreme Court's TAIA jurisprudence. And it avoids the potentially serious impediments to revenue collection that would exist if taxpayers could bring prepayment challenges after 2015.²¹

Part I of this Essay explains why it is so difficult to determine whether the ACA exaction for being uninsured meets the TAIA's definition of a tax. Part II argues that the Supreme Court need not untangle this knot in the ACA litigation because there is a distinct reason why the TAIA does not bar the present suits to enjoin the minimum coverage provision. This Part also identifies the virtues of our reading of the TAIA. The Conclusion, counseling caution, recommends that Congress pass a special-purpose statute providing that the TAIA does not bar pre-enforcement challenges to the minimum coverage provision until the provision goes into effect.

I. IS THE ACA EXACTION A TAIA "TAX"?

The TAIA bars actions to enjoin the assessment or collection of "any tax." One might think, therefore, that the key question for determining whether the suits challenging the ACA may go forward now is whether the ACA's individual "penalty" for failure to satisfy the minimum coverage provision constitutes a "tax" under the TAIA.²² And indeed, that is more or less how the federal judges who have addressed the issue have conceptualized it.²³ The judges who think that the ACA exaction does not count as a tax for purposes of the TAIA hold the TAIA bar inapplicable, while those who think that the ACA exaction does count as a tax for TAIA purposes hold that the bar applies.

21. See *Liberty Univ.*, 2011 WL 3962915, at *41-43.

22. The ACA also imposes what might be regarded as a tax on large employers, in the form of an "assessable payment." See *id.* at *2 (discussing ACA, Pub. L. No. 111-148, § 1513, 124 Stat. 119, 253 (2010) (to be codified at I.R.C. § 4980H)). For simplicity, here we consider only the minimum coverage provision and shared responsibility payment required of individuals.

23. We say "more or less" because another provision of the ACA sweeps in penalties that are collected in the same manner as taxes. See *infra* text accompanying notes 43-45.

A. *Why the ACA Exaction Might Be a TAIA “Tax”*

The chief argument against applying the TAIA bar is extremely straightforward but, we contend, problematic nonetheless. The straightforward argument begins and ends with the observation that Congress was careful to avoid calling the penalty for failure to comply with the minimum coverage provision in the ACA a “tax”; therefore, it is not a tax under the TAIA.²⁴ That’s the whole of it.

We should not be too quick to dismiss this line of reasoning as simpleminded, for it is less formalistic than it may appear. The Congress that enacted the ACA can be presumed to have been aware of the use of the triggering word “tax” in the TAIA, and it seems plausible that by pointedly refusing to call the ACA’s penalty provision a tax, it meant to exempt actions challenging the ACA from the TAIA’s litigation bar.

The difficulty with this line of reasoning is not its simplicity; that is a virtue. The problem is that the Congress that enacted the ACA may also be presumed to have been aware of the Supreme Court’s case law, and that case law has assiduously resisted a jurisprudence of labels. As the Fourth Circuit explained in its opinion dismissing the ACA challenges as barred by the TAIA, whether an exaction counts as a tax does not depend on whether Congress called the exaction a tax.²⁵ Instead, the TAIA has been construed “to bar interference with the assessment of any exaction imposed by the [Internal Revenue] Code.”²⁶ The Supreme Court cautioned against excessive formalism in the 1922 TAIA case *Lipke v. Lederer*,²⁷ writing that “[t]he mere use of the word ‘tax’ . . . is not enough to show that within the true intendment of the term a tax was laid.”²⁸

To be sure, *Lipke* held that an exaction may be labeled a tax and yet not trigger the TAIA bar. It did not say the converse: that an exaction that is *not* labeled a tax *may* trigger the TAIA bar. Nor, indeed, does any Supreme Court

24. See *supra* note 15 and accompanying text.

25. See *Liberty Univ.*, 2011 WL 3962915, at *6-7 (compiling cases supporting this proposition).

26. *Id.* at *6.

27. 259 U.S. 557 (1922).

28. *Id.* at 561. We have substituted an ellipsis for the following qualifier: “in an act primarily designed to define and suppress crime.” It could be argued that *Lipke* treats the “tax” label as insufficient to trigger the TAIA only because barring an injunctive action against a criminal law would raise due process questions not presented by the run-of-the-mill civil tax case. We agree that such considerations played an important role in the *Lipke* case itself, but we think that the excerpted quotation in the text accurately characterizes the functional nature of the case law more broadly, as we explain in the balance of this Part.

case, although the doctrine arguably gestures in that direction. As the Fourth Circuit correctly observed, the Supreme Court cases in closely related areas define “tax” in functional terms.²⁹

To be clear, if writing on a clean slate, the courts *might have* construed the TAIA to bar injunctions against only those exactions designated by the magic words “tax” or “taxes.” But given that the prior TAIA case law came down the other way, it is implausible to argue that Congress intended to render the TAIA bar inapplicable to the ACA simply by using the word “penalty” rather than “tax.”³⁰ Were the Supreme Court now to say that Congress all along was assuming that only exactions denominated as taxes were protected against injunctive and declaratory suits, it would overturn well-established lower court case law affecting numerous provisions of law, not just the ACA.

The same problem infects a closely related argument that has been offered to render the TAIA bar inapplicable to the ACA. The D.C. Circuit majority contended that the TAIA did not apply because the plaintiffs did not sue “for the purpose of restraining the assessment or collection of *any* tax.”³¹ Rather, they sued “for the purpose of enjoining a regulatory command, the individual mandate, that requires them to purchase health insurance from private companies.”³² Yet this argument, if accepted by the Supreme Court, would cut deeply into the TAIA, because numerous provisions of the Internal Revenue Code have both regulatory and revenue-raising aspects.³³

Equally problematically, the D.C. Circuit’s proposed purpose inquiry under the TAIA would stand the traditional view of the TAIA on its head. On the merits, the ACA’s challengers argue that the minimum coverage provision cannot be sustained as an exercise of Congress’s Article I taxing power because it seeks to regulate in the guise of a tax. Perhaps they are right; perhaps they are wrong. But the whole point of the TAIA is to require taxpayers making such claims to pay up first and then seek a refund,³⁴ rather than to seek injunctive or declaratory relief first. If there is even a small possibility that the

29. See *Liberty Univ.*, 2011 WL 3962915, at *7 (“[T]he Supreme Court has repeatedly instructed that congressional labels have little bearing on whether an exaction qualifies as a ‘tax’ for statutory purposes.”).

30. See *Seven-Sky v. Holder*, 661 F.3d 1, 23 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“The fact that the Tax Code equates tax penalties to taxes for IRS assessment and collection purposes is known by Members of Congress who work on tax-related legislation . . .”).

31. *Id.* at 5 (majority opinion) (quoting TAIA, I.R.C. § 7421(a)(2006)).

32. *Id.*

33. See Cooter & Siegel, *supra* note 15 (discussing taxes with both regulatory and revenue-raising purposes).

34. See discussion *infra* Section II.A.

government could prevail on the merits of the constitutional challenge, then the TAIA bar applies.³⁵ Thus, Supreme Court case law says that the ACA challengers’ suits should be allowed to bypass the TAIA only if they are clear winners.³⁶ Yet, under the D.C. Circuit’s approach, the lawsuits can bypass the TAIA so long as they are not clear losers.³⁷

B. Why the ACA Exaction Might Not Be a TAIA “Tax”

In light of all the contrary case law, how have some lower courts been able to find the TAIA bar inapplicable? The answer turns on an intricate parsing of the relevant statutes and cases. Although the D.C. Circuit majority said that “aside from the Fourth Circuit’s recent decision, no court has ever held that ‘any tax’ under the Anti-Injunction Act includes exactions that Congress deliberately called ‘penalties,’”³⁸ this appears to be an overstatement. Consider an amicus brief filed in the D.C. Circuit by two former Commissioners of the IRS. With ample supporting citations, the brief attests that prior to the ACA litigation, the lower courts had uniformly held that the TAIA blocks lawsuits to enjoin exactions denominated as “penalties.”³⁹ The D.C. Circuit majority

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35. See *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 12 (2008) (“Despite [the TAIA’s] broad and mandatory language, . . . ‘if it is clear that under no circumstances could the Government ultimately prevail, . . . the attempted collection may be enjoined if equity jurisdiction otherwise exists.’” (quoting *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962))); see also *Bob Jones I*, 416 U.S. 725, 742-46 (1974) (affirming the narrowness of the “no circumstances” exception).
 36. For example, in *Bailey v. George*, 259 U.S. 16 (1922), the Supreme Court applied the TAIA bar to a lawsuit challenging a federal child labor tax on the ground that, although styled as a tax, the exaction was really a regulation. The same day, that very argument prevailed as a basis for invalidating the tax on the merits in *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922). The doctrinal basis for the substantive holding vanished when the Court overruled *Hammer v. Dagenhart*, 247 U.S. 251 (1918), in *United States v. Darby*, 312 U.S. 100 (1941). Nonetheless, the core principle discernible in the two *Bailey* cases remains part of TAIA doctrine: an exaction may be unconstitutional—because it exceeds the scope of congressional power or for some other reason—but still qualify as a “tax” that triggers the TAIA prohibition.
 37. For an argument that the ACA exaction is a tax for constitutional purposes once one puts aside labels, see generally Cooter & Siegel, *supra* note 15.
 38. *Seven-Sky v. Holder*, 661 F.3d 1, 7 (D.C. Cir. 2011).
 39. See Corrected Brief of Amici Curiae Mortimer Caplin & Sheldon Cohen in Support of Appellees and Affirmance at 8-10, *Seven-Sky*, 661 F.3d 1 (No. 11-5047), 2011 WL 2349595, at *8 (collecting lower court cases with code provisions); see also *Seven-Sky*, 661 F.3d at 23 (Kavanaugh, J., dissenting) (noting that the “Tax Code equates tax penalties to taxes for numerous administrative purposes”).

dismissed this line of attack by holding it inapplicable to “penalties assessed by [the] IRS but unrelated to taxes.”⁴⁰

Taken at face value, the court’s reasoning is unpersuasive. If the applicability of the TAIA turns on whether Congress called an exaction a “tax” or a “penalty,” it should not matter whether the penalty is related or unrelated to another tax. But the D.C. Circuit and the Sixth Circuit—which made the same argument—adduced some additional textual support for their position: Section 6671 of the Internal Revenue Code, they noted, deems some “penalties” imposed by some portion of the Code to be “taxes” for a variety of purposes.⁴¹ But, these courts further noted, the penalty for failing to maintain minimum coverage in the ACA is not contained in the part of the Code that is subject to this deeming provision. Thus, the D.C. and Sixth Circuits concluded, the penalty does not count as a tax for TAIA purposes.⁴²

In our view, the foregoing close reading of the ACA, the rest of the Internal Revenue Code, and the TAIA provides the strongest grounds for concluding that a challenge to the ACA’s minimum coverage “penalty” is not a challenge to a “tax” under the TAIA. But it is hardly a slam dunk. As Judge Kavanaugh concluded in his dissent from the D.C. Circuit decision, yet another provision of the ACA—requiring that the penalty for failing to maintain minimum coverage be assessed and collected in the same manner as taxes⁴³—does for that “penalty” what § 6671 does for other penalties: it deems the “penalty” a “tax.”⁴⁴ After all, as Judge Kavanaugh observed, penalties for failing to maintain minimum coverage “can be assessed and collected in the same manner as taxes only if they are insulated from pre-enforcement suits under the [TAIA], as taxes are.”⁴⁵

If that were not enough, the Fourth Circuit noted that the Internal Revenue Code itself expressly forbids just the sort of “intra-textualist” argument on which the D.C. Circuit relied: “Congress has forbidden courts from deriving any ‘inference’ or ‘implication’ from the ‘location or grouping of any particular

40. *Seven-Sky*, 661 F.3d at 8.

41. I.R.C. § 6671 (2006).

42. *Seven-Sky*, 661 F.3d at 6-8; *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 539-40 (6th Cir. 2011).

43. ACA, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 249 (2010) (to be codified at I.R.C. § 5000A(g)(1)).

44. *Seven-Sky*, 661 F.3d at 35 (Kavanaugh, J., dissenting).

45. *Id.*

section or provision or portion of this title.”⁴⁶ Thus, the Fourth Circuit concluded that nothing about § 6671 rendered the general proposition that penalties are taxes for purposes of the TAIA inapplicable to the ACA’s shared responsibility payment.⁴⁷

C. A Reason To Worry About Relying on These Arguments

Who has the better of this complicated textual argument? We think reasonable minds can differ on that question. We would *hope* that in construing the relevant statutes, the Supreme Court would take account of the policy consequences.⁴⁸ The conclusion that the ACA cannot be challenged until 2015 could lead to the waste of tens of billions of dollars, should the Court eventually invalidate it.⁴⁹ Therefore, pragmatic Supreme Court Justices would likely be inclined to try to find the TAIA bar inapplicable.

But no Supreme Court Justice is a thoroughgoing pragmatist. Textualists and even their fellow travelers—who constitute a majority on the current Court—could well be persuaded by the arguments advanced for the conclusion that the relevant statutory texts are best read to bar the current suits. The arguments for that conclusion, however, rest on the assumption that the dispositive question under the TAIA is whether the “penalty” for failing to maintain minimum coverage counts as a tax. The judges who have thus far

46. *Liberty Univ., Inc. v. Geithner*, No. 10-2347, 2011 WL 3962915, at *10 (4th Cir. Sept. 8, 2011) (quoting I.R.C. § 7806(b)).

47. *See id.* at *11 (“Specific direction that the term ‘tax’ in the [T]AIA encompass the individual mandate ‘penalty’ was . . . unnecessary.”).

48. The Court-appointed amicus curiae, in a brief that does not address our argument, boldly asserts that “[p]olicy considerations cannot justify departing from the explicit statutory language of a jurisdictional statute.” Brief for Court-Appointed Amicus Curiae Supporting Vacatur (Anti-Injunction Act) at 14, *U.S. Dep’t of Health & Human Servs. v. Florida*, No. 11-398 (U.S. Jan. 6, 2012).

49. The Congressional Budget Office (CBO) estimated in May 2010 that implementing the ACA would cost the IRS and the Department of Health and Human Services between \$10 billion and \$20 billion over ten years. *See* Letter from Douglas Elmendorf, Dir. of the CBO, to Hon. Jerry Lewis (May 11, 2010), available at http://www.cbo.gov/ftpdocs/114xx/doc11490/LewisLtr_HR3590.pdf. Some substantial fraction of that cost would be frontloaded startup costs that would need to be expended before 2015. The same is true of costs for states, employers, insurers, and private individuals. Although we have found no comprehensive estimate of the unrecoverable startup costs for complying with the ACA, we are confident that it would have to be reckoned in many billions of dollars. *See id.* (estimating some of the effects of the ACA on discretionary spending by the federal government and forecasting that they would “probably exceed \$115 billion over the 2010-2019 period”).

addressed the issue have all shared that assumption,⁵⁰ leading to a detailed and highly technical battle over what counts as a tax under the TAIA. Fortunately, the ACA litigation does not require the Supreme Court to untangle this knot, as the next Part explains.

II. A FRESH START

Even if one accepts that the ACA exaction for being uninsured qualifies as a “tax” for purposes of the TAIA, there is a different reason why the TAIA does not bar the current suits to enjoin the ACA: because the exaction does not go into effect until 2014, the present challenges to the ACA do not fall within the TAIA’s prohibition of suits having “the purpose of restraining the assessment or collection of any tax.”⁵¹

A. A Narrower Reading of the TAIA

The Fourth Circuit conveyed the standard interpretation of the TAIA. “By its terms,” the court wrote, “the [T]AIA bars suits seeking to *restrain* the assessment or collection of a tax. Thus, the [T]AIA forbids only pre-enforcement actions brought *before* the [government] has assessed or collected an exaction.”⁵² The court noted that “[a] taxpayer can always pay an assessment, seek a refund directly from the IRS, and then bring a refund action in federal court.”⁵³ Decades earlier, in *Bob Jones University v. Simon (Bob Jones I)*, the Court was more tentative. “[I]t may be possible to conclude,” the Court wrote, “that a suit for a refund is not ‘for the purpose of restraining the assessment or collection of any tax . . . ,’ and thus that neither the literal terms nor the principal purpose of § 7421(a) is applicable.”⁵⁴

50. The TAIA would not bar the current litigation if it were regarded as a merits defense that could be waived by the government, rather than as a limit on federal court jurisdiction. See Patrick J. Smith, *Is the Anti-Injunction Act Jurisdictional?*, 133 TAX NOTES 1093 (2011) (arguing that the TAIA is not jurisdictional, notwithstanding the Supreme Court’s assertion to the contrary in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962)). Not surprisingly, given the existence of Supreme Court precedent directly on point, the lower courts have not questioned the jurisdictional status of the TAIA. We express no view on the question here.

51. I.R.C. § 7421(a) (2006).

52. *Liberty Univ.*, 2011 WL 3962915, at *4.

53. *Id.* (citing *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4-5 (2008)).

54. 416 U.S. 725, 748 n.22 (1974).

The Court may have been tentative because the literal language of the statute arguably extends to refund actions. Just because “the [T]AIA bars suits seeking to *restrain* the assessment or collection of a tax,” it does not necessarily follow that “the [T]AIA forbids only pre-enforcement actions brought *before* the [government] has assessed or collected an exaction.”⁵⁵ This is because refund actions, in addition to having the purpose of obtaining a refund of an exaction already paid, can also have the purpose of restraining the assessment or collection of future exactions.⁵⁶ Indeed, the plaintiff in a refund action may be more concerned about paying the exaction year after year than she is about having paid it once. Deprived by the TAIA itself of the ability to obtain injunctive or declaratory relief without first paying some tax, a taxpayer may bring her refund action chiefly for the purpose of resolving questions regarding her future tax liability.

Indeed, that is exactly what Bob Jones University did. After the Supreme Court held in *Bob Jones I* that the TAIA barred Bob Jones University’s attempt to obtain an injunction against the IRS’s revocation of its tax-exempt status, the university paid a tiny amount of unemployment tax and then sued for a refund of \$21(!) in federal court.⁵⁷ That suit involved review of the question of § 501(c)(3) status, because the university would have been exempt from the unemployment tax if it had been entitled to such status.⁵⁸

But reading the literal language of the TAIA as barring refund actions would be absurd. It would mean that individuals could not challenge a federal exaction *at any time*, even though Congress has elsewhere specifically authorized refund actions.⁵⁹ The whole point of the TAIA is for the taxpayer to sue later, not never. To avoid this absurd conclusion, the Court has read the TAIA in light of what it has called its “principal” and “collateral” purposes.

In *Enochs v. Williams Packing & Navigation Co.*, the Court identified “[t]he manifest purpose of § 7421(a)” as “to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that

55. See *Liberty Univ.*, 2011 WL 3962915, at *4 (citing *Clintwood Elkhorn*, 553 U.S. at 4-5).

56. Cf. *Bob Jones I*, 416 U.S. at 748 n.22 (“And there would be serious question about the reasonableness of a system that forced a § 501(c)(3) organization to bring a series of backward-looking refund suits in order to establish repeatedly the legality of its claim to tax-exempt status and that precluded such an organization from obtaining prospective relief even though it utilized an avenue of review mandated by Congress.”).

57. *Bob Jones Univ. v. United States (Bob Jones II)*, 461 U.S. 574, 581-82 (1983).

58. The Supreme Court ultimately held that Bob Jones University did not qualify as a tax-exempt organization under § 501(c)(3) because of its racially discriminatory admissions and disciplinary policies, notwithstanding the religious basis for those policies. *Id.* at 605.

59. See I.R.C. § 7422 (2006).

the legal right to the disputed sums be determined in a suit for refund.”⁶⁰ “In this manner,” the Court stressed, “the United States is assured of prompt collection of its lawful revenue.”⁶¹ Similarly, the *Bob Jones I* Court described “the protection of the Government’s need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference” as the TAIA’s “principal purpose.”⁶² It then observed that “[t]he Court has also identified ‘a collateral objective of the Act—protection of the collector from litigation pending a suit for refund.’”⁶³ The *Bob Jones I* Court noted that refund suits implicate neither “the principal purpose” of the TAIA nor its “collateral objective.”⁶⁴

Reading the TAIA in light of its purposes to avoid absurdity, the Court has, in effect, construed the statutory language as if it barred suits brought for the *immediate* purpose of restraining the assessment or collection of any tax. Refund actions have the immediate purpose of obtaining a refund of an exaction already paid. Thus they do not have the immediate purpose of restraining the assessment or collection of a future exaction, even if that is their main purpose. That is why the Court has not construed the TAIA to bar them, notwithstanding the literal language of the statute.⁶⁵

60. 370 U.S. 1, 7 (1962); *see id.* at 5 (“The object of § 7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes.”).

61. *Id.* at 7.

62. *Bob Jones I*, 416 U.S. at 736 (citing *Williams Packing*, 370 U.S. at 7).

63. *Id.* at 737 (quoting *Williams Packing*, 370 U.S. at 7-8).

64. *Id.* at 748 n.22 (quoting *Williams Packing*, 370 U.S. at 7-8).

65. In *South Carolina v. Regan*, the Court held that the TAIA “was not intended to bar an action where . . . Congress has not provided the plaintiff with an alternative legal way to challenge the validity of a tax.” 465 U.S. 367, 373 (1984). The Court based this conclusion on “the Act’s purposes and the circumstances of its enactment.” *Id.* at 381. The Court did not explain how its interpretation of the TAIA was supported by the text of the statute. Likewise, in *Miller v. Standard Nut Margarine Co. of Florida*, the Court held that the predecessor version of the TAIA implicitly contained an exception permitting injunctive actions in “extraordinary and exceptional circumstances.” 284 U.S. 498, 509-10 (1932). The Court subsequently invoked *Standard Nut Margarine* in *Williams Packing* as support for the proposition that the TAIA does not bar relief “if it is clear that under no circumstances could the Government ultimately prevail.” 370 U.S. at 7. Yet neither *Standard Nut Margarine* nor *Williams Packing* attempted to tie the exception to any language in the Act. *See Standard Nut Margarine*, 284 U.S. at 509 (finding no evidence that Congress intended to depart from the traditional equity practice of affording exceptions in extraordinary circumstances, without looking for any statutory language creating an exception); *see also Williams Packing*, 370 U.S. at 7 (“[T]he central purpose of the Act is inapplicable . . .”). These cases show that, in the past, the Court has been willing to root exceptions to the TAIA in the Act’s purposes, without regard to any specific text. Our proposal, by contrast, does construe specific language in the

To be sure, we have found no authority on the question of whether courts may issue injunctions in refund actions, but the absence of authority may simply reflect the fact that taxpayers do not experience the need to seek injunctions in refund actions. Why not? Because they know that they can depend on the collateral estoppel effect of the decision in a refund suit should the same issues involving the same taxpayer arise in future years. Collateral estoppel does not by itself enjoin the IRS from reassessing or recollecting the tax, but it would be a waste of everyone’s time for the IRS to do so when the taxpayer will win on collateral estoppel grounds—and similarly situated taxpayers will win their cases as well on grounds of precedent. Accordingly, the IRS does not assess and attempt to collect a second time when it is sure to lose. The practical effect of a successful refund action is very similar to that of an injunction.

More importantly, even if we were to assume that an injunction is technically unavailable in a refund action, one still must explain how the language of the TAIA permits refund actions like *Bob Jones II*. In such cases, the taxpayer’s undoubted subjective “purpose” in the sense of motive is to restrain the assessment or collection of future taxes, even though the mechanism of restraint is the pleading of collateral estoppel or precedent in a future case. In other words, the ability of the taxpayer to plead collateral estoppel or precedent in a second refund action discourages the IRS from assessing or attempting to collect the tax the second time, and that discouragement is the primary motive—but not the immediate purpose—of the refund action in a case like *Bob Jones II*.⁶⁶

When the TAIA is read in line with *Williams Packing* and *Bob Jones I*—that is, to bar suits with the immediate purpose of restraining tax assessment or collection—the question presented by the ACA litigation is whether pre-enforcement challenges *at this time* have the *immediate* purpose of restraining the assessment or collection of the ACA exaction. The answer is “no,” because the legal authority to assess and collect the ACA exaction will not exist until 2015.⁶⁷ The immediate purpose cannot be to restrain assessment or collection

TAIA and thus should appeal to textualists as well as purposivists. See *infra* text accompanying notes 76-79.

66. Cf. *Alexander v. “Americans United” Inc.*, 416 U.S. 752, 760-61 (1974) (noting that a lawsuit motivated by the purpose of reassuring donors about tax deductibility was nonetheless for the purpose of restraining the assessment or collection of taxes where restraining assessment or collection was the means of providing reassurance).
67. When we say that legal authority to assess and collect does not yet exist, we mean that such authority may not lawfully be exercised any time soon. In other words, we mean that the events that will give rise to the possibility of an assessment have not occurred yet. We do *not*

until the relevant agencies gain the authority to assess and collect, just as the immediate purpose cannot be to restrain assessment or collection after that authority has been exercised. The Court in *Williams Packing* ruled authoritatively that, “in general, the [TAIA] prohibits suits for injunctions barring the collection of federal taxes when the collecting officers have made the assessment and claim that it is valid.”⁶⁸ Because the ACA litigation will take place before the collecting officers will have the authority to make any assessments, this animating purpose of the statute simply does not apply.

What, then, is the immediate purpose of the present challenges to the minimum coverage provision? Rather than having the immediate purpose of restraining the assessment or collection of taxes, these suits can be understood to have the immediate purpose of seeking clarification from the federal courts about the present and future legal obligations of the many individuals and entities subject to the ACA. In other words, when legal authority to assess or collect an exaction does not yet exist, a suit challenging the exaction is better understood as having the immediate purpose of obtaining guidance from the federal judiciary than as having the immediate purpose of restraining assessment or collection.

B. The Declaratory Judgment Act Is No Barrier to This Reading

One might object that a lawsuit with the purpose of seeking guidance is still a forbidden lawsuit. On this view, the fact that Congress prohibited declaratory judgment actions “with respect to Federal taxes”⁶⁹ shows that it meant to block even the taxpayer who seeks guidance. After all, guidance-seeking is invariably the purpose of lawsuits for declaratory relief.

There may be two versions of this objection. One version asserts that an injunctive action for the purpose of seeking guidance is *really* a declaratory judgment action “with respect to Federal taxes,” which, per the terms of the DJA, cannot be brought.⁷⁰ We question the premise of this claim. After all, a declaratory action that accomplishes the same thing that could have been accomplished in a suit for injunctive relief is just as readily viewed as *really* an injunctive action.

mean that the tax is not yet due. Nor do we mean that the IRS may not act until Congress grants it further authority.

68. *Williams Packing*, 370 U.S. at 8.

69. Declaratory Judgment Act (DJA), 28 U.S.C. § 2201(a) (2006).

70. *Cf. Bob Jones I*, 416 U.S. 725, 732-33 n.7 (1974) (“Nor need we decide whether any action for an injunction is of necessity a request for a declaration of rights that triggers the terms of the Declaratory Judgment Act.”).

Even granting the premise, it does not follow that the DJA blocks the present ACA challenges. The Supreme Court asserted in *Bob Jones I* that there was a division of authority on the question of whether the DJA bar on tax litigation is coextensive with or broader than the TAIA bar.⁷¹ This division, however, is hardly even. The Court cited three lower federal court cases concluding that the limits are coextensive and none opining to the contrary.⁷² Moreover, the leading federal practice treatise concludes that the limitation on tax-related declaratory judgment actions “reflects the same vital policy that underlies the [tax] anti-injunction act.”⁷³ This authority comports with the history of the DJA, which did not originally contain a prohibition on tax litigation. Congress amended the statute in 1935 in response to lawsuits that sought to use it to circumvent the prohibition on injunctive relief.⁷⁴ Against all of this authority, the *Bob Jones I* Court offered three citations for the proposition that the DJA bar may be broader than the TAIA bar, but none of the cited sources really makes that point, beyond noting that the DJA lacks some of the TAIA’s express exceptions.⁷⁵ Accordingly, when the explicit

71. *Id.*

72. *Id.*

73. 13D WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3580, at 712 (3d ed. 2008).

74. See “Americans United” Inc. v. Walters, 477 F.2d 1169, 1175-76 (D.C. Cir. 1973), *rev’d on other grounds sub nom.* Alexander v. “Americans United” Inc., 416 U.S. 752 (1974) (citing the DJA’s legislative history for the conclusion that its prohibition on tax litigation is coextensive with the TAIA).

75. See *Bob Jones I*, 416 U.S. at 732 n.7 (citing S. REP. NO. 74-1240 (1935); EDWIN BORCHARD, DECLARATORY JUDGMENTS (2d ed. 1941); and Boris I. Bittker & Kenneth M. Kaufman, *Taxes and Civil Rights: “Constitutionalizing” the Internal Revenue Code*, 82 YALE L.J. 51 (1972)). Borchard worried that the Senate Report indicated that the government sought a broader prohibition in the DJA than the exception-riddled TAIA, but he nonetheless said that the “sounder view” would be to read the statutes as coextensive. BORCHARD, *supra*, at 855. Bittker and Kaufman simply relied on Borchard, but without acknowledging Borchard’s counsel that the courts should construe the DJA restriction to mirror the TAIA. See Bittker & Kaufman, *supra*, at 58 (“Professor Borchard argued that the 1935 amendment was more restrictive than the [TAIA] . . .”). The 1935 Senate Report itself contains exactly one relevant paragraph on the DJA. It states:

Your committee has added an amendment making it clear that the Federal Declaratory Judgment[] Act of June 14, 1934, has no application to Federal taxes. The application of the Declaratory Judgment[] Act to taxes would constitute a radical departure from the long-continued policy of Congress (as expressed in Rev. Stat. 3224 and other provisions) with respect to the determination, assessment, and collection of Federal taxes. Your committee believes that the orderly and prompt determination and collection of Federal taxes should not be interfered with by a procedure designed to facilitate the settlement of private

exceptions in each statute are inapplicable, the DJA should be construed to allow tax litigation whenever the TAIA allows such litigation.

According to the second version of the potential objection based on the DJA, the DJA's prohibition on tax-related litigation shows that Congress meant to bar such litigation even when the immediate purpose of that litigation is clarification, because clarification is always the objective of a declaratory suit. Because Congress has not allowed tax-related declaratory actions for clarification, this argument goes, Congress also would not want to permit tax-related injunctive suits.

This second objection may not be distinguishable from the claim that a clarification-seeking injunctive action is *really* a declaratory judgment action. If it cannot be distinguished, then our foregoing response should suffice to answer the objection when thus rephrased.

To the extent that the second version of the objection makes a distinct point, it does not go to the heart of our proposal. Our key point is that a current challenge to the ACA does not have the immediate purpose of restraining the assessment or collection of a tax, because a tax that has not yet come into existence cannot be assessed or collected. We have said that the immediate purpose of the current litigation is to seek judicial guidance, but we might equally have argued that the present ACA challenges have the immediate purpose of restraining *the establishment* of the taxing authority, or that they have the immediate purpose of *restraining the government from taking any steps necessary* to make assessments and collect revenues once the taxing authority does exist. The precise affirmative characterization of the immediate purpose of the current lawsuits is much less important than understanding that their immediate purpose does not make them subject to the TAIA. So long as the immediate purpose is characterized as something other than guidance-seeking—as it readily and honestly can be characterized—one need not worry about even the appearance of a conflict with the DJA.

controversies, and that existing procedure both in the Board of Tax Appeals and the courts affords ample remedies for the correction of tax errors.

S. REP. NO. 74-1240, *supra*, at 11. We find this language unclear and thus mostly unhelpful. On the one hand, the sweeping assertion that the DJA “has no application to Federal taxes” suggests a ban that could be more far-reaching than the TAIA timing rule. On the other hand, the Report’s invocation of the “determination, assessment, and collection of Federal taxes” echoes the language of the TAIA, suggesting that the amendment was intended to ensure that the DJA tax-litigation exclusion would be interpreted in parallel with the TAIA. We see nothing in the legislative history or logic that supplies a reason why Congress would wish to make it more difficult to obtain declaratory relief than to obtain injunctive relief in tax cases. In general, declaratory relief is considered *less* intrusive than injunctive relief, not more intrusive.

C. *The Virtues of Our Approach*

To return to our affirmative case, our reading of the TAIA has four main virtues. First, textualists and purposivists alike can embrace it. This reading will appeal to textualists because, as used in the statute, “the purpose” must mean “the immediate purpose” or otherwise risk creating absurd results.⁷⁶ After all, anytime anyone brings a lawsuit, he may have several purposes: to obtain money, to prevent certain behavior by the defendant in the future, to have his day in court, to prove a point, and so forth. Accordingly, to make sense of the singular phrase “the purpose” in the TAIA, one must ask what it is doing in the statute. Given the context—which includes Congress’s providing for refund actions in another Internal Revenue Code section—the phrase “the purpose” in the statute must refer to the immediate purpose.⁷⁷

Purposivists can embrace our reading of the TAIA because pre-enforcement challenges to exactions that the government does not yet have authority to assess or collect do not implicate “the manifest purpose of §7421(a),” which, to reiterate, “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 refund.”⁷⁸ Nor does permitting pre-2015 lawsuits frustrate the TAIA’s “collateral purpose” of protecting the tax collector from potentially vexatious litigation. That collateral purpose ultimately serves to protect “collecting officers [who] have made the assessment and claim that it is valid.”⁷⁹ Where there has been no assessment because no taxing authority yet exists, there is no vexation.

76. Cf. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2391 (2003) (“[E]ven the staunchest modern textualists still embrace and apply, even if rarely, at least some version of the absurdity doctrine.”).

77. One might instead say that “the purpose” of a lawsuit is simply the judicial action sought in the complaint’s prayer for relief. Taking such a view, one could then argue that a prayer for relief is TAIA-barred when it seeks to enjoin the assessment or collection of taxes. Under this close cousin of our view, the current ACA litigation would be permissible insofar as it does not seek to enjoin assessment or collection of any tax by the IRS but seeks instead to enjoin the IRS from taking preparatory steps aimed at implementing the assessment and collection authority in 2015. Alternatively, the current litigation seeks to enjoin other federal agencies from implementing the ACA in reliance upon the minimum coverage provision. Thus, for example, a prayer for relief seeking to “enjoin the enforcement of” the ACA in a complaint filed in 2010 is permissible on this view, as on our own. *Complaint, Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010) (No. 2:10-cv-11156), 2010 WL 4784409.

78. *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962).

79. *Id.* at 8.

Second, unlike readings of the TAIA that focus on the meaning of the word “tax,” our construction of the statute does not in any way affect the merits of the question whether the exaction for being uninsured in the ACA is a “tax” or a “penalty” for constitutional purposes. There is no relationship between the immediate purpose of a suit challenging an exaction and the constitutional status of that exaction. By contrast, there is arguably some relationship between statutory and constitutional definitions of the word “tax.”⁸⁰ A Justice who persuades herself that the ACA exaction is not a tax under the TAIA in order to reach the merits may find that this conclusion predisposes her to reject the argument that the ACA exaction is within the scope of Congress’s tax power. Our reading of the TAIA enables the Court to reach the merits without prejudging the merits.

Third, our reading of the TAIA is consistent with Supreme Court precedent. This is a case of first impression: in no previous TAIA case did the Court confront the situation presented by the ACA and have to decide whether the TAIA applied when legal authority to assess and collect the challenged exaction did not yet exist.

Fourth, unlike readings of the TAIA that place the ACA exaction outside its purview for all time, our reading does not pose “serious long-term consequences for the Secretary’s revenue collection.”⁸¹ The Fourth Circuit, in ruling that the TAIA barred all pre-enforcement challenges to the ACA exaction, wrote that “[t]o exempt the individual mandate from the [T]AIA would invite millions of taxpayers—each and every year—to refuse to pay the § 5000A(b) exaction and instead preemptively challenge the IRS’s assessment.”⁸² Our reading of the TAIA poses no such problem; it justifies pre-enforcement challenges to the ACA exaction only until 2015, during which time no assessments or collections will take place.

80. See, e.g., *Liberty Univ., Inc. v. Geithner*, No. 10-2347, 2011 WL 3962915, at *21 (4th Cir. Sept. 8, 2011) (Wynn, J., concurring) (“[W]ere I to rule on the merits . . . , I would uphold the constitutionality of the Affordable Care Act on the basis that Congress had the authority to enact the individual and employer mandates, which operate as taxes, under its taxing power. Accordingly, I must agree with Judge Motz that the [T]AIA bars this suit.”).

81. *Id.* at *14 (majority opinion).

82. *Id.*; see also *id.* (“Moreover, some of those taxpayers will undoubtedly possess a host of non-constitutional, individual grounds upon which to challenge the assessment of the § 5000A(b) exaction. . . . This would threaten to interrupt the IRS’s collection of \$4 billion annually from the challenged exaction. Moreover, those challenges could impede the collection of other income taxes by preemptively resolving—in litigation over the exaction imposed by § 5000A(b)—issues basic to all tax collection, such as a taxpayer’s adjusted gross income.” (citations omitted)).

To be sure, it is possible to imagine a *reductio* of our view. Suppose that Congress enacted a prospective change in the tax law that was scheduled to go into effect one week after enactment. Could taxpayers bring pre-enforcement challenges to the new law for just that one week? If not, how long must the delay be before the TAIA is rendered inapplicable? And if one accepts our view that lawsuits are permitted before the authority to tax goes into effect, why not permit lawsuits before an extant tax becomes due for a particular taxpayer in any given year or quarter?

We think that this line of objections calls for line-drawing rather than abandonment of our analysis. Various lines might be defended as ways to distinguish an objective immediate purpose of restraining tax assessment or collection from another objective immediate purpose. One sensible test would ask whether it appears likely that the litigation, including all appeals, would be completed before the tax goes into effect. Such a test would require a court to make an *ex ante* determination of the likely length of litigation. That sort of determination is familiar to the law of federal jurisdiction.⁸³

Alternatively, one might worry that courts would have difficulty predicting when litigation would be completed. If so, one could opt for a more mechanical rule: litigation filed before the assessment or collection authority goes into effect would be permissible at that time, but the case would be dismissed under the TAIA if it were still pending when a tax becomes assessable or collectable. Under such a regime, plaintiffs would have to weigh the risk that a pre-enforcement challenge would be dismissed before final judgment against the expected value of a judgment obtained before the TAIA bar becomes applicable.

The choice between the two sorts of line-drawing approaches is more theoretical than real, because Congress rarely enacts an exaction but delays its implementation long enough to make full litigation feasible. Moreover, the current challenges to the ACA should fall on the permissible side of the line however it is drawn: Supreme Court review of these actions will be completed years before the minimum coverage provision or the exaction for remaining uninsured goes into effect.

Judge Kavanaugh commented in his impressive opinion that “there is no ‘early-bird special’ exception to the Anti-Injunction Act,” and that “creating

83. See *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 353 (1961) (“The general federal rule has long been to decide what the amount in controversy is [for federal jurisdictional statutes] from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed ‘in good faith.’” (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938))).

such an exception would pose a host of arbitrary line-drawing problems.”⁸⁴ Adoption of our interpretation of the TAIA would permit the Supreme Court to reach the merits of the current ACA litigation without worrying about the line-drawing problems that concerned the lower courts: the casuistic question of what counts as a TAIA “tax.”

Judge Kavanaugh did not consider our interpretation of the statute because no one had yet offered it. His “early-bird special” image is thus humorous but (understandably) unresponsive. Whether pre-enforcement challenges to the ACA should be barred after the provision goes into effect will turn on whether the exaction is deemed a “tax” for purposes of the TAIA, but an authoritative Supreme Court ruling on the substantive issues during the current Term would obviate the need for most such challenges.

CONCLUSION

In light of the daunting number of individuals and entities who require guidance from the Supreme Court on the constitutionality of the minimum coverage provision, resolving the present challenges by the end of the current Term would be in the public interest. We have offered a reading of the TAIA that makes sense of its text and purposes and that would allow this to happen. We cannot know the likelihood that five Justices will be persuaded either by our reading of the statute or by an alternative reading that also will allow the Supreme Court to reach the merits.

There is a simple solution to this uncertainty. Congress could pass a special-purpose statute stating that the TAIA does not bar pre-enforcement challenges to the minimum coverage provision until the provision goes into effect.⁸⁵ There is no dispute about the authority of Congress to pass such a law. It has taken similar action in the past.⁸⁶ Moreover, if the political branches were to turn their attention to the matter, there is good cause to expect that the

84. *Seven-Sky v. Holder*, 661 F.3d 1, 46 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

85. For an example of a straightforward proposal that Congress could enact, see Steve R. Johnson, *The Anti-Injunction Act and the Individual Mandate*, 133 TAX NOTES 1395, 1401-02 (2011). Such a statute could specify that it renders the TAIA (and possibly the DJA tax-litigation bar) inapplicable only to lawsuits filed before a specified date.

86. See, e.g., *Liberty Univ.*, 2011 WL 3962915, at *14 (noting that Congress enacted such a provision after *Bob Jones I*). There is a statutory exception to the TAIA for exemption cases— I.R.C. § 7428(a) (2006)—which allows organizations whose tax-exempt status has been denied or revoked to sue for a declaratory judgment on that question, without having to tee up a refund suit.

“EARLY-BIRD SPECIAL” INDEED!

bill would pass both chambers and be signed into law by the President. The time for Congress and the Obama Administration to act is now.

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