No. 15-622

In the Supreme Court of the United States

STEVEN F. HOTZE, M.D., AND BRAIDWOOD MANAGEMENT, INCORPORATED,

Petitioners,

v.

SYLVIA MATHEWS BURWELL, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND JACOB J. LEW, SECRETARY, DEPARTMENT OF TREASURY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC. AND APA WATCH IN SUPPORT OF PETITIONERS IN SUPPORT OF REVERSAL

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE. NW
SUITE 200
WASHINGTON, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for Amici Curiae

QUESTION PRESENTED

The court of appeals expressly rejected the holding by the Fourth Circuit on whether the Anti-Injunction Act ("AIA"), 26 U.S.C. §7421(a), precludes businesses from bringing pre-enforcement challenges to the employer mandate in the Patient Protection and Affordable Care Act ("ACA").

The questions presented are these:

1. Does the AIA bar a pre-enforcement challenge by an employer to the constitutionality of ACA?
2. Does the AIA preclude pre-enforcement review of ACA even where there would be no opportunity for post-enforcement review of the tax because the plaintiff makes the alternative payment (*i.e.*, elevated ACA-compliant insurance prices) to avoid the tax?

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INTEREST OF *AMICI CURIAE*

Amicus curiae Association of American Physicians & Surgeons, Inc.[1] ("AAPS") is a not-for-profit membership organization incorporated under the laws of Indiana and headquartered in Tucson,

[1] *Amici* file this brief with consent by all parties, with 10 days' prior written notice; the *amici* have lodged the parties' letters of consent with the Clerk. Pursuant to Rule 37.6, counsel for *amici* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amici* and their counsel – contributed monetarily to preparing or submitting the brief.

Arizona. AAPS members include thousands of physicians nationwide in all practices and specialties, many in small practices. AAPS was founded in 1943 to preserve the practice of private medicine, ethical medicine, and the patient-physician relationship. The members of *amicus* AAPS include without limitation medical caregivers – who also are consumers of medical care – as well as medical employers and owners and managers of medical businesses subject to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA"). In addition to participating at the legislative and administrative levels in national, state, and local debates on health issues, AAPS also participates in litigation, both as a party, *see, e.g., Ass'n of Am. Physicians & Surgeons v. Sebelius,* 113 A.F.T.R.2d (RIA) 1196 (D.C. Cir. 2014); *Ass'n of Am. Physicians & Surgeons v. Clinton,* 997 F.2d 898 (D.C. Cir. 1993), and as *amicus curiae. See, e.g., Springer v. Henry,* 435 F.3d 268, 271 (3d Cir. 2006) (citing and relying on AAPS argument); *United States v. Rutgard,* 116 F.3d 1270 (9th Cir. 1997). AAPS *amicus* briefs also have been cited in decisions of this Court. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 933 (2000); *District of Columbia v. Heller*, 554 U.S. 570, 703 (2008) (Breyer, Stevens, Souter and Ginsburg, JJ., dissenting).

Amicus curiae APA Watch is a nonprofit membership organization formed under Virginia law. On its own and through its membership, APA Watch devotes significant effort both to combating agencies' exceeding their authority and to preserving the legislatively and constitutionally intended balance

for review under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), its equity predecessors, and their state-law equivalents. APA Watch has participated as *amicus curiae* before various federal courts and agencies on these issues, including: *Envtl. Def. v. Duke Energy Corp.*, No. 05-848 (U.S.); *Astra USA, Inc. v. Santa Clara Cnty., Cal.*, No. 09-1273 (U.S.); *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, Nos. 09-958, 09-1158 & 10-283 (U.S.); *Stormans Inc. v. Seleky*, No. 07-36039 (9th Cir.); *Metro. Taxicab Bd. of Trade v. City of New York*, No. 09-2901-cv (2d Cir.); and *Sec'y of Labor v. Kiewit Power Constructors, Inc.*, OSHRC Docket No. 11-2395 (2013). In addition, APA Watch has filed rulemaking comments with federal and state agencies. The law challenged here – the ACA – intrudes the federal government into approximately one sixth of the national economy, and the relief petitioners seek would end that intrusion because a law enacted in violation of the Origination Clause is a nullity. In denying judicial review, the Fifth Circuit harmed the public's ability to ensure government accountability and to protect itself from governmental overreach.

For the foregoing reasons, *amici* have direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

Dr. Steven Hotze and his employer Braidwood Management (collectively, "Petitioners") sued the Secretaries of the Treasury ("Treasury") and of Health and Human Services ("HHS") for declaratory and injunctive relief against enforcement of the "Employer Mandate" and "Individual Mandate," 26

U.S.C. §§4980H, 5000A,[2] of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA"). Petitioners allege that the Senate-initiated ACA raises revenue in violation of the Constitution's requirement that revenue-raising measures originate in the House of Representatives. U.S. CONST. art. I, §7, cl. 1. The Fifth Circuit dismissed Dr. Hotze's claims against the Individual Mandate for lack of standing, given that Braidwood's ACA-compliant health-insurance policy renders the Individual Mandate inapplicable to him, and it dismissed the claim against the Employer Mandate under the Anti-Injunction Act, 26 U.S.C. §7421(a) ("AIA"), as a pre-enforcement challenge to a federal tax. In this Court, Petitioners challenge only the AIA-based dismissal of the Employer Mandate claim.

Constitutional and Statutory Background

The Origination Clause requires that "[a]ll Bills for raising Revenue shall originate in the House of Representatives, but the Senate may propose or concur with Amendments as on other Bills." U.S. CONST. art. I, §7, cl. 1. Bills enacted without meeting the Origination Clause's requirements are a nullity.

On November 21, 2009, the Senate Majority Leader called up a house bill tangentially related to taxation that had nothing to do with raising revenue, much less healthcare, and offered an amendment

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[2] Strictly speaking, "mandate" is a misnomer because both the Employer and Individual Mandates operate as alternative taxes or penalties that employers and individuals incur as the result of noncompliance with ACA's health-insurance rules. If employers provide or individuals obtain ACA-compliant health insurance, they do not pay the "mandates."

that replaced the entire House bill with ACA. 155 Cong. Rec. S11,967 (2009); *id.* at S11,607-816. It is unclear how the Majority Leader made that mistake, but it may have resulted from ACA's having been drafted in his office, outside the usual committee process, without the deliberative value that committees provide. Moreover, because his party then had a 60-vote supermajority, the legislative process reduced to backroom horse-trading to secure the moderate members of the majority caucus, without inviting input from the Senate minority.

Whatever legislative end-game the Majority Leader had planned, those plans were thwarted by a special election on January 19, 2010, when Massachusetts elected Scott Brown as the Senate's forty-first Republican. Losing a filibuster-proof majority eliminated the Senate Democrats' options for acceding to a new House bill or accepting House amendments to the Senate bill without Republican support. That left the Democrats with the options of either accepting Republican amendments or sticking with ACA as already passed in the Senate, 155 Cong. Rec. S13,891 (2009), modified only by a reconciliation bill not subject to Senate filibuster. *See* 2 U.S.C. §641(e)(2). The Democrats took the second option and passed ACA without a single Republican vote in the House or Senate.

With respect to judicial review of taxes, the AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. §7421(a). Similarly, the Declaratory Judgment Act ("DJA") includes an exception for a "case … with

respect to Federal taxes." 28 U.S.C. §2201(a). Under this Court's precedents, the AIA and DJA restrict – without outright *prohibiting*[3] – federal courts' issuing injunctive and declaratory relief on taxation.

In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012) ("*NFIB*"), this Court addressed the intersection between the AIA and ACA's Individual Mandate, holding that the AIA did not bar review of the mandate to purchase health insurance, which exceeds the Commerce Power, 132 S.Ct. at 2587-89, but could be "saved" by interpreting its penalty for non-compliance as within the Taxing Power for *constitutional* purposes, *id.* at 2598-2600, even though Congress did not intend that penalty as a tax for *statutory* purposes. *Id.* at 2582-84.

Factual Background

Amici adopt the facts as stated by Petitioners. *See* Pet. 2-5. Because the court dismissed the action for want of jurisdiction, the relevant facts include those pleaded in the complaint, which the defendants admit in moving to dismiss under Rule 12(b). *Warth v. Seldin*, 422 U.S. 490, 501 (1975). The facts salient to the arguments presented in this brief are that the employer Braidwood would prefer to provide its employees the same pre-ACA high-deductible, low-cost health insurance, but ACA has reduced market choices, increased prices, and limited some features

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[3] *See, e.g.*, *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509-10 (1932); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7-8 (1962); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 748-49 (1974); *cf. United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 13 (2008) (construing similar language in 26 U.S.C. §7422(a)); *see* Sections I.B, I.C, II.A, *infra*.

that Braidwood and its employees valued. Compl. ¶¶3, 28, 30, 33 (Pet. App. 75a, 79a-80a). Further, Petitioner Hotze and many other Braidwood employees are not eligible for either free Medicare or ACA's lower-cost catastrophic plans because they are aged between 30 and 65. Compl. ¶25 (Pet. App. 78a). Finally, Petitioners lack a practical alternate remedy to sue either the federal government or private insurers to redress financial injuries inflicted by ACA and its implementation. *See* Compl. ¶32 (Pet. App. 79a-80a).

SUMMARY OF ARGUMENT

As Chief Justice Marshall famously put it, "[courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Indeed, federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976); *accord Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1386 (2014). The Fifth Circuit attempts to shirk that "unflagging obligation" for two general sets of reasons. First, this Court has long rejected the arguments that the AIA poses a barrier to the pre-enforcement review of regulatory taxes, easily reviewable and unconstitutional taxes, and tax-regimes that do not provide an opportunity for post-enforcement review. Second, this Court recently held in *NFIB* that Congress itself did not intend the AIA to bar pre-enforcement review of ACA's analogous Individual Mandate, which counsels for holding that the

Congress did not intend to bar pre-enforcement review here, either. This Court should grant the writ to make clear that at least one – if not all – of these bases requires federal courts to hear pre-enforcement challenges to ACA's Employer Mandate.

The Fifth Circuit's decision splits directly with the Fourth Circuit's decision in *Liberty Univ. v. Lew*, 733 F.3d 72, 89 (4th Cir.), *cert. denied*, 134 S. Ct. 683 (2013), on the precise question presented here. *See* Section I.A. Moreover, even if the Court agreed with the Fifth Circuit on the inapplicability of the analogy to *NFIB* and the Individual Mandate, a line of cases under *Lipke v. Lederer*, 259 U.S. 557 (1922) – including recent ACA cases from the Seventh and Tenth Circuits – holds the AIA does not apply to regulatory taxes. *See* Section I.B. Further, in *Williams Packing*, this Court recognized that the AIA does not bar pre-enforcement review of plainly illegal or unconstitutional taxes. *See* Section I.C.

Even if the AIA applied generally to preclude pre-enforcement review of the Employer Mandate as a tax penalty for an employer who refused to provide health insurance, the AIA would not preclude review by employers like Braidwood who *do* purchase ACA-compliant health insurance. Such employers lack any opportunity for post-enforcement review to recoup a tax that they never paid. Under *South Carolina v. Regan*, 465 U.S. 367, 378-380 (1984), the AIA does not bar review when there is no alternate remedy. *See* Section II.A. Finally, even if the AIA bars review of the Employer Mandate as a tax, the district court would still have federal-question jurisdiction to declare the scope of legitimate federal power over the

health-insurance market, which would provide employers at least *partial* relief against ACA's unconstitutional federal intrusion into health-insurance issues; nothing in the AIA bars that form of *non-tax* relief. *See* Section II.B.

ARGUMENT

I. THE AIA DOES NOT BAR PRE-ENFORCEMENT REVIEW OF ACA'S EMPLOYER MANDATE.

Like the Fourth Circuit in *Liberty University*, this Court should recognize that the parallels that Congress intended between ACA's Individual and Employer Mandates compel the conclusion that this Court reached in *NFIB*: Congress did not intend for the AIA to preclude pre-enforcement review of the Employer Mandate. But even if Congress intended the Employer Mandate to qualify as a "tax" for statutory purposes, the AIA still would not preclude review because the AIA does not preclude review of regulatory taxes like the Employer Mandate and ACA's enactment violated the Origination Clause for purely legal and easily resolved reasons.

A. This Court should follow the Fourth Circuit's holding that Congress did not intend to preclude review.

The AIA's restrictions on pre-enforcement review should pose no barrier to judicial review here because – while ACA's mandate penalties qualify as taxes for *constitutional purposes* under the *NFIB* "saving construction" – those penalties are not taxes for *statutory purposes*. *NFIB*, 132 S.Ct. at 2584 (Individual Mandate); *Liberty Univ.*, 733 F.3d at 89

(Employer Mandate). Petitioners' challenge to ACA generally and its Employer Mandate specifically should be able to proceed in federal court under federal-question jurisdiction, 28 U.S.C. §1331, and this Court should grant the writ to address the split between the Fifth and Fourth Circuits on the precise issue of the AIA's applicability to ACA's Employer Mandate.

B. The AIA does not preclude review of regulatory taxes.

Assuming *arguendo* that this Court would side with the Fifth Circuit against the Fourth Circuit on the question of whether the Employer Mandate is a tax for statutory purposes, the Court's so holding would merely close one two-court circuit split and open another, wider split on the AIA's application to regulatory taxes.

In a series of decisions that rely on this Court's *Lipke* decision, the Seventh Circuit has found the AIA inapposite to tax laws that are regulatory in nature.[4] *See Robertson v. United States*, 582 F.2d

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[4] The question of whether the Employer Mandate regulates versus raises revenue does not go to the Origination Clause merits because other ACA provisions raise revenue, even if the Employer Mandate does not. For example, ACA's excise taxes on medical devices also trigger the Origination Clause, Pub. L. No. 111-148, §9009, 124 Stat. at 862-65, as does the Individual Mandate, which lacks any constitutional authority other than the taxing power. *NFIB*, 132 S.Ct. at 2598-2600; *cf. In re Kollock*, 165 U.S. 526, 536 (1897) ("[t]he act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception … its primary object must be assumed to be the raising of revenue"). Thus, the Origination Clause applies to ACA's enactment, whether or not the specific

1126, 1127 (7th Cir. 1978). Indeed, just last year, this Court upheld on the merits a Tenth Circuit decision on another ACA tax-based provision where the Tenth Circuit found the AIA inapposite:

> The statutory scheme makes clear that the tax at issue here is no more than a penalty for violating regulations related to health care and employer-provided insurance, *see, e.g.*, 42 U.S.C. § 300gg-22(b)(2)(C)(i) (calculating the maximum "penalty" that the Secretary of HHS can impose on non-compliant insurers in the same way that 26 U.S.C. § 4980D(b)(1) calculates the "tax" for non-compliant employers, namely "$100 for each day for each individual with respect to which such a failure occurs"), and *the AIA does not apply to "the exaction of a purely regulatory tax*," *Robertson v. United States*, 582 F.2d 1126, 1127 (7th Cir. 1978).

Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1128 (10th Cir. 2013) (emphasis added), *aff'd on other grounds sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014); *accord Korte v. Sebelius*, 735 F.3d 654, 670-71 (7th Cir. 2013). To be sure, this Court addressed the merits in its *Hobby Lobby* decision, not the AIA jurisdictional issues, and "drive-by jurisdictional rulings of this sort … have no precedential effect." *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 91 (1998). As such, *amici* do not suggest that this Court's *Hobby Lobby* decision

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tax that gives rise to the Petitioners' standing – the Employer Mandate – is a regulatory or revenue-raising tax.

resolves the issue. To the contrary, *amici* respectfully submit that this Court now must resolve the Fifth Circuit's split with the Seventh and Tenth Circuits on the AIA's application to regulatory taxes.

C. The AIA allows review of purely legal and easily resolved questions.

Even if it applied here – which it does not – the AIA would nonetheless allow review under the judge-made exception for instances where "it is clear that under no circumstances could the Government ultimately prevail." *Williams Packing*, 370 U.S. at 7. Where "it is … apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, … the suit for an injunction [may] be maintained." *Id.* When this exception applies, the unconstitutional or otherwise unlawful tax is not a tax, but "merely in 'the guise of a tax.'" *Id.* (*quoting Standard Nut Margarine*, 284 U.S. at 509)). Here, the constitutional question that the Petitioners raise to challenge ACA is purely legal and easily resolved.

In *Clintwood Elkhorn Mining*, 553 U.S. at 13, this Court recently left open the question whether this exception covers facially unconstitutional statutes, and in *Standard Nut Margarine*, 284 U.S. at 510-11, the Court held that the exception covered taxes that violate the Constitution's requirement that excise taxes be nationally uniform. *Amici* respectfully submit that ACA's violation of the Origination Clause is plain because the simple, six-page, six-section House bill into which the Senate substituted the 2000-page ACA was not a bill for raising revenue at all. *See* Service Members Home

Ownership Tax Act of 2009, H.R. 3590, 111th Cong., 1st Sess. (Oct. 8, 2009). Specifically, none of the House bill's six sections raised revenue.

- Section 1 provided the House bill's short title, which raised no revenue. *See* Compl. ¶45 (Pet. App. 81a).
- Sections 2 through 4 provided targeted tax exemptions to benefit military, intelligence, and foreign-service personnel, without affecting in any way the taxes on others. *See* Compl. ¶¶46-47 (Pet. App. 81a). Those exemptions functioned to encourage Americans to serve their country: "A willingness is shown to sink money … to accomplish that object," and "[i]n no just view … can the statute in question be deemed a revenue law." *United States v. Norton*, 91 U.S. (1 Otto) 566, 567-68 (1875); *cf. Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 859 (1995) (targeted exemptions should be considered tax expenditures, a form of spending) (Thomas, J., concurring); *accord* 2 U.S.C. §639(c)(2)-(3) (distinguishing revenues from tax expenditures). Moreover, bills that merely zero out a defined revenue stream cannot raise revenue under the seminal 1872 resolution of Origination Clause disputes between the Senate and House: "To say that a bill which provides that no revenue shall be raised is a bill 'for raising revenue' is simply a contradiction of terms." S. REP. NO. 42-146, at 5 (1872); 2 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §1489 (1907). Targeted tax expenditures – especially ones that zero out taxation – without retaining or

altering unaffected taxpayers' obligations do not raise revenue under the Origination Clause.

- Section 5 increased by $21 (from $89 to $110) the penalty for failing to file certain tax returns. *See* Compl. ¶48 (Pet. App. 82a). Such regulatory penalties do not "levy taxes in the strict sense of the word" required to qualify as revenue-raising measures for the purposes of the Origination Clause. *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897). Penalties that merely enforce another statute enacted pursuant to an Article I power do not raise revenue within the meaning of the Origination Clause.
- Section 6 amended the Corporate Estimated Tax Shift Act of 2009, Pub. L. 111-42, tit. II, §202(b), 123 Stat. 1963, 1964 (2009), to shift 0.5% of *estimated* taxes for certain corporations from the fourth calendar quarter to the third calendar quarter, with an offsetting reduction to fourth-quarter payments. *See* Compl. ¶49 (Pet. App. 82a). Applying only to *estimated-tax* payments, Section 6 would not affect the taxes that a corporation ultimately would owe. *Baral v. United States*, 528 U.S. 431, 436 (2000) ("[w]ithholding and estimated tax remittances are not taxes in their own right, but methods for collecting the income tax"). More fundamentally, Section 6 would not have altered the amount of estimated-tax payments, either. The Corporate Estimated Tax Shift Act merely *shifts* payments by a fraction of a percent within the calendar year, without increasing the overall annual estimated-tax payment rates. Joint Committee on Taxation, Technical Explanation of H.R. 3590,

> the "Service Members Home Ownership Tax Act of 2009" Scheduled for Consideration by the House of Representatives on October 7, 2009, at 9 (Oct. 6, 2009) (JCX-39-09). It does not raise revenue for a corporation to pay more in estimated taxes in September and then to pay that same amount less in estimated taxes in December.[5]

Because none of the House bill's six sections raised revenue within the Origination Clause's meaning, the Senate's substitution of ACA into the House bill violated the Origination Clause's requirement that revenue bills originate in the House.[6]

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[5] Section 6's oddity derives from budget gimmickry and the federal fiscal year's ending on September 30. Shifting receipts from December to September benefits the baseline fiscal year at the expense of the following fiscal year, without actually changing revenue. Because the shift applies annually, each new fiscal year loses out in December (Q1), but makes it up in September (Q4), which suggests a pointless shell game. Under the ten-fiscal-year budget window, however, congressional accounting for bills enacted later in a fiscal year than December will count the credits from ten Septembers, but the offsetting debits from only nine Decembers, creating the false appearance of increased rceipts in that ten-year fiscal window. The tenth December's debit should erase that appearance, but it happens eleven fiscal years away, outside the budget window.

[6] James Saturno, Section Research Manager, Congressional Research Serv., *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement*, at 6 (Mar. 15, 2011) (*citing* 2 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §1489 (1907)); *Rainey v. United States*, 232 U.S. 310, 317 (1914); *Sperry Corp. v. United States*, 12 Cl. Ct. 736, 742 (1987), *aff'd in pertinent part on other grounds*, 925 F.2d 399 (Fed. Cir.), *cert. denied* 502 U.S. 809 (1991); *Armstrong v. United States*, 759 F.2d 1378, 1382

In a related ACA Origination-Clause challenge, *Sissel v. Dep't. of Health & Human. Services*, No. 15-543 (U.S.), asks whether the Senate's wholesale substitution of the massive ACA into the short and wholly unrelated House bill falls within the Senate's amendment powers, without also asking whether the underlying House bill raised revenue in the first place. *Amici* respectfully submit that granting the writ in both cases would ensure the full resolution of the Origination Clause questions presented by ACA's enactment. But even if it denies the writ in *Sissel*, this Court still should reverse the Fifth Circuit's denial of review here.

II. THE AIA DENIES PRE-ENFORCEMENT REVIEW ONLY WHEN PLAINTIFFS HAVE A POST-ENFORCEMENT TAX REMEDY.

Even if it applied to the Employer Mandate as a tax, the AIA would not displace pre-enforcement review here for two reasons. First, this Court has recognized a due-process exception to the AIA for instances in which the plaintiff would lack any post-enforcement remedy, such that denying pre-enforcement review would render the tax wholly unreviewable. Second, the district court on remand could issue declaratory relief on the legal status of ACA's federal intrusion into the health-insurance market, without in any way declaring upon or enjoining the collection of the tax in question (*i.e.*, the Employer Mandate). Petitioner Braidwood as an employer intends to continue to provide a health-

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(9th Cir. 1985); Thomas L. Jipping, *TEFRA and the Origination Clause: Taking the Oath Seriously*, 35 BUFF. L. REV. 633, 688 (1986).

insurance benefit to its employees, but would obviously prefer the option to purchase a wider variety of health-insurance options than the federal government's unconstitutional ACA intrusion allows.

A. Employers purchasing ACA-compliant insurance under ACA's coercion lack any post-enforcement remedy because they never pay the alternate ACA tax.

Petitioners' second Question Presented concerns the lack of any alternate remedy here: "Congress did not intend the [AIA] to apply to actions brought by aggrieved parties for whom [Congress] has not provided an alternative remedy." *South Carolina v. Regan*, 465 U.S. at 378. This Court should reject the Fifth Circuit's eliminating Petitioners' ability *ever* to challenge an unconstitutional act of Congress.

As indicated, the Employer Mandate injures large employers not only by imposing standards on the health-insurance industry that have the effect of limiting market options and raising prices but also by coercing employers to purchase ACA-compliant insurance under the threat of debilitating alternative tax penalties for employers that decline to provide ACA-complaint insurance. As long as the employer Braidwood still provides health-insurance for its employees, it will avoid having to pay the so-called tax. As such, there will *never* be a post-enforcement remedy because the employer will never pay the tax penalty. Instead, employers pay inflated, unnecessarily high insurance premiums to private insurance companies, with no option to recoup the additional ACA-induced and unnecessary costs.

Under the circumstances, the AIA does not bar pre-enforcement review, which is the only review available.

B. A court could issue partial *non-tax* relief, even if the AIA applied.

Given that the employer Braidwood intends to provide its employees with health insurance, the issue that Petitioners seek to declare or enjoin is not the collection of a tax *per se*, but rather the types of health-insurance policies that are (or would be) on the market and available to purchase, but for ACA's intrusion and coercion. Accordingly, it would be possible for the district court to craft relief that – without enjoining the collection of any tax – would prevent the federal government's unconstitutional interference with health-insurance markets. By its terms, the AIA does not remove jurisdiction for that type of relief, *Hill v. Wallace*, 259 U.S. 44, 62-63 (1922) ("right to sue for an injunction against the taxing officials is not, however, necessary to give us jurisdiction" if other relief is available after dismissing the taxing officials); *Georgia R. & B. Co. v. Redwine*, 342 U.S. 299, 303 n.11 (1952) ("adequate remedy as to only a portion of the taxes in controversy does not deprive the federal court of jurisdiction over the entire controversy"); *Foodservice & Lodging Inst. v. Regan*, 809 F.2d 842, 846 & n.10 (D.C. Cir. 1987) (allowing APA challenge to [Internal Revenue Service] tip regulation without individual refund suits);, even assuming *arguendo* that the AIA applies at all.

Given the duty of federal courts to assume the jurisdiction that they have, *Cohens*, 19 U.S. (6

Wheat.) at 404; *Colorado River*, 424 U.S. at 817; *Lexmark Int'l*, 134 S.Ct. at 1386, this Court should reverse the Fifth Circuit's dismissal, even if the AIA applies.

CONCLUSION

The Court should grant the petition for a writ of *certiorari.*

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Respectfully submitted,

Lawrence J. Joseph
1250 Connecticut Ave. NW
Suite 200
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com
Counsel for *Amici Curiae*