



NYU | LAW

# MOOT COURT BOARD

Sheldon Scott, Secretary of Health and Human Services,  
in his official capacity as Secretary of Health and Human Services, et al.,  
Petitioner,

-against-

Aimee Baker,  
Respondent.

Memorandum of Law

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## **QUESTION PRESENTED**

Whether the exaction provision of section 4980H of the Affordable Care Act is barred from pre-enforcement challenge by the Anti-Injunction Act.

## **STATEMENT OF FACTS**

Aimee Baker runs a large health and fitness club with multiple floors of exercise equipment, a pool, a café, a tennis court, and a daycare center. Baker opened their business this year and employs 61 employees. Baker is “reasonably expected” to employ at least 61 employees at all times this year, none of whom have health coverage under TRICARE or the Department of Veterans Affairs. These characteristics make Baker an “applicable large employer” under section 4980H of the Affordable Care Act (“ACA”). *See* 26 U.S.C. § 4980H(c)(2)(A) (“The term ‘applicable large employer’ means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.”). As an “applicable large employer,” Baker is required to provide a minimum level of health coverage to their employees or else face an exaction.

Under 42 U.S.C. § 300gg–13(a)(1), a group health plan must cover “evidence-based items or services that have in effect a rating of ‘A’ or ‘B’ in the current recommendations of the United States Preventive Services Task Force” (“Task Force”). *See* A & B Recommendations, U.S. Preventative Serv. Task Force, <https://www.uspreventiveservicestaskforce.org/uspstf/recommendation-topics/uspstf-a-and-b-recommendations> (last visited Sep. 28, 2024) (listing the A & B grade recommendations group health plans must cover pursuant to the ACA). Baker has decided not to provide health coverage to their employees because Baker objects to the Task Force’s recommendations. Baker believes maintaining a healthy lifestyle and exercise regimen is sufficient prevention and that this type of care is unnecessary. Additionally, Baker believes this regulatory mandate is unconstitutional because the members of the Task Force were not appointed in accordance with the Article II Appointments Clause. *Braidwood Mgmt. v. Becerra*, 104 F.4th 930, 935, 940 (5th Cir. 2024) (finding that the Task Force members are principal officers required to be nominated by the President and confirmed by the Senate). As a result of Baker’s choice not to provide health care to their employees, Baker would potentially be liable for an exaction under section 4980H.

## **PROCEDURAL HISTORY**

Baker sought a preliminary injunction against Sheldon Scott, Secretary of Health and Human Services, in his official capacity as Secretary of Health and Human Services, as well as other agency officials, to prevent the IRS from attempting to collect an exaction from them for not providing health insurance to their employees under section 4980H during the pendency of this suit. The Government, litigating on

behalf of Scott, moved to dismiss Baker’s suit on the ground that the Anti-Injunction Act divests the district court of jurisdiction over the action. The Anti-Injunction Act places a jurisdictional bar against a court maintaining any suit seeking to “restrain[] the assessment or collection of any tax.” 26 U.S.C. § 7421(a). The district court granted the motion, dismissing Baker’s suit under Fed. R. Civ. P. 12(b)(1), on the ground that Baker lacked subject matter jurisdiction. The district court held that an exaction under section 4980H is a “tax” for purposes of the Anti-Injunction Act. Respondent appealed to the Court of Appeals for the Fourteenth Circuit, which reversed the district court’s decision and remanded with instructions to consider the merits of Baker’s case. The Government petitioned the Supreme Court for certiorari, which was granted.

### SUMMARY

The question presented is a jurisdictional one, specifically concerning the potential implications of the Anti-Injunction Act on section 4980H of the ACA, which details the employer mandate. The Anti-Injunction Act bars “suit[s] for the purpose of restraining the assessment or collection of any tax.” 26 U.S.C. § 7421(a). In *National Federation of Independent Business v. Sebelius*, the Supreme Court decided that a different provision of the ACA, the “individual mandate,” was not a “tax” for purposes of the Anti-Injunction Act. 567 U.S. 519, 546 (2012) [hereinafter *NFIB*]. Rather, the Court decided that Congress’s labeling of the exaction as a “penalty” suggested that Congress did not intend the Anti-Injunction Act to apply to the individual mandate. *Id.* at 543–44. The Supreme Court has not weighed in on whether section 4980H must be classified as a “tax” for Anti-Injunction Act purposes. However, given the close relationship between the employer and individual mandates, the Court’s analysis in *NFIB* is of crucial importance to both Petitioner’s and Respondent’s analyses.

Several circuit courts have addressed this very question. The Fifth and D.C. Circuits have held that the employer mandate is a “tax” for purposes of the Anti-Injunction Act. *Hotze v. Burwell*, 784 F.3d 984, 991 (5th Cir. 2015); *Optimal Wireless LLC v. IRS*, 77 F.4th 1069, 1075 (D.C. Cir. 2023). The Fifth Circuit in *Hotze* found that the plaintiff-employer’s pre-enforcement challenge to the constitutionality of the employer mandate was barred by the Anti-Injunction Act because the mandate was a “tax” under the Act. 784 F.3d at 1000. The court noted that the employer mandate’s exaction is labeled as a “tax” and there is no strong evidence that Congress intended for this exaction to be treated as something other than a “tax.” *Id.* at 991. In *Optimal Wireless*, the D.C. Circuit held that employer Optimal Wireless’s suit could not go forward until they paid the exaction levied under section 4980H. 77 F.4th at 1070–71. In this case, the court stressed the importance of Congress’s repeated references to the exaction in section 4980H as a “tax,” emphasizing that the use of the phrase “assessable payment” was not dispositive. *Id.* at 1075. Furthermore, the court did not

find the use of the word “penalty” overcame the significance of the repeated use of the word “tax” in the statute. *Id.* at 1076.

On the other hand, the Fourth and Seventh Circuits held that the employer mandate was not a “tax” for Anti-Injunction Act purposes, thus enabling the courts to hear complaints on their merits. In *Liberty University, Inc. v. Lew*, the Fourth Circuit decided that the Anti-Injunction Act did not bar a pre-enforcement challenge to the employer mandate because the exaction is primarily referred to as an “assessable payment” in the ACA and Congress did not specifically indicate that the exaction was to be treated as a tax. 733 F.3d 72, 88 (4th Cir. 2013). The *Lew* court opined that labeling the exaction as an “assessable payment” negated it also being labeled as a “tax.” *See id.* at 88–89. The court noted the anomaly that would result if a plaintiff could bring a pre-enforcement challenge to the individual mandate, but not to the employer mandate. *Id.* This concern was not persuasive to the Fifth Circuit. *Hotze*, 784 F.3d at 998–99. The Seventh Circuit agreed with the Fourth Circuit that the Anti-Injunction Act did not apply but raised an additional argument in support of this assertion. In *Korte v. Sebelius*, the Seventh Circuit found that the Anti-Injunction Act did not apply because “[t]he suits seek relief from a regulatory mandate that exists separate and apart from the assessment or collection of taxes.” 735 F.3d 654, 669 (7th Cir. 2013). The plaintiffs in *Korte* challenged the “contraception mandate” of the ACA, which requires an employer’s group health plan or group health insurance coverage to furnish certain contraception coverage without cost sharing. *Id.* at 659–60. However, the court ultimately determined that the exaction was not a “tax” for purposes of the Anti-Injunction Act. *Id.* at 671. To reach this conclusion, the Seventh Circuit analyzed a similar provision, 26 U.S.C. § 4980D, which outlines a “tax on any failure of a group health plan to meet the requirements” for group health plans. *Id.* at 669–71. The court found that section 4980D was not a tax for Anti-Injunction Act purposes because it is more properly considered a penalty. *Korte*, 735 F.3d at 670–71. Specifically, § 4980D demands a large price for noncompliance, contains exceptions for an employer’s scienter, and is referred to as a “penalty.” *Id.* The court determined that “[b]y parallel reasoning the same is true of the alternative payment in § 4980H.” *Id.* at 671.

Petitioner will urge for a textual analysis of section 4980H that emphasizes the repeated use of the word “tax” as evidence of Congress’s intent that the employer mandate be subject to the Anti-Injunction Act. *See Optimal Wireless*, 77 F.4th at 1075 (Congress’s “repeated references to the exaction as a ‘tax’ require treating it as one for purposes of the Anti-Injunction Act”); *Hotze*, 784 F.3d at 991 (“Congress labeled the employer-mandate exaction a ‘tax’ . . . [T]here is no compelling evidence that Congress intended for the employer-mandate exaction to be treated as something other than a ‘tax’ for the purposes of the AIA.”). Respondent will emphasize that Congress uses the phrases “assessable payment” and “assessable penalty” to describe the exaction, and the use of the word “tax” on two occasions should not be given so much significance. *See Lew*, 733 F.3d at 88–89. Petitioner will counter that the words

“tax” and “assessable payment” or “penalty” are not inconsistent, and the use of the latter does not negate the use of the former. *See Hotze*, 784 F.3d at 998 (“The terms ‘tax’ and ‘assessable payment’ do not present a contradiction in the use of terms.”). The ultimate debate between the two sides is which phrase is more significant in determining Congress’s intent.

Respondent will argue that a ruling in their favor would merely prevent the Department of Health and Human Services from enforcing a regulatory mandate as it relates to their business’ health care plan. A favorable ruling would not be for the purpose of preventing Congress from collecting taxes. Petitioner will argue that this has significant implications for Respondent’s tax liability, thus implicating the Anti-Injunction Act’s jurisdictional bar. *E.g.*, *Korte*, 735 F.3d at 669–70 (concluding that § 4980H was not a tax under the Anti-Injunction Act but acknowledging that tax liability would be implicated). Analogous arguments have been made and have found success; for example, a challenge to a reporting requirement that carried with it a tax penalty for noncompliance was found not to be barred by the Anti-Injunction Act. *CIC Servs., LLC v. IRS*, 593 U.S. 209, 209–10, 226 (2021). Petitioner and Respondent will argue about the lawsuit’s aims and whether the Anti-Injunction Act is implicated.

Finally, Petitioner and Respondent may appeal to policy arguments to articulate why the employer mandate should or should not be classified as a tax for purposes of the Anti-Injunction Act.

## **DISCUSSION**

“[T]his [c]ourt must avoid deciding a constitutional issue ‘if there is some other ground upon which the case may be disposed of.’” *Hotze v. Burwell*, 784 F.3d 984, 990–91 (5th Cir. 2015) (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)) (citing *St. Joseph Abbey v. Castille*, 712 F.3d 215, 220 (2013)). There is only a narrow set of cases in which the underlying merits of Respondent’s claim should be considered under the Anti-Injunction Act. In *Enochs v. Williams Packing & Navigation Co.*, the Court held that a pre-suit injunction may be granted “if it is clear that under no circumstances could the Government ultimately prevail.” 370 U.S. 1, 7 (1962). Given the strong arguments that can be presented by both sides in this case, the merits of Respondent’s claim should not be weighed at this stage. As a result, the Court’s analysis will only address whether it has subject matter jurisdiction over the lawsuit under the Anti-Injunction Act.

The Anti-Injunction Act states that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.” 26 U.S.C. § 7421(a). The result of this Act is that most challenges to taxes must be made only after they are already paid. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 543 (2012) [hereinafter *NFIB*]. So, if the employer mandate is found to

be a tax and the lawsuit is for the purpose of preventing the collection of that tax, then Respondent must pay the tax before the court will hear a challenge on the merits.

The ACA contains both an employer mandate and an individual mandate. The individual mandate requires that most persons maintain “minimum essential [health] coverage.” 26 U.S.C. § 5000A(a). Any “applicable individual” who does not maintain such coverage faces a “[s]hared responsibility payment,” which is described as a “penalty.” *Id.* § 5000A(b)(1). The individual mandate is not at issue here. Rather, Respondent, as an employer, is potentially liable for the exaction imposed by the employer mandate.

The ACA’s employer mandate requires employers that have an average of 50 or more full-time employees in the year prior to provide their employees the option to enroll in “minimum essential coverage under an eligible employer-sponsored plan.” 26 U.S.C. §§ 4980H(a)(1), (c)(2)(A). For employers, like Respondent, who were not in existence last year, the number of employees for this calculation is “based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.” *Id.* § 4980H(c)(2)(C)(ii). Employers must provide an affordable option based on employees’ household income which covers at least 60% of costs. *See id.* §§ 36B(c)(2)(C)(i)–(ii); *see also Optimal Wireless LLC v. IRS*, 77 F.4th 1069, 1071 (D.C. Cir. 2023). Employees whose employers do not do this become eligible for a tax credit or cost-sharing reduction, the claiming of which subjects the employer to the exaction. *See Optimal Wireless*, 77 F.4th at 1071; 26 U.S.C. § 36B (tax credit); 42 U.S.C. § 18071 (reduced cost-sharing). § 4980H(a) applies when the employer does not provide coverage at all, and § 4980H(b) applies when the coverage provided does not meet the affordable or minimum value requirements. 26 U.S.C. §§ 4980H(a)–(b). Since Respondent is refusing to provide health care at all, they are potentially subject to the exaction under § 4980H(a), which states as follows:

(a) LARGE EMPLOYERS NOT OFFERING HEALTH COVERAGE

If —

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled

for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the Baker as full-time employees during such month.

26 U.S.C. § 4980H(a).

**I. Petitioner’s and Respondent’s Analyses Begin at the Anti-Injunction Act’s Applicability to the Individual Mandate Outlined in *National Federation of Independent Business v. Sebelius*.**

In *National Federation of Independent Business v. Sebelius*, the NFIB challenged the individual mandate and Medicaid expansion provisions of the ACA. 567 U.S. 519, 530–31 (2012) [hereinafter *NFIB*]. The Supreme Court was tasked with deciding whether the individual mandate is a “tax” under the Anti-Injunction Act, thus depriving it of jurisdiction to hear the case before the tax was paid. *Id.* at 543.

The Court ultimately held that the individual mandate was not a tax for purposes of the Anti-Injunction Act, and so it could hear the case on its merits. *Id.* at 546. As the Court explained, the Anti-Injunction Act and the ACA are both acts of Congress, and “[h]ow they relate to each other is up to Congress.” *Id.* at 544. Specifically, the Court said “the best evidence of Congress’s intent is the statutory text.” *Id.* The Court noted that the payment for noncompliance with the individual mandate was described as a “penalty” in subsections (b) and (g)(2), while several other exactions provided for by the Act are described as “taxes.” *Id.* at 543–44. The Court rejected the argument that something labeled as a “penalty,” if it functioned like a tax (as was argued about the “shared responsibility payment” here), would require implicating the Anti-Injunction Act. *Id.* at 544. The Court emphasized that Congress cannot change the meaning of a “penalty” or “tax” by labeling an exaction one or the other for constitutional purposes, but it can for Anti-Injunction Act purposes. *Id.* Moreover, Congress can specifically provide that an exaction labeled as a penalty should be treated as a tax for Anti-Injunction Act purposes, which it notably did not do for the individual mandate. *Id.* at 544–45. Thus, the Court ultimately determined that the individual mandate was a “penalty” for Anti-Injunction Act purposes but a “tax” for constitutional purposes. *Id.* at 546, 575.

The circuit courts have looked to *NFIB* to determine whether the Anti-Injunction Act is applicable to the employer mandate. As outlined by *NFIB*, the circuit courts examine congressional intent, which is most clearly manifested in the text of the statute. *See, e.g., Korte v. Sebelius*, 735 F.3d 654, 670 (7th Cir. 2013) (citing *NFIB*,

567 U.S. at 543–44). The courts look for similarities and differences between the mandates, with the Fourth and Seventh Circuit arguing for the same result as was reached in *NFIB*, and the Fifth and D.C. Circuits urging for the opposite.

## **II. Parties Will Debate the Meaning of Section 4980H’s Text.**

### **A. Petitioner Will Emphasize that No Clear Statement Is Required for Another Statute to Implicate the Anti-Injunction Act.**

Respondent may argue that there must be a “clear statement” in section 4980H that the exactions called for by the statute are a tax. *See Optimal Wireless LLC v. IRS*, 77 F.4th 1069, 1073 (D.C. Cir. 2023). This is based on the premise that there is a “high bar” for a jurisdictional statute, given the consequences of a finding that a statute contains a jurisdictional bar. *Id.* However, per the D.C. Circuit, this higher threshold only applies to the Anti-Injunction Act which is, without controversy, a jurisdictional statute. *Id.* Therefore, in determining whether the Anti-Injunction Act is implicated by another statute, only ordinary principles of statutory interpretation apply. *Id.* As such, Petitioner will argue that no clear statement that the exaction is a tax is necessary to determine that the exaction is in fact a “tax” for purposes of the Anti-Injunction Act.

### **B. Petitioner Will Argue that the Employer Mandate Being Labeled a “Tax” Is Significant.**

As emphasized above, the relationship between the Anti-Injunction Act and the ACA “is up to Congress”, and “the best evidence of Congress’s intent is the statutory text.” *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 544 (2012) [hereinafter *NFIB*]. Petitioner will cite the Fifth and D.C. Circuits’ findings that the use of the word “tax” in the statute is evidence that Congress intended the employer mandate to be treated as a tax. *See Optimal Wireless*, 77 F.4th at 1074; *Hotze v. Burwell*, 784 F.3d 984, 991 (5th Cir. 2015). Within § 4980H, the word “tax” appears three times: twice in subsection (c)(7) and once in subsection (b)(2). Subsection (b)(2) references the “aggregate amount of tax determined under paragraph (1),” and subsection (c)(7), entitled “tax nondeductible,” pertains to the “denial of deduction for the tax imposed by this section.” 26 U.S.C. §§ 4980H(b)(2), (c)(7). Additionally, another section of the ACA refers to the “tax imposed by section 4980H” of Title 26. *See* 42 U.S.C. § 18081(f)(2)(A). Petitioner will contrast this with the fact that Congress never referred to the individual mandate exaction as a “tax.” *See Optimal Wireless*, 77 F.4th at 1074. The District Court for the Southern District of Florida noted that the use of the word “tax” in § 4980H was “clearly deliberate and must be afforded its plain meaning within the whole statutory framework of Section 4980H.” *Welt v. United States*, No. 22-cv-20294-BLOOM/OTAZO-REYES, 2022 U.S. Dist. LEXIS 178234, at \*14 (S.D. Fla. Sept. 29, 2022). The District Court for the District of Wyoming also found that the employer mandate was a “tax” for purposes of the Anti-Injunction Act, noting that the reference



in another section of the ACA (cited above) was “[p]erhaps even more telling” than the references within section 4980H. *N. Arapaho Tribe v. Burwell*, 118 F. Supp. 3d 1264, 1275 (D. Wyo. 2015).

Petitioner will argue that the Court has “applied the Anti-Injunction Act to statutorily described ‘taxes’ even where that label was inaccurate.” *NFIB*, 567 U.S. at 544. As a result, the use of the label “tax” is very important. Nonetheless, Respondent may argue that the word “tax” is used only because it is necessary to avoid confusion. *See Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 88 (4th Cir. 2013). Specifically, one of the places the ACA uses the word “tax” is where a cross-reference is being made. *Id.* The employer mandate can be found in chapter 43 of the Code, leading the Fourth Circuit to conclude that “the Act presumably refers to the employer mandate exaction as a ‘tax’ when cross-referencing § 275(a)(6) to make clear that, for purposes of determining deductibility, the exaction is a tax imposed by chapter 43.” *Id.* This section disallows deductions for any “[t]axes imposed by chapter[] . . . 43.” 26 U.S.C. § 275(a)(6). The Fourth Circuit conceded that in the other place the ACA uses the word “tax” to describe the employer mandate, there is no analogous cross-reference explanation (or, as the court puts it, an “equally obvious” explanation). *Lew*, 733 F.3d at 88. Respondent, per the Fourth Circuit, will likely argue that the Court “simply cannot place much significance on a single unexplained use of that term.” *Id.*

Petitioner will contend that the legislative history may make the presence of the word “tax” significant. Specifically, the individual mandate was revised so as not to include the word “tax.” *See Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 424 (Davis, J., dissenting) (“Congress deliberately deleted all of these references to a ‘tax’ in the final version of the Act and instead designated the exaction a ‘penalty.’”), *abrogated by NFIB*, 567 U.S.. Therefore, Petitioner will argue that the inclusion of this word in the employer mandate is highly significant in interpreting Congress’s intention.

**C. Respondent Will Argue that the References to the Exaction as an “Assessable Payment” and “Assessable Penalty” Are More Significant Than the Word “Tax.”**

Respondent will highlight that although section 4980H refers to the exaction as a “tax,” the provision also refers to the exaction as an “assessable payment” and “assessable penalty.” *See Lew*, 733 F.3d at 88. The statute refers to the exaction as an “assessable payment” before it calls it a “tax,” and then uses the former language six additional times. 26 U.S.C. §§ 4980H(b)(1)–(d)(3). Petitioner will argue that the use of the phrase “assessable payment” does not contradict the use of the word “tax.” *See, e.g., Hotze*, 784 F.3d at 998. Likewise, the *Optimal Wireless* court noted that “a tax is one species of assessable payment: it is ‘assessable,’ and its assessment calls for a ‘payment.’” 77 F.4th at 1075. Petitioner will argue that if only “assessable payment” were used, it might be “unclear” whether the exaction would be a “tax” for

Anti-Injunction Act purposes. *Id.* However, because Congress “used the more specific term ‘tax’ to describe the same exaction,” the Anti-Injunction Act applies. *Id.* Respondent, on the other hand, will contend that Congress could have used the word “tax” instead of “assessable payment” if it wanted to impose a tax. *See Christian Empls. All. v. Azar*, No. 3:16-cv-309, 2019 U.S. Dist. LEXIS 81919, at \*11 (D.N.D. May 15, 2019). As a result, “[Congress] must mean something other than a tax.” *Id.* While the use of both terms might be confusing, Respondent will argue against the significance of the word “tax,” instead emphasizing that “the focus of the section is on imposing an ‘assessable payment.’” *Id.*

The Fifth Circuit in *Hotze* directly attacked the reasoning of the Fourth Circuit in *Lew*. The *Lew* court pointed out how section 4980H “does not consistently characterize the exaction as a tax.” 733 F.3d at 88. Rather, the statute refers to the exaction as an “assessable payment” seven times. *Id.* The Fifth Circuit said that the *Lew* court provided “no reasons for treating [‘tax’ and ‘assessable payment’] as if they did [contradict each other].” *Hotze*, 784 F.3d at 998. There must be a more “compelling reason . . . to ignore Congress’s labeling the employer-mandate exaction as a ‘tax.’” *Id.* Respondent will echo the Fourth Circuit in arguing that the inconsistent use of the word “tax” means that Congress did not intend the exaction to be treated as a tax for Anti-Injunction Act purposes. Meanwhile, Petitioner will argue that the Fifth Circuit’s approach is more persuasive and there is no reason to believe that the use of “assessable payment” negates the use of the word “tax.”

Respondent will note that the exaction is also labeled a “penalty,” thereby making the references to a “tax” even less significant. *See* 26 U.S.C. § 4980H(d)(1); 42 U.S.C. § 18081(f)(2)(B). Meanwhile, Petitioner will argue the use of the word “penalty” does not prevent section 4980H from being treated as a tax for Anti-Injunction Act purposes. *See, e.g., Optimal Wireless*, 77 F.4th at 1076 (finding that “the term ‘penalty’ is not inconsistent with the term ‘tax.’ Rather, an exaction can be described as both a ‘tax’ and a ‘penalty.’”). The court cited Black’s Law Dictionary’s definitions of the terms, both of which involved paying money. *Id.* Therefore, like the use of the term “assessable payment,” the use of the phrase “penalty” does not necessarily mean that the exaction was not intended to be treated as a tax for purposes of the Anti-Injunction Act.

### **III. The Anti-Injunction Act Might Not Apply Where the Lawsuit Is Aimed at Something Other Than the Collection or Assessment of Taxes.**

The Anti-Injunction Act targets lawsuits “for the purpose of restraining the assessment or collection of any tax.” 26 U.S.C. § 7421(a). Courts often look to the nature of an action to determine whether the lawsuit is aimed at restraining the assessment or collection of a tax. *See Welt v. United States*, No. 22-cv-20294-BLOOM/OTAZO-REYES, 2022 U.S. Dist. LEXIS 178234, at \*14–16 (S.D. Fla. Sept.

29, 2022) (quoting *CIC Servs., LLC v. IRS*, 593 U.S. 209, 217 (2021) (“When considering whether the Anti-Injunction Act applies, the court looks ‘into the action’s objective aim—essentially, the relief the suit requests.’”)).

Petitioner will argue that since Respondent is seeking a preliminary injunction against the assessment of a tax, the Anti-Injunction Act is implicated. On the other hand, Respondent will argue that the Anti-Injunction Act does not apply where the lawsuit is aimed at the regulatory mandate itself, not the tax. In *Korte v. Sebelius*, the plaintiffs sought to be exempted from the contraception mandate of the ACA. 735 F.3d 654, 658–59 (7th Cir. 2013). They were “seek[ing] relief from a regulatory mandate that exists separate and apart from the assessment or collection of taxes.” *Id.* at 669. The plaintiffs conceded that if they were granted their exemption, they would not have to pay the tax penalty, but insisted “the Anti-Injunction Act does not reach ‘all disputes tangentially related to taxes.’” *Id.* at 670 (quoting *Cohen v. United States*, 650 F.3d 717, 727 (D.C. Cir. 2011)). Likewise, Respondent will argue that even if they were to be exempted from the exaction under section 4980H, the purpose of their action is to object to the regulatory mandate that requires them to furnish certain preventive care in their group health plan, and thus the Anti-Injunction Act does not apply.

Petitioner will point out, however, that despite arguments that the lawsuit challenges the regulatory mandate and not the tax itself, the lawsuit would still implicate the tax and thus the Anti-Injunction Act applies. The *Korte* court acknowledged that if the plaintiffs in that case were exempted from the contraception mandate, they would not be required to pay the penalty under section 4980D, implicating their tax liability. *Id.* at 670 (“[T]here is no doubt that § 4980D, a provision in the Internal Revenue Code, is implicated in the remedial sweep of these cases.”). The court thus proceeded to determine whether section 4980D was a tax under the Anti-Injunction Act. *Id.* Petitioner will argue that, similarly, even if Respondent’s lawsuit is aimed at a regulatory mandate, this is not dispositive.

Respondent will note, however, that the Seventh Circuit may have been overly cautious in conducting an Anti-Injunction Act analysis for section 4980D and that no such analysis is needed for section 4980H. The Supreme Court considered section 4980D in more detail in *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. 682, 696–700, 720 (2014). This case, like *Korte*, concerned the religious objections of employers to various aspects of the contraception mandate and their decision not to meet the requirements for group health plans of the ACA because of this objection. *Id.* at 683–88. Ultimately, the Court found that the Religious Freedom Restoration Act (“RFRA”) prevented the government from enforcing the contraception mandate against these employers. *Id.* at 692 (explaining how the contraception mandate fails RFRA’s test, which requires any government action that substantially burdens religious exercise to serve a compelling government interest and be the least restrictive means of serving that interest). Respondent will argue that *Hobby Lobby*

is significant here because it did not address the Anti-Injunction Act issue. The Anti-Injunction Act was not addressed in this opinion even though section 4980D uses the word “tax” 24 times. Erin M. Hawley, *The Jurisdictional Question in Hobby Lobby*, 124 Yale L.J. F. 63, 63–65 (2014). Respondent will therefore argue that in their own suit targeted at a regulatory mandate, there is no reason to determine whether section 4980H is a tax for purposes of the Anti-Injunction Act.

*Hobby Lobby* is not the only case to support Respondent’s proposition that the Anti-Injunction Act is not implicated when the lawsuit is not targeted at a tax itself. In *CIC Servs.*, the Court held that a reporting requirement is not a “tax” barred by the Anti-Injunction Act, even if “the reporting rule will help the IRS bring in future tax revenue.” 593 U.S. at 216. The Court noted that even though the tax penalty will not be imposed in the absence of the reporting duty, “that is the suit’s after-effect, not its substance.” Likewise, Respondent may argue that exemption from section 4980(a)’s exaction is not the substance of the suit.

#### **IV. Parties Will Make Policy Arguments for Treating the Exaction as a Tax.**

Respondent will argue that it would not make sense to allow pre-enforcement suits regarding the individual mandate but not the employer mandate. *See, e.g., Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 88 (4th Cir. 2013). Likewise, Respondent will contend that “[i]t seems highly unlikely that Congress meant to signal—with two isolated references to the term “tax”—that the mandates should be treated differently for purposes of the AIA’s applicability.” *Id.*

Petitioner will argue there is no anomaly that would result from the individual mandate being treated one way under the Anti-Injunction Act and the employer mandate being treated another. *See Hotze v. Burwell*, 784 F.3d 984, 998 (5th Cir. 2015). This is because the ACA itself provides different ways of enforcing the mandates. *Id.* (“For instance, the employer-mandate exaction is enforceable by levies and by the filing of notices of liens, while the individual mandate is not.”) (citing 26 U.S.C. §§ 5000A(g), 4980H(d)). Unlike § 5000A (the individual mandate provision), section 4980H refers to a “repayment,” thus indicating its contemplation of a post-enforcement suit. *Id.* at 999 (citing *Halbig v. Sebelius*, 27 F. Supp. 3d 1, 15–16 (D.D.C. 2014)). Finally, Petitioner will argue any anomaly that might exist between the enforcement of the individual and employer mandates is beyond the court’s power to fix. *See id.* at 998.

### **CONCLUSION**

Petitioner and Respondent will take several approaches to arguing that the employer mandate should or should not be treated as a tax for Anti-Injunction Act purposes, but the bulk of these arguments will likely be textual. It is persuasive for Respondent that the Supreme Court found the individual mandate, a similar

provision, to be exempt from the Anti-Injunction Act. However, Petitioner's textual argument is ultimately stronger given the reasoning of *National Federation of Independent Business v. Sebelius* and the fact that—unlike the individual mandate—Congress chose to label the employer mandate as a tax. 567 U.S. 519, 546 (2012). Respondent has a stronger non-textual argument that the purpose of the lawsuit is not to restrain the collection of a tax but rather to challenge a regulatory mandate. However, the fact that the Seventh Circuit engaged in a textual analysis even though it claimed to support this argument is a solid counterargument for the Petitioner. Despite a slight advantage on the policy side for Petitioner, the strong textual and non-textual arguments on both sides suggest Petitioner and Respondent have equal chances of prevailing.