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No. 11-117

IN THE

Supreme Court of the United States

THOMAS MORE LAW CENTER, *et al.*,

Petitioners,

v.

BARACK HUSSEIN OBAMA, in his official capacity as

President of the United States, *et al.*,

Respondents.

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

**BRIEF OF AMICI CURIAE MORTIMER CAPLIN &
SHELDON COHEN IN SUPPORT OF
NEITHER SIDE**

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ADDITIONAL QUESTION PRESENTED

This constitutional challenge seeks to prevent respondents from enforcing the individual mandate provision of the Affordable Health Care Act of 2009, which is contained in the Internal Revenue Code, and will be implemented, beginning in 2014, by reporting and payment requirements imposed on individuals in connection with their filing of federal income tax returns for that year. In addition to the questions presented in the petition, the case also raises the following jurisdictional question:

Are petitioners' constitutional claims jurisdictionally barred by the Federal Tax Injunction Act, 26 U.S.C. § 7421, which precludes federal courts from entertaining suits that seek to restrain the assessment or collection of federal taxes?

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INTEREST OF AMICI CURIAE¹

Notice pursuant to Rule 37 was provided to all counsel on August 9, 2011. This brief is being filed pursuant to consent given by all counsel and filed with this Court.

Amici curiae Mortimer Caplin and Sheldon Cohen are lawyers who have been tax practitioners for their entire careers. Both are former Commissioners of the Internal Revenue Service (“IRS”). As such, they know that the functioning of the IRS depends on an orderly system for the assessment, payment, collection, and contesting of determinations made under the Internal Revenue Code (the “Code”).

This case challenges the constitutionality of the provisions of the Code that, with some exceptions, require taxpayers who do not obtain minimum coverage health insurance in 2014 to pay an additional amount with their federal income taxes, based in part on their income. The applicable provision, known as the individual mandate, is contained in section 1501 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and is codified at 26 U.S.C. § 5000A.

None of the petitioners in this or any currently pending case owes any money under section 1501, and it is far from certain that they will not have obtained health insurance by 2014 or be otherwise exempt from owing any money under section 1501. Initially, the Government raised standing and ripeness objections in this and other cases, as well as the jurisdictional defense based on the Federal Tax Anti-Injunction Act, 26 U.S.C. § 7421 (“section 7421”), which forbids federal courts from maintain-

¹ No person other than the named *amici* or their counsel authored this brief or provided financial support for it.

ing any suit “for the purpose of restraining the assessment or collection of any tax.”

After this and some of other cases challenging section 1501 were decided by the district courts, the Government decided to abandon the jurisdictional arguments, including that based on section 7421. On May 31, 2011, in response to an order of the Court of Appeals for the Fourth Circuit in *Liberty University, Inc. v. Geithner*, No. 10-2347, the Government filed a brief in which it took the position that section 7421 did not apply to challenges to section 1501 in which plaintiffs include individuals who do not have health insurance and do not plan to obtain it by 2014. See <http://aca-litigation.wikispaces.com/file/view/U.S.+supplemental+%2805.31.11%29.pdf>. In this case, the Court of Appeals addressed the applicability of section 7421 and found that it was not a bar. App. 19a. Thus, because section 7421 literally has no friend in court, amici filed a brief in *Susan Seven-Sky v. Holder*, No. 11-5047, D.C. Circuit, (oral argument scheduled for September 23, 2011) urging that section 7421 is a bar to that case.

Amici take no position on whether the Court should grant review in this or any other case challenging section 1501. They are filing this brief urging the Court that, if it grants review in this or any similar case, it direct the parties to brief the applicability of section 7421 to the claim that section 1501 is unconstitutional.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case challenges the constitutionality of the individual mandate in section 1501 of the Patient Protection and Affordable Care Act. With certain exceptions, section 1501 requires that individuals who do not have health insurance meeting certain federal standards must pay -- with their federal income taxes -- an amount estimated to be no more than \$3000 a year for 2014, when

the law first becomes effective. No individual plaintiff in this or any case currently owes any money pursuant to section 1501. Nor is it possible to predict whether any particular individual challenging section 1501 will not have the required health insurance in 2014, or whether that person will be obligated to make any payment pursuant to section 1501, because individuals with low incomes are exempt from making such payments.

This brief argues that section 7421 effectively decides the standing and ripeness issues in most cases involving the Code, by requiring that the specific procedures set forth in the Code for litigating disputes with the IRS, and only those procedures, be followed to the exclusion of all others (such as lawsuits like this one). Put another way, even if plaintiffs in these cases met the Article III tests for standing and ripeness – which they do not – section 7421 would prevent them from going forward because it is a specific limitation on federal court jurisdiction.

Several features of section 7421 deserve emphasis. First, its purpose is to assure that federal taxes are assessed and collected in an orderly fashion, a purpose that it shares with 28 U.S.C. § 1341, an analogous statute that protects states from federal court interference with the collection of their taxes. As demonstrated below, “any tax” in section 7421 has been broadly construed to include the whole range of amounts payable under the Code, whether labeled a tax, penalty, interest, or anything else. Second, there are two basic routes to challenge section 1501, both of which will be fully available and completely adequate once that section is in effect. One option is to pay the tax and sue for a refund in the Court of Federal Claims or in the district court where the taxpayer resides, with a right of appeal to the appropriate circuit court of appeals. In the alternative, the taxpayer can file a return without paying the tax, wait

for the IRS to sue to collect, and then defend on the ground that the tax is unconstitutional. Because of section 7421, those routes are the exclusive means for resolving disputes regarding the constitutionality of section 1501.

Third, although section 7421 bars only injunctions, there is an express exception in the Declaratory Judgment Act, 28 U.S.C. § 2201, and the courts have consistently held that these two provisions are co-extensive. Fourth, section 7428 allows actions for declaratory judgments regarding claims of non-profit organizations to tax-exempt status, as an exception to the prohibition in the Declaratory Judgment Act. That provision was enacted in 1976, in response to two decisions of this Court requiring the use of the refund route even for claims that provisions of the Code violated the First Amendment and Equal Protection rights of organizations claiming tax-exempt status, and even where the actual taxes that might be owed, if any, were incidental to the constitutional principles at issue. Fifth, section 7421 includes twelve specific exceptions that allow federal courts to issue injunctions in federal tax disputes, none of which applies here. Nor do plaintiffs or the Government rely on either of the implied exceptions enunciated by this Court and discussed *infra*.

Finally, section 1501(g) contains two exceptions to the usual administrative procedures respecting disputes involving section 1501, but neither of them negates section 7421's applicability. Contrary to the conclusion of the court below, their inclusion demonstrates that Congress expected the usual rules for the enforcement and collection of taxes and penalties under the Code would be followed, unless one of these express exceptions applied. Moreover, there is no special judicial review provision permitting lawsuits over section 1501, comparable to section 7428 or other special review provisions that Con-

gress enacted when it wished to assure an immediate decision involving an important statute that raised major constitutional issues, such as the Gramm-Rudman-Hollings Act, the Line Item Veto Act, and the Bipartisan Campaign Reform Act.

ARGUMENT

IF THE COURT GRANTS REVIEW, IT SHOULD DIRECT THE PARTIES TO BRIEF THE APPLICABILITY OF SECTION 7421 TO THIS CASE.

A. The General Principles Underlying Section 7421.

The complaint in this case seeks an order that would prevent the federal government from carrying out the individual mandate of section 1501. To obtain such relief, petitioners must surmount section 7421, which provides in pertinent part:

(a) **Tax.**--Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

No one claims that any of the listed sections applies to this case, or that any previously recognized implied exception (discussed below) is available. Thus, if petitioners are seeking to enjoin the assessment or collection of "any tax," section 7421 is a bar to proceeding further, unless the Government and the Sixth Circuit are correct that

section 1501(g) itself creates an implied exception to section 7421, a claim addressed in Part B.²

Those who have opposed the applicability of section 7421 argue that, because the amounts due under section 1501 are designated as penalties, they are not taxes under section 7421. That approach is without basis because section 7421 prevents courts from reviewing all claims involving payments under the Code, not just those labeled taxes, unless there is an explicit exception in section 7421, which no plaintiff argues here, or the claim meets the implied exceptions in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), or *South Carolina v. Regan*, 465 U.S. 367, 378 (1984), on which no plaintiff has relied.

Perhaps the best illustration of the breadth of the applicability of section 7421 is that it has been uniformly applied to efforts to enjoin assessment of “penalties” under section 6672. Section 6672 deals with the frequent problem of employers withholding taxes (including income, social security, and Medicare taxes) from their employees and then not turning them over to the IRS as required by law. In many cases, the employer is a corporation, and the corporation is no longer in business or is unable to pay its debts when the IRS catches up with it

² Petitioners also seek a declaratory judgment as to the invalidity of the individual mandate, but that relief is barred by the exception to the Declaratory Judgment Act, 28 U.S.C. § 2201, that precludes declaratory relief “with respect to federal taxes,” with limited exceptions not applicable here. This Court has been clear that the bar of section 7421 and the tax exception in section 2201 are coterminous, such that if a court cannot issue an injunction because of section 7421, it is equally barred from rendering a declaratory judgment by the exception to section 2201. See *Bob Jones University v. Simon*, 416 U.S. 725, 732 n.7 (1984).

for failure to pay over the amounts withheld. Section 6672 creates a special remedy for the IRS that entitles it to collect personally from the corporate officers who were responsible for not paying over the amounts withheld a "penalty" equal to 100% of those amounts withheld but not paid over. Penalties under section 6672 are never direct obligations of the responsible officers, unlike amounts due under section 1501, which are solely the obligation of the uninsured taxpayer. Nonetheless, the courts have always applied section 7421 to those penalties and have remitted the responsible officer to the specific means provided by the Code for contesting those liabilities. See, e.g., *Shaw v. United States*, 331 F.2d 493 (9th Cir. 1964); *Botta v. Scanlon*, 314 F.2d 392 (2d Cir. 1963).

In addition, section 7421 has been applied in a wide variety of other similar circumstances, including efforts to block the collection of transferee liability for interest due on interest, *Transport Manufacturing & Equipment Co. v. Trainor*, 382 F.2d 793 (8th Cir. 1967); penalties for late filings of tax returns, *Professional Engineers, Inc., v. United States*, 527 F.2d 597 (4th Cir. 1975); \$500 penalties for false filings on withholding, *Herring v. Moore*, 735 F.2d 797 (5th Cir. 1984); a \$25 penalty for a tax preparer who did not include social security numbers on returns he prepared, *Crouch v. Commissioner of Internal Revenue*, 447 F. Supp. 385 (N.D. Cal 1978); penalties for promoting abusive tax shelters for others, *National Commodity & Barter Ass'n v United States*, 625 F. Supp. 920 (D. Col. 1986); and a penalty of as little as \$5 for parents who refused to obtain a social security number for their children because it would require them to participate in a "mandatory universal numbering system for all American citizens and residents" that they claimed violated their First and Fifth Amendment rights. *Spencer v. Brady*, 700 F. Supp. 601, 602 (D.D.C.

1988). It was even applied in *Mobile Republican Assembly v. United States*, 353 F.3d 1357 (11th Cir. 2003), to bar a constitutional challenge to disclosure provisions imposed on certain corporations as a condition of obtaining an exemption under section 527, a challenge not tied to any alleged tax liability.

The broad sweep of section 7421 is supported by a very sensible reason: “the principal purpose of this language [is] the protection of the Government’s need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference.” *Bob Jones*, 416 U.S. at 736. To serve that need, section 7421 requires taxpayers to use the mechanisms explicitly created by Congress to contest amounts claimed to be owed to the IRS, which both assures due process for taxpayers and enables the IRS to avoid being sued in inconvenient places and before it has finished its review of the taxpayer’s return.

Examining the options available to taxpayers to contest the collection of taxes (including the tax created by section 1501) illustrates both their fairness and why Congress would not want to have the ordinary processes of tax administration interrupted by having to respond to suits by taxpayers who want to challenge the IRS at times and places of their choosing. For ordinary income taxes, many taxpayers either cannot afford to pay the amounts that the IRS claims are due or would prefer to keep their money until there has been a final determination of what they owe. They also do not want the IRS to start collection actions while the merits of their case are being decided. The Code allows taxpayers to do this under sections 6212, 6213 and 6512. Before the IRS can begin collection efforts, it must send the taxpayer a formal notice of assessment within three years from the time that the return is filed, spelling out what is owed and why. That notice triggers the 90 days that the tax-

payer has to file a petition with the Tax Court contesting the IRS's position. If that is done, the IRS is forbidden, with certain limited exceptions mainly applicable where the taxpayer may be dissipating his assets, from starting collection efforts while the case is pending, including on an appeal as of right to the circuit court where the taxpayer resides.

The Tax Court route is unavailable for challenges to section 1501 because section 6213 applies only to taxes imposed by subtitles A or B, or by chapters 41, 42, 43, or 44 of the Code, and section 1501 is in chapter 48 of subtitle D. Nonetheless, taxpayers contesting the constitutionality of section 1501 have the option of not paying the amount due and waiting for the IRS to file a collection action under 28 U.S.C. § 1340, when they can raise the constitutional claim in defense. That option is made more attractive because section 1501(g)(2)(B) forbids the IRS from using liens and levies to collect amounts owed under section 1501, which effectively means that a taxpayer can avoid paying amounts asserted under section 1501 until the case is decided, making the avenue very similar to the Tax Court route.

Alternatively, taxpayers may pay the tax and sue for a refund, either in the Court of Federal Claims or in the district court for the district where they reside. 28 U.S.C. § 1346(a)(1). Another feature of refund actions confirms the desire of Congress to assure that tax disputes are resolved in an orderly manner: taxpayers cannot simply pay the tax alleged to be due and then sue. Rather, sections 6532 and 7422 require that the taxpayer first file a claim for a refund, telling the IRS why he is not liable for the tax, and then wait at least six months to give the IRS a chance to agree (or disagree) and to marshal its defense.

The carefully crafted methods Congress has chosen to resolve disputes with the IRS assure both fairness to the taxpayer and the ability of the IRS to complete its determination of liability and the gathering of necessary information before the litigation is commenced. The contrast to preemptive suits by the plaintiffs in this case could hardly be greater. It is because Congress has set these rules for contesting IRS determinations that this Court has held that the bar in section 7421 is jurisdictional. *Enochs*, 370 U.S. at 5 (section 7421 “withdraws jurisdiction from federal courts”).

Another feature of section 7421 demonstrates the absoluteness with which its ban is applied. Through a series of amendments to section 7421(a), Congress has created twelve specific exceptions to the ban on injunctions. Many of them are there to assure that other procedures designed to protect taxpayers from overreaching by the IRS are followed, with the injunction remedy restored if the IRS disobeys them. The existence of these exceptions underscores that Congress did not intend the courts to create new exceptions for whatever reason, but to follow the command of section 7421.

Despite section 7421’s breadth, this Court has allowed two implied exceptions to it, neither of which any plaintiff (and surely not the Government) argues is applicable here. The first is where it is “apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim.” *Enochs*, 370 U.S. at 7. The second applies where a person with standing literally has no possible remedy under the Code. *Regan*, 465 U.S. at 378. Neither of these exceptions applies simply because the putative taxpayer (and the Government) would prefer to have the merits decided now, by a route other than through a refund or collection action.

To avoid section 7421, some plaintiffs have argued that this is not a tax case, but a constitutional law case, which, they suggest, means that the carefully designed routes are not applicable. That kind of argument was made to this Court in *Alexander v. "Americans United," Inc.*, 416 U.S. 752 (1974), and *Bob Jones*, 416 U.S. 725, where the plaintiffs raised only constitutional objections to their denial of tax-exempt status under section 501(c)(3) of the Code. Indeed, in *Americans United*, the claim was that the applicable statute violated the First and Fifth Amendments, a facial challenge similar to those made to section 1501 here. No income taxes were at stake in *Americans United* because the plaintiff was exempt from those taxes as a section 501(c)(4) organization. However, under the law at the time, it would not have owed small amounts of unemployment taxes if it had qualified under section 501(c)(3). Nonetheless, the Court held that only by paying those taxes and suing for a refund could the organization have its constitutional claims adjudicated.

Equally significant for these cases is Congress's response two years later. It left section 7421 unchanged, and instead created a declaratory judgment remedy in section 7428 of the Code to allow challenges to adverse tax-exempt status determinations (but not revocations). Section 7428, like other tax dispute provisions, requires the taxpayer to exhaust administrative remedies with the IRS before suing, and it gives the taxpayer the same choice of fora as in more traditional tax disputes. Moreover, Congress also created an express exception in the Declaratory Judgment Act for actions brought under section 7428. Thus, Congress has provided a special method to bring certain constitutional challenges to provisions of the Code, but that method plainly is not available to this particular challenge.

In addition to its function of preserving the orderly administration of the tax laws, section 7421 incorporates the same concerns as do the doctrines of ripeness and standing, by absolutely forbidding speculation about whether a taxpayer-plaintiff would be subject to an allegedly illegal tax in the future and deferring litigation until he has either paid it, and sued for a refund, or is defending an enforcement proceeding. As several of the courts dealing with these issues have recognized, the question is not whether someone, someday, will not obtain insurance and object to paying the amount due under section 1501. Rather, the question is whether any of the individuals named in this lawsuit will be among that group. Section 7421 provides a direct answer, which is that all taxpayers must wait until 2015, the first time that the IRS could either assert a deficiency, or an individual could pay the tax and sue for a refund.

As this Court made clear in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967), one aspect of the ripeness question is whether a statute other than the one being challenged precludes the action. That there is an express alternative avenue for judicial review is not dispositive, so long as the alternative does not directly, or by implication, preclude other types of non-statutory review. In this case, the remedies of suits for refunds or defending against collection efforts might not, on their own, preclude other judicial review. However, section 7421, with its specific exceptions and its clear direction that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person,” could not be more definitive that the litigation alternatives spelled out in the Code are the means by which Congress wished to have legal and factual issues involving the tax laws resolved. Because section 7421 provides a clean, simple, and direct answer to the ripeness and standing inquiries as they relate to

challenges to the individual mandate, plaintiffs must proceed by the routes specified in the Code and not through suits like this.

The Court of Appeals pointed to the fact that the amounts payable under section 1501 are labeled a “penalty,” not a tax, thus making section 7421, which refers to “any tax,” inapplicable. App.15a-17a. However, the proper question is not whether, for all purposes (or even for some purposes), a tax and a penalty are identical. Rather, the question is whether under section 7421 Congress made any distinction between the two. As to that, the answer is that it did not, as demonstrated by the penalty cases cited above, in particular the responsible officer cases under section 6672.

Some courts have defined penalties as a “punishment for an unlawful act or omission,” *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996), or “an exaction imposed by statute as punishment for an unlawful act,” *United States v. LaFranca*, 282 U.S. 568, 572 (1931). Those definitions describe the section 6672 penalties, yet there is no dispute that section 7421 bars actions seeking to enjoin their imposition. *See, e.g., Shaw*, 331 F.2d 493; *Botta*, 314 F.2d 392. Although penalties may be treated differently from taxes in some statutes, it does not mean that Congress drew that distinction in section 7421. Since the penalties under section 1501 are *not* imposed for unlawful act, there is even less reason to exclude them from the reach of section 7421 than are the penalties under section 6672 to which section 7421 applies.

Furthermore, the payments required by section 1501 are made to the IRS, are based on the taxpayer’s income, are deposited into the Treasury, and are used to fund government programs. That they are labeled penalties has no bearing on the constitutional question or on the

applicability of section 7421. Indeed, in two cases decided the same day, both involving challenges to the Child Labor Law, this Court held that a penalty provision was a “tax” barring the suit under the predecessor of section 7421, *Bailey v. George*, 259 U.S. 16 (1922), and then reached the merits in a proper refund action, holding that the penalty was not a tax for constitutional purposes and hence was invalid. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

Far more significant than the label used is the choice that Congress made to include the mandate in the Code and make it enforceable by the IRS, using the laws and practices applicable to the collection of taxes, including the filing of annual income tax returns to report whether the taxpayer had health insurance. In that way, Congress assured that the money would be collected and, if necessary, contested in a timely and efficient way, subject only to the express exceptions contained in section 1501(g). Had Congress not done so, it would have had to establish a new mechanism, including a new or different agency, to assure that the payments were made by those who chose not to purchase health insurance. Had Congress made that choice, individuals who objected to the mandate would not have been barred by section 7421.

B. The Government and the Sixth Circuit Misread Subsection 1501(g), Which Supports the Applicability of Section 7421.

In its brief to the Fourth Circuit, the Government contended that section 7421 is not a bar to challenges to section 1501 for two basic reasons. First, it cited section 6671, a provision that treats penalties imposed under chapter 68 of the Code as taxes for assessment and collection purposes (which includes section 7421), and argued that, because section 1501 is not part of chapter 68, it is not subject to section 7421. Second, it argued that

Congress could not have intended the refund route to be the “sole path” or “sole recourse” to challenging the individual mandate, <http://aca-litigation.wikispaces.com/file/view/U.S.+supplemental+%2805.31.11%29.pdf>, at 2, 10, and thus there must be an implied exception to section 7421 for these lawsuits. The Sixth Circuit agreed that the language of section 1501 and of sections 6665 and 6671 made section 7421 inapplicable, App. 16a-17a, but it did not accept the Government’s implied-exception argument. Neither the Sixth Circuit’s view nor the Government’s is correct.

As to the Government’s first argument, section 6671 does not say that “only” the penalties found in chapter 68 are treated like taxes: it only says that all penalties in that chapter are treated like taxes for assessment and collection purposes. Moreover, section 7421 does not refer to or incorporate section 6671 or otherwise suggest that its applicability is dependent on whether a penalty is within chapter 68. Indeed, many of the courts holding section 7421 applicable to a wide variety of penalties and other impositions have not expressly relied on section 6671, and, to our knowledge, none has treated it as the exclusive touchstone for the applicability of section 7421.

In addition, chapter 68 covers a wide range of penalties, some very significant and others quite trivial. The Sixth Circuit concluded that section 1501 is distinguishable from all the penalties under chapter 68 because it “has nothing to do with tax enforcement.” App. 17a. However, contrary to the Sixth Circuit’s view, a number of those penalties are also unrelated to “tax enforcement.” *See* 26 U.S.C. §§ 6685, 6711, 6718, & 6720A (all of which create tax penalties to help enforce some other regulatory laws). Moreover, a brief examination of Chapter 68 shows the breadth of Congress’s concern over the collection of those penalties, and yet the Government and the Sixth Circuit assume that Congress

would not have wanted to assure the same orderly assessment, collection, and litigation of amounts due under section 1501 as under those provisions.

Indeed, if the Government and the Sixth Circuit are correct as to the inapplicability of section 7421, a taxpayer in 2014 or any year thereafter could also bypass the refund route and proceed directly to court to challenge a potential liability under section 1501. However, there is simply no evidence that Congress wanted to create such a wholesale evasion of section 7421, now and forever. Moreover, in contrast to the Government's position on the merits, its narrow view of what constitutes a tax under section 7421 would mean that the constitutional power to tax would be broader than the reach of section 7421, which is the opposite of what this Court held in the Child Labor Cases, discussed *supra* at 14.

The Government's other suggestion—that Congress impliedly created an exception to section 7421 when it enacted section 1501—is also unavailing. The most direct answer to the implied-exception approach is the language that Congress actually included in section 1501(g), and the failure to include language excluding section 7421. Section 1501(g) provides as follows:

(g) Administration and procedure.--

(1) In general.--The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Special rules.--Notwithstanding any other provision of law—

(A) Waiver of criminal penalties.--In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

(B) Limitations on liens and levies.--The Secretary shall not--

(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

(ii) levy on any such property with respect to such failure.

The proper reading of subsection (g)(1) is that, with the limited exceptions in (2), section 1501 penalties should be treated “in the same manner” as penalties under chapter 68. Thus, contrary to what the Sixth Circuit stated, App. 17a, the fact that section 1501 is not “a penalty ‘provided by’ chapter 68” is irrelevant because subsection 1501(g)(1) directs that section 1501 be treated as part of chapter 68 for assessment and collection purposes. Nor is there any reason to support the Sixth Circuit’s conclusion, App. 17a-18a, that the word “manner”—which is found in both subsection (g)(1) and subsection 6671(a)—encompasses section 7421 as applied to all penalties except those under section 1501. Therefore, even if the argument based on section 6671 and chapter 68 were correct, there is nothing in the 2,300-page statute, or its legislative history, that suggests that Congress has directed that the penalty imposed by section 1501 should be treated differently from other penalties under chapter 68—which means that it is subject to section 7421.

The Government’s answer to this argument is that section 6671(a) has two sentences. The first sentence mirrors subsection 1501(g)(1), but the second contains the following additional statement: “Except as otherwise

provided, any reference to ‘taxes’ imposed by this title [which includes section 7421] shall also be deemed to refer to the penalties and liabilities provided by this subchapter.” Because that additional statement is not in subsection 1501(g), the Government contends that section 7421 is inapplicable. To bolster its argument, the Government points to sections 5114(c)(3), 5684(b) and 5761(e) of the Code, which it agrees are subject to section 7421. However, all three sections contain virtually identical language to subsection 1501(g)(1), except that the cross-reference is to section 6665(a). Like subsection 1501(g)(1), all three refer to assessment, collection, and payment of taxes, which is what is contained in subsection 6665(a)(1). But none of the three sections pointed to by the Government refers to the language in subsection 6665(a)(2)—“any reference in this title to ‘tax’ imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter”—which is virtually identical to the second sentence in subsection 6671(a), quoted above. Thus, the Government’s argument provides no way to distinguish section 1501 from sections 5114(c)(3), 5684(b) and 5761(e) for purposes of the application of section 7421. In our view, Congress intended that the three sections cited by the Government *and* section 1501 be subject to section 7421, because there is no sensible reason why Congress would have wanted any of those penalties to be treated like taxes for assessment, collection, and payment purposes, but to exclude them categorically from section 7421.

The second response to the Government’s implied-exception argument is that Congress included in subsection 1501(g)(2)(B) three specific exceptions from the normal rules on administration and procedure for penalties under section 1501: it waived criminal prosecutions, it barred the use of notices of liens on a taxpayer’s prop-

erty for failure to pay, and it prohibited levies for such a failure. These exceptions support two related arguments as to the applicability of section 7421: (1) the inclusions of specific exceptions to the ordinary rules on assessment and collection show that Congress expected those ordinary rules to apply, other than where it created a specific exception; and (2) the failure to include an express exception for section 7421, while creating other exceptions, meant that Congress did not intend to render section 7421, and presumably provisions allowing the IRS to sue to collect deficiencies, inoperable as to claims involving section 1501.

Finally, contrary to the Government's claim that Congress could not possibly have intended to require taxpayers to wait until 2015 to challenge section 1501, the indisputable fact is that Congress did not include a special judicial review provision for claims regarding section 1501, although it has often included such provisions to assure prompt judicial review, generally before three-judge district courts in the District of Columbia, that would do exactly what Congress did not do here. Three prominent examples of special judicial review provisions in wide-ranging new laws with potentially significant constitutional issues are the Gramm-Rudman-Hollings Act in *Bowsher v. Synar*, 478 U.S. 714 (1986); the Line Item Veto Act in *Raines v. Byrd*, 521 U.S. 811 (1997); and the Bipartisan Campaign Reform Act in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). These examples, combined with the special judicial review provisions for denials of tax-exempt status found in section 7428, show that Congress knows how to create special judicial review provisions when it wants to do so. It did not do so here. In short, there is no basis for the Government's creation of an implied exception to section 7421 for challenges to section 1501 and every reason to believe that Congress did not want there to be one.

CONCLUSION

If this Court grants review in a case challenging the constitutionality of section 1501, it should direct the parties to include in their briefs on the merits their positions on the applicability of section 7421.

Respectfully submitted,

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