No. _____

In the Supreme Court of the United States

HEALTHCARE DISTRIBUTION ALLIANCE,
ASSOCIATION FOR ACCESSIBLE MEDICINES,
and SPECGX LLC,

Petitioners,

v.

LETITIA JAMES *and* HOWARD A. ZUCKER,
in their respective official capacities as Attorney General and Commissioner of Health of the State of New York,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

JAY P. LEFKOWITZ
Kirkland & Ellis LLP
601 Lexington Ave.
New York, NY 10022

MATTHEW D. ROWEN
Kirkland & Ellis LLP
1301 Pennsylvania Ave. NW
Washington, DC 20004

Counsel for Association for Accessible Medicines

ERIN R. MACGOWAN
Ropes & Gray LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199

Counsel for SpecGx LLC

MICHAEL B. KIMBERLY
Counsel of Record
SARAH P. HOGARTH
McDermott Will & Emery LLP
500 North Capitol St. NW
Washington, DC 20001

ANDREW B. KRATENSTEIN
KAREN LIN
McDermott Will & Emery LLP
340 Madison Ave.
New York, NY 10173

Counsel for Healthcare Distribution Alliance

DOUGLAS H. HALLWARD-DRIEMEIER
Ropes & Gray LLP
2099 Pennsylvania Ave. NW
Washington, DC 20006

Counsel for SpecGx LLC

QUESTION PRESENTED

The Tax Injunction Act (TIA) forbids federal courts from enjoining "the assessment, levy or collection of any tax under State law" when state-court remedies are adequate. 28 U.S.C. § 1341. The lower courts are in disarray over what constitutes a "tax" within the meaning of this language. All agree that injunctions against "classic" taxes are verboten, while injunctions against penalties and fees are not. But the distinctions among taxes, penalties, and fees have produced open discord among the lower courts.

This case squarely implicates the disagreement. It involves a challenge to New York's Opioid Stewardship Act (OSA), which imposes a levy that bears no resemblance to a traditional tax and has all the hallmarks of a punitive fee: It is assessed in recurring lump sums of $100 million annually; it reaches just 97 companies out of millions doing business in the State; it is collected by regulators, not tax authorities; it is placed in a segregated account and used to pay for remedial programs related to the opioid crisis; and the law expressly bans the payers of the surcharge from passing it on.

The Second Circuit nevertheless concluded that the OSA levies a "tax" within the meaning of the TIA because the opioid-abuse programs that it funds provide a general "public benefit." In that court's view, the charge would be a non-tax fee only if it were used to pay for a benefit enjoyed narrowly by its payers (like a highway toll) or to defray the cost of regulation (like a licensing fee). That reasoning conflicts squarely with decisions of the First, Fourth, and Ninth Circuits.

The question presented is whether the New York Opioid Stewardship Act's surcharge is a "tax" within the meaning of the Tax Injunction Act, despite having features that other circuits repeatedly have held indicative of a punitive fee.

CORPORATE DISCLOSURE STATEMENT

Petitioner Healthcare Distribution Alliance (HDA) is a 501(c)(6) trade association incorporated in Virginia. It does not have any parent or affiliates, does not issue stock, and is not publicly traded.

Petitioner Association for Accessible Medicines (AAM) is a membership organization. It does not have any parent or affiliates, does not issue stock, and is not publicly traded.

Petitioner SpecGx LLC is a limited liability company. Its sole member is SpecGx Holdings LLC, the sole member of which is Mallinckrodt LLC, the sole member of which is Mallinckrodt Enterprises LLC, the members of which are Mallinckrodt ARD Finance LLC and WebsterGx Holdco LLC. Mallinckrodt Enterprise Holdings, Inc. is the sole member of both Mallinckrodt ARD Finance LLC and WebsterGx Holdco LLC. MEH, Inc. owns the stock of Mallinckrodt Enterprise Holdings, Inc. Mallinckrodt International Finance SA (Luxembourg) owns the stock of MEH, Inc. Mallinckrodt plc, a publicly held Irish corporation, owns Mallinckrodt International Finance SA and indirectly holds more than 10% of the stock of SpecGx LLC.

DIRECTLY RELATED PROCEEDINGS

The directly related proceedings are as follows.

- In U.S. District Court for the Southern District of New York, a consolidated judgment was entered on December 19, 2018 in:
  - *Healthcare Distribution Alliance* v. *Zucker*, No. 18-cv-6168;
  - *Association for Accessible Medicines* v. *Zucker*, No. 18-cv-8180; and
  - *SpecGx LLC* v. *Zucker*, No. 18-cv-9830.
- In the U.S. Court of Appeals for the Second Circuit, a consolidated judgment was entered on September 14, 2020 in:
  - *Healthcare Distribution Alliance* v. *Zucker*, No. 19-199;
  - *Association for Accessible Medicines* v. *Zucker*, No. 19-183; and
  - *SpecGx LLC* v. *Zucker*, No. 19-201.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Cases—continued

Statutes

Other Authorities

Petitioners Healthcare Distribution Alliance (HDA), Association for Accessible Medicines (AAM), and SpecGx LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion (App., *infra*, 1a-22a) is reported at 974 F.3d 216.

The district court's opinion (App., *infra*, 23a-72a) is reported at 353 F. Supp. 3d 235.

JURISDICTION

The court of appeals entered its judgment on September 14, 2020. The court thereafter extended the time to file a petition for rehearing, which was timely filed on November 12, 2020 and denied on December 18, 2020. App., *infra*, 73a.

On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari due on or after that date to 150 days from the date of an order denying a timely petition for rehearing. Under that order, the deadline for filing a petition for a writ of certiorari in this case is May 17, 2021. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix at pages 77a-85a.

INTRODUCTION

This case presents a compelling opportunity for the Court to clarify the boundaries of the Tax Injunction Act, a jurisdictional statute that has spawned inconsistent decisions among the lower courts.

Breaking with the long-settled law of several other circuits, the Second Circuit held below that a state exaction constitutes a "tax" within the meaning of the

TIA unless it is levied to pay for a narrow benefit to payers (like a highway toll) or to defray the cost of regulation (like a licensing fee). Moreover, according to the Second Circuit, an exaction's "method of assessment" is categorically "[ir]relevant to whether [it] is a tax within the meaning of the TIA." App., *infra*, 20a (emphasis omitted). That deeply flawed opinion is an extreme outlier among recent TIA precedents and has far-reaching implications for federal judicial review of unconstitutional state fees and fines.[1]

This case proves the point. It concerns New York's Opioid Stewardship Act (OSA), which imposes a fixed, punitive surcharge on opioid manufacturers and distributors to pay for remedial programs related to opioid abuse. The statute's openly stated purpose was to punish opioid manufacturers and distributors for perceived misdeeds and to "make them pay" for their conduct. The surcharge unsurprisingly bears no resemblance to a traditional tax:

- It is assessed in fixed, annual lump sums of $100 million;
- it is assessed against sellers, not buyers;
- it is not collected in real time as transactions take place, but rather divided *pro rata* among market participants in the following year;
- prior to the district court's decision, it contained a highly punitive pass-through prohibition designed to ensure that the payers of the surcharge, and they alone, bore its burden;

---

[1] The lower courts use the terms "penalty," "fine," and "punitive fee" interchangeably in the TIA context. We do as well. We also occasionally refer to a "restitutionary" fee or fine. In this sense, we mean restitution as "full or partial compensation paid by a criminal to a victim," ordered as an element of punishment. *Restitution*, Black's Law Dictionary (11th ed. 2019).

- it is collected by the New York Department of Health, not state taxing authorities;
- its proceeds are deposited in a special fund that is strictly segregated from the general treasury and accessible only by the Health Department and the Office of Alcoholism and Substance Abuse;
- its proceeds are rigidly earmarked to pay for regulation of the opioid supply chain and opioid addiction programs; and
- it tellingly was not denominated a "tax" by the legislature that adopted it.

In addition, the first year of liability under the OSA is based on conduct that pre-dates the Act's passage, and the assessment is so burdensome that, for many manufacturers of generic drugs, it would effectively wipe out all revenue on opioids.

In numerous respects, the OSA violates the Constitution. Among other things, it regulates and penalizes purely extraterritorial conduct, in violation of the Commerce Clause; it applies retroactively and contains vague terms, in violation of the Due Process Clause; and it imposes a legislative punishment, in violation of the Bill of Attainder Clause.

The district court agreed with petitioners that that the OSA's surcharge is a not a tax, and further agreed that it is unconstitutional. But the Second Circuit concluded that, because the OSA's surcharge is not a narrow-benefit or cost-of-regulation user fee, it is a "tax" under the TIA, and that any challenge to the surcharge must proceed in state court. The First, Fourth, and Ninth Circuits have expressly rejected the Second Circuit's untenably broad reading of the TIA. They have reasoned, in stark contrast to the decision below, that when an exaction is set aside in a segregated fund

and strictly earmarked to pay for remedial programs necessitated by the payers' activities—like the surcharge here—it falls outside the TIA's ambit and may be challenged in federal court. This Court's cases, stretching back nearly 140 years, confirm the same.

This Court's intervention is desperately needed. The decision below deepens longstanding confusion among the courts of appeals, and it will have far-reaching consequences for federal-court review of plainly unconstitutional state laws. This case is also tremendously important in its own right; petitioners' and their members' liability for $200 million hangs in the balance. The Court should grant further review.

STATEMENT

A. Legal background

1. Enacted in 1937, the TIA provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. This language "was modeled on the Anti-Injunction Act (AIA)," which is the federal analog of the TIA. *Direct Mktg. Ass'n* v. *Brohl*, 575 U.S. 1, 8 (2015).

The AIA, enacted in 1867, provides that "no suit for the purpose of restraining the assessment or collection of any [federal] tax shall be maintained in any court." 26 U.S.C. § 7421. Because the TIA and AIA are so closely related, this Court has long "assume[d] that words used in both Acts are generally used in the same way." *Direct Mktg.*, 575 U.S. at 8.

At the time of the TIA's enactment, this Court had drawn a clear distinction between "taxes" (as to which the AIA applied) and "penalties" and "fees" (as to which that AIA did not apply). As early as 1922, the Court recognized that taxes may be enacted for the purpose

not only "of obtaining revenue" but also "discouraging [the activities taxed] by making their continuance onerous." *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 38 (1922). The Court explained that such assessments "do not lose their character as taxes because of the incidental motive." *Ibid*. "But," the Court cautioned, "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment" rather than taxation. *Ibid*. Accord *A. Magnano Co.* v. *Hamilton*, 292 U.S. 40, 46 (1934) (quoting same).

Applying this tax/penalty distinction in *Lipke* v. *Lederer*, 259 U.S. 557 (1922), the Court held that an assessment denominated a "tax" by Congress fell outside the reach of the AIA because it "lack[ed] all the ordinary characteristics of a tax" and instead had the "function of a penalty." *Id.* at 562. See also *Regal Drug Corp.* v. *Wardell*, 260 U.S. 386, 391 (1922) (similar).

Similarly applying the tax/regulation distinction in *Rickert Rice Mills, Inc.* v. *Fontenot*, 297 U.S. 110 (1936), the Court held that an assessment against agricultural commodities processors, used to pay farmers to reduce their crop production, "lack[ed] the quality of a true tax" because its purpose and effect was not to raise revenue for general public use, but to "effectuat[e] the regulation of agricultural production." *Id*. at 113. See also *United States* v. *Butler*, 297 U.S. 1, 61 (1936) (similar).

Thus, by the time the 75th Congress enacted the TIA in 1937—using the word *tax* "in the same way" as it had used it in the AIA (*Direct Mktg.*, 575 U.S. at 8)—this Court had held that assessments with a predominantly punitive purpose or regulatory effect were not "taxes" within the meaning of the law.

2. The analytical framework reflected in cases like *Bailey* and *Lipke* has been carried forward by the courts of appeals in more recent decisions.

The lower courts today generally agree, for example, that the TIA applies to classic *ad valorem* taxes upon transactions, property, and income. As then-Chief-Judge Breyer put it, "classic" taxes are assessments "imposed by a legislature upon many, or all, citizens" to "raise[] money, contributed to a general fund, and spent for the benefit of the entire community." *San Juan Cellular Tel. Co.* v. *Public Serv. Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992).

In contrast, the TIA does not reach mere fees. Assessments that "raise[] money placed in a special fund to help defray the agency's regulation-related expenses," for instance, generally are not treated as taxes for purposes of the TIA. *San Juan Cellular*, 967 F.2d at 685. On this reasoning, for example, bridge and road tolls are not taxes. See *Am. Trucking Ass'ns* v. *Alviti*, 944 F.3d 45, 52-53 (1st Cir. 2019); *Corr* v. *Metro. Wash. Airports Auth.*, 740 F.3d 295, 301 (4th Cir. 2014).

Nor does the TIA cover fines or penalties. Such exactions are those with "punitive qualities" (*Denton* v. *City of Carrollton, Ga.*, 235 F.2d 481, 485 (5th Cir. 1956)), the assessment of which is intended as reparation for acts or omissions of which the government disapproves. As this Court has said, a state exaction with such a "punitive character" is distinguished from a mere "tax." *Dep't of Revenue of Mont.* v. *Kurth Ranch*, 511 U.S. 767, 779-780 (1994).

In evaluating whether an assessment is punitive, courts also typically look to the method of assessment. A levy that "is a concoction of anomalies, too far

removed in crucial respects from a standard tax assessment" is indicative of "punishment." *Lynn* v. *West*, 134 F.3d 582, 589 (4th Cir. 1998) (quoting *Kurth Ranch*, 511 U.S. at 783). Thus, for example, "[a]n assessment placed in a special fund and used only for special purposes is less likely to be a tax." *Bidart Bros.* v. *Cal. Apple Comm'n*, 73 F.3d 925, 932 (9th Cir. 1996) (citing *Trailer Marine Transp. Corp.* v. *Rivera Vazquez*, 977 F.2d 1, 6 (1st Cir. 1992)). And collection of an assessment by a regulator rather than the State's taxing authorities also indicates a penalty or fee. *San Juan Cellular*, 967 F.2d at 685.

B. Factual Background

1. From the beginning, the proponents of the OSA, including Governor Andrew Cuomo, made clear that the Act's purpose was to punish opioid manufacturers and distributors and to make them pay for remedial programs related to the opioid crisis. For example, Governor Cuomo openly blamed the opioid crisis on manufacturers and distributors and promised "to hold [them] accountable for their role in perpetuating the opioid epidemic." C.A. Joint App. (JA) 62 ¶ 2 (emphasis omitted).

Likening opioid manufacturers and distributors to the tobacco industry, Governor Cuomo declared:

> Unscrupulous distributors developed a $400 billion industry selling opioids, and they were conveniently blind to the consequences of their actions. They pumped these pills into society. And they created addictions. Like the tobacco industry, they killed thousands, and they did it without warning. *We will make them pay for their illegal and reprehensible conduct*.

JA62 ¶ 1.

The governor later explained in his State of the State address that he would accomplish that goal with a "comprehensive five-point plan." JA62 ¶¶ 1-2. The first point of that plan was to assess an "Opioid Epidemic Surcharge" (JA63 ¶ 5) that "would go to offset the costs that we're spending to fight opioid abuse" (*id*. ¶ 4). Accord JA62 ¶ 2 (funds "would be used to support the state's efforts to combat opioid addiction") (emphasis omitted).

As introduced by Governor Cuomo, the Act imposed annual lump sum payments of $100 million, denominated the "Opioid Epidemic Surcharge." JA63 ¶ 5. The final Act labels the surcharge an "[o]pioid stewardship payment." App., *infra*, 77a. The State Comptroller later acknowledged that the surcharge is a "fee" and not "an excise tax." JA64 ¶ 18.

Throughout the legislature's consideration and passage of the Act, lawmakers repeatedly affirmed that their support was dependent on assurances that the surcharge would not be passed on to consumers. Governor Cuomo told legislators that "[l]anguage in the budget ensures the costs are borne by industry, not by consumers." JA66 ¶ 30. At a legislative hearing, after one lawmaker expressed that "a lot of us are concerned on how this surcharge could go to the consumer," Health Commissioner Howard Zucker promised that the surcharge would not "get filtered down to the end-user." *Id*. ¶ 29.

2. As first adopted in April 2018, the Act imposed a $600 million surcharge on manufacturers and distributors licensed by the Department of Health. App., *infra*, 78a (§ 3). The surcharge was spread evenly over six years, from 2017 through 2022. The first $100 million annual payment would have been due on January 1, 2019, and would have been apportioned among manufacturers and distributors according to

their shares of opioid sales in 2017, before the Act's passage. App., *infra*, 81a (§§ 5(c), 6). Under an intervening amendment to the Act, the surcharge has been reduced to $200 million, spread over two years and apportioned according to companies' shares of in-state opioid sales in 2017 and 2018. See 2019 N.Y. Sess. Laws 59, Part XX, § 5.

Each manufacturer's and distributor's liability varies from year to year depending on the sales of other manufacturers and distributors. App., *infra*, 80a (§ 5(a)). Each payer's share of the fixed annual payment corresponds with the percent of first sales of covered opioids (measured in morphine milligram equivalents, or MMEs) that it sold or distributed in New York in the prior year. *Ibid.* A manufacturer's or distributor's share of the surcharge is calculated by dividing the number of MMEs the manufacturer or distributor first sold into New York in the prior year by the total number of MMEs first sold into the State that year and multiplying the result by $100 million. *Ibid.* Thus, unlike a traditional tax, a payer's liability under the Act depends not only on its own commercial activities, but on the activities (and resulting liabilities) of other market participants.

The surcharge is assessed against sellers, not buyers. App., *infra*, 77a (§ 1(b)). Departmental guidance limits the surcharge to the "initial transaction in the distribution chain when opioids are first sold or distributed within, or into, New York." JA65 ¶ 21. In-state distributors are therefore exempt from the surcharge because they are always on the buy-side of the first sale into the State. *Id*. ¶ 22.

3. The Act forbids manufacturers and distributors from "pass[ing] the cost of their ratable share amount to a purchaser, including the ultimate user of the opioid." App., *infra*, 78a (§ 2). The prohibition thus

purports to regulate the price of sales that take place entirely outside of New York.

This prohibition was essential to fulfill the legislature's goal of forcing manufacturers and distributors to bear the costs of the crisis it believed they had caused. Indeed, for certain generic products, the amount of the surcharge per MME exceeded the sales price per MME; the pass-through prohibition thus would effectively force logical manufacturers to cease sales altogether.

The punitive purpose of the pass-through prohibition is evident, in part, from the size of the penalties imposed for violating it: The legislature determined that a manufacturer or distributor will be fined up to $1 million "per incident" for violating the prohibition on pass-through. App., *infra*, 83a (§ 10(c)).

4. The surcharge is collected by the Department of Health, not state tax authorities. App., *infra*, 81a (§§ 5(c), 6). The Act specifies that the Department is to deposit the proceeds into the newly-created "opioid stewardship fund," and directs that the fund be strictly segregated from the general treasury. App., *infra*, 78a (§ 2). That is, "[m]oneys in [the] opioid stewardship fund shall be kept separate and shall not be commingled with any other moneys in the custody of the state comptroller and the commissioner of taxation and finance." App., *infra*, 84a (§ 2).

The proceeds of the fund are set aside by statute to defray the costs of programs that (1) regulate the opioid supply chain; (2) educate the public about the health risks of opioids; and (3) treat those who abuse opioids. App., *infra*, 84a (§ 4) ("Moneys of the opioid stewardship fund" shall be allocated "to support programs" that "provide opioid treatment, recovery and prevention and education services," including "to

provide support for [New York's] prescription monitoring program registry."); see also *id.* § 5 (authorizing transfer of the fund to "any other fund of the state" for the same purposes). Any "moneys, when allocated, shall be paid out of the opioid stewardship fund" exclusively by "(i) the commissioner of the office of alcoholism and substance abuse services" or "(ii) the commissioner of the department of health" or their respective designees. App., *infra*, 85a (§ 7).

C. Procedural Background

Petitioners each brought suit challenging the OSA in federal district court. The suits were consolidated for decision.

1. The district court's opinion

The district court denied the State's motions to dismiss, granted HDA's motion for summary judgment, and granted AAM's and SpecGx's motions for preliminary injunctions. App., *infra*, 23a-72a.

As relevant here, the court rejected the State's argument that the TIA bars petitioners' challenges, holding that the Act's surcharge is a "regulatory fee" or "regulatory penalty on opioid manufacturers and distributors," not a "tax." App., *infra*, 25a.

The court rested that conclusion on its observations that the Act "charges a regulated industry to create a segregated fund that is directed toward specific purposes closely intertwined with the industry in question"; the Department is the collector of the surcharge, not taxing authorities; the surcharge is born by a "specific and defined group that can do nothing to change a preexisting * * * liability"; and the Act "studiously avoids the use of the word 'tax' throughout its provisions." App., *infra*, 44a-46a. The court held further that petitioners' challenges to the pass-through prohibition are not barred by the TIA because that pro-

vision is a regulation of economic conduct and not a revenue-raising measure. App., *infra*, 46a-48a.

On the merits, the court held that the pass-through prohibition violates the Commerce Clause because it regulates transactions outside New York. App., *infra*, 60a-62a. And even if the Act were read to apply only to New York sales, it would discriminate unconstitutionally against out-of-state purchasers by allowing payers to pass on the surcharge to them alone. App., *infra*, 62a-65a.

Turning to the remedy, the court held that the pass-through prohibition cannot be severed from the remainder of the Act and thus struck the entire Act. App., *infra*, 65a-69a. The court noted that "the Governor, Commissioner, and legislators explicitly pledged that the costs of the bill would *not* flow to end-users and pharmacies." App., *infra*, 67a. In the district court's view, the legislature would not have adopted the surcharge "without any mechanism for preventing the costs of that surcharge from flowing to the consumer." *Ibid*. Having struck the entire OSA on this ground, the district court did not reach petitioners' other constitutional claims.

2. The legislative response to the district court's decision

In response to the district court's decision, the legislature enacted, and Governor Cuomo signed into law, a new excise tax on opioid products, which became effective on July 1, 2019. See N.Y. Tax Law §§ 497-499. The new tax is distinguished from the surcharge in all relevant respects: It is expressly designated as a tax, assessed based on a fixed rate per-unit of drug sold, collected by New York taxing authorities in real time, and paid into the State's general treasury for unrestricted public use. *Id.* § 498(a); 2019 N.Y. Sess. Laws

59, Part XX, § 3. In addition, the excise tax applies to a broader population of entities than the surcharge does. Compare App., *infra*, 78a (§ 2), with N.Y. Tax Law § 497(f). And there is no pass-through prohibition.

The 2019 Act applies prospectively only and has no end date. It leaves in place the $200 million surcharge imposed by the original Act on manufacturers and distributors based on their 2017 and 2018 market shares. See 2019 N.Y. Sess. Laws 59, Part XX, § 5. It also leaves in place the pass-through prohibition for those two years. *Id.* § 3.

3. The Second Circuit's decision

a. New York abandoned its defense of the pass-through prohibition on appeal, arguing only that the district court lacked jurisdiction under the TIA to invalidate or enjoin the State's collection of the surcharge on non-severability grounds. App., *infra*, 3a. The State did not suggest that its abandonment of the pass-through prohibition would cure the constitutional defects that the district court had identified or was relevant to the TIA analysis.

b. The Second Circuit reversed the TIA holding only. App., *infra*, 1a-22a. In the Second Circuit's view, the surcharge would constitute a non-tax fee if its proceeds were used "to deliver narrow benefits" to its payers or to "defray the Department of Health's costs of regulating" the payers. App., *infra*, 12a (cleaned up). But surcharges assessed against a narrowly-defined market segment "believed to impose unusual costs on the state or its residents," the Second Circuit reasoned, "are common, and are unquestionably taxes." App., *infra*, 15a (quoting *Entergy Nuclear Vt. Yankee, LLC* v. *Shumlin*, 737 F.3d 228, 233 n.2 (2d Cir. 2013)).

Although the Second Circuit recognized that the proceeds of the surcharge are strictly reserved to de-

fray the cost of regulating the opioid supply chain and remediating externalities associated with opioids, it concluded that those uses are generally connected to the "public health." App., *infra*, 12a. The surcharge thus "provide[s] a general benefit to New York residents of a sort often financed by a general tax." *Ibid.* (quotation marks omitted).

The Second Circuit similarly dismissed the fact that the Department of Health, and not tax authorities, is "tasked with collecting proceeds of the stewardship payment" and that the Act "does not call the stewardship payment a 'tax.'" App., *infra*, 18a-19a. The court found it sufficient that the Opioid Stewardship Fund, although segregated from the general treasury, is technically held in the custody of the state comptroller (App., *infra*, 18a)—but evidently without appreciating that the state comptroller, as the effective banker for the State, holds all such funds and oversees the fiscal affairs of all state agencies.

As to whether the surcharge is a punitive fine, the court of appeals acknowledged that fines are "typically fixed sums" and taxes are "usually calculated as a percentage of each sale." App., *infra*, 19a (quotation marks omitted). But the court dismissed that distinction, concluding categorically that "the method of assessment is [not] relevant to whether a state-imposed payment is a tax within the meaning of the TIA." App., *infra*, 20a.

Ultimately, the court of appeals did not disagree with the district court that the Act was punitive as originally enacted, including with the pass-through prohibition. It held, instead, that because the State had not appealed the district court's invalidation of the pass-through prohibition, it did not need to consider that provision at all, as though the OSA had been enacted without it—rather than in the form actually

adopted by the legislature. App., *infra*, 20a. Viewing the surcharge divorced from the pass-through prohibition, the court held that the surcharge is not a fine. App., *infra*, 20a-21a.

c. Petitioners sought en banc rehearing, which the Second Circuit denied. App., *infra*, 73a-74a.

Petitioners thereafter moved to stay the mandate, on the grounds that there is a "reasonable probability" that this Court will grant review and a "fair prospect" that it will reverse on the merits if it hears the case. C.A. Dkt. 139, at 4. The court of appeals granted the motion, staying its mandate pending the filing and disposition of this petition and a decision on the merits if the petition is granted. App., *infra*, 75a-76a.

REASONS FOR GRANTING THE PETITION

The question in this case is whether federal courts have jurisdiction to hear federal constitutional challenges to punitive exactions by state legislatures against politically unpopular, out-of-state parties—or instead whether such parties must seek recourse from the courts of the very State that has singled them out for punishment. Taken to its logical conclusion, the Second Circuit's aberrational decision below will funnel virtually all such challenges to state court, in contravention of the settled purposes and history of the TIA and in conflict with the precedents of at least three other circuits.

The decision below is wrong, the issue is important, and the lower courts are in disarray. Moreover, the TIA is a jurisdictional statute, the application of which is supposed to be simple and clear. This Court should intervene to bring clarity to this area of law.

A. The outcome in this case conflicts with decisions of three other circuits

Courts have long recognized that "the line between a 'tax' and a 'fee' can be a blurry one" (*Home Builders Ass'n of Miss.* v. *City of Madison*, 143 F.3d 1006, 1011 (5th Cir. 1998)) and that "[t]he line between a tax and a fee, and a tax and a fine, is sometimes fuzzy" (*Empress Casino Joliet Corp.* v. *Balmoral Racing Club, Inc.*, 651 F.3d 722, 729 (7th Cir. 2011) (en banc)). In the absence of clear guidance from this Court, the lower courts unsurprisingly have come to "opposite conclusion[s]" in cases involving analytically indistinguishable facts. *Empress Casino*, 651 F.3d at 730. The resulting disagreement and confusion warrant review in this case.

1. The holding below conflicts squarely with decisions of the First, Fourth, and Ninth Circuits

The Second Circuit held below that the OSA's surcharge is a tax and not a fee because, although it is set aside in a strictly segregated special-purpose account to fund opioid addiction programs, those programs advance the public interest broadly speaking, rather than "provid[ing] more narrow benefits to regulated companies or defray[ing] [the] agency's costs of regulation." App., *infra*, 11a-13a.

That line of reasoning—that fees to offset the direct cost of regulation are *not* taxes, while fees to offset other costs that the payers might cause *are* taxes—conflicts squarely with binding decisions of the First, Fourth, and Ninth Circuits. In those other circuits, the question presented would have been decided differently, and the district court's invalidation of the OSA would have been affirmed.

First Circuit. The First Circuit's decision in *Trailer Marine Transport Corp.* v. *Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992), concerned an annual, per-truck assessment against commercial shipping companies to fund an automobile accident compensation plan in Puerto Rico. *Id*. at 4. The program "provide[d] hospital and medical costs" and "payments for death or disability" to "victims of motor vehicle accidents." *Id*. at 2.

The proceeds in *Trailer Marine* were placed in a segregated fund set aside exclusively to pay for "damage resulting from [the] activity" in which the payers of the fee were engaged. 977 F.2d at 6. That is analytically the same use to which the OSA's proceeds are put. Like the State in this case, the Commonwealth in *Trailer Marine* argued that the charge was a tax because it was used to fund a general "social welfare program" that served a general public purpose, rather than to offset the "agency's costs of regulation." *Id*. at 5. The First Circuit rejected that argument. Accepting such an embracive interpretation of the word "tax" would mean that virtually any levy that serves some public need would be a "tax" under the TIA. *Ibid*. Unconvinced, the First Circuit held that "the fee involved should not be treated as a tax for purposes of the" TIA. *Id*. at 6.

The First Circuit more recently extended that reasoning in *American Trucking Associations, Inc.* v. *Alviti*, 944 F.3d 45 (1st Cir. 2019). That case presented the question whether "tolls charged by the state on a state-owned bridge are taxes under the TIA." *Id*. at 51. The court observed that although "maintenance of public ways and bridges in a broad sense benefits the entire community," it cautioned that such "can be said of virtually all activity by a state and all sources of state revenue." *Id.* at 52-53. The more relevant question, according to the First Circuit, is "whether an

injunction would pose a 'threat to the central stream of tax revenue relied on by' the state." *Id*. at 53. When the proceeds of an assessment "are placed in a segregated account and expended by a single entity for a single purpose," they "never enter that central stream." *Ibid*. Funds of that sort thus "stand quite apart from the state's central stream of government funding provided by traditional types of taxes." *Ibid*. Challenges to such excises accordingly are not barred by the TIA.

Neither the reasoning nor the outcomes in *Trailer Marine* and *American Trucking* can be reconciled with the Second Circuit's decision below. According to the Second Circuit, the OSA's surcharge is a tax because it funds "broad public health initiatives that undoubtedly provide a general benefit to New York residents," albeit initiatives purportedly necessitated by the payers' conduct; and its proceeds are not used to "defray the Department of Health's costs of regulating manufacturers and distributors." App., *infra*, 12a (cleaned up). That is the exact proposition the First Circuit rejected in *Trailer Marine*.

The Second Circuit further rejected the notion that "depositing the proceeds of an assessment in a special fund invariably cuts against finding that the assessment is a tax." App., *infra*, 16a. The only question, according to the court below, is whether the funds are "allocated to the agency that administers the collection, for the purpose of providing a narrow benefit to or offsetting costs for the agency." *Ibid.* That is the exact proposition the First Circuit rejected in *American Trucking*. There is no doubting, therefore, that the First Circuit would have held that the OSA assesses a fee and not a tax.

Fourth Circuit. The decision below also conflicts squarely with the Fourth Circuit's decision in *GenOn Mid-Atlantic* v. *Montgomery County*, 650 F.3d 1021

(4th Cir. 2011). There, the Fourth Circuit considered a "carbon charge" assessed by Montgomery County, Maryland against large power plants. *Id.* at 1022-1023. Although half of the proceeds was "available for the County's general use," the other half was earmarked "for County greenhouse gas reduction programs." *Id*. at 1022, 1025. Just like the OSA surcharge, the purpose of the charge in *GenOn* was to ensure that large greenhouse gas emitters "contribute[d] to paying for [those] programs," to offset the external social costs of their activities. *Id*. at 1025. Under separate regulations, moreover, the plaintiff was "unable to pass the cost of the charge on to its customers." *Id*. at 1024.

In light of those facts—indistinguishable from those here—the Fourth Circuit held that the charge was a "punitive and regulatory" fee. *GenOn*, 650 F.3d at 1024. That was so even though reducing greenhouse gas emissions serves the general welfare (by offsetting costs imposed on the public) rather than providing a narrow benefit to the payer.

As the State itself acknowledged in the briefing below, *GenOn* "is at odds" with the Second Circuit's approach to the TIA. State C.A. Br. 28 n.27. The OSA assesses a special surcharge against a small number of companies to ensure that those companies are contributing financially to state-sponsored opioid addiction programs. And just as in *GenOn*, the surcharge here cannot be passed on. Indeed, the case here for characterizing the surcharge as a restitutionary fine is even stronger, given that it is a fixed, annual lump sum, which is not the way any tax operates. Without question, the Fourth Circuit would have held that the OSA imposes a "punitive and regulatory" fee (650 F.3d at 1024), not a tax, under the TIA.

The Second Circuit attempted to distinguish *GenOn* on two grounds: The assessment there applied

to a single company rather than many, and it was attended by a pass-through prohibition. App., *infra*, 20a-21a. Those are no distinctions at all.

First, like the fee in *GenOn*, the surcharge here applies to an exceedingly narrow population—just 97 companies, each of which is politically out-of-favor and blamed for wrongdoing. Ninety-seven companies is a vanishingly thin sliver of the countless *millions* of companies doing business and paying tax in New York. See HDA C.A. Br. 28 n.2.

Second, the OSA also contains an express pass-through prohibition. App., *infra*, 78a (§ 2). The Second Circuit refused to consider the pass-through prohibition here for the head-scratching reason that the district court had invalidated it and the State did not appeal that holding. App., *infra*, 21a. That makes no sense. The question whether the OSA is a punitive fee—and thus whether the district court had jurisdiction to entertain petitioners' challenges to the surcharge—turns on legislative purpose. See *Kurth Ranch*, 511 U.S. at 779-780; *Home Builders*, 143 F.3d at 1011-1012. Legislative purpose cannot be transformed from one thing (punishment) into another (raising revenue) midstream in litigation, by judicial order—even if the State declines to appeal. The facts here thus cannot be distinguished from *GenOn*.

Ninth Circuit. The Second Circuit's decision in this case further conflicts with *Bidart Brothers* v. *California Apple Commission*, 73 F.3d 925 (9th Cir. 1996). There, the Ninth Circuit held that a government charge was not a tax, precisely because it was "[a]n assessment placed in a special fund and used only for special purposes." *Id*. at 932. The court held that mere "indirect public benefit" from the assessment's expenditure does not transform a fee into a tax. *Id*. at 932-

933. That is the opposite of the Second Circuit's opinion in this case.

Along the way, the Ninth Circuit (like then-Chief-Judge Breyer in *San Juan Cellular*, 967 F.2d at 685) relied on this Court's decision in *Head Money Cases*, 112 U.S. 580 (1884). *Head Money Cases* involved a per-passenger assessment "upon ship owners * * * to care for immigrants 'for the protection of the citizens among whom they are landed.'" *Bidart Bros.*, 73 F.3d at 932-933 (quoting *Head Money Cases*, 112 U.S. at 596). Because the exaction was assessed against only "those who are engaged in the transportation of these passengers," and because it was "appropriated in advance" to offset the costs of caring for sick and needy immigrants and "[did] not go to the general support of the government," this Court held that the charge was not a tax. *Head Money Cases*, 112 U.S. at 596. That describes the OSA, and yet the Second Circuit held that the OSA's surcharge is a tax.

As in the First and Fourth Circuits, the outcome here would have been different in the Ninth Circuit under *Bidart Brothers* and its application of *Head Money Cases*. The Second Circuit held below that, although strictly reserved in a separate fund for the limited purpose of subsidizing programs to address the social costs of the payers' activities, the OSA's surcharge is a tax because it is used neither to "provid[e] a narrow benefit" to the payers of the surcharge nor to "offset[] costs" of regulation. App., *infra*, 15a. Rather, they are used to fund "public health programs" relating "to the general welfare." App., *infra*, 14a. That is just the line of reasoning that the preceding cases reject, leaving no doubt that this case would have been decided differently by the First, Fourth, and Ninth Circuits.

2. Even among circuits more favorable to respondents, the decision below is an extreme outlier

Three other circuits have adopted more embracive interpretations of the word "tax" under the TIA than have the First, Fourth, and Ninth Circuits. And yet even among those other courts of appeals, the Second Circuit's decision in this case stands apart as an outlier.

Fifth Circuit. In *Home Builders Association of Mississippi* v. *City of Madison*, 143 F.3d 1006 (5th Cir. 1998), the Fifth Circuit advanced a "broad construction of 'tax'" under the TIA, explaining that the "paradigmatic" non-tax assessment is "one imposed by an agency upon those it regulates for the purpose of defraying regulatory costs," and never those "intended to provide a benefit for the general public." *Id*. at 1011. On that basis, the court held that an "impact fee" assessed for licenses to build new homes, with proceeds used to offset the costs of "providing and maintaining essential municipal services and facilities" necessitated by population growth (*id*. at 1009), was in fact a "tax" under the TIA (*id*. at 1012).

Seventh Circuit. In *Empress Casino*, the en banc Seventh Circuit likewise took a broad approach to the concept of a "tax" under the TIA. In its view, fees include only those assessments representing "a reasonable estimate of the cost imposed by the [payer]" for regulation. 651 F.3d at 728 (quoting *Diginet, Inc.* v. *W. Union ATS, Inc*., 958 F.2d 1388, 1399 (7th Cir. 1992)). If, by contrast, the fee "is calculated not just to recover a cost imposed" by the payer, but also "to generate revenues that the municipality can use to offset" costs other than those of direct regulation, then "it is a tax" in the Seventh Circuit, "whatever its nominal designation." *Id*. at 728-729 (quoting same).

Notably, the court in *Empress Casino* observed that "[t]he First Circuit reached the opposite conclusion" on this point in *San Juan Cellular*. *Id.* at 730.

Tenth Circuit. In line with *Empress Casino*, the Tenth Circuit explained in *Hill* v. *Kemp*, 478 F.3d 1236 (10th Cir. 2007), that the "classic" non-tax assessment is "designed to help defray an agency's regulatory expenses" and no more. *Id*. at 1245 (quoting *Marcus* v. *Kan. Dep't of Revenue*, 170 F.3d 1305, 1311 (10th Cir. 1999)). There, then-Judge Gorsuch held for the court that a specialty license plate fee was a "tax" under the TIA because it exceeded "the amount necessary to defray the costs of issuing the plates" and did not otherwise have a regulatory purpose. *Id*. at 1246. That was so, then-Judge Gorsuch concluded, despite that a portion of the fee was allocated to a "Reimbursement Fund to cover administrative costs" and the excess proceeds were deposited into a separate fund earmarked for specific purposes. *Id*. at 1240.

Despite superficial similarity between those cases and the decision below, it is doubtful that even the Fifth, Seventh, and Tenth Circuits would have reached the same decision as the Second Circuit in this case.

For its part, the Fifth Circuit recognized that courts applying the TIA must be "more concerned with the purposes underlying the ordinance than with the actual expenditure of the funds collected under it." *Home Builders*, 143 F.3d at 1011. The court thus noted that "the language of the ordinance and the circumstances surrounding its passage" are of central importance. *Id*. at 1011-1012. Here, however, the Second Circuit brushed those considerations aside, describing the statutory text as "less significant to [the] inquiry" (App., *infra*, 19a) and ignoring altogether the historical context of the OSA's passage, which was unmistakably indicative of a punitive purpose.

With respect to the Seventh and Tenth Circuit's reasoning, the OSA's annual $100 million surcharge does not exceed the cost of the programs it is assessed to subsidize. It is therefore unclear that those circuits would have reversed the district court. That is especially so given that the surcharge is assessed and collected in fixed annual lump sums by regulators a year or more after the relevant transactions take place. A fine is typically assessed as a fixed sum of money for past conduct. See *Fine*, Black's Law Dictionary (11th ed. 2019) (a fine is "a sum of money or mulct imposed or laid upon an offender for some offence done"). A "tax," by contrast, usually entails a "uniform ratio," such as a percentage of each sale, assessed concurrently with the transaction. Thomas M. Cooley, *Law of Taxation* 4 (3d ed. 1903). The Second Circuit brushed these distinctions aside, too, declaring without explanation that "the *method* of assessment bears [not] at all on the jurisdictional inquiry" under the TIA. App., *infra*, 20a. We are unaware of any other court to take that unsupported position.

The method of assessment assuredly *can* be among the "the penalizing features" that render an assessment a fine rather than a tax. *Bailey*, 259 U.S. at 38. Indeed, "anomalies" of this sort, "far-removed in crucial respects from a standard tax assessment," are precisely the kinds of considerations that drive the tax/fee analysis. *Kurth Ranch*, 511 U.S. at 783. The Second Circuit is an outlier to hold otherwise.

B. The question presented is tremendously important, and this is a good vehicle

This Court's intervention is warranted because the question presented implicates matters of significant practical importance, and this is a suitable vehicle for bringing clarity to the TIA.

1. As we have noted, the TIA is a jurisdictional statute. See *Hibbs* v. *Winn*, 542 U.S. 88, 104 (2004) (it "was designed expressly to restrict the jurisdiction of the district courts"). This Court has emphasized the importance of "clear boundaries in the interpretation of jurisdictional statutes." *Direct Mktg.*, 575 U.S. at 11. The confusion now surrounding the distinctions between taxes, penalties, and fees is certain to "eat[] up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). This case proves the point: As of this writing, the parties have been litigating for very nearly three years, still with no definitive decision whether the OSA's surcharge is lawful.

"Judicial resources too are at stake" because "[c]ourts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it." *Hertz*, 559 U.S. at 94. Thus, "courts benefit from" clarity in jurisdictional rules, just like litigants, so "they can readily assure themselves of their power to hear a case." *Ibid*. Persistent confusion among the lower courts on the scope of "taxes" under the TIA is at odds with that value.

The potential for mischief on this point is all the greater in light of the Second Circuit's aberrational approach to the pass-through prohibition. The court deemed that provision irrelevant to the TIA question because the district court invalidated it and the State did not appeal that aspect of the district court's decision. App., *infra*, 20a-21a. Seen to its conclusion, this element of the Second Circuit's analysis means that legislative purpose is not fixed and may be altered by judicial order and the parties' litigation strategies. Not only does that reasoning contradict the truism that "the jurisdiction of the court depends upon the state of

things at the time of the action brought" (*Grupo Dataflux* v. *Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570 (2004)), but it will invite troubling and illogical manipulation of the TIA question in the midst of ongoing litigation.

2. What is more, the decision below is practically limitless. According to the Second Circuit's reasoning, effectively all government exactions except simple regulatory user fees fall within the TIA's scope. If that extraordinary holding were the law, many unconstitutional state levies would escape federal judicial review. It also would arm state legislatures with a "powerful tool to prevent individuals from challenging the constitutionality of state legislative programs in federal courts," by simply "attach[ing] a 'fee' whose proceeds benefit the entire community." Brianne J. Gorod, *Limiting the Federal Forum: The Dangers of an Expansive Interpretation of the Tax Injunction Act*, 115 Yale L.J. 727, 732 (2005) (cleaned up).

The Nation's Framers understood the importance of a neutral federal forum to resolve disputes of this sort. That is why, in adopting the Judiciary Act of 1789, they provided for diversity jurisdiction in federal court. The Second Circuit's decision in this case, if allowed to stand, will deprive untold numbers of litigants the benefits of a neutral federal forum to resolve their constitutional claims.

3. This case cleanly presents the TIA question. The district court held that the TIA does not apply because the OSA's exaction is a "regulatory fee" or "regulatory penalty on opioid manufacturers and distributors," not a "tax." App., *infra*, 25a. Without calling into question the district court's subsequent invalidation of the OSA, the Second Circuit reversed solely on the basis of the TIA: "We conclude that the payment is a tax within the meaning of the Tax Injunction Act (TIA), 28 U.S.C.

§ 1341, thus depriving the District Court of subject matter jurisdiction to adjudicate the plaintiffs' challenges to the payment." App., *infra*, 3a. There are no factual or procedural complications standing in the way of the Court's review of that clear holding.

And the time for review is now. Challenges to state fees and penalties are frequent, as we have shown with the many cases discussed above. Yet by dint of the Second Circuit's decision in this case, many such challenges will be routed to state court from the start by litigants wary of wasting years on litigation dedicated solely to the question of "which court is the right court to decide." *Hertz*, 559 U.S. at 94. Again, this case proves the point; it stands as a warning to future litigants against attempting suit in federal court to challenge even the clearest of non-tax fees. Immediate review is therefore imperative.

C. The decision below is wrong

Review is furthermore warranted because the decision below is wrong. The OSA's surcharge is a punitive fee outside the TIA's scope.

1. At its foundation, the question presented here is whether the 75th Congress, acting in 1937, would have intended the word "tax" to cover a punitive fee of the sort imposed by the OSA. All evidence is that it would not have.

The Court has recognized that the TIA "was modeled on" the AIA. *Direct Mktg.*, 575 U.S. at 8. When the 75th Congress used the word "tax" in the TIA, therefore, it would have intended to invest it with the same meaning that courts had given the word "tax" under the AIA. The Court "presume[s] Congress [acts] with full cognizance of the Court's * * * interpretation of * * * prior statutes" and that, "absent any indication" to the contrary, it means to "adopt[] that interp-

retation" when it uses the same language in related statutes. *Ankenbrandt* v. *Richards*, 504 U.S. 689, 700-701 (1992). For just that reason, this Court "assume[s] that words used in both [the TIA and AIA] are generally used in the same way." *Direct Mktg.*, 575 U.S. at 8.

This Court's cases interpreting the word "tax" in the AIA at the time of the TIA's enactment leave no doubt that the OSA's surcharge is not a tax. As we noted earlier, the Court in *Bailey*, in 1922, had explained that "there comes a time in the extension of the penalizing features of [a] so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment" rather than taxation. 259 U.S. at 38. And it was on that basis (and in the same year) that the Court held in *Lipke* that an assessment laid by Congress fell outside the AIA's scope because it "lack[ed] all the ordinary characteristics of a tax" and instead had the "function of a penalty." 259 U.S. at 562. Accord *Regal Drug*, 260 U.S. at 391.

2. The OSA's text, history, and structure confirm that it is of precisely the same character.

Statutory text. The Act imposes liability, not for a tax, but for an "[o]pioid stewardship payment." App., *infra*, 77a. Consistent with that label, the Act is codified in New York's public health law (*ibid.*), not the tax code. The Act also designates the Department of Health, not the Department of Taxation and Finance, as the assessor, collector, and administrator of the surcharge. App., *infra*, 80a-81a. The Department of Health's Guidance similarly refers to "assessments" and "ratable shares," not "taxes." Even the State Comptroller has acknowledged that the surcharge is not a tax. JA64 ¶ 18 (referring to the Act as imposing "a fee" instead of "an excise tax").

Statutory text matters here. Legislatures, including New York's, "describe[] many other exactions [they] create[] as 'taxes.'" *NFIB* v. *Sebelius*, 567 U.S. 519, 544 (2012) (holding a "payment" not a tax under the Anti-Injunction Act because of the label used). Most notably, that includes the 2019 excise tax enacted by the New York legislature in response to the district court's decision in this case—it is called a tax, codified in the tax code, and assessed and collected by taxing authorities rather than the Department of Health. See *supra* at 12. "[I]t is generally presumed that the legislature acts intentionally and purposely in the disparate inclusion or exclusion" of words when drafting statutes. *Rivers* v. *Birnbaum*, 102 A.D.3d 26, 36 (N.Y. App. Div. 2012) (quotation marks and brackets omitted).

Statutory scheme. The broader statutory scheme confirms the OSA's status as a punitive fee: (1) It is assessed in a lump sum, which is typical of a fine and utterly unheard of in taxation. (2) Its proceeds are deposited into a segregated fund that must be used to pay for prevention and treatment of opioid abuse, which lawmakers believed to be the fault of those they made liable for the fee. And (3) it is attended by a pass-through prohibition, which is "unavoidably punitive in operation." *Consol. Edison Co. of N.Y.* v. *Pataki*, 292 F.3d 338, 355 (2d Cir. 2002); *see id*. at 353-354 (holding that nothing "other than punishment can justify * * * preventing [payers] from passing [an exaction] along to [customers]").

The importance of the pass-through prohibition to the Act's framers is underscored by the massive penalties imposed for violations of the prohibition. If the legislature had not been so adamant that the surcharge not be passed on, it would not have subjected violations to fines of up to $1 million "per incident." App., *infra*, 83a.

This "concoction of anomalies, too far-removed in crucial respects from a standard tax assessment" confirm the OSA's punitive character. *Kurth Ranch*, 511 U.S. at 783. Simply put, "the penalizing features" of the OSA confirm that it is "a mere penalty, with the characteristics of regulation and punishment" rather than taxation. *Bailey*, 259 U.S. at 38.

Legislative history. These textual and functional indications of punitive intent come into sharp focus when viewed through the lens of "legislative history evinc[ing] a legislative intent to punish." *Consol. Edison*, 292 F.3d at 354. Accord *GenOn*, 650 F.3d at 1024-1025. The OSA's proponents proudly billed it as a punishment. Governor Cuomo—who personally introduced the OSA in the legislature—described opioid manufacturers and distributors as "[u]nscrupulous" companies, which he blamed for "kill[ing] thousands * * * without warning." JA62 ¶ 1. He promised to "make them pay for their illegal and reprehensible conduct" (*ibid*. (emphasis omitted)) and declared that the OSA would help "hold pharmaceutical companies accountable for their role in perpetuating the opioid epidemic" (*id*. ¶ 2 (emphasis omitted)).

Against that background, it would be impossible to understand the $100 million yearly exaction imposed by the OSA as anything other than an annually-recurring fine assessed against a small group of politically disfavored companies as restitution for the opioid crisis. This is not remotely the kind of "tax" that Congress had in mind when it enacted the TIA in 1937. The lower federal courts thus had jurisdiction to consider the legality of the surcharge.

The Second Circuit's contrary decision deepens a broad conflict among the courts of appeals on a matter of great importance. It warrants further review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

JAY P. LEFKOWITZ
Kirkland & Ellis LLP
601 Lexington Ave.
New York, NY 10022

MATTHEW D. ROWEN
Kirkland & Ellis LLP
1301 Pennsylvania Ave. NW
Washington, DC 20004

Counsel for Association for Accessible Medicines

ERIN R. MACGOWAN
Ropes & Gray LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199

Counsel for SpecGx LLC

MICHAEL B. KIMBERLY
Counsel of Record
SARAH P. HOGARTH
McDermott Will & Emery LLP
500 North Capitol St. NW
Washington, DC 20001

ANDREW B. KRATENSTEIN
KAREN LIN
McDermott Will & Emery LLP
340 Madison Ave.
New York, NY 10173

Counsel for Healthcare Distribution Alliance

DOUGLAS H. HALLWARD-DRIEMEIER
Ropes & Gray LLP
2099 Pennsylvania Ave. NW
Washington, DC 20006

Counsel for SpecGx LLC

Counsel for Petitioners