No. 20-1611

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

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

DARYL JOSEFFER
JENNIFER B. DICKEY
U.S. CHAMBER
LITIGATION CENTER
1615 H St., N.W.
Washington, DC 20062

YAAKOV M. ROTH
Counsel of Record
MICHAEL A. CARVIN
BRINTON LUCAS
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
yroth@jonesday.com

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE SECOND CIRCUIT'S OVERBROAD READING OF THE TIA IS BADLY MISTAKEN 4

A. Injunctive Relief Against Unconstitutional Actions by State Officers Is Presumptively Available in Federal Court 4

B. The TIA Prevents Interference with State Tax Collection, Not Federal Pre-Enforcement Review of Unlawful State Penalties 5

II. THE SECOND CIRCUIT'S OVERBROAD READING OF THE TIA THREATENS FEDERAL JUDICIAL REVIEW OF PUNITIVE STATE LAWS 11

A. In the Chamber's Experience, States Regularly Seek to Use the TIA to Shield Punitive Laws from Federal Pre-Enforcement Review 11

B. This Court's Review Is Necessary to Ensure the Availability of a Federal Forum to Address Constitutional Violations 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES

Armstrong v. Exceptional Child Ctr., Inc.,
575 U.S. 320 (2015) 4, 5

Blatchford v. Native Vill. of Noatak,
501 U.S. 775 (1991) 5

Chamber of Commerce v. Edmonson,
594 F.3d 742 (10th Cir. 2010) 13, 14

Child Labor Tax Case,
259 U.S. 20 (1922) 7

CIC Servs., LLC v. IRS,
141 S. Ct. 1582 (2021) 4, 5, 16

Comptroller of Treasury of Md. v. Wynne,
575 U.S. 542 (2015) 17

Department of Revenue of Mont. v. Kurth Ranch,
511 U.S. 767 (1994) 8

Direct Mktg. Ass'n v. Brohl,
575 U.S. 1 (2015) .... *passim*

Dows v. City of Chicago,
78 U.S. (11 Wall.) 108 (1871)................................4

Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.,
651 F.3d 722 (7th Cir. 2011) (en banc) 17

Entergy Nuclear Vt. Yankee, LLC v. Shumlin,
737 F.3d 228 (2d Cir. 2013)....................................3

Ex parte Young,
209 U.S. 123 (1908) 4, 5

TABLE OF AUTHORITIES
(continued)

Page(s)

Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.,
561 U.S. 477 (2010) 5

GenOn Mid-Atlantic, LLC v. Montgomery Cnty.,
650 F.3d 1021 (4th Cir. 2011) 3, 15, 16

Graham v. Dupont,
262 U.S. 234 (1923) 6, 7

Great Lakes Dredge & Dock Co. v. Huffman,
319 U.S. 293 (1943) 8

Hibbs v. Winn,
542 U.S. 88 (2004) 6, 15

Hill v. Kemp,
478 F.3d 1236 (10th Cir. 2007) 7

Hill v. Wallace,
259 U.S. 44 (1922) 6, 7, 8, 10

Holland v. Florida,
560 U.S. 631 (2010) 6

Lipke v. Lederer,
259 U.S. 557 (1922) 6, 7

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007) 5

NFIB v. Sebelius,
567 U.S. 519 (2012) 10

Ohio Tax Cases,
232 U.S. 576 (1914) 8

TABLE OF AUTHORITIES
(continued)

Page(s)

Parsons v. District of Columbia,
170 U.S. 45 (1898) 7

Regal Drug Corp. v. Wardell,
260 U.S. 386 (1922) 6

Retail Indus. Leaders Ass'n v. Fielder,
475 F.3d 180 (4th Cir. 2007) 11, 12

Rosewell v. LaSalle Nat'l Bank,
450 U.S. 503 (1981) 7, 17

Sisson v. Ruby,
497 U.S. 358 (1990) 18

United States v. Butler,
297 U.S. 1 (1936) 9

Von Hoffman v. City of Quincy,
71 U.S. (4 Wall.) 535 (1866)... 4

STATUTES

7 U.S.C. § 518 *et seq.* 16

26 U.S.C. § 7421 6

28 U.S.C. § 1341 .... 1, 2, 6, 10

31 U.S.C. § 3302 .... 9, 16

Fair and Equitable Tobacco Reform Act
of 2004, Pub. L. No. 108-357, Tit. VI,
118 Stat. 1418 16

Md. Code, Tax-Gen. § 7.5-101 14

Md. Code, Tax-Gen. § 7.5-102 14

Md. Code, Tax-Gen. § 7.5-103 14

TABLE OF AUTHORITIES
(continued)

Page(s)

N.Y. Exec. Law § 63.6 9

N.Y. Tax Law § 498 10

OTHER AUTHORITIES

1 Thomas M. Cooley, THE LAW OF TAXATION (4th ed. 1924) 7, 9, 10

Senator Bill Ferguson, Post, FACEBOOK (Feb. 12, 2021) 14

Paul Romer, Opinion, *A Tax That Could Fix Big Tech*, N.Y. TIMES (May 6, 2019)..........................14

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community. This case presents a recurring issue that the Chamber has litigated, and is currently litigating, in courts across the country: Whether punitive exactions qualify as "taxes" for purposes of the Tax Injunction Act, 28 U.S.C. § 1341 (TIA), merely because they raise revenue for general public purposes. *See infra* Pt. II.A.

SUMMARY OF ARGUMENT

Consistent with a long equitable tradition stretching back to England, this Court has made clear that federal courts may review—and halt—unconstitutional state laws before they are enforced. That mechanism of pre-enforcement review ensures that regulated parties are not forced into a cruel dilemma of either complying with an unlawful edict or throwing themselves on the mercy of the

[1] All parties have consented to the filing of this brief and received timely notice of *amicus'* intent to file as required by Rule 37. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

courts of the State whose law they just transgressed. One narrow exception to this rule, the TIA, instructs that federal district courts are not to "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.

Deepening a conflict in the courts of appeals, the Second Circuit held that States can fit within this limited exception—and thereby opt out of federal judicial scrutiny before a law is enforced—merely by directing the revenues raised by an unconstitutional penalty to activities that benefit the general public. But all sorts of financial penalties fit that description, as fines no less than taxes can and do fund the States' general treasuries. Given that reality, those subject to regulation by New York, Connecticut, and Vermont—including the many companies doing business in those States—may soon find themselves in a lose-lose situation. That bodes ill not just for the nation's businesses, but for the rule of law itself.

The Second Circuit thought unconstitutional exactions that raise revenue for public purposes—in this case, to address the opioid crisis—were immune from federal pre-enforcement review under the TIA. But one can agree that the opioid epidemic is a public-health emergency that requires serious responses, as the Chamber does, without reading the TIA to produce such a startling result. The mere fact that an exaction produces revenue for general public purposes does not make it a "tax" under this statute. 28 U.S.C. § 1341. Rather, when Congress enacted the TIA in 1937, it was understood that exactions were not "taxes" when their primary purpose was to regulate or punish, even if they also produced revenue for general public purposes.

This Court should grant certiorari and reverse. Petitioners have shown that the decision below furthers a division in the circuits, and the Second Circuit's approach cannot be reconciled with the TIA or this Court's precedents. The question here is also an important and recurring one, as the Chamber's own litigating experience confirms. States have tried to dress up punitive exactions as revenue-producing taxes before, and they continue to do so today. Those efforts are unsurprising given that many of the courts of appeals, including the Second Circuit, have employed open-ended multifactor tests to interpret a jurisdictional statute whose boundaries should be clear. Even a limited ruling from this Court would go a long way toward taming the TIA inquiry in the lower courts and providing clarity to both regulated parties and States alike.

ARGUMENT

As petitioners have demonstrated, the decision below exacerbates a conflict within the circuits over how to determine whether a state exaction constitutes a "tax" immune from pre-enforcement constitutional challenges in federal court. *See* Pet. 16-24. Indeed, respondents have repeatedly acknowledged that decisions from the Second Circuit and the Fourth Circuit are "at odds" in this area. Resp. C.A. Br. 28 n.27 (contrasting *GenOn Mid-Atlantic, LLC v. Montgomery Cnty.*, 650 F.3d 1021 (4th Cir. 2011) (Wilkinson, J.), with *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 737 F.3d 228 (2d Cir. 2013)); *accord* Resp. C.A. Reply. Br. 12 n.3. That conflict alone merits this Court's review. The Chamber writes to explain why the Second Circuit's sweeping view of what qualifies as a "tax under State law" for purposes of the TIA is not only deeply flawed, but also threatening to the nation's business community.

I. THE SECOND CIRCUIT'S OVERBROAD READING OF THE TIA IS BADLY MISTAKEN.

When it comes to challenging the constitutionality of state exactions, the TIA's "pay-now-sue-later procedure," *CIC Servs., LLC v. IRS*, 141 S. Ct. 1582, 1592 (2021), is the exception, not the rule. That exception may make sense when it comes to taxes, where delays in collection could deprive States of "the means to carry on their respective governments." *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871). But it cannot become the rule lest States become free to strong-arm parties into "voluntarily" complying with unlawful commands on pain of ruinous penalties. By adopting a sweeping definition of "tax" as an exaction that "raises revenue to provide a clear general public benefit," Pet. App. 19a, the Second Circuit lost sight of th3se fundamental principles.

A. Injunctive Relief Against Unconstitutional Actions by State Officers Is Presumptively Available in Federal Court.

Had New York enacted a law imposing a "fine" of up to $100 million for selling or distributing opioids within its borders, no one would question petitioners' ability to challenge its constitutionality in federal court and seek an injunction against its enforcement. *See Ex parte Young*, 209 U.S. 123, 147, 155-56 (1908). "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). In the absence of this form of judicial review, constitutional protections would be meaningless, for a "right without a remedy is as if it were not." *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 554 (1866).

Moreover, petitioners could seek this relief *before* the law was ever enforced, rather than violate the edict and then raise its unconstitutionality as a defense to a state enforcement proceeding. Courts "normally do not require plaintiffs to bet the farm by taking the violative action before testing the validity of the law." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490 (2010) (cleaned up). And for good reason: In the absence of pre-enforcement review, a regulated party would face the classic "dilemma" of either "abandoning his rights or risking prosecution." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007). And because the latter is "not the kind of thing an ordinary person risks, even to contest the most burdensome regulation," a "pre-enforcement" suit must be available in these situations "if there is to be a suit at all." *CIC Servs.*, 141 S. Ct. at 1592.

Finally, petitioners would have their day in the right court—a federal one. Whether a state law comports with "the Federal Constitution is a judicial question, and one over which Federal courts have jurisdiction by reason of its Federal nature." *Young*, 209 U.S. at 144. Petitioners therefore would not have to depend on the courts of the State whose law they were challenging for vindication of their federal constitutional rights.

B. The TIA Prevents Interference with State Tax Collection, Not Federal Pre-Enforcement Review of Unlawful State Penalties.

Of course, Congress remains free to displace this longstanding form of equitable relief, *Armstrong*, 575 U.S. at 327-28, and it did so in the TIA with respect to "state tax-injunction suits," *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 784 (1991). The question here is whether the TIA permits New York to evade pre-enforcement review in federal court merely by framing its penalty on the sale

or distribution of opioids as a way to raise revenue for opioid-abuse programs. It does not. Nothing in the TIA suggests that Congress decided to give state penalties a pass from federal pre-enforcement challenges so long as they raise revenue for providing a general public benefit—a description that could apply to virtually any exercise of the police power.

1. By its terms, the TIA deprives federal courts only of the power to "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. Consistent with a longstanding reluctance to "construe a statute to displace courts' traditional equitable authority absent the clearest command," *Holland v. Florida*, 560 U.S. 631, 646 (2010) (cleaned up), this Court has declined to give terms in the TIA a "broad meaning" when "statutory context" counsels otherwise. *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 13 (2015) (rejecting broad reading of "restrain"); *see Hibbs v. Winn*, 542 U.S. 88, 100-102 (2004) (rejecting broad reading of "assessment").

The same approach should control the meaning of "tax" within the TIA. 28 U.S.C. § 1341. Because the TIA "was modeled on the Anti-Injunction Act (AIA)," this Court "assume[s] that words used in both Acts are generally used in the same way." *Direct Mktg.*, 575 U.S. at 8; *see* 26 U.S.C. § 7421(a). And by the time Congress enacted the TIA in 1937, this Court had repeatedly held that the term "tax" in the AIA did not cover "a penalty in the form of a tax." *Graham v. Dupont*, 262 U.S. 234, 258 (1923) (discussing *Hill v. Wallace*, 259 U.S. 44 (1922); *Lipke v. Lederer*, 259 U.S. 557 (1922); and *Regal Drug Corp. v. Wardell*, 260 U.S. 386 (1922)).

Then, as now, "[t]he difference between a tax and a penalty" (or other exercise of the police power) occasionally proved "difficult to define," as it was understood that taxes could have both revenue-raising and regulatory purposes. *Child Labor Tax Case*, 259 U.S. 20, 38 (1922). In his treatise on taxation, Judge Cooley confronted the issue directly and took the position that the distinction turned on whether "the primary purpose of the legislative body in imposing the charge is to regulate." 1 Thomas M. Cooley, THE LAW OF TAXATION 99 (4th ed. 1924); *see id.* at 94-102, 108-15. If so, "the charge is not a tax even if it produces revenue for the public." *Id.* at 99.[2]

This Court's decisions from the period reflected a similar test. The relevant question was whether a law imposed "a tax with only that incidental restraint and regulation which a tax must inevitably involve" or "regulate[d] by the use of the so-called tax as a penalty." *Child Labor Tax Case*, 259 U.S. at 36. Accordingly, this Court declined to apply the AIA to bar injunctions against so-called taxes "primarily designed to define and suppress crime," *Lipke*, 259 U.S. at 561, or "imposed for the purpose of regulating the future grain business." *Graham*, 262 U.S. at 257-58 (discussing *Hill*); *see* Cooley 115 (explaining that *Hill* addressed a statute whose "purpose was to regulate the business of grain boards of trade, with a heavy penalty, called a tax, imposed on sales of grain for future delivery

[2] This Court has repeatedly relied on Cooley's treatise on taxation—including when interpreting the TIA—and has referred to him as a "text writer[] of high authority." *Parsons v. District of Columbia*, 170 U.S. 45, 55 (1898); *see Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 523-24 (1981) (consulting Cooley's treatise in interpreting the phrase "plain, speedy and efficient remedy" in the TIA); *see also Hill v. Kemp*, 478 F.3d 1236, 1244-45 (10th Cir. 2007) (Gorsuch, J.) (relying on Cooley's treatise to interpret the term "tax" in the TIA).

to coerce boards and their members into compliance with the regulations").

Reading "tax under State law" in this statute to exclude exactions primarily meant to regulate "is also consistent with" the fact that "the TIA 'has its roots in equity practice.'" *Direct Mktg.*, 575 U.S. at 13. The TIA "partially codifie[d]" a longstanding "comity doctrine," *id.*, under which "courts of equity" would "not ordinarily restrain state officers from collecting state taxes where state law affords an adequate remedy to the taxpayer." *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297 (1943). But even while applying that doctrine, "those courts did not refuse to hear every suit that would have a negative impact on States' revenues," *Direct Mktg.*, 575 U.S. at 14—including when the challenged tax legislation included "penalties and coercive features." *Ohio Tax Cases*, 232 U.S. 576, 587 (1914); *see Hill*, 259 U.S. at 62 (holding that the AIA did not prevent an injunction against a federal penal exaction and observing that "[w]ere this a state act, [an] injunction would certainly issue").

2. The decision below sharply broke from that understanding. While the Second Circuit paid lip service to the rule that an exaction qualifies as a "tax" under the TIA only if its primary purpose is to raise revenue, *see* Pet. App. 9a, its actual analysis employed a far more expansive definition. In the court of appeals' view, any exaction whose "revenue's ultimate use is to provide a general benefit to the public" is presumptively a "tax" for TIA purposes. *Id.* at 11a (cleaned up).

That sweeping definition threatens to make the TIA's exception to federal pre-enforcement review the rule. While "taxes … generate government revenues," so do "fines" and "penalties." *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 778 (1994). And in each

instance, those revenues can and often will be used to benefit the general public. At the federal level, the Miscellaneous Receipts Act requires that any funds received by a federal official—including fines or penalties—be deposited into the general treasury absent a statutory exception. *See* 31 U.S.C. § 3302(b). New York likewise requires its Attorney General to deposit "penalties forfeited to the people of the state" in the State's treasury. *See* N.Y. Exec. Law § 63.6. Yet no one thinks that this funding structure transforms these punitive exactions into taxes.

Rather, it was understood at the time the TIA was enacted that a "charge is not a tax even if it produces revenue for the public"—and even when that revenue is ultimately "paid into the state treasury"—so long as "the primary purpose of the legislative body in imposing the charge is to regulate." Cooley 99-100; *see, e.g.*, *United States v. Butler*, 297 U.S. 1, 57, 61 (1936) (deeming a regulatory "exaction not a true tax" even though its "proceeds … go into the federal Treasury and thus become available for appropriation for any purpose"). To conclude otherwise would threaten to cause "the TIA to bar every suit with" a "negative impact on States' revenues," despite the Act's equitable roots to the contrary. *Direct Mktg.*, 575 U.S. at 14.

3. As the decision below illustrates, a test turning on the ultimate use of revenue from an exaction will cause courts to overlook evidence of its primary purpose. For example, the Second Circuit brushed off the exaction's "method of assessment"—here, "a 'fixed sum' of $100 million per year"—as not "bear[ing] at all on the jurisdictional inquiry." Pet. App. 19a-20a. It likewise dismissed the relevance of the fact that this annual $100 million surcharge is collected by New York's "Department

of Health"—and not its "Department of Taxation and Finance"—on the ground that the proceeds are technically held in the custody of "the State Comptroller and the Commissioner of Taxation and Finance." *Id.* at 18a. But in determining whether a particular exaction constitutes a tax or penalty, this Court has repeatedly considered whether it is "collected … through the normal means of taxation"—including by looking to the "agency responsible for" securing the funds. *NFIB v. Sebelius*, 567 U.S. 519, 566 (2012); *see id.* at 569 (indicating that how "[t]he amount due is adjusted" is evidence of whether an exaction constitutes a tax). In other words, both *who* collects the exaction and *how* it is collected matters, not merely *where* its proceeds are stored.

The Second Circuit's blinkered approach also led it to dismiss evidence from the rest of New York's Opioid Stewardship Act, such as its refusal to call the $100-million surcharge a "tax" and its prohibition on passing the costs of that surcharge on to customers. *See* Pet. App. 19a, 21a. But a State's choice not to call an exaction a "tax" under state law is decent evidence that it is in fact not a "tax under State law." 28 U.S.C. § 1341; *cf. Hill*, 259 U.S. at 66 (relying on the fact that "the title of the act recites that one of its purposes is the regulation of Boards of Trade" to conclude that a so-called "tax" was in fact a "penalty"). And the observation that "taxation is unpopular these days, so taxing authorities avoid the term," Pet. App. 19a (cleaned up), rings hollow here given that New York proved quite willing to adopt an explicit excise "tax" on opioid products in response to the district court's decision. N.Y. Tax Law § 498(a). Likewise, New York's choice to "no longer defend[]" the "pass-through prohibition" after the district court held it invalid, Pet. App. 20a, in no way bears on "the primary purpose of the legislative body in imposing" the surcharge itself. Cooley 99.

II. The Second Circuit's Overbroad Reading of the TIA Threatens Federal Judicial Review of Punitive State Laws.

The decision below not only conflicts with text, history, and precedent, it also imperils the nation's business community. As the Chamber's litigating experience illustrates, states are not shy about trying to evade federal pre-enforcement review by dressing up penal exactions as "taxes" under the TIA. Given that background, the Second Circuit's sweeping understanding of what constitutes a "tax" in this context is likely to be used in the future to punish unpopular out-of-state businesses unimpeded by the prompt scrutiny of federal courts.

A. In the Chamber's Experience, States Regularly Seek to Use the TIA to Shield Punitive Laws from Federal Pre-Enforcement Review.

As an institutional litigant, the Chamber has witnessed States repeatedly disguise penalties as "taxes" in an attempt to force regulated parties into state-court refund suits. Thankfully, courts have largely seen through these schemes, although the decision below marks a troubling step in the wrong direction.

1. For example, the Chamber participated as an *amicus curiae* in *Retail Industry Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007), where the Fourth Circuit confronted a so-called "tax" gerrymandered to compel a single company to provide its employees with better health insurance. Following "a nationwide campaign to force Wal-Mart Stores, Inc., to increase health insurance benefits for its 16,000 Maryland employees," Maryland passed "the Fair Share Health Care Fund Act," which, while framed in general terms, "was crafted to cover just Wal-Mart." *Id.* at 183; *see id.* at 185. The Act required covered employers to devote at least eight percent of their

total payrolls to employee health insurance or pay the shortfall to the State. *Id.* at 184. A district court enjoined the exaction's enforcement after concluding the Act was preempted by ERISA. *Id.* at 186.

In affirming that injunction, the Fourth Circuit rejected the State's argument that the Act "imposes a *tax* on employers" for purposes of the TIA. *Fielder*, 475 F.3d at 188. As it explained, "[t]he circumstances surrounding the Act's enactment" indicated that its "primary purpose [wa]s to regulate employers' healthcare spending, not to raise revenue." *Id.* at 189. And that was true, the Fourth Circuit observed, even though the Act's declared purpose was "to establish the Fair Share Health Care Fund" dedicated "to support[ing] the operations of the Maryland Medical Assistance Program.' " *Id.* (cleaned up). As the court correctly determined, the State's "superficial characterization … does not determine the Act's actual purpose and effect; its content and context do." *Id.*

Thus, unlike the decision below, the Fourth Circuit did not miss the primary purpose of an exaction by focusing on the intended disposition of the funds. Similar to New York's Opioid Stewardship Act, Maryland's law directed that its revenues were to be "held by the Treasurer of the State and accounted for by the State Comptroller like all other state funds," and to be used to "support the Maryland Medical Assistance Program." *Fielder*, 475 F.3d at 185. That scheme can be fairly described as funding "broad public health initiatives that undoubtedly provide a 'general benefit' to [state] residents 'of a sort often financed by a general tax,' " Pet. App. 12a, but that did not blind the court to the fact that Maryland had gerrymandered legislation to punish Wal-Mart for allegedly "provid[ing] its employees with a substandard level of healthcare benefits." *Fielder*, 475 F.3d at 183.

2. The Tenth Circuit took a similar approach in *Chamber of Commerce v. Edmonson*, 594 F.3d 742 (2010). In that case, Oklahoma had enacted legislation requiring independent contractors to provide documentation to contracting entities showing that they were eligible to work in the United States under federal immigration law. *Id.* at 754. If they failed to do so, the contracting entity was to "withhold compensation" from the independent contractor "in amount equal to 'the top marginal income tax rate' allowed under Oklahoma law." *Id.* at 755. And if a contracting entity did not comply, it was " 'liable for the taxes required to have been withheld.' " *Id.* at 754 n.9.

The Chamber successfully challenged this legislation as preempted by federal immigration law and obtained an injunction against in its enforcement. *Edmonson*, 594 F.3d at 750. In upholding that relief, the Tenth Circuit rejected Oklahoma's argument that the law merely imposed "a tax" under the TIA. *Id.* at 761. As the court explained, this exaction "constitutes a regulatory penalty, not a tax, because its purpose is to regulate behavior"—namely, the verification of the employment eligibility of independent contractors—"rather than to raise revenue." *Id.* at 763. Even though contracting entities could comply with the law by withholding the maximum amount of compensation from independent contractors who failed to document their eligibility to work—and thus raise funds for Oklahoma—the Tenth Circuit held that revenue generation was not its "*primary* purpose." *Id.* at 764 n.23.

Unlike the Second Circuit here, the Tenth Circuit treated "the ultimate use of funds" raised by an exaction as "relevant" but "not dispositive" to the inquiry. *Edmonson*, 594 F.3d at 761-62. Rather, the Tenth Circuit explained, "[t]he mere fact that revenue received from a violation of [the law] ends up in Oklahoma's general fund

is of little significance when measured against the incentive structure created and the avowed statutory purpose." *Id.* at 763.

3. The Chamber is currently seeking federal pre-enforcement review of a recent Maryland law that imposes a "tax" on digital advertising by large technology companies. *See* Am. Compl., Doc. 23-1, *Chamber of Commerce v. Franchot*, No. 21-cv-410 (D. Md. Apr. 30, 2021). This digital-advertising "tax" seeks to penalize politically unpopular companies from outside the State for allegedly "erod[ing]" the "shared values and norms of American society" by creating "a haven for dangerous misinformation and hate speech." Paul Romer, Opinion, *A Tax That Could Fix Big Tech*, N.Y. TIMES (May 6, 2019), https://bit.ly/3gq9gKU. One of the law's proponents, the President of Maryland's Senate, was quite explicit that it was a "targeted" measure aimed at "[c]ompanies like Amazon, Facebook, and Google." Senator Bill Ferguson, Post, FACEBOOK (Feb. 12, 2021), https://bit.ly/3xjNyPF.

Consistent with this purpose, the law applies only to those companies with $100 million in annual global gross revenues and subjects them to an unusual and severe form of exaction ranging from 2.5 to 10 percent of their "gross" revenues. Md. Code, Tax-Gen. §§ 7.5-102, -103. Moreover, the law expressly exempts the digital advertising of Maryland's preferred speakers—"broadcast" entities and "news media" entities that do not "primarily" serve as "an aggregator or republisher of third-party content." *Id.* § 7.5-101(d), (e), and (g). This is yet another example of the kind of exaction that may be styled as a revenue-raising "tax," but is nonetheless a punitive and unconstitutional penalty warranting pre-enforcement review in federal court.

B. This Court's Review Is Necessary to Ensure the Availability of a Federal Forum to Address Constitutional Violations.

The Chamber's experience in litigation confirms this need for further review here. In the absence of this Court's intervention, the decision below will provide States—at least within the Second Circuit—with a roadmap to insulate unconstitutional state laws from federal pre-enforcement review. The upshot of the decision below is that so long as a State carefully frames its punitive exactions as a way of "rais[ing] revenue to provide a clear general public benefit," Pet. App. 19a, it can rest comfortably in the knowledge that its targets will be hamstrung from seeking pre-enforcement review in federal court. Rather, the only recourse for those parties disfavored by New York, Connecticut, or Vermont under the TIA is "to pursue refund suits" or some other challenge in the courts of the State whose law they are challenging. *Hibbs*, 542 U.S. at 104.

Indeed, the decision below all but invites States to target disfavored industries through gerrymandered "taxes." The Second Circuit dismissed the fact that "the State Legislature here imposed" the $100 million surcharge "to hold opioid manufacturers and distributors responsible for the 'unusual costs' of the opioid epidemic" as irrelevant on the theory that States are free to "require an industry to pay a tax to support public programs designed to address a widespread problem caused by the industry." Pet. App. 19a. And that was so, the court emphasized, even if the exaction falls on "only a few entities, or one entity alone." *Id.* at 14a. That approach threatens to "turn what are truly interstate issues over to local authorities" and "encourage punitive financial strikes against single entities with national connections." *GenOn*,

650 F.3d at 1026. Because "[t]he implications of allowing localities to impose financial exactions exclusively upon single entities of national reach with no accountability in federal court are profound," *id.*, this Court, and not the Second Circuit, should have the last word on whether the TIA compels this result.

Moreover, the Second Circuit's sweeping interpretation of "tax" in the TIA will presumptively guide how that term is understood in the AIA, *see CIC Servs.*, 141 S. Ct. at 1589 & n.1, and thereby threaten to insulate unlawful federal statutes and regulations from pre-enforcement review. Under the Miscellaneous Receipts Act, revenues from federal enforcement proceedings are presumptively sent to the general treasury, *see* 31 U.S.C. § 3302(b), and thus would appear to serve "general revenue-raising purposes" under the Second Circuit's approach. Pet. App. 12a. And as respondents contended below, at least one federal statute—the Fair and Equitable Tobacco Reform Act of 2004, Pub. L. No. 108-357, Tit. VI, § 643, 118 Stat. 1418, 1536 (codified at 7 U.S.C. § 518 *et seq.*)—bears several similarities to New York's Opioid Stewardship Act, including that "the proceeds of the assessment" can be plausibly described as "used for [a] public purpose"—namely, "stabilizing the tobacco market." Resp. C.A. Reply Br. 18; *see id.* at 17-18 & n.7.

Finally, this case provides an opportunity for this Court to furnish some much-needed clarity in this area. Applying the principle that "jurisdictional rules should be clear," this Court has rejected constructions of the TIA that would produce "a vague and obscure boundary" leading to "both needless litigation and uncalled-for dismissal … in the name of a jurisdictional statute meant to protect state resources." *Direct Mktg.*, 575 U.S. at 14 (cleaned up). Yet in deciding whether an exaction

constitutes a "tax" under the TIA, many courts of appeals have employed "open-ended, multifactor tests" where the "relative weights of the factors are left to judicial discretion." *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722, 727 (7th Cir. 2011) (en banc). This case is no exception. By our count, the Second Circuit applied at least seven different factors, *see* Pet. App. 9a-19a, while ultimately concluding that the "most significant" one is the "use of the revenues generated by the assessment." *Id.* at 10a; *see, e.g.*, *id.* at 19a (concluding that New York's "refusal to call" the surcharge "a tax" is "less significant" because the surcharge "raises revenue to provide a clear general public benefit").

The uncertainties and delays associated with these sprawling inquiries only serve to deter regulated parties from challenging unconstitutional state laws. The time required for a state tax-refund suit alone is frequently sufficient to coerce businesses into compliance: Few companies will choose to spend years in state courts contesting a law's constitutionality while their competitors alter their business practices to comply, especially when this Court has held that nothing in the TIA requires a state tax-refund scheme to "be the speediest." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 520 (1981) (holding that "2-year wait" to receive tax refund without interest sufficient); *cf. Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 545-46 (2015) (holding aspect of Maryland taxing scheme unconstitutional in 2015 after taxpayers challenged it in connection with their 2006 tax returns). Accordingly, for many businesses, it is either pre-enforcement review in federal court or no review at all. And those companies need to know whether the doors to the federal courthouse will be open or shut, not devote " 'an enormous amount of expensive legal ability' " and years of litigation to navigating the vagaries associated

with multifactor tests. *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment); *cf. Direct Mktg.*, 575 U.S. at 6 (ruling, in 2015, that a 2010 challenge to notice and reporting requirements in federal court was not barred by the TIA). Even a narrow decision from this Court holding that the use of revenues should not be dispositive under the TIA would mark a significant step toward replacing this bestiary of considerations with a framework oriented in text and history.

CONCLUSION

The Court should grant certiorari and reverse the decision below.

June 18, 2021

Respectfully submitted,

DARYL JOSEFFER
JENNIFER B. DICKEY
U.S. CHAMBER
LITIGATION CENTER
1615 H St., N.W.
Washington, DC 20062

YAAKOV M. ROTH
Counsel of Record
MICHAEL A. CARVIN
BRINTON LUCAS
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
yroth@jonesday.com

Counsel for Amicus Curiae Chamber of Commerce of the United States of America