No. 20-1611

IN THE
Supreme Court of the United States

HEALTHCARE DISTRIBUTION ALLIANCE, et al.,
Petitioners,

v.

LETITIA JAMES, Attorney General
of New York, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

For two years, New York's Opioid Stewardship Act imposed a monetary assessment on the sale of opioids in the State by licensed opioid manufacturers and distributors, to raise revenue for broad public health initiatives, including statewide opioid-addiction treatment and prevention services and a prescription-drug-monitoring registry. The New York Legislature has since replaced this assessment with an assessment that is undisputedly a state tax. The question presented is:

> Whether the Opioid Stewardship Act's revenue-raising assessment was a tax within the meaning of the Tax Injunction Act, 28 U.S.C § 1341.

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INTRODUCTION

This case arises from three separate lawsuits challenging New York's Opioid Stewardship Act (OSA), a New York law that, for two years, imposed an assessment (known as the "opioid stewardship payment") on licensed opioid manufacturers and distributors in order to fund broad public health initiatives, including statewide opioid-addiction treatment and prevention services and a prescription-drug-monitoring registry. While the litigation was pending, the New York Legislature replaced the OSA with a new scheme that indisputably imposes a tax under the Tax Injunction Act (TIA), 28 U.S.C. § 1341.

Petitioners now ask this Court to review the Second Circuit's conclusion that the two years of payments mandated by the now-superseded OSA qualify as a tax under the TIA. This Court should deny the petition.

The case does not present a circuit split; instead, the court below applied a widely adopted test in a manner consistent with the precedents of both this Court and other circuits. Certiorari is further unwarranted because petitioners' claims would fail for independent reasons, and because their challenge here addresses a statutory scheme that has no analogue in other States and has been replaced in New York in any event. Petitioners' case-specific objections to the court of appeals' ruling on a short-lived statutory scheme do not merit further review.

STATEMENT

A. Factual and Legal Background

1. New York Suffers Significant Harms from the Opioid Epidemic

Opioids are a class of drugs used to treat pain that include prescription pain relievers, such as oxycodone and morphine, as well as illegal substances, such as heroin. Although prescription opioid medications can treat and manage pain when properly prescribed by a physician, they also pose serious risks of addiction and abuse.[1] According to the National Institute on Drug Abuse, up to twelve percent of people who use opioids for chronic pain relief ultimately develop an opioid use disorder.[2] Misuse of prescription opioids can lead individuals to turn to illegal substances, such as heroin, which are often cheaper to obtain.[3]

The U.S. Department of Health and Human Services has declared the misuse of opioids a public health emergency.[4] From 1999 to 2019, almost 500,000

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[1] *See* Ctrs. for Disease Control & Prevention (CDC), *Opioid Basics* (last reviewed Mar. 16, 2021) (internet). For sources available on the internet, URLs appear in the table of authorities. All websites were lasted visited on July 19, 2021.

[2] *See* Nat'l Inst. on Drug Abuse (NIDA), Nat'l Insts. of Health, *Opioid Overdose Crisis* (Mar. 11, 2021) (internet).

[3] *See* NIDA, *Opioid Overdose Crisis*, *supra*; Healthcare Trs. of N.Y. State, *The Opioid Crisis in New York State: A Primer for Healthcare Trustees* 2 (Dec. 2017) (internet); Exec. Office of the President of the U.S., *National Drug Control Strategy* 1-2 (2016) (internet).

[4] U.S. Dep't of Health & Human Servs., *What Is the U.S. Opioid Epidemic?* (last reviewed Feb. 19, 2021) (internet).

people in the United States died from an overdose involving an opioid, including both prescription and illicit opioids.[5] In addition to the enormous human costs of the epidemic, the total economic costs of the epidemic in the United States are staggering and were estimated at more than $1 trillion in 2017 alone.[6]

Like the rest of the country, New York has suffered steep losses from the opioid epidemic. Between 2010 and 2017, opioid overdose deaths increased statewide by 200 percent.[7] In 2017 alone, there were 3,224 opioid-related overdose deaths in New York State, of which 1,044 involved prescription opioids.[8] In the same year, the total costs of opioid use disorder and fatal opioid overdose for the State—including the costs of health-care, reduced productivity, addiction treatment, and criminal enforcement—are estimated at over $60 billion.[9]

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[5] *See* CDC, *Understanding the Epidemic* (last reviewed Mar. 17, 2021) (internet).

[6] *See* Feijun Luo et al., CDC, *State-Level Costs of Opioid Use Disorder and Fatal Opioid Overdose—United States, 2017*, 15 Morbidity & Mortality Weekly Report 541, 541 (Apr. 16, 2021) (internet).

[7] *See* N.Y. State Dep't of Health, *New York State Opioid Annual Report 2019*, at 9 (2019) (internet).

[8] *See id.*

[9] *See* Luo et al., *State-Level Costs of Opioid Use Disorder*, *supra*, at 543.

2. The New York Legislature Enacts Legislation to Generate Hundreds of Millions of Dollars to Address the Serious Public Health Costs of the Opioid Epidemic

As part of its multifaceted response to the opioid epidemic, the New York Legislature enacted the Opioid Stewardship Act (OSA) in 2018. *See* Ch. 57, pt. NN, 2018 McKinney's N.Y. Laws 104, 177-81 (codified in part at N.Y. Public Health Law (PHL) § 3323 and N.Y. State Finance Law (SFL) § 97-aaaaa). The OSA reflects a common governmental strategy to address substances that have accepted uses but can also impose substantial social and economic costs when widely abused: it imposes a tax. Like taxes on cigarettes and alcohol, the OSA imposes a monetary charge on the lawful sale of opioids in the State. *See Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 782 (1994). The assessment, called an "opioid stewardship payment," is generally applied to the total amount of covered opioids sold or distributed in the State by licensed opioid manufacturers and distributors ("licensees"). *See* PHL § 3323(1), (5). The stewardship payment was originally intended to raise $100 million annually from 2019 through 2024. *See id.* § 3323(1)-(3).

The principal purpose of the OSA was to raise revenue to fund treatment and prevention programs for opioid addiction. Proceeds from the payments must be placed in a fund, called the "opioid stewardship fund," which is jointly administered by the New York State Comptroller and the Commissioner of Taxation and Finance. *See* SFL § 97-aaaaa(1). The funds must then be used to support opioid-addiction treatment and prevention services administered by the State Office of Addiction Services and Supports (OASAS)—including

recovery, support, and educational services. *See id.* § 97-aaaaa(4). Funds may also be used to support a prescription-drug-monitoring registry maintained by the New York State Department of Health (DOH). *See id.*; PHL § 3343-a. The registry is a database collecting information about controlled substances—including but not limited to opioids—prescribed to patients in New York that practitioners must consult prior to prescribing controlled substances.[10] *See* PHL § 3343-a.

The amount of the payment owed by each licensee is calculated annually based on each licensee's "ratable share," which is essentially the licensee's relative share of the New York market for prescription opioid products in a given calendar year. *See id.* § 3323(1)(b), (3), (5). The annual $100 million overall stewardship payment is divided according to each licensee's ratable share for the previous calendar year. *See id.* § 3323(5)(a). The first stewardship payments were calculated by DOH in the fall of 2018 based on licensees' 2017 opioid sales in New York. *See id.* § 3323(4-a), 5(c). In total, 97 entities were assessed a ratable share.

In addition to the opioid stewardship payment, the OSA originally included a pass-through prohibition, which provided that "[n]o licensee shall pass the cost of their ratable share amount to a purchaser, including the ultimate user of the opioid, or such licensee shall be subject to penalties." *Id.* § 3323(2).

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[10] *See* N.Y. State Dep't of Health, Bureau of Narcotics Enforcement, *Frequently Asked Questions for the NYS Prescription Monitoring Program Registry* 1 (rev. June 2017) (internet).

3. The District Court's Decision and Legislature's Amendment of the Opioid Stewardship Act

On December 19, 2018, the United States District Court for the Southern District of New York (Failla, J.) held that this pass-through prohibition was unconstitutional. The district court then invalidated the entire OSA, including the opioid stewardship payment, because it found that the pass-through provision was inseverable from the rest of the statute. Among other things, the district court permanently enjoined enforcement of the statute; as a result, no stewardship payments have ever been collected. (Pet. App. 68a-72a.)

In reaching this conclusion, the district court rejected the State's argument that it lacked jurisdiction under the TIA. As relevant here, the district court held that the TIA did not bar plaintiffs' claims because the opioid stewardship payment was not a tax for TIA purposes. (Pet. App. 44a-48a.)

After the district court's decision, the Legislature amended the OSA to provide that the opioid stewardship payment would be collected only for opioid sales that took place in calendar years 2017 and 2018. *See* Ch. 59, pt. XX, § 5, 2019 McKinney's N.Y. Laws 541, 612. For subsequent years, the Legislature enacted a new assessment on opioids. *See id.*, § 1, 2019 McKinney's N.Y. Laws at 606-09 (codified at Tax Law §§ 497-499) (hereafter, the "2019 Act"). Like the OSA, the 2019 Act imposes a charge "on the first sale of every opioid unit in the state"; but rather than basing that assessment on relative market share, the 2019 Act imposes a rate that varies from a quarter of a cent to one and one-half cents depending on the type and wholesale acquisition cost of the opioids. *See id.*, 2019 N.Y. Laws

at 607-08 (codified as Tax Law § 498). The 2019 Act does not contain a pass-through prohibition.

B. The Decision of the Court of Appeals

After the enactment of the 2019 Act, the State elected not to seek reversal of the district court's invalidation of the pass-through prohibition. Thus, on appeal, the State sought reversal of only the district court's invalidation of the remaining provisions of the OSA, including the opioid stewardship payment. This petition is thus limited to stewardship payments under the OSA for opioid sales that occurred in calendar years 2017 and 2018.

The Second Circuit unanimously reversed the district court's TIA holding, concluding that the opioid stewardship payment "is a tax within the meaning of the TIA," and that the district court "lacked jurisdiction to declare it invalid or to enjoin its enforcement." (Pet. App. 21a.) As the court of appeals explained, the "most significant" consideration when determining whether an exaction is a tax for TIA purposes is the "ultimate allocation or use of the revenues generated by the assessment." (Pet. App. 10a.) Here, that factor "strongly suggests" that the stewardship payment is a tax, because proceeds from the payment "are statutorily directed to support programs"—i.e., opioid-addiction treatment and prevention services—that "reflect broad public health initiatives that undoubtedly provide a general benefit to New York residents of a sort often financed by a general tax." (Pet. App. 12a (quotation marks omitted).)

The court of appeals identified several other considerations that also weighed in favor of finding the stewardship payment to be a tax. The payment "was clearly imposed by the Legislature, which wields the

taxing power, and not by a 'limited-purpose' agency," which would ordinarily levy a fee. (Pet. App. 13a.) And, like other taxes, the stewardship payment applies to a "broad and general" population—namely, all manufacturers and distributors that distribute or sell opioids in New York—a classification that is sufficiently open-ended "to qualify the payment at issue in this appeal as a tax." (Pet. App. 14a.)

The court of appeals disagreed with the district court's conclusion that the stewardship payment is a fee because the public health programs supported by the assessment are necessitated, at least in part, by petitioners' role in the opioid epidemic. (Pet. App. 14a.) As the court of appeals explained, "[t]axes imposed on industries believed to impose unusual costs on the state or its residents—like the opioid manufacturers and distributors subject to the OSA—are common, and are unquestionably taxes." (Pet. App. 15a (quotation marks omitted).) Here, "the public health programs that the stewardship payment funds 'relate directly to the general welfare of the citizens of [New York,] and the assessments to fund them are no less general revenue raising levies simply because they are dedicated to a particular aspect of the commonwealth.'" (Pet. App. 14a (quoting *Hedgepeth v. Tennessee*, 215 F.3d 608, 613 (6th Cir. 2000)).)

The court of appeals also disagreed with the district court's conclusion that the opioid stewardship payment should be treated as a fee because the proceeds are placed in a special revenue fund. (Pet. App. 15a-16a.) As the court explained, the use of a special fund did not alter the TIA analysis because the moneys in the fund are not allocated to benefit licensees or to offset DOH's costs in regulating licensees; instead, they are "used primarily to support the work of OASAS in its opioid-

related public health initiatives for the benefit of the public at large." (Pet. App. 17a.)

The court of appeals also rejected petitioners' argument that the stewardship payment is a punitive fine because the payment is levied solely on opioid manufacturers and distributors. As the court explained, "the legislature is entitled 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.) Thus, even if petitioners were correct that the Legislature enacted the OSA "to hold opioid manufacturers and distributors responsible for the 'unusual costs' of the opioid epidemic, we would not construe it as a fine for that reason." (Pet. App. 19a.)

Finally, the court found no merit to petitioners' contention that the stewardship payment was a fine because it is for a fixed annual sum of $100 million divided among licensees, or because, as originally enacted, the pass-through prohibition barred licenses from passing the costs of the payment onto consumers. As the court explained, the method of calculating an assessment is not dispositive of the TIA question. And with respect to the pass-through prohibition, the court explained that the provision is no longer in force, and therefore it does not bear on the TIA question, because it "is a separate and distinct element of the OSA that New York no longer defends." (Pet. App. 20a.)

Having held that the district court lacked jurisdiction under the TIA, the court of appeals did not reach the State's alternative argument that the district court's judgment invalidating the entire OSA must separately be reversed because the pass-through prohibition is severable from the rest of the OSA. (Pet. App. 7a, 21a.)

Petitioners subsequently sought rehearing en banc, which the full court denied. (Pet. App. 73a.)

REASONS FOR DENYING THE PETITION

Petitioners seek this Court's review of the Second Circuit's conclusion that the OSA's opioid stewardship payment is a "tax" under the Tax Injunction Act. Contrary to petitioners' arguments, the Second Circuit's resolution of this threshold jurisdictional question implicates no circuit split and is correct in any event. Certiorari also is not warranted because petitioners' challenges to the OSA would fail for independent reasons, and because the statutory scheme at issue here was replaced years ago and is no longer in effect. This Court should accordingly deny the petition.

I. The Decision Below Implicates No Circuit Split and Is Correct in Any Event.

A. The Second Circuit Applied a Test That Is Widely Shared by Other Circuits.

Contrary to petitioners' assertion, the Second Circuit's decision here implicates no "open discord" among the circuits regarding the test for determining whether an assessment is a tax for purposes of the TIA. (*See* Pet. i.) As the court below explained, it applied the same three-factor test also adopted by several other circuits (Pet. App. 9a & n.7), drawn from then–Chief Judge Breyer's decision in *San Juan Cellular Telephone Co. v. Public Service Commission*, 967 F.2d 683 (1st Cir. 1992). "The three factors are: (1) the nature of the entity imposing the assessment, (2) the population subject to the assessment, and (3) the ultimate allocation or use of the revenues generated by the assessment." (Pet. App. 10a.)

As one of petitioners' amici acknowledges, the Second Circuit largely "emphasiz[ed] the same *San Juan Cellular* factors as other courts." (Br. for Nat'l Taxpayers Union Found. as Amicus Curiae in Supp. of Pet'rs 8.) First, the "payment was clearly imposed by the Legislature, which wields the taxing power, and not by a 'limited-purpose' agency," which would ordinarily levy a fee. (Pet. App. 13a.) Second, like other taxes, the stewardship payment applies to a "broad and general" population—namely, all manufacturers and distributors that distribute or sell opioids in New York—a classification that is sufficiently open-ended "to qualify the payment at issue in this appeal as a tax." (Pet. App. 14a.) Third, the ultimate purpose of the OSA's proceeds was a general public benefit: to support opioid-addiction treatment and prevention services that "reflect broad public health initiatives that undoubtedly provide a general benefit to New York residents of a sort often financed by a general tax." (Pet. App. 12a (quotation marks omitted).)

Petitioners' attempt to characterize the Second Circuit's test as "an extreme outlier among recent TIA precedents" (Pet. 2) relies on mischaracterizations of the decision below. For example, petitioners and their amici are simply wrong to assert that the court of appeals adopted a categorical rule that any state assessment is a tax so long as the proceeds "provide a general 'public benefit'"—the third *San Juan Cellular* factor. (Pet. i.; *see also* Br. for Amicus Curiae Chamber of Commerce of the United States of America in Supp. of Pet'rs 2, 4, 8.) In fact, the court expressly stated—in line with its sister circuits—that there is no "bright line between assessments that are taxes and those that are not" (Pet. App. 9a (quotation marks omitted)), and

appropriately considered all three *San Juan Cellular* factors collectively. (Pet. App. 9a-12a.)

Petitioners also overstate the significance of cases from other circuits where courts have found particular exactions to be outside the scope of the TIA. (*See* Pet. 17-24.) Those cases do not reflect any deep-seated disagreement regarding the underlying test for determining a tax for TIA purposes. Rather, the divergent outcomes stem from the distinct features of the statutory schemes at issue.

For example, petitioners point to the Ninth Circuit's decision in *Bidart Brothers v. California Apple Commission*, which found that an assessment on certain high-volume apple producers was a fee. *See* 73 F.3d 925, 931 (9th Cir. 1996). But the Ninth Circuit in that case relied on the very same *San Juan Cellular* factors that the Second Circuit emphasized below. *See id*. The outcome was different only because the disputed exaction was different: among other things, the amount of the assessment could be adjusted by an independent commission, and the proceeds were used exclusively to benefit those who paid the assessment, rather than the general public.[11] *See id.* at 931-32.

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[11] Plaintiffs suggest that the segregation of proceeds into a special fund played a dispositive role in the Ninth Circuit's decision. (*See* Pet. 20.) But the Ninth Circuit recognized that the use of a special fund was relevant because it facilitated the use of the proceeds "only for Commission purposes." *Bidart Bros.*, 73 F.3d at 932. And the Second Circuit here agreed with that principle, approvingly quoting *Bidart Brothers* for the proposition that "'assessments that are segregated from general revenues' may be taxes 'under the TIA if expended to provide a general benefit to the public.'" (Pet. App. 17a (quoting *Bidart Bros.*, 73 F.3d at 932).) Other circuits have reached the same conclusion. *See, e.g.*, *Hill v.*

Petitioners also err when they contend (Pet. 20) that the decision below conflicts with the Fourth Circuit's decision in *GenOn Mid-Atlantic, LLC v. Montgomery County*, which held that a charge levied on the carbon-dioxide emissions of certain high-volume emitters was not a tax. *See* 650 F.3d 1021, 1023 (4th Cir. 2011). Again, the Fourth Circuit, like the court below, relied on the *San Juan Cellular* factors. *See id.* And in concluding that the carbon charge was a fee, the Fourth Circuit emphasized factors that are not applicable to the OSA: the exaction in *GenOn* fell on only "one taxpayer" and effectively could not be passed on to consumers. *See id.* at 1024-25. As the Second Circuit explained here, "[n]either of these concerns are factors in this case." (Pet. App. 20a-21a.)

Finally, petitioners err in contending (Pet. 17-18) that First Circuit precedents are at odds with the decision below. Both of the cases referenced by petitioners approvingly cited the *San Juan Cellular* framework and concluded that the exactions at issue were not taxes because, unlike the OSA's surcharge, they were collected from and distributed to specific populations for narrow purposes. In one case, the assessment was "collected only from those seeking the privilege of driving on state highways," and it was "proportioned (for motor vehicles as a class) to compensate victims for

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Kemp, 478 F.3d 1236, 1244-45 (10th Cir. 2007) (holding that assessments for special license plates were taxes not fees, even though proceeds went to "specific state funds," because the proceeds "are variously spread among a wide array of State initiatives"); *American Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgmt. Dist.*, 166 F.3d 835, 839 (6th Cir. 1999) (holding that a solid waste disposal assessment was a tax because, although the proceeds were "placed in a fund . . . separate from the general fund, [they] serve[d] public purposes benefitting the entire community").

specified damage resulting from that activity." *Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1, 6 (1st Cir. 1992). In the other case, the bridge tolls at issue "benefit[ed] the payer in that each payment allow[ed] passage over the bridge, and the money raised is used to repair wear and tear on the bridge." *American Trucking Ass'ns v. Alviti*, 944 F.3d 45, 54 (1st Cir. 2019). The OSA's opioid stewardship payment is neither collected nor disbursed in any similarly narrow manner.[12]

B. The Second Circuit's Application of the *San Juan Cellular* Factors Implicates No Circuit Split and Is Correct in Any Event.

Not only did the Second Circuit adopt the same test applied by most other circuits, but also its application of the test is fully consistent with the application of the test elsewhere. The circuit's ultimate conclusion, too, is consistent with both this Court's precedents and the precedents of other circuits.

1. Petitioners criticize (Pet. i, 16) the Second Circuit for describing the third *San Juan Cellular* factor, i.e., the "ultimate allocation or use of the revenues generated by the assessment," as "the most significant" consideration for TIA purposes (Pet. App. 10a-11a). But as petitioner Healthcare Distribution Alliance correctly observed below, "[m]ost courts agree that assessments which are imposed primarily for revenue-raising purposes are taxes." (Br. for Appellee Healthcare Distrib. All. 25 (quotation marks omitted), CA2 ECF No. 73.) The D.C. Circuit has similarly noted that "circuits

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[12] All of the other cases petitioners cite (Pet. 22-24) concluded that the challenged exactions were taxes, and the reasoning of those cases comports with the analytic approach applied below.

interpreting the Tax Injunction Act have agreed in saying that the basic issue is whether the charge is for revenue raising purposes, making it a tax, or for regulatory purposes, making it a fee." *American Council of Life Insurers v. District of Columbia Health Benefits Exch. Auth.*, 815 F.3d 17, 19 (D.C. Cir. 2016) (quotation marks omitted).[13] Here, the Second Circuit correctly concluded that this factor supports the tax status of the OSA because payments must be used to support "broad public health initiatives" of the type typically funded by taxes, which "strongly suggests that the stewardship payment requirement serves general revenue-raising purposes without a regulatory or punitive aim." (Pet. App. 12a.)

The Second Circuit's application of the other *San Juan Cellular* factors is equally uncontroversial. The court determined that the OSA surcharge was more likely to be a tax because it was "imposed by the Legislature, which wields the taxing power, and not by a 'limited-purpose' agency," which typically levies fees and fines. (Pet. App. 13a.) Other circuits have likewise agreed that legislative rather than administrative imposition weighs in favor of tax status under the

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[13] *See also Hill*, 478 F.3d at 1244-45 (explaining that the ultimate use of funds has been the most important consideration historically and under modern case law); *Hedgepeth*, 215 F.3d at 612 (explaining that, in difficult cases, "the predominant factor is the revenue's ultimate use" (quotation marks omitted)); *Cumberland Farms, Inc. v. Tax Assessor*, 116 F.3d 943, 947 (1st Cir. 1997) (explaining that whether the purported tax is directed to general public purposes "is the most salient factor in the decisional mix"); *Collins Holding Corp. v. Jasper County*, 123 F.3d 797, 800 (4th Cir. 1997) (explaining that "the purpose and ultimate use of the assessment" is "the heart of the inquiry").

TIA.[14] The Second Circuit further concluded that the payment was more likely to be a tax because the charge was applied to a "broad and general" population, namely, any manufacturer or distributor of opioids in New York. (Pet. App. 14a.) Other courts have likewise concurred in the significance of the open-ended nature of the population subject to the exaction.[15]

2. In arguing that the Second Circuit erred, petitioners rely principally on features of the stewardship payment that courts have uniformly deemed less weighty in the TIA inquiry. For example, petitioners emphasize the Legislature's decision not to label the stewardship payment a tax. (*See* Pet. 28-29.) But as then–Judge Gorsuch has explained, "how a state labels an assessment does not resolve the question whether or not it is a tax." *Hill v. Kemp*, 478 F.3d 1236, 1247 (10th Cir. 2007); *see also Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722, 730 (7th Cir. 2011) (en banc) ("'Taxation' is unpopular these days, so taxing authorities avoid the term."). Numerous courts of appeals have found assessments to be taxes for purposes of the TIA even when they are not labeled "taxes." *See, e.g.*, *Empress Casino*, 651 F.3d at 730 ("payment");[16] *Home Builders Ass'n of Miss. v. City of Madison*, 143 F.3d 1006, 1012 (5th Cir. 1998) ("impact

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[14] *See, e.g.*, *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000); *Hedgepeth*, 215 F.3d at 612; *Bidart Bros.*, 73 F.3d at 931; *San Juan Cellular*, 967 F.2d at 685.

[15] *See, e.g.*, *Valero Terrestrial Corp.*, 205 F.3d at 134; *Hedgepeth*, 215 F.3d at 612; *Bidart Bros.*, 73 F.3d at 931; *San Juan Cellular*, 967 F.2d at 685.

[16] *See* Pub. Act No. 94-0804, § 15, 2006 Ill. Laws 2033, 2038 (requiring all licensees operating a riverboat casino to make "payments" to a special fund).

fee"); *Wright v. McClain*, 835 F.2d 143, 144-45 (6th Cir. 1987) ("contribution").

Petitioners also emphasize that the OSA is codified in New York's Public Health Law rather than the Tax Law, and that New York's Department of Health, rather than its Department of Taxation and Finance, collects the payment. (*See* Pet. 28.) But courts have routinely found assessments to be taxes notwithstanding similar characteristics.[17] And petitioners ignore the substantial role played by the Commissioner of the Department of Taxation and Finance and the Comptroller, who "alone share custody" for and "exercise significant control over the funds" in the special revenue account into which the payments' proceeds are placed. (Pet. App. 16a-17a.) As the Second Circuit explained, the fact that "the funds are functionally and legally maintained by the State's taxing authorities . . . strongly favors New York's argument that the payment is a tax." (Pet. 18a.)

3. Petitioners attempt to paint the stewardship payment as a punitive exaction, but they are mistaken. (*See* Pet. 29-30.) The hallmark of a punitive assessment is its linkage to the commission of unlawful activity. *See Kurth Ranch*, 511 U.S. at 781 & n.19; *National Fed'n of Indep. Bus. v. Sebelius* (*NFIB*), 567 U.S. 519, 567 (2012). Here, however, the OSA payment is not levied on unlawful conduct, but rather on opioid sales that petitioners and others are licensed to conduct.

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[17] *See, e.g.*, *American Council for Life Insurers*, 815 F.3d at 230, 233 (charge promulgated in health insurance regulations and collected by health exchange authority was a tax); *Valero Terrestrial Corp.*, 205 F.3d at 133 ("solid waste assessment fee" codified in provisions of environmental law and collected by landfill operator was a tax).

Petitioners are likewise mistaken in suggesting that the stewardship payment is a fine because it is "assessed in a lump sum." (*See* Pet. 29.) The "lump sum" that is typical of a fine is a fixed exaction per violator or per violation. Here, the "lump sum" is something entirely different—it is the *total* amount the State seeks to collect from all entities subject to the stewardship payment. And this method of assessing a tax is hardly "unheard of." (*See* Pet. 29.) In the Founding Era, Congress repeatedly structured taxes by determining a fixed amount of revenue to collect and then apportioning that amount to the States based on population.[18]

Petitioners also are unaided by the fact that the proceeds of the stewardship payment are dedicated to the funding of opioid addiction programs that are, at some level, linked with petitioners' activities. (*See* Pet. 29.) Many assessments that are undisputedly taxes, including cigarette taxes, are levied against specified industries to account for their role in contributing to social problems. *See Kurth Ranch*, 511 U.S. at 780-81; *see also Empress Casino*, 651 F.3d at 730 (observing that "'sin taxes' are real taxes and so are taxes that go into limited-purpose funds, such as the FICA tax and the gasoline tax"). And taxes retain that status for purposes of the TIA even if they are intended to affect individual or corporate behavior. *See NFIB*, 567 U.S. at 567; *see also Sonzinsky v. United States*, 300 U.S. 506, 514 (1937) (explaining that a "tax is not any the less a tax because it has a regulatory effect").

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[18] *See, e.g.*, Act of July 14, 1798, ch. 75, § 1, 1 Stat. 597, 597-98 (enacting a direct tax to generate $2 million, which was collected by apportioning the amounts among the States based on population); Act of Aug. 2, 1813, ch. 37, 3 Stat. 53, 53-54 (same for $3 million); Act of Jan. 9, 1815, ch. 21, 3 Stat. 164, 164-65 (same for $6 million).

Finally, petitioners are mistaken to place continued emphasis on the OSA's now-defunct pass-through prohibition. (*See* Pet. 29-30.) Because that provision has been excised from the OSA as unconstitutional, and indeed never went into effect, the OSA assessment should be analyzed without it for TIA purposes. As the court of appeals explained, "the pass-through prohibition is a separate and distinct element of the OSA that New York no longer defends," and so the "focus is entirely on the stewardship payment." (Pet. App. 20a.) In any event, there is no merit to petitioners' contention that the pass-through prohibition was punitive or rendered the stewardship payment punitive. Rather, that provision furthered the revenue-generating purposes of the surcharge by, among other things, preventing licensees from passing the costs of stewardship payment back to the State through the Medicaid program. *See, e.g.*, *United States v. Huckabee Auto Co.*, 783 F.2d 1546, 1548 (11th 1986) (provision assigning tax obligation was not "penal in nature" when purpose of assignment was "protection of government revenue").

II. This Case Presents a Poor Vehicle to Address the Question Presented.

Certiorari is also unwarranted because, for at least two reasons, this case presents a poor vehicle to address the question presented.

First, the decision below can be defended on an alternative ground, even in the absence of a jurisdictional bar under the TIA. Petitioners' principal claim in the court below was that the OSA surcharge was inseverable from the statute's pass-through prohibition and thus was automatically invalidated when the district court declared the pass-through prohibition unconstitutional. But under New York law, as under

federal law, severability is a "question of legislative intent." *People v. Viviani*, 36 N.Y.3d 564, 583 (2021). And here, New York's Legislature spoke with exceptional clarity when expressing its intent that the OSA payment should survive without the pass-through prohibition.

Specifically, the Legislature included in the OSA an express severability clause providing that "[i]f any clause, sentence, paragraph, subdivision, or section of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, or section directly involved in the controversy in which such judgment shall have been rendered." Ch. 57, pt. NN, § 4, 2018 McKinney's N.Y. Laws at 181. To drive the point home, the Legislature added that it is "the *intent of the legislature* that this act would have been enacted *even if* such invalid provisions had not been included herein." *Id.* (emphasis added). Although an express severability clause is unnecessary for severability, the presence of such a clause reinforces the strong presumption under New York law that the Legislature did not intend the validity of the OSA to depend on the pass-through prohibition. *See Matter of Westinghouse Elec. Corp. v. Tully*, 63 N.Y.2d 191, 196-99 (1984) (upholding importance of severability clause in light of statutory scheme). Thus, even without the TIA's jurisdictional bar, petitioners' principal challenge to the OSA surcharge would fail.[19]

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[19] Only one petitioner alleged claims against the stewardship payment aside from this inseverability argument before the district court. To the extent that petitioner wishes to press those

Second, the decision below has no ramifications beyond this case. The reasoning of the court below rests on case-specific features of the statutory scheme here, which has no close analogue in any other State.[20] Moreover, even in New York, the statute was in effect for only two years—2017 and 2018—after which the New York Legislature amended the OSA and replaced it with a different statutory scheme that petitioners acknowledge (Pet. 12-13, 29) is a tax under the TIA. *See* Tax Law § 498 (enacted by Ch. 59, pt. XX, § 1, 2019 McKinney's N.Y. Laws at 607-09). Thus, petitioners' challenge here concerns a unique statute, which has been replaced by a new tax that does not implicate the question presented. Certiorari is not warranted to address this narrow dispute.

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claims, nothing in the Second Circuit's decision precludes it from doing so in state court. There is no dispute that New York's courts can adjudicate such claims. *See Tully v. Griffin, Inc.*, 429 U.S. 68, 76-77 (1976) (New York provides a "plain, speedy, and efficient forum" for TIA purposes).

[20] Several States have enacted their own assessments on opioid manufacturers. *See, e.g.*, Del. Code Ann. tit. 16, § 4801B et seq. (enacting a prescription opioid "impact fee"); R.I. Gen. Laws Ann. § 21-28.10-1 et seq. (enacting an annual "registration fee" on opioid manufacturers and distributors). But these exactions are structured differently from New York's opioids stewardship payment, and counsel is not aware of TIA litigation involving these other assessments.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

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