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**

## REPLY BRIEF FOR PETITIONERS


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## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

**Cases**

**Cases—continued**



**Regulations**

## INTRODUCTION

We showed in the petition (at 16-21) that if New York's Opioid Stewardship Act (OSA) had been enacted by a State within the First, Fourth, or Ninth Circuits, the surcharge at issue here would have been deemed a punitive fee under the Tax Injunction Act, and the district court's judgment invalidating the OSA would have been affirmed rather than dismissed for want of jurisdiction.

We showed further (Pet. 24-27) that this Court's review is warranted because the tax/fee distinction is a jurisdictional issue that arises frequently.

Finally, we demonstrated (Pet. 27-30) that the Second Circuit erred: Petitioners' consolidated challenges to the OSA's fixed-sum, restitutionary "surcharge" are not the kind of "tax" suits that the 75th Congress, acting in 1937, would have intended to strip federal courts of the power to hear.

The State's opposition does not overcome these basic points. Its principal response to the conflict is a superficial observation (BIO 11-15) that the courts of appeals all invoke the same three, generally-stated factors announced by then-Chief-Judge Breyer in *San Juan Cellular Telephone* v. *Public Services Commission of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992). But the courts of appeals' uniform intonation of a generally-stated framework sheds no light on the question whether they have construed that framework in fundamentally conflicting ways. The petition demonstrates (at 16-24)—and we confirm further below (at 2-6)—that they have.

Nor is the State's supposed "alternative ground" for affirmance (BIO 19) a basis for denying review. The Second Circuit expressly declined to reach the severability question (to say nothing of petitioners' other constitutional claims) because it concluded it

lacked jurisdiction to do so. The Court routinely grants certiorari to resolve important questions that controlled the lower court's decision notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason. It should do so here.

### A. The First, Fourth, and Ninth Circuits would not have held that the surcharge is a "tax" within the meaning of the TIA

1. Although they superficially recite the same so-called *San Juan Cellular* factors, the courts of appeals in fact apply radically different frameworks to the tax/fee distinction under the TIA.

As the State acknowledges, the "'most significant'" consideration factoring into the Second Circuit's TIA holding below was its anodyne observation that the "opioid-addiction treatment and prevention services" for which the OSA's proceeds are earmarked "'undoubtedly provide a general benefit to New York residents.'" BIO 7 (quoting Pet. App. 10a, 12a). The State further acknowledges that, according to the lower court, it makes no difference that the OSA's proceeds are set aside in a strictly segregated account to fund those programs; that factor would "alter" the analysis only if "the moneys in the fund" were used for a non-public benefit, like a user fee spent "to benefit licensees or to offset [the State's] costs" of regulation. BIO 8 (citing Pet. App. 17a).

As we showed in the petition, that reasoning conflicts squarely with decisions of the First, Fourth, and Ninth Circuits.

The State itself describes *Trailer Marine Transportation Corp.* v. *Rivera Vazquez,* 977 F.2d 1 (1st Cir. 1992) as holding that the assessment there was not a "tax" within the meaning of the TIA because it was "collected only from those seeking the privilege"

of engaging in a state-licensed activity and set aside in a special fund "to compensate victims for specified damage resulting from that activity." BIO 13-14 (quoting *Trailer Marine*, 977 F.2d at 6). Those are precisely the facts here: The OSA's surcharge is collected by state regulators from state-licensed opioid manufacturers and distributors and set aside in a special fund to remedy the damage that the legislature believes results from that activity. See Pet. App. 5a. Yet the court below held that the surcharge here is a "tax" rather than a "fee."

The division with the First Circuit is even clearer in light of *American Trucking Associations* v. *Alviti*, 944 F.3d 45 (2019), which squarely rejected the Second Circuit's reasoning in this case—*i.e.*, that what matters most is whether the exaction raises revenue to "serve[] the public benefit." *Id.* at 53. The proper focus of the tax/fee analysis, according to the First Circuit, is "whether an injunction would pose a 'threat to the central stream of tax revenue relied on by' the [S]tate" to fund ordinary operations. *Ibid*. And when revenues are "placed in a segregated account and expended by a single entity for a single purpose," whatever that purpose may be, they "stand quite apart from the [S]tate's central stream of government funding provided by traditional types of taxes." *Ibid*. That is the exact proposition that the State admits the Second Circuit rejected. See BIO 8-9 (citing Pet. App. 17a).

Indeed, the First Circuit expressly spurned the reasoning adopted by the Second Circuit in this case. It did not matter to the First Circuit in *American Trucking* that the segregated funds were used to support "maintenance of public ways and bridges [which] in a broad sense benefits the entire community." 944 F.3d at 52. It "can be said of virtually

all activity by a state" that "the activity serves the public benefit." *Id*. at 53. Thus, to focus on public benefit, as did the Second Circuit below, "prov[es] too much." *Ibid*. We made this point in the petition (at 17-18), but the State does not respond.

The Ninth Circuit's reasoning was similar in *Bidart Brothers* v. *California Apple Commission*, 73 F.3d 925 (1996). There, the court rejected the State's assertion that, even though "[the] funds are segregated from California's general funds," "the assessments [at issue] should be considered taxes because" they "benefit * * * the entire community." *Id.* at 932. That is the same argument that the Second Circuit credited in this case.

Finally, although reducing $CO_2$ emissions also provides a public benefit, the Fourth Circuit held in *GenOn Mid-Atlantic* v. *Montgomery County*, 650 F.3d 1021 (2011), that an exaction intended to ensure that large greenhouse gas emitters "contribute[d] to paying for the programs" deemed necessary to offset the externalized social costs of burning coal was a "punitive and regulatory" fee because it was very narrowly targeted and its proceeds were earmarked for a restitutionary purpose. *Id.* at 1024-1025. The same is true here, yet the Second Circuit reached the opposite result.

2. The State says (BIO 12) there is no conflict because, at the highest level of generality, each of the foregoing cases "relied on the very same *San Juan Cellular* factors that the Second Circuit emphasized below." Accord BIO 11-13. But the State's own recitation of the *San Juan Cellular* factors spans a mere 29 words. The question here is not whether the courts of appeals invoke the same, extremely general analytical framework; it is instead whether they are construing and applying that framework in funda-

mentally inconsistent ways. As we have just shown, they are—whereas the court below focused on general public benefit while effectively disregarding the segregation of the funds to pay for remediation, the First, Fourth, and Ninth Circuits have taken the precise opposite approach.

3. The State nevertheless attempts to pick nits with the facts of each case, asserting (BIO 12) that "the divergent outcomes stem from the distinct features of the statutory schemes at issue." But whatever factual variations there may be among the cases we cited in the petition, they cannot obscure that the courts of appeals approach the tax/fee distinction in highly divergent ways that are certain to produce different outcomes.

In any event, the purported distinctions offer less than advertised. For example, although it is true the exaction in *GenOn* fell on only "one taxpayer" (BIO 13), the court's rationale was simply that a "tax" is ordinarily "a burden generally borne" (*GenOn*, 650 F.3d at 1024). That is, "[a]n assessment imposed upon a broad class of parties is more likely to be a tax than an assessment imposed upon a narrow class." *Bidart Brothers*, 73 F.3d at 931. Here, just like in *GenOn* and *Bidart*, the $100 million annual surcharge is targeted against an extremely narrow class: fewer than 100 companies among many *millions* of corporate taxpayers in the State of New York. See Pet. 20. That is a point in common with *GenOn*, not the other way around.

Nor is there any merit to the suggestion (BIO 14) that the assessments in *Trailer Marine* and *American Trucking* were "collected [and] disbursed" in a more "narrow manner" than the surcharge here. As we explained in the petition (at 10), the surcharge here is both collected and spent by the New York De-

partment of Health, not state taxing authorities. And it is spent on programs that the State deems necessary because of the state-licensed activities of the payers. The same was true in *Trailer Marine* and *American Trucking*.

4. We also demonstrated in the petition (at 24) that no other court of appeals has taken the categorical position, as did the court below (Pet App. 20a), that "the *method* of assessment bears [not] at all on the jurisdictional inquiry" under the TIA. In fact other courts—taking their cue from this Court—have held the opposite, stressing that anomalous methods of assessing a charge are indicative of a non-tax levy. See *Dep't of Revenue of Mont.* v. *Kurth Ranch*, 511 U.S. 767, 783 (1994); *Lipke* v. *Lederer*, 259 U.S. 557, 562 (1922) (assessments "lack[ing] all the ordinary characteristics of a tax" are not taxes).

The State does not dispute the outlier nature of the Second Circuit's contrary legal pronouncement. But it does dispute (BIO 18 & n.18) that the method of assessing the exaction here is unusual. That is hard to take seriously. The surcharge is assessed in annually-recurring lump sums of $100 million, apportioned among market participants a year or more after the underlying sales have taken place. See Pet. 9. The only support the State cites (BIO 18 n.18) for its assertion that such a method of assessment is "hardly unheard of" are three federal taxes, each enacted *more than 200 years ago*, prior to adoption of the Sixteenth Amendment. That confirms rather than refutes the anomalous nature of the surcharge here.

The bottom line is that "taxes" are not assessed in apportioned lump sums, but fines and penalties are. Every other court of appeals would have considered that plainly relevant observation.

### B. The Second Circuit's dismissal of the pass-through prohibition weighs further in favor of certiorari

As we noted in the petition (at 14-15, 19-20, 25-26), the Second Circuit dismissed the inherently punitive implications of the OSA's pass-through prohibition on the unusual ground that that the district court had invalidated it as unconstitutional and the State did not appeal that holding. That reasoning, we explained (Pet. 20, 25-26), is illogical—whether an exaction is a penalty turns on legislative purpose, which cannot be altered retroactively by judicial decree or the State's litigation conduct.

For its part, the State simply parrots back (BIO 19) the Second Circuit's rationale, but without explaining how or why it is defensible. It is not.

The pass-through prohibition was an essential element of the OSA from the start, amounting to what the district court described as one of two indispensable "pillars" of the act, along with the surcharge itself. Pet. App. 68a. That is why the district court held the prohibition was not severable—without it, the OSA cannot achieve its goal of ensuring that a very narrow class of state-licensed manufacturers and distributors, and they *alone*, bear the surcharge's burden. Pet. App. 66a-69a. See *Consol. Edison* v. *Pataki*, 292 F.3d 338, 355 (2d Cir. 2002) (holding that pass-through prohibitions are "unavoidably punitive in operation" for that reason).

The decision below—dismissing the pass-through prohibition as though it had never existed—turns on the bizarre idea that the district court's order and State's decision not to appeal somehow altered the OSA's history and purpose, transforming its exaction from a punishment-inflicting "fee" into a revenue-raising "tax." Aside from common sense, that aberra-

tional reasoning runs afoul the settled rule that "the jurisdiction of [a federal] court depends upon the state of things at the time of the action brought." *Grupo Dataflux* v. *Atlas Global Group*, 541 U.S. 567, 570 (2004).

We made this point in the petition (at 25-26), but the State again declines to respond. It instead offers (BIO 19) the revisionist supposition that the pass-through prohibition was not punitive at all because it was intended merely to prevent payers of the surcharge from passing it back to the State through the Medicaid program. But there is zero support in the legislative record for that newfound rationale, likely because it makes no sense: State authorities, not manufacturers or distributors, set Medicaid reimbursement rates. See 42 C.F.R. § 430.20(b).

**C. This appeal is worthy of review**

The State asserts (BIO 1, 19-21) this is a "poor vehicle" and the decision below turns on "case-specific features" that won't recur. Not so.

1. For starters, the State's contention that it would prevail on alternative grounds (BIO 19-20) is not truly a "vehicle" argument. The State does not argue that there is any factual or procedural impediment to the Court reaching and resolving the TIA question here, and there is none. Indeed, the State's alternative arguments bear on the merits, which no federal court may reach unless and until this Court reverses the Second Circuit's TIA holding.

In any event, the district court is the only court to have addressed the State's alternative ground for reversal, and it roundly rejected it. Pet. App. 66a-69a. And even if, against the odds, the State were to succeed in obtaining a reversal of the district court's severability holding, it would mean only that the dis-

trict court would have to turn to petitioners' other constitutional challenges to the OSA, which it originally declined to reach. See Pet. App. 68a-69a. All of that is for the lower courts to decide in due course, after this Court holds that the TIA is not a bar to these suits.

2. The State observes (BIO 10) that the OSA "is no longer in effect." That is a red herring. Although the OSA was superseded in 2019 by a traditional excise tax (see Pet. 12-13), HDA's and AAM's members and SpecGx continue to face $200 million in assessments under the original OSA.

3. The State is wrong (BIO 21) that the issues presented for review are unimportant. This is a recurring question of federal law, often involving hundreds of millions of dollars in penalties when it arises. See Chamber Amicus Br. 11-14. A federal forum is essential for politically unpopular out-of-staters attempting to vindicate their federal constitutional rights in cases like this. "The ability to sue to enjoin unconstitutional actions by state [officials] * * * reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong* v. *Exceptional Child Center*, 575 U.S. 320, 327 (2015). The question of how to balance that historical tradition against the equitable values reflected in the TIA is worthy of the Court's attention.

That is all the more true because the TIA is jurisdictional. As we noted (Pet. 25-26), jurisdictional rules implicate public and private resources alike and are supposed to be clear and easy to administer. Yet the TIA's analytical framework has broken down, and continued discord over the tax/fee distinction among the lower courts is at odds with that rule.

**D. The Second Circuit's opinion is wrong**

Much of the State's opposition is devoted to the merits of the TIA question. The merits are, of course, for the next stage of the case, after the Court grants plenary review—and not a reason to avoid such review. Should the Court grant the petition for certiorari, we will respond in kind to the State's merits arguments in our merits briefing. For now, a few preliminary responses bear emphasis.

First, we explained in the petition (at 4-5) that when the 75th Congress used the word "tax" in the TIA, it intended it to have the same meaning that courts had given the word in years prior, under the AIA. Accord *American Trucking*, 944 F.3d at 50. The State does not disagree.

We explained further (Pet. 4-5) that this Court's pre-TIA cases construing federal exactions under both the AIA and Tax Clause consistently drew a line between classic taxes and penalties. *E.g.*, *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 38 (1922) ("[T]here 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."). And we showed (Pet. 28-30) that the surcharge has all the characteristics of a penalty.

Citing *Kurth Ranch* and *NFIB* v. *Sebelius*, 567 U.S. 519 (2012), the State rejoins (BIO 17) that an assessment can never be a penalty unless it is "link[ed] to the commission of unlawful activity." That is wrong. To be sure, this Court recognized in *NFIB* that an exaction imposed for a violation of the law is necessarily a penalty. 567 U.S. at 567-568. But no Member of the Court suggested the inverse, that an exaction imposed for disfavored but lawful conduct can*not* be a penalty. *Bailey* and *GenOn*, among others, show that they can be.

Finally, the State likens (BIO 18) the OSA's surcharge to so-called sin taxes, like "cigarette taxes." But taxes of that sort are regulatory in nature, meaning they are "designed mainly to influence private conduct, rather than to raise revenue." *CIC Services* v. *IRS*, 141 S. Ct. 1582, 1593 (2021). As we have shown, the surcharge here is not regulatory in that sense. It singles out opioid manufacturers and distributors to extract punitive restitution for their purportedly "reprehensible conduct" (CA JA62 ¶ 1), not to influence or incentivize aspects of their business conduct. Sin taxes are thus beside the point.

## CONCLUSION

All the core criteria for certiorari are satisfied, and the petition should be granted.

Respectfully submitted.

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