No. 21-978

IN THE
Supreme Court of the United States

CARMELA RIVERO,

Petitioner,

v.

FIDELITY INVESTMENTS, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases:

Statutes:

Other Authorities:

INTRODUCTION

Fidelity advises that the issues presented are "largely academic here." Opp. 10. They are not. They are real. This case involves real people. And other real people with real cases and real problems will be impacted every time that they are improperly denied access to the judicial system. Only from the most ivory of ivory towers could one characterize a multi-billion-dollar company's improper refusal to allow a retired woman access to her savings as a "largely academic" matter. On the contrary, this case has remarkably practical and widespread implications, and the jurisprudential issues at stake are ripe, presented, and of the utmost import.

Indeed, the time has come for this Court to directly address the jurisdictional or non-jurisdictional nature of the DJA's tax exception and whether it is coterminous with the Anti-Injunction Act. Having expressly acknowledged without reaching the latter issue at least two times,[1] and having recently decided *CIC Services, LLC v. Internal Revenue Service*, 141 S. Ct. 1582 (2021), in which the parties acknowledged (and this Court implicitly accepted, Pet. 15) that the DJA's tax exception and

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[1] *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n.7 (1974) (noting that "A number of courts . . . have held that the federal tax exception to the Declaratory Judgment Act and the Anti-Injunction Act have coterminous application."); *Alexander v. Americans United Inc.*, 416 U.S. 752, 759 n.10 (1974).

the AIA had the same scope,[2] this case is the first to place the question squarely before the Court. And as to the former, while Fidelity claims that the "the circuits have been uniform in their view" that the DJA's tax exception is "a paradigmatic example of a jurisdictional rule," Opp. 11, past members of this Court have disagreed: "Since the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, which prohibits 'any court of the United States' from declaring rights of parties 'with respect to Federal taxes,' **clearly has no jurisdictional effect**, [we] have no occasion to address it at this time." *South Carolina v. Regan*, 465 U.S. 367, 400 n.16 (1984) (J. O'Connor, J. Powell, and J. Rehnquist, concurring) (bold added).

Continued "percolation of this issue," as Fidelity suggests, will only encourage more drive-by-jurisdictional rulings, stunting the judicial development of substantive areas of the law. The questions at issue are jurisprudentially mature,

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[2] In *CIC Services*, the United States acknowledged that the scope of the DJA's federal tax exception and the AIA were coterminous. *See* Dkt. No. 19-930, Brief for Respondents in Opposition, at 15 (noting that the two statutes were coterminous and therefore suit seeking injunctive and declaratory relief could not proceed if covered by the AIA). Petitioner CIC indicated the same in its Brief. *See* Dkt. No. 19-930, Brief for Petitioner, at 11 n.1 ("Because the tax exception and the Anti-Injunction Act are 'coterminous,' BIO 15, CIC's request for declaratory relief rises or falls with its request for injunctive relief."). The issue was also raised during oral argument. If the DJA's tax exception is jurisdictional and broader than the AIA, it would have stripped jurisdiction in *CIC*; the Court, however, did not address it.

drawing upon a culmination in the case law that is decades in the making, unmistakably zeroing in on the jurisdictional nature of the DJA's tax exception and the AIA alike.

I. Fidelity's Response Underscores the Need for Review.

A. Fidelity Improperly Recasts this Case and the Relief at Issue.

Fidelity's Response is unconvincing for a host of reasons. Perhaps chief among them: Its pervasive effort to paint this case as a case about the assessment and collection of taxes—a characterization that runs contrary to the lower court's express determination. Indeed, in a bout of revisionist procedural history, Respondent begins its brief with a faulty premise: "Petitioner sued in federal court, **seeking a declaration that she was not required to file an estate tax return** . . ." Opp. i. Notably, Petitioner never requested such a declaration. Fidelity literally crafts the statement out of whole cloth. Ms. Rivero's Complaint, in fact, did not even contain the phrase "estate tax return" (or the word, "return").

Perhaps because Fidelity takes such great literary license in its effort to recast the requested relief, it has fundamentally missed the point: The issue is not "whether a federal court may decline to

issue a declaratory judgment." Opp. i. Rather, the issue is whether such a court has jurisdiction.

Indeed, this case is about jurisdiction and ownership of property, not taxes. As even the appellate court expressly acknowledged, "this action does not involve 'the assessment or collection of any tax.'" Pet. App. 11a. Fidelity, however, goes to great lengths to cast this case as a technical tax case—one centered on the collection and assessment of taxes. It goes so far as to state that Ms. Rivero had an obligation to resolve her "own" estate tax liability—even though she is still living. Opp. 3, 26 (stating, "it is *her* tax liability that is at issue"). It maintains that Ms. Rivero seeks "to litigate her tax status—she is, in substance, seeking a judicial declaration that . . . she can avoid filing an estate tax return and paying any estate taxes owed." Opp. 21. But again, the Fifth Circuit was clear: "this action does not involve 'the assessment or collection of any tax.'" Pet. App. 11a. Fidelity's entire Response is aimed at taking down a strawman that Rivero never put up in the first place.

After fundamentally recasting (i.e., inventing out of thin air) the specific relief requested below, Fidelity goes one step further, telling the Court—in a jurisprudential Freudian slip—that Petitioner's "claim falls within the heartland of even the AIA's text," Opp. 10, and that the issue presented "falls squarely within the AIA's 'assessment and collection' scope." Opp. 22. But, again, the lower court found

otherwise, specifically holding that the claim was *not* barred by the AIA because it "does not involve 'the assessment or collection of any tax.'" Pet. App. 11a. Fidelity's Freudian slips implicitly acknowledge what Rivero says expressly: the lower court fundamentally got its analysis wrong.

B. Fidelity's Drive-By-Jurisdictional Analysis Misunderstands the DJA.

Fidelity's efforts to recast the dispute place great emphasis on the text of the Declaratory Judgment Act's so-called tax exception: "[i]n a case of *actual controversy* within its jurisdiction, *except with respect to Federal taxes* . . . ." 28 U.S.C. § 2201(a) (emphasis added). But Fidelity gives this offset language far more weight than its text or history can bear. The act was not intended to be jurisdictional; rather, it was intended to emphasize the existence of a particular remedy. This fact is reflected in the statute's title, "Creation of remedy." Jurisdiction, of course, does not hinge on the existence of a particular remedy; remedies are distinct from the question of jurisdiction. *Davis v. Passman*, 442 U.S. 228, 239 (1979); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998).

The DJA was enacted in 1934, on the heels of this Court's 1933 decision in *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249 (1933), in which the Court found that federal courts had *constitutional*

jurisdiction ("judicial power") to issue declaratory relief. There, the Court held "that an appropriate action for declaratory relief *can* be a case or controversy under Article III." *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 126 (2007) (describing the Court's holding in *Nashville*). The DJA codified a remedy the Court had already recognized; as such, it could not be the animating source of jurisdiction. And just a few years later, in upholding the then-newly enacted DJA, the Court "explained that the phrase 'case of actual controversy' in the Act refers to the type of 'Cases' and 'Controversies' that are justiciable under Article III." *MedImmune,* 549 U.S. at 127. In other words, the DJA is jurisdictional in the sense that it is tied to Article III's case-or-controversy justiciability requirements. But the DJA did not serve as a new jurisdictional grant. It would thus be odd to read it to expressly remove jurisdiction.

Indeed, "jurisdiction," as this Court knows, "is a word of many, too many, meanings." *Steel Co.*, 523 U.S. at 90. Much as Fidelity does here, parties routinely confuse and overlook this fact. That very reality has necessitated this Court's decades-long movement to rectify drive-by-jurisdictional rulings. But Fidelity, invoking the siren call of "textualism," posits that this is an open-and-shut case: nothing to see here, it says. Of course, this Court has prescribed a well-defined analytical framework through which to vet the jurisdictional question at issue. And it is not the surface-level-faux-"textualism"-divorced-from-

any-historical-context approach that Fidelity offers up. Indeed, its failure to address that well-established framework's application here is telling.

C. This Case Presents the Right Case at the Right Time to Address the Jurisdictional Questions.

As it stands, this case tees up what could be the single most important statute and decision to date in this Court's *Reed Elsevier* line of cases. And it presents an opportunity to avoid yet another century of reflexive, drive-by rulings that will only further shroud and obscure the historical genesis and meaning of the statutes in play.

Contrary to Fidelity's "percolation" theory, a refusal to act in this case will not encourage the development of a studied, analytical jurisprudence with respect to these questions. It will do precisely the opposite: encourage continued, reflexive drive-by rulings that fail to do the important, but difficult, work of tying the statute to its proper moorings. As this Court has said:

> [Y]ears of unexamined habit by litigants and the courts alike [may establish a practice that lacks fidelity to a statute.]. . . . While [the Court] should not reverse the course of [its] unexamined practice lightly, [its] obligation is to give a correct interpretation of the statute. [The Court

> is] not obliged to maintain the status quo when the status quo is unfounded. The exercise of federal jurisdiction does not and cannot establish jurisdiction.

Hibbs v. Winn, 542 U.S. 88, 126–27 (2004). Much the same, the incorrect refusal to exercise federal jurisdiction—whether entrenched or not—does not and cannot establish a lack of federal jurisdiction. Now is the time for the Court to make that unmistakably clear. Given the import of the statutes involved here, such a decision will do the work of two decades' worth of cases raised in less promising vehicles to examine the issue.

ARGUMENT

I. The Jurisdictional Status of the DJA's Tax Exception Warrants Review.

A. The Conflict with this Court is Real.

The conflict with *Reed Elsevier* is real. The Court need do little more than compare the operative language in the AIA: "No suit . . . shall be maintained;" with the operative language from the statute at issue in *Reed Elsevier*: "No civil action . . . shall be instituted." Fidelity "maintains" that the two statutes are "in fact *not* similarly worded." Opp. 12

(emphasis original). The Court should believe its own eyes.

The two operative phrases, insofar as jurisdiction goes, have the same meaning. Jurisdiction is determined at the beginning—as a threshold matter when a case is "instituted"—and exists or does not exist at the outset even if the parties have "maintained" a suit for a period without the parties or the court calling it into question. Labeling the two operative provisions "entirely dissimilar," Opp. 13, as Fidelity does here, is not an exercise in textualism—it is an exercise in activism.[3]

But even more to the ultimate point at issue, although Fidelity claims that courts "have been uniform in their view" that the DJA's tax exception is "a paradigmatic example of a jurisdictional rule," Opp. 11, past members of this Court have disagreed: "Since the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, which prohibits 'any court of the United States' from declaring rights of parties 'with respect to Federal taxes,' **clearly has no**

[3] Bizarrely, Fidelity argues that even if a circuit conflict exists, this case would not be a good vehicle to address it because federal courts have "broad discretion not to entertain" declaratory judgment cases. But this Court's decisions are littered with cases involving declaratory relief. And in any event, the Court has noted that federal courts cannot decline to entertain a declaratory action "as a matter of whim or personal disinclination." *Public Affairs Assocs., Inc. v. Rickover*, 369 U.S. 111, 112 (1962) (per curiam).

jurisdictional effect, [we] have no occasion to address it at this time." *South Carolina v. Regan*, 465 U.S. 367, 400 n.16 (1984) (J. O'Connor, J. Powell, an J. Rehnquist, concurring) (emphasis added). Contrary to Fidelity's position, the DJA's tax exception is *not* jurisdictional.

II. The DJA and AIA are Coterminous.

Fidelity asserts that whether the AIA and DJA's tax exception are "coterminous" is a "question [that] has almost never arisen in the DJA's history." Opp. 17. Not so. It has arisen in almost every circuit in the federal judiciary. The D.C. circuit alone has opined on the proposition at least a dozen times.[4] And there are more than 100 federal cases referencing the DJA and the AIA and whether they are "coterminous," "coextensive," or similarly related.

Indeed, from the very beginning, the DJA's tax exception was inextricably linked to the AIA in purpose and scope. As Professor Borchard, who this Court has described as "a principal proponent and author of the Federal Declaratory Judgment Act," *Steffel v. Thompson*, 415 U.S. 452, 468 n.18 (1974), opined as early as 1941: "A sounder view would make the prohibition of declaratory judgments in tax cases cover precisely the ground reserved against

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[4] *See, e.g., Maze v. Internal Revenue Serv.*, 862 F.3d 1087, 1091 (D.C. Cir. 2017); *Fla. Bankers Ass'n v. U.S. Dep't of the Treasury*, 799 F.3d 1065, 1067–68 (D.C. Cir. 2015).

injunction by Section 3224 [the Anti-Injunction Act] and no more." E. Borchard, Declaratory Judgments 855 (2d ed. 1941). This is precisely why, at its enactment, Congress tied the Declaratory Judgment Act's exception to the Anti-Injunction Act. S. Rep. No. 74-1240, at 11 (1935). The statute's concern and the policy have been clear, but its words have been less so. And that is precisely why this issue continues to plague courts and scholars to this day. For instance, one of the country's current leading scholars on the issue finds agreement with Professor Borchard: "the weight of authority" favors the view that the DJA and AIA should be interpreted as coterminous. Leslie Book & Marilyn Ames, *The Morass of the Anti-Injunction Act: A Review of the Case and Major Issue*s, 73 Tax Law. 773, 780 (2020).

A. The Response Misreads Both the District Court's and the Fifth Circuit's Opinions.

Fidelity proceeds to downplay the circuit split, arguing that Petitioner's position rests on the lower court's "passing remark" that "this action does not involve 'the assessment or collection of any tax,' such that the AIA does not frustrate jurisdiction." Opp. 18. In telling fashion, Fidelity at times manifests as Dr. Jekyll on this issue, at other times as Mr. Hyde. On the one hand, Fidelity (Dr. Jekyll) informs the Court that: "This case seeks to interfere with the assessment and collection of taxes in ways that lie at

the core of what Congress prohibited in *both* the DJA and the AIA." Opp. 17 (emphasis original). Yet pages later, Fidelity (now Mr. Hyde) tells the court that "It is entirely unsurprising that the court disclaimed the AIA's application—the AIA *was* 'inapplicable,' because Ms. Rivero was seeking only declaratory relief, not an injunction to cease the IRS's assessment or collection efforts."[5] Opp. 19 (emphasis original). Shortly thereafter, Fidelity (again, manifesting as Dr. Jekyll) argues that the relief requested "falls squarely within the AIA's 'assessment and collection' scope." Opp. 22. It goes on to argue that the AIA contains a provision that applies to "precisely the type of liability implicated by this action." Opp. 23. And that "[t]his is precisely the type of lawsuit that the DJA's tax exception and the AIA were enacted to prevent." Opp. 27.

Fidelity's confusion serves as a case-in-point exemplar—more emphatically underscoring the point than Petitioner perhaps ever could—of the confusion in this area and the need for this Court's guidance.

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[5] Fidelity's **drive-by proposition** is incorrect. *See, e.g., CIC Services*, 141 S. Ct. 1582 (2021) (complaint asked to "declar[e] that Notice 2016-66 is unlawful."); *S.E.C. v. Credit Bancorp., Ltd.*, 297 F.3d 127, 138 (2d Cir. 2002); *Rappaport v. United States*, 583 F.2d 298, 302 (7th Cir. 1978).

B. There is a Glaring and Entrenched Circuit Split.

Fidelity attempts to demonstrate that there is no real split on this issue. It effectively argues that circuit court after circuit court has been so befuddled that, in finding the AIA and DJA to be coterminous, they have consistently failed to realize what they are doing—in other words, Fidelity demonstrates the entrenched depth of the drive-by-jurisdictional-ruling problem. Indeed, throughout section II.D., Fidelity expresses complete puzzlement with the analysis and holdings of several circuit court opinions cited by Petitioner. Opp. 28 ("[The] cases Ms. Rivero cites can only be described as puzzling."). Fidelity brushes off every circuit court holding as mere dicta, recited without thought or meaningful analysis, Opp. 28–29—in other words, as what this Court has dubbed jurisdictional drive-by rulings.

For instance, it goes so far as to state that the Sixth Circuit, in stating that the AIA and DJA tax exception are to be interpreted coterminously, "appears not to have realized it was quoting *the dissent* in *Ecclesiastical Order*, not the majority opinion." Opp. 28. This "explanation" underscores a rather remarkable head-in-the-sand lack of analytical rigor to deal with a case that stands for precisely what Petitioner stated.

Fidelity brushes off each cited opinion in similar fashion, each time writing off—to inadvertence or even a failure to apply "common sense"—their clear consensus: The AIA and the DJA's tax exclusion are coterminous.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari.

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