No. 19-10011

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF WISCONSIN; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA, STATE OF MISSISSIPPI, by and through Governor Phil Bryant; STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF NORTH DAKOTA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TENNESSEE; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF ARKANSAS; NEILL HURLEY; JOHN NANTZ,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; ALEX AZAR, II, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF INTERNAL REVENUE; CHARLES P. RETTIG, in his Official Capacity as Commissioner of Internal Revenue,

Defendants-Appellants.

STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF KENTUCKY; STATE OF MASSACHUSETTS; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT, STATE OF VIRGINIA; STATE OF WASHINGTON; STATE OF MINNESOTA,

Intervenors-Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas, Fort Worth, Case No. 4:18-cv-00167, Hon. Reed Charles O'Connor.

BRIEF OF AMICI CURIAE SAMUEL L. BRAY, MICHAEL W. MCCONNELL, AND KEVIN C. WALSH IN SUPPORT OF INTERVENORS-DEFENDANTS-APPELLANTS

Counsel listed on inside cover

Raffi Melkonian
WRIGHT CLOSE & BARGER, LLP
One Riverway, Suite 2200
Houston, Texas 77056
(713) 572-4321
(713) 572-4320 (Fax)
Counsel for Amici Curiae

April 1, 2019

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

State of Texas et. al. v. United States of America, et. al., No. 19-10011

Pursuant to Fifth Circuit Rule 29.2 and Rule 28.2.1, amici curiae make the following supplemental statement of interested parties to fully disclose all those with an interest in this brief.

Amici Curiae

Professor Samuel L. Bray, University of Notre Dame Law School

Professor Michael W. McConnell, Stanford Law School

Professor Kevin C. Walsh, University of Richmond School of Law

Counsel for Amici Curiae

Raffi Melkonian
Wright, Close & Barger LLP
1 Riverway, Suite 2200
Houston, TX 77056
713-572-4321

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY PROVISIONS

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICI CURIAE

Samuel L. Bray is Professor of Law at Notre Dame Law School. He teaches and writes about remedies, constitutional law, and civil procedure. His scholarship includes two articles on the declaratory judgment.[1]

Michael W. McConnell is the Richard & Frances Mallery Professor of Law and Director of the Constitutional Law Center at Stanford Law School. He served as Circuit Judge on the United States Court of Appeals for the Tenth Circuit from 2002-2009.

Kevin C. Walsh is Professor of Law at the University of Richmond School of Law. He teaches and writes about the law of federal jurisdiction. His scholarship includes law review publications on jurisdictional matters that have previously arisen in ACA mandate litigation.[2]

This brief presents a statutory subject-matter jurisdiction argument not previously presented by any other parties or amici curiae. As experts in the law of federal jurisdiction, the amici curiae Professors have an interest in the proper

[1] *See* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 Duke L.J. 1091 (2014); Samuel L. Bray, *Preventive Adjudication*, 77 U. Chi. L. Rev. 1275 (2010).

[2] *See* Kevin C. Walsh, *The Ghost that Slayed the Mandate*, 64 Stan. L. Rev. 55, 64-66 (2012) (applying the *Skelly Oil* test to explain why there was no federal statutory subject-matter jurisdiction over Virginia's constitutional challenge to Section 5000A); Kevin C. Walsh, *The Anti-Injunction Act, Congressional Inactivity, and Pre-Enforcement Challenges to Section 5000A of the Tax Code*, 46 Univ. of Richmond L. Rev. 823, 841-43 (2012) (explaining that Section 5000A is an integrated whole and there is "no Article III case or controversy in the absence of threatened enforcement or some other negative legal consequence arising out of failure to comply with § 5000A").

application of that law and believe that their perspective will be helpful to the Court in its disposition of this appeal.[3]

[3] No counsel for any party authored this brief in whole or in part. No person or entity, other than amici, made a monetary contribution intended to fund the preparation and submission of this brief. The parties have consented to the filing of this brief. The institutional affiliation of amici curiae is noted for identification purposes only.

ARGUMENT

I. The district court lacked statutory subject-matter jurisdiction because Plaintiffs fail the *Skelly Oil* test.

Congress has not vested the federal courts with statutory subject-matter jurisdiction to opine whether an unenforceable statutory provision is unconstitutional. Yet that is precisely what the district court did in granting partial summary judgment to Plaintiffs on Count One of their Amended Complaint. Because the Declaratory Judgment Act "enlarged the range of remedies available in the federal courts, but did not extend their jurisdiction," the Supreme Court has held that there is no statutory jurisdiction over a federal declaratory judgment action unless one of the parties to the action could have brought a nondeclaratory action about the same issue against the other party. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 71-72 (1950); *see also* Richard H. Fallon, Jr., et al. *Hart & Wechsler's The Federal Courts and the Federal System* 841 (7th Ed. 2015) ("[T]he existence of jurisdiction over a declaratory action depends on the answer to a hypothetical question: had the Declaratory Judgment Act not been enacted, would there have been a nondeclaratory action (i) concerning the same issue, (ii) between the same parties, (iii) that itself would have been within the federal courts' subject-matter jurisdiction?").

Application of the *Skelly Oil* rule is fatal here: the federal government has no right to nondeclaratory relief against any Plaintiffs with respect to Section 5000A, and none of the Plaintiffs has a right to nondeclaratory relief against enforcement of Section 5000A. The federal government has no right to nondeclaratory relief against the Individual Plaintiffs because the government cannot collect a tax of zero, and the government has never been able to seek anything from State Plaintiffs in connection with Section 5000A. Nor do any Plaintiffs have a right to nondeclaratory relief against the federal government regarding Section 5000A. Injunctions run against officials not laws: "If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). Because the defendant officials cannot enforce Section 5000A against Plaintiffs—again, because the government cannot collect a tax of zero from anyone—there is no basis for a federal court to enjoin "the acts of the official, the statute notwithstanding." *Id.* Even though Plaintiffs' request for an injunction is not directly before the Court in this appeal, any injunction would be unwarranted because the government cannot enforce Section 5000A against Plaintiffs.

The *Skelly Oil* defect in statutory subject-matter jurisdiction fully disposes of this appeal because the only judgment on appeal is the Declaratory Judgment entered by the district court on Count One of Plaintiffs' Amended Complaint. *See*

Final Judgment on Count I, ROA.2784-2785. This conclusion that there is no statutory subject-matter jurisdiction overlaps with the absence of Article III jurisdiction owing to the absence of a true case or controversy. Because the *Skelly Oil* defect is jurisdictional, though, the Court can decide on this ground instead of Plaintiffs' lack of standing without running afoul of the Supreme Court's warning against assuming hypothetical jurisdiction. *See generally Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-93 (1998). The jurisdictional limit identified by the Supreme Court in *Skelly Oil* operates in this case as a sea wall that keeps out on statutory grounds a claim that should also be kept out on Article III grounds. Try as they might, Plaintiffs cannot plead around the problem that Defendants are powerless to wield Section 5000A against them. Plaintiffs therefore have no business asking a federal court to address their objections to Section 5000A.

CONCLUSION

In purporting to declare 26 U.S.C. § 5000A(a) unconstitutional and inseverable from the rest of the Affordable Care Act, the district court's decision provides a textbook illustration of the "writ-of-erasure" fallacy at work. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 943 (2018) (blasting "the fallacy that equates a court's non-enforcement of a statute with the suspension or revocation of that law"). The resulting declaratory judgment is outside of the limited statutory jurisdiction conferred by Congress and beyond

the authority of an Article III court. This Court should vacate the judgment issued by the district court on Count One of Plaintiffs' Amended Complaint and remand with instructions to dismiss.

Dated: April 1, 2019

Respectfully submitted,

/s/ Raffi Melkonian

Raffi Melkonian
WRIGHT CLOSE & BARGER, LLP
One Riverway, Suite 2200
Houston, Texas 77056
Telephone: 713-572-4321
Facsimile: 713-572-4320
melkonian@wrightclosebarger.com

Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Fed. R. App. P. 32(g), counsel for Amici Curiae hereby certify as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 9(a)(5) because this brief contains 1,089 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, including serifs, using Microsoft 2010 in Times New Roman 14-point font.

Dated: April 1, 2019

/s/ Raffi Melkonian
Raffi Melkonian

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system on April 1, 2019.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: April 1, 2019

/s/ Raffi Melkonian
Raffi Melkonian