No. 20-40371

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Carmela Rivero,

Plaintiff - Appellant

v.

Fidelity Investments, Incorporated,

Defendant - Appellee

On Appeal from

United States District Court for the Eastern District of Texas

4:18-CV-909

BRIEF OF APPELLANT CARMELA RIVERO

SUBMITTED BY:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th CIR Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellees:	**Counsel for Appellees:**
Fidelity Investments, Incorporated	Ellen Sessions of Norton Rose Fulbright US, L.L.P. Dallas, TX
Fidelity Investments, Incorporated	Alexandra Wendt of Norton Rose Fulbright US, L.L.P. Dallas, TX

Appellants:	**Counsel for Appellants:**
Carmela Rivero	Jason Freeman of Freeman Law, P.L.L.C. Frisco, TX

/s/Jason B. Freeman
Attorney of record for Carmela Rivero

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested and would aid the Court. This case presents novel and important issues, including whether the district court erred in dismissing *sua sponte* on grounds that the Anti-Injunction Act denies subject-matter jurisdiction in a case between two private parties that turns on a question of state property law. Appellant owned the financial account at issue by operation of state law. Appellee nonetheless incorrectly raised a tax-law-oriented objection against allowing Appellant access to her account in accordance with state law. While the case presents a superficial tax-law façade, it is deceptively simple. The district court's ruling, issued without requesting briefing, runs contrary to a decade-plus movement by the Supreme Court to avoid "drive-by-jurisdictional rulings" like the one here, and counter to on-point precedent from this Circuit. It cited three cases—two against federal regulators involving direct challenges to federal tax laws, and an unpublished opinion that, while not on point generally, hinged on a lack of diversity jurisdiction (which is present here). The decision below lacks meaningful analysis and unilaterally recasts the precise request for relief. The decision invites creative future litigants to assert obscure defenses of all types sounding in the more than 100,000 pages of tax laws that simply do not govern matters of property law, leaving litigants with no forum to settle disputes.

TABLE OF CONTENTS

Contents Page(s)

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REGULATIONS

JURISDICTIONAL STATEMENT

The district court erred in dismissing Appellant's case for lack of subject-matter jurisdiction. The district court had subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, and 2201. The district court had diversity jurisdiction under 28 U.S.C. § 1332 because the matter in controversy exceeds $75,000 and is between Appellant, a citizen of Mexico who resided in Texas at the time that the Complaint was filed, and Appellee, a corporation domiciled in Delaware.

Moreover, the district court had federal question jurisdiction under 28 U.S.C. § 1331 because Appellant's case, at least as framed by Appellee, arose under a federal law, 26 U.S.C. § 6325, and federal regulation, 26 C.F.R. § 20.6325-1(a)-(b). The district court's subject-matter jurisdiction was not abrogated by the Anti-Injunction Act or the Declaratory Judgment Act.

Finally, the district court had jurisdiction over Appellant's claims under 28 U.S.C. § 2201 because Appellant's case was a case of actual controversy within the district court's jurisdiction and was not otherwise limited by that statute's reference to 28 U.S.C. § 2201.

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. The district court's May 19, 2020 Order was a final judgment that disposed of all issues in this case. No motion for a new trial or alteration of the judgment or any other motion

that would toll the time to appeal was filed. A briefing notice was issued on August 12, 2020.

STATEMENT OF THE ISSUES

1. Appellant maintains that this suit turns on a simple principle of state property law: The Fidelity account became Appellant's sole property by operation of state law. Appellee agrees that the account became Appellant's sole property by operation of state law, but maintains that a federal tax statute prohibits it from granting her access to her account. Appellee never raised the Anti-Injunction Act or Declaratory Judgment Act as defenses, thereby waiving such defenses. Did the district court err in *sua sponte* dismissing Appellant's claims for lack of subject-matter jurisdiction pursuant to the DJA and AIA.
2. The Fidelity account was owned by Appellant. She alone established and funded the account. She subsequently granted another individual rights of survivorship with respect to the account as an estate-planning mechanism. Both parties here agree that upon that individual's death, the account transferred to Appellant by operation of state law. Under these circumstances, can Appellee, Fidelity, prohibit Appellant, Ms. Rivero, from accessing her property by requiring that she first obtain and provide an IRS Form 5173 ("IRS Transfer Certificate").

STATEMENT OF THE CASE

This is not a dispute over taxes. Win or lose, Appellant will not owe or pay any taxes as a result of any decision in this case. This case instead presents novel questions of (1) whether the AIA prohibited the district court from exercising subject-matter jurisdiction over Appellant's claims for declaratory relief; and (2) whether Appellee can prohibit Appellant from accessing her account by requiring that she first obtain an IRS Transfer Certificate, a process that she is unable to complete because it requires cooperation from other persons and, under the same regulations cited by Appellee, is expressly inapplicable.

Appellant sought declaratory judgments that she was the owner of a brokerage account (the "Fidelity Account") managed by Appellee, and that she was entitled to access the account without providing Fidelity with an IRS Transfer Certificate. Appellant, a citizen of Mexico and a resident of Texas at the time, opened the account in her name only and funded the account with stock that was her sole property. ROA.43, 198, 204. She subsequently added an individual, and decades-long friend, Jorge Diaz-Gonzalez Medrano—a Mexican citizen and resident who is now deceased—to the account, providing him a right of survivorship with respect to the account as an estate-planning mechanism. ROA. 43, 198, 204.

Mr. Medrano expressed to Appellant that he understood and agreed that the account was not his property, but that he was being given survivorship rights to ensure

that it passed to him if Appellant predeceased him. ROA.198. Mr. Medrano did not ever contribute any money or property to the Fidelity Account, nor to any account owned by Appellant, and Mr. Medrano never owned the account. ROA.198. Mr. Medrano was a citizen and resident of Mexico, and his only relation to any property in the United States was his right of survivorship with respect to Appellant's Fidelity Account. ROA.198.

After Mr. Medrano's death on October 24, 2016, Appellant submitted requests to change the designation of the Fidelity Account back to her as the sole owner. ROA.199. Appellee denied the request, maintaining that an IRS Transfer Certificate must be provided to change ownership of the account despite previously indicating to Appellant at the time of recommending that she add Mr. Medrano with rights of survivorship that Appellee could change ownership of the account "without a problem" at a later time. ROA.198-199.

Appellant filed her Original Complaint against Appellee on December 31, 2018, in the United States District Court for the Eastern District of Texas under Cause No. 4:18-cv-00909-SDJ requesting that the district court render declaratory judgment that the Fidelity Account was her sole property. Because the account transferred to her by operation of law, she requested that the court further hold that an IRS Transfer Certificate was not necessary to transfer ownership of the Fidelity Account pursuant to I.R.C. § 2040(a); 26 C.F.R. § 20.2040-1(c)(3); and 26 C.F.R. § 20.6325-1(a)-(b). ROA. 6.

Appellee filed its Answer on February 20, 2019. ROA.22. On August 6, 2019, the parties filed cross motions for summary judgment. ROA.71, 196. Appellee filed its Response to Appellant's Motion for Summary Judgment on August 27, 2019, ROA.259, and Appellant filed her Response to Appellee's Motion for Summary Judgment on August 27, 2019. ROA.269. Each parties' Reply to the Responses for both Motions for Summary Judgment was filed on September 3, 2019. ROA.218, 288. Appellant filed a Sur-Reply to Appellee's Reply regarding Appellee's Motion for Summary Judgment on September 10, 2019. ROA.296.

At no point in the pleadings or submissions did Appellee raise the issue or contend that the Anti-Injunction Act, *see* 26 U.S.C. § 7421 (the "AIA"), or the federal tax exception to the Declaratory Judgment Act, *see* 28 U.S.C. § 2201 ("DJA"), barred the relief requested by Appellant in her Original Complaint.

The district court issued its Memorandum Opinion and Order on May 19, 2020 ("Order"). ROA.330. In its Order, the district court *sua sponte* dismissed Appellant's case for lack of subject-matter jurisdiction under the AIA and DJA. ROA.336. The Order also denied both parties' Motions for Summary Judgment as moot. ROA.336. Appellant filed her Notice of Appeal on May 29, 2020. ROA.337.

SUMMARY OF THE ARGUMENT

The AIA and the DJA do not deprive the district court of subject-matter jurisdiction. Federal courts have repeatedly interpreted the scope of the AIA and the

DJA to be coterminous—accordingly, "[i]f a suit is allowed under the Anti-Injunction Act, it is not barred by the Declaratory Judgment Act." *Perlowin v. Sassi*, 711 F.2d 910, 911 (9th Cir. 1983); *see also Cohen v. U.S.*, 650 F.3d 717, 730-31 (D.C. Cir. 2011). Here, because the AIA is a "claims-processing rule" and not a jurisdictional threshold, the district court erred in *sua sponte* concluding that it lacked subject-matter jurisdiction over the claims. Moreover, because Appellee waived any "claims-processing" arguments under the AIA, such arguments are barred at this stage of the proceedings. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (noting that claims-processing rules, unlike subject-matter jurisdiction rules, may be waived by the parties).

In addition, even if the Court concludes that the AIA is jurisdictional, the AIA does not apply where, as here, there was no tax assessment at issue; the litigation involved two private parties and no government actors; and the dispute turned entirely upon an argument that the financial account at issue, held as a joint tenancy with right of survivorship, automatically passed by operation of state law. *See Helvering v. Davis*, 301 U.S. 619 (1937). Because the primary purpose of Appellant's requests for declaratory relief is to recover property, not to restrain the collection of taxes, and only incidentally touch on federal tax matters,[1] Appellant's claims are not barred under the AIA. *Linn v. Chivatero*, 714 F.2d 1278, 1282 (5th Cir. 1983) (citing *Bob Jones Univ. v.*

[1] Despite the fact that much of the briefing below involved the tax regulations raised by Appellee as a defense, Appellant maintained and maintains that the case is fundamentally about a relatively simple proposition of state law.

Simon, 416 U.S. 725, 738 (1974)) ("In order to decide whether the Act applies to this case, we must determine whether the 'primary purpose' of [Plaintiff's] lawsuit is to recover his property, irrespective of the involvement of the IRS agents, or whether it is a suit to restrain the collection of taxes or the collection of information that would aid in the assessment of taxes."); *Pendleton v. Heard,* 824 F.2d 448, 451-52 (5th Cir. 1987) (restraining the assessment or collection of a tax must be the primary purpose of the lawsuit, not an incidental effect of it, for the Anti–Injunction Act to apply). *See also Z Street, Inc. v. Koskinen*, 44 F.Supp.3d 48, 59 (D.C. Dist. Ct. May 27, 2014) (noting that D.C. Circuit has refused to "read[ ] the AIA to reach all disputes tangentially related to taxes."); *see also Christian Employers Alliance v. Azar*, Case No. 3:16-cv-309, 2019 WL 2130142 (N.D. Dist. Ct. May 15, 2019) ("The AIA does not apply to all disputes tangentially related to taxes.") (quoting *Korte v. Sebelius*, 753 F.3d 654, 670 (7th Cir. 2013) (quotations omitted)).

With respect to the second issue, Treasury Regulation § 20.6325-1(a) does not apply. This regulation does not apply for three independent reasons: (1) The property at issue transferred automatically by operation of state law upon Appellant's death, leaving no "transfer" to be effectuated under the regulation; (2) federal law does not include the account at issue in Appellant's "gross estate;" and (3) Appellant has demonstrated that a Certificate of Transfer is not required.

ARGUMENT

The district court erred in dismissing Appellant's complaint for lack of subject-matter jurisdiction. The AIA does not limit the district court's subject-matter jurisdiction because it is a claims-processing rule and not a jurisdictional statute.[2] Moreover, even if this Court interprets the AIA as jurisdictional, the AIA does not apply in this case because Appellant and Appellee are private parties, not government actors, and the principal purpose of the suit is to recover property, not to restrain the collection of taxes.

The Court should hold that the district court erred by denying Appellant's Motion for Summary Judgment as moot. As the disposition of the case turns solely on legal issues, this Court should hold that Appellant is the owner of the Fidelity Account and that she is entitled to access the account, order the account changed into her name, and hold that a government-issued Transfer Certificate is not required to transfer ownership of the Fidelity Account to Appellant. The Fidelity Account transferred by operation of state law upon Mr. Medrano's death. The regulation at issue does not

[2] While this Court has, on limited occasion, spoken of the AIA in jurisdictional terms, *see Lange v. Phinney,* 507 F.2d 1000, 1006 (5th Cir.1975), its language in that respect is precisely the type with respect to which the Supreme Court has since mandated a new framework of analysis that, as set out below, demonstrates the AIA is not jurisdictional in terms of the court's capacity to adjudicate. See *infra* section B2. Moreover, such loose language can easily be reconciled by recognizing that if the AIA could be said to be "jurisdictional" in any sense, it is strictly so to the extent that the AIA merely governs a court's *equity* jurisdiction—its equity jurisdiction to issue an injunction restraining the collection of taxes. Such jurisdictional restrictions are not implicated where, as here, the lower court was called upon to exercise diversity jurisdiction to determine a matter of state property law as between two private parties. In any event, this Court can avoid the issue of whether the AIA is "jurisdictional" by determining that the AIA simply does not apply to this case. See *infra* section B3.

apply, and a Transfer Certificate is not required. Alternatively, this Court should remand the summary judgment matter to the district court for further consideration.

A. Standard of Review

Generally, the party seeking the federal forum bears the burden of establishing jurisdiction. *See Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001). The Fifth Circuit will "exercise plenary, de novo review of a district court' assumption of subject matter jurisdiction." *Union Planters Bank Nat. Ass'n v. Salih*, 369 F.3d 457, 460 (5th Cir. 2004) (quoting *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 772 (5th Cir. 2003)). As part of this review, "the question of subject matter jurisdiction must be resolved by the application of proper legal principles to the facts." *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1297 (5th Cir. 1985).

Summary judgment under Federal Rule of Civil Procedure 56 is appropriate when the pleadings and record show that no genuine issue of material fact exists and, as a matter of law, the movant is entitled to judgment. *Hart v. Hairston*, 343 F.3d 762, 764 (5th Cir. 2003). The movant bears the burden of proving that no genuine issue of material fact exists. *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th Cir. 2001). To determine whether a genuine issue of material fact exists, the court should view all evidence in the light most favorable to the non-movant, and the evidence must be sufficient such that a reasonable jury could not return a verdict for the non-movant. *Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 371-72 (5th Cir. 2002).

To raise a genuine issue of material fact, the non-movant must proffer some evidence that directly contradicts the evidence provided by the movant with respect to the salient facts. *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1264 (5th Cir. 1991). Merely raising an issue of fact with respect to minor aspects of the claim does not preclude summary judgment in favor of the movant. *Id.* ("Of course, the court need only concern itself with contradictions of salient facts."). The parties do not dispute the facts of this case.

B. The Declaratory Judgment Act and Anti-Injunction Act Do Not Deprive the District Court of Subject-Matter Jurisdiction.

In the district court, Appellant sought the following declarations under the DJA: (1) she is the sole owner of the Fidelity Account; (2) an IRS Transfer Certificate is not necessary to transfer ownership of the Fidelity Account; and (3) Appellee may grant Appellant access to the Fidelity Account. The district court incorrectly held that it lacked subject-matter jurisdiction over Appellant's claims for declaratory relief under the federal tax exception to the DJA and the AIA.

1. The Declaratory Judgment Act and the Anti-Injunction Act.

The DJA provides that "[i]n a case of actual controversy within its jurisdiction, except with respect to Federal taxes . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201. The AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be

maintained in any court by any person . . ." 26 U.S.C. § 7421(a). The DJA's federal tax exception and the prohibitory language of the AIA are co-extensive, and the federal tax exception is "at least as broad as the [AIA]." *See Liberty Univ., Inc. v. Lew*, 733 F.3d 72 (4th Cir. 2013); *Perlowin v. Sassi*, 711 F.2d 910 (9th Cir. 1983); *McCabe v. Alexander*, 526 F.2d 963, 965 (5th Cir. 1976). Thus, "[i]f a suit is allowed under the [AIA], it is not barred by the [DJA]." *Perlowin*, 711 F.2d at 911; *see also Cohen v. U.S.*, 650 F.3d 717, 730-31 (D.C. Cir. 2011).

2. The Anti-Injunction Act is a Claims-Processing Rule.

"Jurisdiction," the Supreme Court has warned, "is a word of many, too many, meanings." *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness,* 85 F.3d 661, 663, n. 2 (C.A.D.C.1996)); *Kontrick v. Ryan,* 540 U.S. 443, 454 (2004) (quoting *Steel Co.*); *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 510 (2006) (same); *Rockwell Int'l Corp. v. United States,* 549 U.S. 457, 467 (2007) (same). "This variety of meaning has insidiously tempted courts, [the Supreme Court] included, to engage in 'less than meticulous,' *Kontrick, supra,* at 454, 124 S.Ct. 906, sometimes even 'profligate ... use of the term,' *Arbaugh, supra,* at 510, 126 S.Ct. 1235." *Bowles v. Russell*, 551 U.S. 205, 215 (2007) (J. Souter dissent) (citations included).

Thus, in recent years, the Supreme Court has sought to bring clarity and "some discipline" to the determination of whether any particular statute is a "claims-processing rule" or, alternatively, a jurisdictional threshold. *See, e.g., Fort Bend County v. Davis*, 139 S.Ct. 1843 (2019); *U.S. v. Kwai Fung Wong*, 575 U.S. 402 (2015); *Gonzalez v. Thaler*, 565

U.S. 134 (2012); *Henderson v. Shinseki*, 562 U.S. 428 (2011); *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). Critical of its prior decisions and the lower courts' decisions on this issue, the Supreme Court has cautioned courts to avoid "drive-by-jurisdictional rulings . . . which too easily can miss the crucial difference[s] between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010).

In *Arbaugh* and its progeny, the Supreme Court has demanded more clarity from Congress because the characterization of a statute as either a claims-processing rule or a jurisdictional rule has significant ramifications to the litigants. First, "[u]nlike most arguments, challenges to subject-matter jurisdiction may be raised by the defendant at any point in the litigation, and courts must consider them *sua sponte*." *See Fort Bend County*, 139 S.Ct. at 1849. (quotations omitted). Second, if a statute is jurisdictional, the issue of subject-matter jurisdiction may never be forfeited or waived because subject-matter jurisdiction relates to the court's authority or power to hear a case. *Arbaugh*, 546 U.S. at 514. Thus, "harsh consequences" attend the jurisdictional brand. *Ford Bend County*, 139 S.Ct. at 1849.

Claims-processing rules, on the other hand, merely "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 562 U.S. at 435. And unlike jurisdictional statutes, claims-processing rules may be waived, forfeited, or subject to equitable tolling. *Fort Bend County*, 139 S.Ct. at 1849; *Pierre-Paul v. Barr*, 930 F.3d 684, 692 (2019); *John R. Sand &*

Gravel Co. v. U.S., 552 U.S. 130, 133-34 (2008). Unlike jurisdictional statutes, courts have no obligation to raise *sua sponte* whether the requirements of a claims-processing rule have been met. *See U.S. v. Marshall*, 954 F.3d 823, 826 (6th Cir. 2020).

In an effort to provide much needed clarity in this area, the Supreme Court has fashioned a "readily administrable line" for distinguishing between jurisdictional statutes and claims-processing statutes:

> If the legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But **when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character**.

Arbaugh, 546 U.S. at 515-16 (footnote and citation omitted) (emphasis added). This rule comports with the Supreme Court's repeated admonition that "[j]urisdictional rules should be clear." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 14 (2015) (quoting *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 321 (2005) (THOMAS, J., concurring); *see also Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

Under *Arbaugh* and its progeny, federal courts must now consider the statute's text, context, and structure to determine whether a particular statute is jurisdictional. *See Reed Elsevier*, 559 U.S. at 163-66. As discussed more fully below, the AIA's text, context, and structure all support Appellant's contention that the AIA is a claims-processing rule. Accordingly, the district court erred in *sua sponte* determining that it lacked subject-matter jurisdiction over Appellant's requests for declaratory relief under

the DJA. Moreover, because the AIA is a claims-processing rule, Appellee has waived any AIA defense in this case.

i. The Anti-Injunction Act's Text.

Federal courts first look to the statutory text to determine whether a statute is jurisdictional or a claims-processing rule. *See Henderson*, 562 U.S. at 438. Generally, a statute is jurisdictional if its terms refer to the court's jurisdiction, either explicitly or implicitly. *See id.* But a statute that does "not suggest, much less provide clear evidence . . . [that it] was meant to carry jurisdictional consequences" should properly be characterized as a claims-processing rule. *Id.* at 438. This is particularly so if Congress enacted and placed the statute in question in a separate provision from the statutory grant of jurisdiction in the statutory scheme. *Id.* at 439-40.

Here, the district court dismissed Appellant's request for declaratory relief *sua sponte* on the basis that it lacked subject-matter jurisdiction over Appellant's claims under the AIA. That statute provides:

> Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

26 U.S.C. § 7421(a). Significantly, the statutory text of the AIA does not clearly indicate or even suggest that it was meant to carry jurisdictional consequences. Indeed, the statute makes no reference—explicit or implicit—to a federal court's jurisdiction.

Rather, the AIA speaks only to a *person's* ability to file and maintain a lawsuit in federal court regarding federal tax matters. The distinction is not semantics. Prohibitions that speak to the power or capacity of a court to maintain a suit indicate a jurisdictional mandate governing the court's adjudicatory capacity; those speaking of the rights of parties, as does the language of the AIA, indicate rights of persons before the court, which can be waived or forfeited. *See Kontrick v. Ryan,* 540 U.S. 443, 455 (2004) ("Jurisdiction" refers to "a court's adjudicatory authority."); *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 89 (1998) ("subject-matter jurisdiction" refers to "the courts' statutory or constitutional *power* to adjudicate the case" (emphasis in original)); *Landgraf v. USI Film Products,* 511 U.S. 244, 274 (1994) ("[J]urisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties'" (quoting *Republic Nat. Bank of Miami v. United States,* 506 U.S. 80, 100 (1992) (THOMAS, J., concurring))).

Indeed, the Supreme Court has held that an almost identical statute did *not* have jurisdictional effect but was instead a claims-processing rule. Specifically, in *Reed Elsevier*, the Supreme Court faced the question of whether a copyright statute, 17 U.S.C. § 411, was jurisdictional or a claims-processing rule. *See Reed Elsevier*, 559 U.S. 154 (2010). That copyright statute provided: "[N]o civil action . . . shall be maintained . . ." *Id.* at 157. Based on the *Arbaugh* test, the Supreme Court concluded that the statute "[said] nothing about whether a federal court has subject-matter jurisdiction." *Id.* at 164. Much like the statute at issue in *Reed Elsevier*, the AIA provides: "[N]o suit . . .

shall be maintained . . ." *See* 26 U.S.C. § 7421. Accordingly, *Reed Elsevier* and the statutory text of the AIA support a conclusion that the AIA is a claims-processing rule and not jurisdictional. *See also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1158 (10th Cir. 2013) (Gorsuch, J., concurring).[3]

The implications from the AIA's text are supported by its placement within the overall statutory scheme. Congress placed the AIA separate and apart from federal court's jurisdictional grant to hear federal tax matters, a factor that the Supreme Court has found to be indicative of a claims-processing rule. In *Reed Elsevier*, the Supreme Court found it significant that the copyright statute was "separate from those granting federal courts subject-matter jurisdiction over those respective claims." *See Reed Elsevier*, 559 U.S. at 164-65 (*comparing* 17 U.S.C. § 411 *with* 28 U.S.C. §§ 1331 and 1338). Similarly here, Congress enacted the AIA as part of the Internal Revenue Code under Title 26 of the United States Code. However, Congress placed the grant of jurisdiction to contest matters under Title 26 in Title 28 of the United States Code. *See* 28 U.S.C. § 1331; *see also Hobby Lobby Stores, Inc.*, 723 F.3d at 1158 ("Second, the AIA does not even appear in the same *title* of the Code as most statutes bearing on federal courts' jurisdiction.") (Gorsuch, J., concurring opinion).

[3] If the AIA could be said to be "jurisdictional" in any sense, it is strictly so to the extent that the AIA merely governs a court's *equity* jurisdiction—its equity jurisdiction to issue an injunction restraining the collection of taxes, rendering *Lange v. Phinney,* 507 F.2d 1000, 1006 (5th Cir.1975) (which involved a request for an injunction against the collection of taxes) simply inapplicable. Such an interpretation is consistent with the Supreme Court's and this Court's precedent and brings this Court's jurisprudence in line with the Supreme Court's subsequent mandates with respect to jurisdictional analysis. In any event, the court is not and was not called upon to do so here.

ii. The Anti-Injunction Act's Structure and Context.

Under *Arbaugh* and its progeny, federal courts also look to the context and structure of the statute at issue to determine whether the statute is jurisdictional or a claims-processing rule. Generally, these two factors are considered together. *See Reed Elsevier*, 559 U.S. 154, 167 ("[C]ontext, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional."). Thus, the background and framework of the statute, the statutory scheme, and the Supreme Court's prior treatment of the statutory provision may be relevant as to whether a rule is jurisdictional or a claims-processing rule. *See Henderson*, 562 U.S. at 440; *see also Union Pacific R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. of Adjustment, Central Region*, 558 U.S. 67 (2009).

The Supreme Court has held that federal courts have "no authority to create equitable exceptions to jurisdictional requirements." *Bowles v. Russell*, 551 U.S. at 214; *see also Texas v. United States*, 891 F.3d 553, 559 (5th Cir. 2018) ("As they do not stake out limits on a federal court's subject matter jurisdiction, their application [claims-processing rules, as distinguished from jurisdictional statutes] may be tempered by considerations such as equity and waiver."). A jurisdictional statute is absolute, and federal courts have no authority to craft equitable exceptions. This fundamental precept has been established through centuries of case law. And it runs counter to viewing the AIA as a jurisdictional statute.

The Supreme Court has repeatedly recognized that the AIA is subject to equitable exceptions. It does not apply if "equity jurisdiction exists." *See Enochs v. Williams Packing*, 370 U.S. 1, 7 (1962); *see also Bob Jones Univ. v. Simon*, 416 U.S. 725, 748-49 (1974) ("Since we hold that *Williams Packing*, supra, governs this case, the remaining issue is whether petitioner has met the standards of that case."); see also *Allen v. Regents of Univ. Sys. of Georgia*, 304 U.S. 439, 449 (1938) ("What we have said indicates that [the AIA] does not oust the jurisdiction. The statute is inapplicable in exceptional cases where there is no plain, adequate, and complete remedy at law."); *Hill v. Wallace*, 259 U.S. 44, 62 (1922) ("extraordinary and exceptional circumstances" may render the Anti-Injunction Act inapplicable); *Bailey v. George*, 259 U.S. 16, 20 (1922) (same). Likewise, the Fifth Circuit has recognized equitable exceptions to the AIA. *See Smith v. Booth*, 823 F.2d 94, 97 (5th Cir. 1987). Any holding that the AIA is jurisdictional would be at odds with the Supreme Court's and this Court's AIA precedent recognizing equitable exceptions to the AIA.

Moreover, much as jurisdictional statutes are not subject to equitable exceptions, the Supreme Court has also repeatedly recognized that "subject-matter jurisdiction can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). Notably, the Supreme Court has, on at least three occasions, knowingly authorized the government to waive the AIA defense, permitting the Court to render decisions on the merits of those cases. *See* Erin M. Hawley, The Equitable Anti-Injunction Act, 90 Notre Dame L. Rev. 81, 106-107 (2014) (citing to *Sunshine Anthracite*

Coal Co. v. Adkins, 310 U.S. 381 (1940); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 554 (1895)); *see also Seven-Sky v. Holder*, 661 F.3d 1, 13 (D.C. Cir. 2011) ("And in *Helvering v. Davis*, 301 U.S. 619 . . . the Court held that the predecessor to the Anti-Injunction Act could be waived by the Government in litigation."), *abrogated on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

In *Sunshine Anthracite*, the government informed the court that it was "expressly waiv[ing]" its "defense" under the AIA, which, if applicable, would have led to the dismissal of the case. 310 U.S. 381 (1940). The Supreme Court allowed the government to waive the AIA defense in that case. *Id.*

Similarly, in *Pollock v. Farmers' Loan & Trust Co.*, the government asked the court to review the constitutionality of a tax prior to its assessment and "explicitly waived" any question as to jurisdiction. 157 U.S. 429, 554 (1895) ("[S]o far as it was within the power of the government to do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument.")

This precedent cannot be reconciled with a view that the AIA is jurisdictional. Nor can its history. The AIA is a Civil War-era statute, *see* Act of March 2, 1867, ch. 169, § 10, 14 Stat. 471, 475 (1867) which codified the "old and familiar rule" of equity that barred injunctions against tax assessors and collectors. *Pullan v. Kinsinger*, 20 F. Cas. 44, 48 (C.C.S.D. Ohio 1870). It "has no recorded legislative history," *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974), a fact inconsistent with a wide-reaching jurisdictional purpose, and has never been meaningfully amended.

The AIA was enacted as part of an amendment to Section 19 of the Revenue Act of 1862, the portion of the 1862 Act providing the procedures for collecting taxes after tax assessors (under the then-income tax regime) supplied collectors with the lists of taxes assessed, indicating the AIA was associated directly with that collection process. Revenue Act of 1862, ch. 119, § 19, 12 Stat. 432, 439. The provision's meaning, which was clear in context, merely precluded judicial review from delaying that specific—and since disbanded—assessment-and-collection process under the Civil War-era income tax. In 1872, Congress abolished the assessor positions, *see* 1 Rev. Stat. §§ 3172-3231 (1875), but the AIA continued as a part of the federal tax laws. Consistent with the text, context, and structure of the statute, this history indicates what may be a commonsense proposition: that Congress never evinced any intent for the AIA to bar a suit like the one here. *See, e.g., South Carolina v. Regan*, 465 U.S. 367, 378 (1984) ("the Act's purpose and the circumstances of its enactment indicate that Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy.").

Accordingly, the AIA's context and structure further demonstrate that the AIA is not jurisdictional but rather a claims-processing rule.

3. Even if the AIA is Jurisdictional, It Does not Apply to the Facts of this Case.

Even if the Court determines that the AIA is jurisdictional, the AIA would not apply here. When a case does not evoke the purpose of the AIA, Congress did not

intend the act to deny jurisdiction. In other words, the fact that a tax-related statute is incidental to—or somehow informs— an underlying property dispute does not deprive a court of jurisdiction to rule upon the underlying dispute between the parties before it.

In *Williams Packing*, the Supreme Court explained the purpose of the AIA:

> The manifest purpose of s 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue.

Enochs v. Williams Packing & Nav. Co., 370 U.S. 1, 7 (1962). The purpose of the AIA, in other words, is efficient tax administration. In many instances, this purpose is best served by pre-enforcement review, explaining why the government itself has often expressly waived the AIA as a bar to litigation.

Here, there was no tax assessment at issue; no taxes alleged to be due. There was, therefore, no disputed sum, nor a disputed sum that could be determined in a suit for refund, leaving (if the district court's ruling holds) no forum to resolve this dispute. The case involved two private parties before the court on diversity jurisdiction.[4] There was no government actor. The dispute, at heart, turned entirely upon state law: the financial account at issue, held as a joint tenancy with right of survivorship,

[4] In *Helvering v. Davis*, 301 U.S. 619 (1937), the Supreme Court held that the predecessor statute to the AIA did not apply where the parties in the litigation were both private actors. Indeed, even then-Judge Kavanaugh of the District of Columbia circuit recognized that the facts in *Davis* "show[] simply that the [AIA] does not necessarily apply in private litigation between a corporation and its shareholders." *See Seven-Sky v. Holder*, 661 F.3d 1, 28 (D.C. Cir. 2011) (Kavanaugh, J., dissenting as to jurisdiction).

automatically passed by operation of law to Appellant. While Appellee eventually acknowledged that Appellant owned the account by operation of law, it nonetheless raised an obscure tax-law-oriented objection to transferring rights to that account in compliance with state law. The case is simply not about tax statutes, though it would admittedly require a merits-based analysis to sift through the superficial tax-law facade. But a jurisprudence shirking this responsibility would invite creative litigants to assert obscure defenses of all types sounding in tax laws that simply do not govern matters of property law, leaving litigants with virtually no forum.[5]

Much as the AIA's purpose would not be furthered by its application here, the case also falls outside the scope of the precise text of the AIA. The AIA applies only to actions brought "*for the purpose* of restraining the assessment or collection of any tax." § 7421(a) (emphasis added.)

Where, as here, a suit involves a dispute to recover property, the Fifth Circuit has adopted the "primary purpose" test to determine whether the AIA bars the suit to recover property. As this Court has held:

> In order to decide whether the Act applies to this case, we must determine whether the "primary purpose" of [the Plaintiff's] lawsuit is to recover his property, irrespective of the involvement of the IRS agents, or whether it is a suit to restrain the collection of taxes or the collection of information that would aid in the assessment of taxes.

[5] *South Carolina v. Regan*, 465 U.S. 367, 378 (1984) ("the Act's purpose and the circumstances of its enactment indicate that Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy.")

Linn v. Chivatero, 714 F.2d 1278, 1282 (5th Cir. 1983) (citing *Bob Jones,* 416 U.S. at 738, 94 S.Ct. at 2046). *Pendleton v. Heard,* 824 F.2d 448, 451–52 (5th Cir. 1987) (restraining the assessment or collection of a tax must be the primary purpose of the lawsuit, not an incidental effect of it, for the Anti–Injunction Act to apply). Under this test, where the suit has only an "incidental" effect on taxation or the "assessment or collection of a tax," the AIA does not bar the suit. *Id. See also, e.g., Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 275-76 (1993) ("'for the purpose of' means '*aimed at*' or 'a conscious objective of,' not mere 'effect' or 'aware[ness]'").

In applying the "primary purpose" test, the Fifth Circuit requires that courts separate the non-tax claim aspects of the case from the tax claim aspects and attempt to resolve the non-tax claim in a manner that is consistent with the relevant tax statute. *Linn v. Chivatero*, 714 F.2d 1278, 1285 (5th Cir. 1983) ("Recognizing that the '[non-tax]' aspects and the 'tax' aspects of the case 'are not mutually exclusive,' we have tried to separate the non-tax claim from the tax claim and to deal with the former so that the latter may be resolved as the Internal Revenue Code provides."). This Court has also cautioned that where the interpretation of the AIA would effectively leave "no forum available for [the plaintiff's] complaint about the allegedly wrongful retention of his property," the AIA may be inapplicable—particularly where the plaintiff does not challenge the propriety of any tax. *Id.* at 1283.

Here, the clear primary purpose of Appellant's lawsuit was to recover property that she rightfully owned. There is no indication that the suit was initiated in an attempt

to restrain the collection of taxes. Under the *Linn* framework, the court was required to separate the non-tax (i.e., the property-dispute) aspects and the tax aspects of the case and attempt to resolve the property dispute in a manner consistent with the overall statutory framework. Appellant offered a simple solution: the account transferred by operation of law, leaving no "transfer" to be effectuated within the scope of the statutes raised by Appellee, *and*, in any event, Appellant complied to a 't' with those statutes, thereby negating any obligation to provide a Transfer Certificate if one was assumed to exist in the first place.[6]

Moreover, the Supreme Court has recently held that the Tax Injunction Act, an act "modeled on the Anti-Injunction Act (AIA)," Direct Marketing Ass'n v. Brohl, 575 U.S. 1, 7-8 (2015),[7] does not prohibit suits involving notice-and-reporting requirements. The would-be requirement that Appellee raises here is nothing more than a notice-and-reporting requirement that, as the Supreme Court explained in Direct Marketing, does not implicate a "suit for the purpose of restraining the assessment or collection of any tax." *Direct Marketing*, standing alone, demonstrates that the AIA is not applicable here. And, in any event, it directly informs this Court's "primary purpose" test, making clear

[6] To the extent relevant, in an effort to resolve this case prior to suit (and during the pending suit), Appellant's counsel even offered to provide Appellee with a security interest in the funds in the account throughout any relevant statute of limitations (to guard against any risk of a future tax assessment), or to hold funds at issue in an escrow to be released upon a number of years. This demonstrates that there was no conceivable intention to restrain the collection of taxes.

[7] *Id.* at 8. ("[W]ords used in both Acts are generally used in the same way.")

that under that test, Appellant's suit is not—and could not be—for the primary purpose of restraining the assessment or collection of tax.

Finally, the Supreme Court has also held that the AIA does not apply in instances where it would effectively bar a plaintiff from having any other legal remedy available at law. *See South Carolina v. Regan*, 465 U.S. 367 (1984). Similar to the plaintiff in Regan, if the AIA does apply here, Appellant would lack any other legal remedy available at law to bring suit to enforce her property rights with respect to the Fidelity Account. Indeed, Appellant would lack standing to bring a refund or other suit on behalf of Mr. Medrano, another taxpayer, against the IRS because she is not the executor or authorized representative of the estate and the tax matter relates to another taxpayer. *See Sandrow v. U.S.*, 832 F. Supp. 918, 920 (E.D. Pa. 1993) (noting cases in which taxpayers who pay taxes of another are effectively volunteers or donors who lack standing to bring refund suits). In addition, the IRS has not assessed any tax against Mr. Medrano's estate, and there is no guarantee—or reason to believe— it will ever do so. See 26 U.S.C. § 7422 (requiring an assessment or collection of tax prior to bringing suit); *see also Regan*, 465 U.S. at 373 ("Congress intended the [AIA] to bar a suit only in situations in which Congress had provided the aggrieved party with an alternative legal avenue by which to contest the legality of a particular tax."). Accordingly, the AIA does not apply in this case.

C. The District Court Erred in Denying Ms. Rivero's Motion for Summary Judgment.

1. The Account Transferred Automatically by Operation of Law Upon Mr. Medrano's Death.[8]

Because she contributed 100 percent of the property in the account, Appellant owned 100 percent of the account, even during Mr. Medrano's life. In any event, upon his death, the account transferred to her sole ownership automatically by operation of law.

Under Massachusetts law, property that is held by joint tenancy "passes to the survivor by operation of law and does not constitute a part of the decedent's estate." *In re Smith*, 361 Mass. 733, 737 (1972). Texas law applies a similar rule by statute—providing that an account transfers by operation of law to the surviving party if there is a right of survivorship in place:

> Sums remaining on deposit on the death of a party to a joint account belong to the surviving party or parties against the estate of the deceased party if the interest of the deceased party is made to survive to the surviving party or parties by a written agreement signed by the party who dies.

Tex. Est. Code § 113.151(a); *see also Punts v. Wilson*, 137 S.W.3d 889, 892 (Tex. App.—Texarkana 2004) ("The party to the account owns the account. On the death of the party, ownership of the account passes to the P.O.D. beneficiaries of the account. The

[8] Texas or Massachusetts law governs—either under a choice-of-law provision or the fact that Ms. Rivero resided in Texas and all dealings with Fidelity took place in Texas. (Exh. ¶ 15). The outcome is not impacted by which state's laws are operative.

account is not a part of the party's estate."). In this case, the parties do not dispute that there was a right of survivorship in place. ROA.6, 24. Under both Massachusetts law and Texas law, the Fidelity Account transferred by operation of law to Appellant on the death of Mr. Medrano. Mr. Medrano's estate has no property interest in the Fidelity Account. Thus, the Court should declare that Appellant is the owner of the Fidelity Account and require that Fidelity provide her with access to the account.

2. The Decedent's Gross Estate Does Not Include the Fidelity Account.

I.R.C. § 2040(a) provides that certain property is excluded from the gross estate of a decedent. In pertinent part, § 2040 provides as follows:

> The value of the gross estate shall include the value of all property to the extent of the interest therein held as joint tenants with right of survivorship by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth . . .

I.R.C. § 2040(a) (emphasis added). Treas. Reg. § 20.2040-1(c)(3) elaborates on the exception for property held in "right of survivorship" form that originally belonged to the survivor: "if the decedent furnished no part of the purchase price, no part of the value of the property is so included" in the gross estate of the decedent. Treas. Reg. § 20.2040-1(c)(3).

Appellant owned the PepsiCo stock and funds (the underlying assets, received

from her employer, that funded the account at issue) solely in her name and transferred them into the Fidelity Account, which was titled solely in her name. ROA.8, 24, 213-216. The Decedent did not furnish any part of the purchase price of the original PepsiCo stock that Appellant transferred into the Fidelity Account. ROA.8, 213-216. Appellant did not receive or purchase the PepsiCo stock from the decedent. ROA.8, 213-216. He did not contribute any property to the account; it was funded entirely by Appellant with her property. ROA.213-216. The Decedent at no point owned the PepsiCo stock or the account. ROA.213-216. He was merely added to Appellant's account through a right of survivorship interest as an estate-planning mechanism. ROA.8, 213-216.

The uncontroverted facts establish that the account "originally belonged" to Ms. Rivero, and that the Decedent did not receive or acquire the property. ROA.213-216. The account was not includible in the Decedent's gross estate because, given that the Decedent had no other property in the United States, ROA. 213-216, the Decedent's gross estate was zero. There is no material issue of fact or directly controverting evidence. As such, Treas. Reg. § 20.6325-1(b)(1)(i) requires the relief requested herein. See also § 2040(a); Treas. Reg. § 20-2040-1(c)(3).

3. A Transfer Certificate is not Required.

i. The Regulation Regarding Transfer Certificates Does

Not Apply.

The plain language of Treas. Reg. § 20.6325-1(a) demonstrates that it does not apply. The regulation provides that a transfer certificate relates to the "*transfer* of property *of* a nonresident decedent," such as Mr. Medrano. *See* Treas. Reg. § 20.6325-1(a). Here, however, there is no property *of* Mr. Medrano that is being *transferred*.

First, the property at issue is the property *of* Appellant, not Mr. Medrano—the property was not "property *of a* nonresident decedent." *See* Tex. Est. Code § 113.102 ("During the lifetime of all parties to a joint account, the account belongs to the parties in proportion to the net contributions by each party to the sums on deposit unless there is clear and convincing evidence of a different intent.") (emphasis added); Punts v. Wilson, 137 S.W.3d 889, 892 (Tex. App.—Texarkana 2004) ("The party to the account owns the account. On the death of the party, ownership of the account passes to the P.O.D. beneficiaries of the account. The account is not a part of the party's estate."); *see Buckley v. Buckley*, 301 Mass. 530, 531, 17 N.E.2d 887, 888 (1938) ("The determination of the interest the [joint tenants] had in the deposits in the joint accounts is dependent primarily on what their intention was . . ."); *Campagna v. Campagna*, 337 Mass. 599, 604 (1958). The evidence provided shows that Appellant was the only party who contributed property to the account, and that the parties both intended for Appellant to be the true owner of the property. ROA.213-216. The regulation, therefore, does

not apply.

Indeed, the regulation's introductory language assumes that the property (in order to fall within the scope of the regulation) is actually the property *of* the decedent. Treas. Reg. § 20.6325-1(a) ("property *of* a nonresident decedent") (emphasis added).[9] Likewise, its last sentence ends with a similar description. *Id.* ("receiving transfer certificates before transfer of *property of* nonresident decedents") (emphasis added). But where, as here, the undisputed facts demonstrate that the property at issue is not the property *of* the decedent, but the property of another (Appellant), the regulation simply does cannot apply.

Second, the "transfer" at issue occurred by operation of state law, and is, thus, outside the scope of the regulation. Tex. Est. Code § 113.151 ("Sums remaining on deposit on the death of a party to a joint account belong to the surviving party"); Punts v. Wilson, 137 S.W.3d 889, 892 (Tex. App.—Texarkana 2004) ("The party to the account owns the account. On the death of the party, ownership of the account passes to the P.O.D. beneficiaries of the account. The account is not a part of the party's estate."); *In re Smith*, 361 Mass. 733, 737 (1972) ("Property held either by tenancy by the entirety or by joint tenancy passes to the survivor by operation of law and does not constitute a part of the decedent's estate."). An account held by "right of survivorship"

[9] Other sections of the regulation use the same language. For example, "in the case of a nonresident not a citizen of the United States . . . a transfer certificate is not required with respect to the transfer . . . of any property *of the decedent* . . ." Treas. Reg. § 20.6325-1(b)(1)(ii) (emphasis added).

transfers "automatically" by operation of law. Punts v. Wilson, 137 S.W.3d 889, 892 (Tex. App.—Texarkana 2004); In re Smith, 361 Mass. 733, 737, 282 N.E.2d 412, 415 (1972). Merely memorializing what has already happened by operation of law—by properly titling the account and granting access thereto—is not a "transfer" of property. Appellee was not, therefore, "transferring" the property at issue, which is a requirement for the regulation to apply. It was asked instead to merely allow Appellant to access her property—property that had already transferred to her under state law.

The context of the regulation at issue further supports this conclusion. For example, the regulation provides that its general rule applies "except [with respect to] such shares which have been submitted for transfer by a duly qualified executor or administrator who has been appointed and is acting in the United States." Treas. Reg. § 20.6325-1(a) (emphasis added.). This language implies—and reinforces the underlying assumption of the regulation—that the property at issue is still the property "of" the decedent (or his estate) and can thus be "transferred" (i.e., that it has not already transferred by operation of law). Notably, an executor or estate administrator cannot transfer property that passes outside of probate (as with an account transferring by right of survivorship), because a person functioning in such capacity has authority only over property "of" the decedent's estate. *See, e.g.,* Punts v. Wilson, 137 S.W.3d 889, 892 (Tex. App.—Texarkana 2004) ("The party to the account owns the account. On the death of the party, ownership of the account passes to the P.O.D. beneficiaries of the account. The account is not a part of the party's estate."); In re Smith, 361 Mass. 733, 737, 282

N.E.2d 412, 415 (1972) ("Property held either by tenancy by the entirety or by joint tenancy passes to the survivor by operation of law and does not constitute a part of the decedent's estate.").

It is also clear that the regulation does not apply because Appellee (Fidelity Brokerage Services LLC) is not a "domestic corporation" or a "transfer agent." It is instead a limited liability company. The regulation at issue applies only with respect to a "domestic corporation or its transfer agent." This limited scope is not a blind failure to keep up with business organizations laws and the development of limited liabilities. It is a product of the embedded assumption that the stock being "transferred" is "*its*" stock; that is, that it is stock that was issued by the very corporation itself—or that the corporation's assigned transfer agent is performing the transfer of *its* stock. *See also* the second sentence of Treas. Reg. § 20.6325-1(a) ("no domestic corporation . . . should transfer . . . without . . . a transfer certificate covering all of the decedent's stock *of the* corporation," further making clear that it refers to *the issuing* corporation) (emphasis added). This makes sense from a logical perspective, as a "transfer agent" is traditionally an entity hired by the issuing corporation to manage and keep track of registered shareholders of its own stock. *See* U.S. Securities and Exchange Commission, *Transfer Agents*, available at https://www.sec.gov/divisions/marketreg/mrtransfer.shtml ("Transfer agents record changes of ownership, maintain the issuer's security holder records, cancel and issue certificates, and distribute dividends."). In other words, the provisions raised by Appellee are entirely inapplicable in the first place.

Furthermore, the text of the regulation demonstrates that it does not apply because the stock at issue is not registered in the name of "a nonresident decedent." Specifically, the stock was never registered in the name of Mr. Medrano. ROA.213-216. Again, this underscores the conclusion that the regulation simply does not apply.

Other aspects of the text of the regulation further demonstrate that it does not prohibit a *transfer* in this scenario. Even where the regulation applies, it provides merely that a domestic corporation or its transfer agent "should [not]," rather than "shall [not]," transfer stock. *See Hines v. Graham*, 320 F. Supp. 2d 511, 525-26 (N.D. Tex. 2004) ("use of the word 'shall' is 'language of an 'unmistakably mandatory character.'") (quoting *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983)); *cf Marshall v. Anaconda Co.*, 596 F.2d 370, 375 (9th Cir. 1979) (stating that the words "should . . . unless" are more advisory than the words "shall . . . unless"); *United States v. Maria*, 186 F.3d 65, 70 (2d Cir. 1999)(stating that the common meaning of "should" suggests or recommends a course of action, while the ordinary understanding of "shall" describes a course of action that is mandatory.). It is, in other words, a cautionary or protective recommendation (and one that, as a practical matter, works in the vast majority of situations) but not a positive legal directive or proscription. This is notable because, as stated above, state law provides the mechanism of transfer.

Not only does the contextual language support Ms. Rivero's reading, but the absence of certain language further reinforces the conclusion that the regulation does not apply. The regulation does not purport to override state law where state law

provides the mechanism of property transfer. *See Louisiana Public Service Comm. v. FCC*, 476 U.S. 355, 368–69 (1986) ("Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible . . .") (emphasis added).[10]

There is no indication that the IRS intended to displace state law and usurp a subject traditionally governed by state law by issuing this regulation. The statute, in other words, provides a protective device where a transfer has not yet occurred, but does not displace state law governing the transfer of property where that transfer occurred automatically upon the decedent's death. Because state law provided for the transfer by operation of law, the property belongs to Ms. Rivero.

ii. Applying the Regulation Also Demonstrates That a Transfer Certificate Is Not Required.

Even if the Court determines that a transfer has not yet occurred by operation of state law, and the Court determines that the regulations apply, the regulations provide that a Transfer Certificate is not required to transfer a nonresident decedent's property under the circumstances presented here. For example, the regulation states as follows:

> (i) In the case of a nonresident not a citizen of the United States . . . a transfer certificate is not required with respect to the transfer of any property of the decedent if the value on the date of death of that part of the decedent's gross estate situated in the United States did not exceed the lesser of $60,000 or $60,000 reduced by the adjustments, if any, required

[10] Nowhere does the I.R.C. or regulation indicate an intent to preempt transfer by operation of law as a result of a right of survivorship. There is, thus, no conflict between state law and the regulation.

> by section 6018(a)(4) for certain taxable gifts made by the decedent and for the aggregate amount of certain specific exemptions.

Treas. Reg. § 20.6325-1(b)(1)(i). Here, the Decedent was not a citizen or resident of the United States. ROA.213-216. He died in 2016, well after the date required by the regulation. ROA.213-216. Other than his right of survivorship interest in Ms. Rivero's accounts, the Decedent had no other property located in the United States. ROA.213-216.

The regulations provide that where a person who may be reasonably regarded as having possession of the pertinent facts provides a statement of the facts relating to the estate—demonstrating that a Transfer Certificate is not required—then no transfer certificate is necessary. Treas. Reg. § 20.6325-1(b)(3). That section provides as follows:

> A corporation, transfer agent, bank, trust company, or other custodian will not incur liability for a transfer of the decedent's property without a transfer certificate if the corporation or other person, having no information to the contrary, first receives from the executor or other responsible person, who may be reasonably regarded as in possession of the pertinent facts, a statement of the facts relating to the estate showing that the sum of the value on the date of the decedent's death of that part of his gross estate situated in the United States, and, if applicable, any amounts includible in his gross estate under section 2107(b), is such an amount that, pursuant to the provisions of paragraph (b) (1) and (2) of this section, a transfer certificate is not required.

Treas. Reg. § 20.6325-1(b)(3).

Appellant provided a declaration pursuant to 28 U.S.C. § 1746 demonstrating that she is indeed a person who may be reasonably regarded as having the pertinent facts—especially as the owner of the account and long-time, close friend of Mr.

Medrano that wanted him to be her beneficiary on her death. ROA.213-216.[11] That fact has not been controverted. Here, Ms. Rivero provided a statement of the facts relating to the Decedent's estate showing that the gross value of the estate falls under the exception provided by Treas. Reg. § 20.6325(b)(1)(i) and that the property at issue belongs to her. *See* ROA.213-216. There is no evidence to the contrary.[12] Accordingly, this Court should grant the relief requested herein.

Notably, with respect to this particular ground for relief, the applicable legal standard is not whether the summary judgment evidence established that the account transferred to Appellant, which occurred by operation of state law. The issue is technically whether Treas. Reg. § 20.6325-1(b)(3) applies, and if so, whether its requirements are satisfied. It turns on whether Appellee received a statement of facts relating to the estate indicating that Mr. Medrano's gross estate situated in the United States was such that no transfer certificate was required, and that Appellant is a responsible person reasonably regarded as having the relevant facts. This is, notably, a lower standard and burden than proving that the facts themselves are actually true (although, of course, they are). It is, thus, the case that even if some evidence were

[11] These were not mere self-serving statements lacking credibility. Ms. Rivero was in the United States on a work visa. ROA.213-216. She had been in the United States intermittently since the 1990s and owns property in the United States. *Id.* Under such circumstances, a false statement in proceedings before the Court would subject her to very harsh consequences, such as revocation of the visa—a fact that lends particular credibility to her statements.

[12] The non-movant must go past the pleadings and support his or her contentions with some evidence to sustain a defense to a summary judgment motion. *Geiserman v. MacDonald*, 893 F.2d 787, 794 (5th Cir. 1990). The Appellees did not introduce any actual contradictory evidence indicating that Ms. Rivero is not a person having knowledge of the pertinent facts. ROA.22-26.

submitted that raised a question to some degree, as long as the offered evidence was not directly contrary, Appellant satisfied the standard.

CONCLUSION

The district court erred in dismissing Appellant's complaint for lack of subject-matter jurisdiction pursuant to the DJA and AIA. The AIA is a claims-processing rule, not a jurisdictional rule, and Appellee waived any defense under the AIA by failing to raise such a claim. In any event, the AIA, even if it had been raised, does not deny jurisdiction.

The district court further erred in denying Appellant's Motion for Summary Judgment as moot. Appellant demonstrated, without factual dispute, that she is the owner of the Fidelity Account, and that she is entitled to access the account. State law provides that she is the sole owner of the account by operation of law. And as a corollary, the account was not includible in Mr. Medrano's gross estate. As such, the regulation at issue does not apply.

Even if the regulation did apply, the regulation makes it clear that the Fidelity Account should not be included in Mr. Medrano's gross estate for purposes of applying Treas. Reg. § 20.6325-1(b)(1)(i), and because Appellant provided a statement of facts so demonstrating, a Transfer Certificate is not required. Treas. Reg. § 20.6325-1(b)(1)(i).

WHEREFORE, Appellant requests that this Court reverse the district court's decision to dismiss her case for lack of subject-matter jurisdiction and declare (1) she is

the sole owner of the Fidelity Account, (2) a Transfer Certificate is not necessary to transfer ownership of the Fidelity Account, and (3) Fidelity may grant Appellant access to the Fidelity Account. Alternatively, Appellant requests that this Court remand the case to the district court to further consider the motions filed by the parties.

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CERTIFICATE OF SERVICE

I certify that on September 28, 2020, the foregoing document was served, via the Court's CM/ECF Document Filing System, upon all counsel of record.

/s/Jason B. Freeman

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 32(a)(7)(B) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and 5th CIR. R. 32.1: this document contains 10,278 words.

2. This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5), and 5th CIR. R. 32.1 and the type-style requirements of FED. R. APP. P. 32(a)(6) because: this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

/s/Jason B. Freeman